THEFT IN PRIMITIVE SOCIETIES

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To Webster, theft is simply "the act of stealing", and he defines this act as "to take and carry away feloniously and usually unobserved; to take or appropriate without leave or right, and with intent to make use of wrongfully".

This act is not unknown within our society. In fact, we have fragmented the act into several discrete parts the more easily to define precisely how the act was accomplished. The terms we use show whether the stolen article was just taken (larceny), whether the victim's gullibility or cupidity was employed (confidence game), whether threat or force was used (robbery), or whether some other technique was utilized. In addition to separating the spectrum of theft into several component parts our society has also established courts, jails, and selected enforcement officials. These constitute that section of the social fabric charged with apprehending and punishing those who transgress the laws which society has established for its protection. This care for the welfare of the individual members of our society has even reached the point of suggesting a standardization of packaging for the goods we buy in order to preclude the least hint of 'false pretence' in the transaction.

When we examine the legal aspect of theft within a

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primitive culture, however, two generalized statements on primitive legal systems should be remembered:

What is clear is that one has no business expecting of any primitive culture that its law shall have achieved the official and doctrinal unity allegedly found in the modern state (Llewellyn and Hoebel 1941:60).

Generally there seems to be little doubt that the degree of sophistication attained by the judicial organs of a given community is directly related to the stage and form of its social organization (Elias 1956:30).

These allow us to recognize law in more rudimentary, less polished forms than we are accustomed to seeing in our own social structure. Throughout this paper laws will be considered as those rules having the threat of socially approved and specified force to insure their observance.

On the basis of man's past and present performance it seems reasonable to assume that avarice and greed are present, to some measure, in nearly every human on earth. When these are channeled into better herdsmanship, more skillful hunting, or more effective farming they are social assets, tending to strengthen the total social fabric through increased knowledge and productivity. These same drives, however, can also lead a man to steal. An individual's resistance to the temptation is based on several factors. Probably the most important ones are the customs of his social group, and the firmness with which they have been instilled in him during his formative years. If his social group has developed a legal recourse against theft then the threat of punishment can be an effective deterrent. Another factor, not
often mentioned, is whether the thief can freely use that which he has stolen. The concept of possessions for the sake of possessions does not seem to be characteristic of most primitive societies. If material wealth is important, it is important for what it can do rather than as a thing in itself. Thus it can bring renown and importance through 'potlatching', or, if food in a chief's granary, it can be a barrier against tribal famine in times of bad crops.

In examining theft, and its punishment, in primitive societies, the concept of restitution to the one wronged seems to be one of the principal penalties imposed on the thief. The degree to which restitution is exacted, and the number and variety of added penalties which may be imposed vary widely from society to society, and often seem to increase with an increase in the sophistication of the political structure. The simpler and more elemental the social and political organization, the simpler and more direct seem the punishments for crime.

A key factor in the development of a body of criminal law is the recognition by the social body that certain actions are dangerously anti-social. The society must display a willingness to create judging and enforcing mechanisms to control the frequency of occurrence of these anti-social actions. If a society creates no formal political or governing structures yet possesses certain well-defined
penalties and enforcement techniques for specific offences, it can be said that such a society recognizes crime, and has a legal structure to combat it.

The Nuer

The Nuer of the Sudan are a society that had no regular institutions for the enforcement of customary law in the past (Howell 1954:22). They had, however, established recognized standards for the control of human relationships, established categories of property, set scales of compensation, and had formulas for compromise (Howell 1954:27).

Since the Nuer are, and were basically herdsmen, the theft of cattle brought down the quickest and severest punishment. Stealing another's cattle for any reason other than eating was rare. As Evans-Pritchard points out, the Nuer social idiom was, and is, a bovine idiom, (Evans-Pritchard 1956:19) and cattle were as easily identified as human members of the family. The chance of hiding stolen cattle from their owner, therefore, became rather remote. When a cow or steer was stolen and eaten, and the thief discovered, compensation was ten head of cattle. The Nuer did not believe that restitution on a one-for-one basis was a sufficient deterrent to the thief. When a sheep or goat was stolen and eaten the compensation was six head of cattle (Howell 1954:201).

Although Nuer material culture, and wealth, was simple
they did assign personal property to one of the following four categories and applied scales of compensation against these:

1. Those articles made from local material, easily available, which required no special skill to make, had no traditional scale of compensation. In fact the question of ownership was rarely raised. Cattle ropes, sandals, spear-shafts, etc. were examples of property in this category.

2. Articles which were made locally, but required some knowledge and skill constituted another category. The clubs, shields, leather ornaments, pottery, etc. which comprised this group were given freely to relatives and freely exchanged with others. Removal by a stranger, however, brought strong objections (presented the combative Nuer with an excellent excuse for a fight).

3. Those articles of local manufacture which could only be created by a skilled craftsman (canoes, ivory bangles, etc.) had a definite value and there was a scale of compensation for their theft.

4. Imported articles such as iron hoes, fish-spears, spear-heads, etc. which had been obtained from other tribes in exchange for cattle had a definite compensation value (Howell 1954:179-80).

The scale of compensation was based on two factors. One was the rarity of the item taken or the difficulty of replacing it. Thus to a tribe right on the trade routes an iron
fish-spear might be worth one cow. That same spear to a tribe far from the trade routes might be worth six cows. The other basis for compensation was the value of the item to the subsistence economy. Thus fish-spears, hoes, canoes, etc., which had a direct and important relationship to the subsistence economy of the family had a high compensation value (Howell 1954:201-202).

Although they had recognized sanctions and scales of compensation the Nuer had no enforcing mechanism as such. The collection of compensation, recognized as due, depended on the willingness of the injured party to act (take his compensation by force). His success or failure usually hinged on the extent of support his kinsmen would provide against the resistance of the offender and his kin group (Howell 1954:23).

**Plains Tribes**

The Indian tribes of the Great Plains, like the Nuer, were a semi-nomadic people. Both possessed recognized tribal areas, and roamed within these as conditions dictated. Where the Nuer followed the grass, the Indian followed the buffalo. Unlike the Nuer, however, most of the Plains Indians, as tribal units possessed recognizable governmental organizations (Llewellyn and Hoebel 1941:67). The governmental organizations usually consisted of two functionary orders. One of these acted as the executive/legislative/
judicial branch; the other functioned as the policing unit. The first branch was made up of the tribal chiefs while the second group included the military societies or Plains Police.

Punishment among these people was inflicted not as an act of social vengeance but rather as a technique to insure the preservation of order. In consonance with this concept the severity of the punishment and the rigidity of enforcement varied with the seriousness of the effect of the offence on the welfare of the tribe (Provinse 1937:350).

If we take the Cheyenne as an example we find a strange ambivalence in their attitude towards stealing. Since they believed gift-giving to be a high virtue, and did not put a great value on material possessions, they tended to shame the thief by publicly declaring "If I had known you wanted it I would have given it to you" (Hoebel 1964:169). Despite this high-minded attitude towards misappropriation of property, they did feel that when one took something at night, "that is stealing and not liked" (Llewellyn and Hoebel 1941:226).

The development of Cheyenne law with reference to unauthorized borrowing is exemplified by the following:

A man borrowed a horse from a friend while the latter was away. To show who had taken the animal he left his bow and arrow at the horse owner's lodge. The latter was not upset since he knew who had the horse, and expected its return shortly. However, a
year passed and the horse had not yet been returned. The owner talked to the Elk Soldier chiefs. They went to the village of the man who had borrowed the horse and brought him and two horses to the lodge of the one whose horse had been borrowed. The borrower offered both horses to the man whose horse he had taken. The offer was refused, only the one horse was returned to its rightful owner and the two men remained friends.

When this affair was brought to the attention of the chiefs they realized that such unrestricted borrowing could lead to social disruption. To prevent this they made a new law wherein it was stated that there would be no more borrowing of horses without asking. In addition if one man were to take another man's goods without asking, the soldier societies would get them back. If he who took them objected, the members of the soldier society would beat him and take them by force (Llewellyn and Hoebel 1941:127-128).

Grinnell recognizes the problem raised by unrestricted, unauthorized borrowing. Though he claims there is no theft among the Cheyenne he admits there is a certain amount of borrowing without permission. He continues by pointing out that continued conduct of this nature on the part of an individual could result in whipping, destruction of the culprit's personal property, or the slaughter of his horses by the members of a soldier society (Llewellyn and Hoebel 1941:349-350). The punishments of whipping, or destruction of personal property seem to be quite uniform throughout the Plains area (Provinse 1937:349).
Kalmuks

Although the Kalmuks are true, cattle-breeding, nomads they are also a remnant of the Mongol Horde that centuries ago ruled or terrorized half the known world. As such they are the inheritors of that body of customary Mongol law which Jenghiz-Khan codified as the 'Yassa" in 1206 A.D. This law was modified in 1320 (Yuan Dynasty), and again in 1640 (Oirat Regulations) (Riasanovsky 1929:20-21).

The Kalmuks based their law essentially on the Oirat Regulations but included some complementing additions of their own (Riasanovsky 1929:264). In the 1820's these Regulations were further modified by the Digest which reflected the impact of Russian law on the legal system (Riasanovsky 1929:285-286).

All Mongol codes, from the Yassa of Jenghiz-Khan to the present Digest of the Kalmuks recognizes theft as a crime. From the few existing fragments of the Yassa two references to theft, and the punishment therefore, remain:

Whoever takes goods on credit and becomes bankrupt, and then repeats the offence, and then repeats it again, shall be put to death.

The man with whom a stolen horse is found is bound to return it to its owner and add nine horses of the same kind. If he is unable to provide the horses his children are to be taken in lieu of the horses. If he has no children he is slaughtered like a sheep (Riasanovsky 1929:57-59).
The Yuan Dynasty Code of 1320 defined several types of theft. It recognized robbery, robbery with murder, looting, and such other kinds of theft as simple stealing, swindling, etc. (Riasanovsky 1929:24-25).

The Oirat Regulations which formed the basis of Kalmuk law were even more explicit in their definition of theft, and the varieties of appropriate punishments and restitutions. Thus, they differentiated between stealing from a guest, theft from the treasury of the khaghan, theft by a noble through an intermediary, failure to assist a man who has been robbed, concealing a thief, stealing either cattle or coal from a monastery, etc. (Riasanovsky 1929:41-51).

These Regulations reserved the severest punishment for the theft of the fundamental property which provided the nomad with a means of livelihood. Each element of fundamental property had a specified restitution value. This value varied with the importance of the object stolen, but, in all cases, was extremely high. An indication of how high can be obtained from the following partial list of restitutions:

Theft of camel repaid by 15 x 9 animals
Theft of Gelding " " 10 x 9 "
Theft of armour, bow, etc. " " 3 x 9 "
Theft of sheepskin coat " " 1 x 9 "
(Riasanovsky 1929:91)

The basic Kalmuk punishment for theft was a distinct modification of the Régulations of 1640. It was not so
severe yet it was still sufficiently costly to make a
would-be thief think twice before acting. It stated:

If a thing worth more than a rouble
is stolen the thief is punished, the
head-man of the village is fined, and
a fine is levied for the benefit of
the prince. The thief is bound to re-
store to the owner of the stolen pro-
erty twice as much, and give in addi-
tion, a ram to sacrifice to the deity
of the fire. He must also make the
following gifts: to the informer a 3
year old horse to be sacrificed to
Buddha; to the camp of the prince a
camel; to each of the judges a 4-year
old cow; to the witness a 4-year old
horse; to the executioner a 3-year old
animal. The headman of the thief's
village is fined one camel (Riasanovsky
1929:91).

To the penalties established by the basic law, steal-
ing from a foreign envoy resulted in additional fines which
were paid to the camp of the prince. Robbery, also, was
considered more serious than simple theft. In addition to
the fines and punishments specified in the basic law, as
many serfs were taken from the thief as there were men robbed
(Riasanovsky 1929:269).

The present Kalmuk laws as contained in the Digest re-
tain the fundamental concepts of Mongol customary law, which
was based on common nomad culture. The punishments, how-
ever, have undergone a considerable change. Fines in cattle
have been reduced, and are also payable in money as well as
cattle. Corporal punishment with whip or stick has become
a principal form of punishment (Riasanovsky 1929:285-286).
Agricultural Societies

In considering the agriculturists we find, once again, a wide range of political sophistication. From the 'government sine government' of the Hopi to the tightly structured political societies of Nigeria and South Africa the problem of theft exists to a widely varying degree.

To the Hopi, with their interlocking kinship, religious, and secret society structure, stealing is looked upon as bad, and does not seem to present much of a social problem. One of the most pungent comments any informant ever made on the subject of theft was that by a Hopi who said, simply, "The Navajo steal" (Thompson and Joseph 1945:106).

In considering the question of theft among the Papago we find that here too it is a rare occurrence. There is a simple reason for this. All the people have about the same amount of material possessions, and there is a cultural pattern of sharing within the family as well. In those few cases where theft does occur the Keeper asks the offender to make restitution. If the thief does not comply he loses his status in the community. Persistent stealing results in banishment, and among the Papago this penalty is inflicted not only on the culprit but also on his entire family (Underhill 1939:118).

Among the people of Ontong Java there is only one crime in a specific legal sense (i.e. a specific act punished by
society either collectively or through its officers. This crime is theft, either of coconuts from the land or taro from the swamp (Hogbin 1961:210). Joint families own, in common, the land on which the palm trees grow and the product of these trees belongs to the joint family. Each woman owns her own taro garden in the swamp and the product is hers. In order to reduce temptation, as well as to catch those who would thieve, lookouts are established to keep watch over the common land and the bush in which the taro gardens lie. Not only is permission required to go onto the common land or into the bush beyond the village, but specific days are designated for cultivating the taro patches. When a person is found on the common land without permission he is taken before a koko’a (a member of one of the major joint families) for sentencing. For the first offence the culprit escapes with nothing worse than a head shaving. Should he repeat the offence he is either exposed in the sun for some time without food or water, or he can be killed. A woman found in the taro patches or on the common ground without permission suffers the same punishment as a man (Hogbin 1961:211).

African States

The African societies with strongly centralized political systems tend invariably to have a more advanced body of legal principles and judicial techniques
than have those with more or less rudimentary political organizations. (Elias 1950:30).

The validity of this observation is borne out by the legal techniques of the Nigerian tribes, and, to an even greater extent by the law-ways of the South African Bantu.

Among the Yoruba theft is considered a crime rather than just a civil action. As such it is judged, not by the local or compound courts, but is a matter for the Council of State. The punishment levied by the Council is quick and certain. The first offence results in flogging. The second and third offences call for mutilation, while he who proves himself an habitual thief may be sold into slavery (Forde 1951:24).

Among the Bini theft does not often occur but when it does punishment, as with the Yoruba, is swift and certain. The thief makes restitution to the man he has robbed, and pays a fine as well. If the thief is too poor to pay the fine he is beaten. If, however, he has robbed an official of the government, or a stranger in the land, the penalty is death (Roth 1903:85-86). Among the Bini the old men act as judges, and the accused has the right to chose someone to defend him before them. The accuser makes his own charge before the court, but if he does not bring sufficient proof to convince the court of the truth of his charge he undergoes the punishment that would have been meted out
to the accused (Roth 1903:85). One might expect that this eliminates false accusations, and reduces those of questionable validity to a mere trickle. Meek points out that as regards criminal law in Nigeria it is directed towards redress of individual wrongs rather than the maintenance of public order as is the case with European law (Meek 1925:270).

Among the Bantu there are no written laws; however, laws are, to a considerable extent, inherent in the social system of the people. The great bulk of the law is derived from the authority of tradition and precedent in social behaviour (Schapera 1937:197). The enforcement of the laws is accomplished in two ways. One is the group pressure which gives respect and approval to those who obey laws, and withdraws social esteem and treats with ridicule and contempt those who break the laws. The other method is through the power of compulsion vested in the courts (Schapera 1937:197-198). In the sophistication of its court structure the Bantu differ markedly from most primitive societies. The lowest court is the headman's court. A person who is dissatisfied with a judgement given by this court may appeal to the sub-chief's court, and appeals may be made from this court to the chief's court. This last is the supreme court of the Bantu (Schapera 1937:213).
To the Bantu the proper remedy for a civil wrong consists of restitution and compensation. Theft is considered a civil wrong, and the thief, when caught, must restore the stolen property or its equivalent and then pay an additional compensation equal to the value of the property stolen. This restoration and added compensation is often made without recourse to the courts. There is a simple economic reason for this. Whenever the case comes before a court the thief not only has to make restitution and pay the added compensation but is often fined an additional sum equal to the value of the item that he stole. This fine goes to the chief, or some other designated tribal authority (Schapera 1937:199-209).

If we create a composite picture of theft, its definition and punishment as it occurs in these primitive societies, several marked deviations from our Western concepts appear. These deviations include the relative importance given to what was stolen; the way in which theft is subdivided by method; the punishments imposed and their relationship to the social economy; the basic purposes on which the punishments are based.

Within our legal system the seriousness of a simple theft is established on a purely monetary basis. If what is stolen is less than a specified amount, the crime is termed 'petty' larceny. If the value of the goods stolen
exceeds the specified amount the crime then becomes 'grand' larceny. Within those primitive cultures which do recognize that material items can have varying worth the basis for valuation is simpler. The value of an object depends either on the difficulty of replacing it, or its importance to the economic well-being of the person, family or larger kin-group, or the tribe. Thus it is only logical to the Nuer that the theft of an iron fish-spear or hoe represented a greater loss than the theft of an ivory bangle. The loss of a particularly skillful hunting or war horse could seriously affect the ability of a Cheyenne warrior to feed and clothe his family, or effectively support his tribe in war. The primitive recognition of this value standard was a logical and necessary development from the simple problem of survival which they faced.

Restitution and compensation seems to be the basis on which many primitive peoples build their punishments for theft. When the thief is caught he returns to his victim the goods he stole (or items of equivalent value) and then gives something extra to assuage the anguish his roguery has caused. The amount of this "something extra" varies from people to people but it seems to range from an amount equal to the original theft to a sum many times its equal. This great interest in seeing that the victim not only receives that which is his, but usually a sizable bonus as
well, is not present in our western societies. Our idea, it seems, is to catch the thief and put him away. If in the process the proceeds of his knavery (in an identifiable form) are recovered, those from whom he took them may recoup all, or part, of their losses. Otherwise officialdom expresses its regrets but assures the public that a proper jail sentence will insure that 'he' will not, for a fixed period of time, pose any threat to the social body.

Unlike our society which considers jail the proper place for a felon, most primitive societies never use this method of punishment. One can easily guess the rationale behind this position. A man in jail must be fed, yet does not have to work. Therefore he is completely non-productive, in fact he is a drag on the economy because every other member of the group has to work just a little bit harder to support him. In addition, were men to realize that by simply stealing something and then refusing to make restitution and pay the compensation they could lie in a shady hut all day long and be fed without working, it would not be long before there would be several in "jail" and the burden of their support would weigh heavier on the rest of the group. So instead of jail the simple primitives made the act of stealing so costly in restitution and compensation that it really didn't pay, and the chronic thief they kill, banish, or sell into slavery.
Throughout the literature, however, one constantly comes across statements that theft is rare in this society, almost unheard of in that society. Admitting that restitution and compensation are deterrents, we have deterrents in our society also and we still experience considerable theft. Despite our jails, and our "four-time loser" laws we still have thieves, and repeaters too. It might be that there are two areas in which our western cultures differ markedly from the primitive cultures examined. These differences may represent the most effective deterrents to primitive theft.

One area is the very nature of the material culture itself. Our Western culture is characterized by its great outpouring of machine-made goods. These goods are, essentially identical to all others of the same kind from the same factory. Thus a green Chevy coupe is, except for its serial number, quite the same as any other green Chevy coupe of the same grade. One Big Ben alarm clock cannot, normally, be differentiated from another Big Ben of the same color. So it goes with our material goods, factory produced, as like as peas in a pod. The other element of our wide-spread use of coined money. This, too, bears no distinguishing marks, is carried, in varying amounts, by almost everyone, is collected in stores and banks, and can be easily carried away. Thus the thief in our society
is faced with a host of temptations, and the knowledge
that the tracing and identification of stolen property
requently presents an extremely difficult problem.

When we turn to the primitive society however, the
material culture presents a startlingly different picture.
Most items are hand made, and those few machine-made
trade goods are so well known within the group that they
are effectively labelled. Hand made goods, even if made
by the same artisan, are never quite identical, and the
little differences marking each single item enable quick
and sure identification. So our primitive thief is not
only faced with the probability of restitution and com-
pensation, but is also saddled with an item he hardly
dares use. He has no crooked pawnbroker or 'fence' who
will take it off his hands and provide him with something
else that is both useful and safe. Nor does he have
access to unidentifiable money which he can steal and
use to buy some item he desires. Money, as we know it,
is not a common item in primitive societies. Certainly
stealing the storied pot-latch coppers of the Kwakiutl
would result in little but ill-fortune attending the
robber, and the stone coinage of Yap is not the type of
currency that lends itself to being tucked in the hand
or pocket. Thus, the primitive who would steal is faced
with the fact that there is very little he can steal,
that he can rarely use what he does steal, and that in the end he will not only be faced with restoring what he took, but also quite probably paying a ruinous compensation as well.

If the problems created by the primitive material culture were not enough to deter the would-be thief there exists a psychological barrier that is not present in our culture, and which reinforces the strong economic reasons to ignore the attractions of crime.

A thief, in the United States, has a great geographical area in which he can move freely. From coast to coast and border to border all the people are 'Americans'. They speak a common language, have common customs, wear common dress, use common currency, etc. A man who steals something in New York need have no fear about going to Chicago, or Los Angeles, or New Orleans. Though he may be assailed by homesickness he is no stranger to, nor in physical danger from, the natives of Omaha, Denver, or Boston.

If we consider the world of primitive man, however, we find that it is far from the great, wide, wonderful world we know. His geographical knowledge is usually restricted to the tribal boundaries. He feels that to pass beyond these boundaries is an open invitation to trouble. The tribes surrounding his may be neutral or hostile, but they are usually not too friendly. The forests, rivers,
and ranges may have strange gods and powerful spirits against which he has no medicine. His strength is drawn from the strength of the tribe. Without this strength supporting him he becomes weak. The only way a primitive thief could be sure of enjoying the fruits of his theft would be to take the stolen articles away from the tribal area. This would require flight, flight into the strange and terrible unknown beyond the boundaries of his tribal lands and away from the tribal support.

When one considers the magnitude of the problem which the material and psychological areas combine to create, it is no wonder that observer after observer comments on the low incidence of theft among so many primitive tribes.
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