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A CONFLICT OVER LAND

Francis E. Ackerman*

I.

American historians have made shockingly little effort to understand the life, the societies, the cultures, the thinking, and the feeling of the Indians, and disastrously little effort to understand how all these affected white men and their societies.¹

The American Indian has been accorded scant attention in some of the most widely acclaimed studies of the history of the United States.² This is one aspect of the fate commonly reserved for a conquered people, particularly where their culture is regarded as a primitive survival that must finally disappear before the inevitable progress of civilization. It has been generally assumed that the study of Indian institutions and history has no immediate relevance to modern American society.³ However, the relationship between the Indian and his European conqueror has by no means been brought to a close.

Recently, several tribes, notably the Passamaquoddy and Penobscot in Maine, have asserted claims to extensive tracts of land which had long since passed from their possession.⁴ The resulting litigation has been described as "potentially the most complex . . . ever brought in the federal courts, with social and economic impacts without precedent. . . ."⁵ Beneath the complexity of the legal issues lie deeper questions as to the nature of the grievance that gave rise to these actions. The land claims cannot be dismissed in simplistic terms as the attempt of a defeated people to win back at law what was lost in war: the dealings between Indian and European were not confined exclusively to armed hostilities, but consisted also of a long history of diplomatic relations, treaty commitments, legislation, and transactions in

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1. Bernard de Voto, quoted in J. HOWARD, *STRANGE EMPIRE* 8 (1952), at introduction [hereinafter cited as HOWARD].

2. *E.g.*, D. BOORSTIN, *THE AMERICANS* (19—).

3. With some notable exceptions, many of which are referred to *infra*.

4. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, *aff'd*, 528 F.2d 370 (1975).

5. Memorandum of Justice Dep't, to U.S. District Court for the District of Maine, Jan. 14, 1977. 123 CONG. REC. S 3205 (1977).

land. An understanding of the Indian attitude to land, and his concept of the relationship of man to the land in terms of tenure and ability to convey is therefore elementary to any attempt to comprehend the historical context of the present land claims. Moreover, the questions raised by the claims cannot be settled with them. Such questions lie at the root of American and indeed of modern European history.

The first part of this article will examine Indian concepts of land tenure in the pre- and post-Columbian eras. The focus will be primarily on tribes belonging to the Algonkian and Iroquoian linguistic groups. The Algonkian group includes the Montagnais-Naskapi of eastern Canada, the Ojibwa and Cree of Ontario, the Micmac of Nova Scotia, the Malecite, Abenaki, Passamaquoddy, and Penobscot of Maine, the Pequot, Narragansett, and Wampanoag of southern New England, as well as one Plains tribe, the Cheyenne. The Iroquoian group comprehends the Five Nations of the League (Seneca, Cayuga, Mohawk, Oneida, and Onondaga), the Huron, Erie, Neutrals, Susquehanna, Tuscarora, and to the south, the Cherokee. Because attitudes toward property in land cannot be fully understood in isolation from the culture of which they form an integral part, the second part of the article will attempt to situate them in a broad cultural unity. Specifically, it appears that Indian concepts of land tenure were closely linked to an attitude to social welfare, to a rudimentary division of labor and cooperative work patterns, to the role of government and law in society, and to a religious world-view.

At a deeper level, a study of the relationship between European culture and the so-called primitive culture of the Amerindian necessitates a consideration of the attempts of liberal economic theorists on the one hand, and Marxists on the other, to construct a theory of the development of property rights, or a model of social evolution. Some commentators, including structuralist anthropologists, have denied that it is either possible or useful to construct such a model. The third part of the article will enter this controversial area. Finally, in the concluding section, there is a brief consideration of the history of interaction between the two cultures, and of the significance of that relationship for modern society. Obviously, the scope of the article is far too broad to permit an exhaustive treatment of these areas of discussion: its purpose is more to raise questions than to provide any final answers.

II.

The conflict between the Whites and Indians that marked

American Indian relations was basically a conflict over land.⁶

Most of coastal Maine from Kittery to Pemaquid passed under the control of English settlers between 1625 and 1675. In most instances, these lands were conveyed by deeds, signed by Indians. Often, the consent of an entire band or tribe was obtained. James Sullivan, a native of Berwick, Maine, and then Attorney General of Massachusetts, wrote in 1801: "When the natives transferred their right of possession to the first civilized settlers, it was not done by the act of an individual, as of his own authority; but by the voice of a council, assembled on the occasion."⁷ In a brief but illuminating monograph, Roger B. Ray has noted that "many of the Maine Indian deeds contained no restrictions or rights reserved and did contain a clause granting the buyers peaceable access and possession. Today such a clause implies that the vendor shall get out. But the Indians did not leave."⁸ Evidently, the Indians did not understand that in signing these instruments, they were agreeing to quit the premises: their interpretation must have been that they and colonists would both use the land.⁹

The entire history of American Indian relations, not only in Maine but across the continent, was colored, often with tragic results, by similar misunderstandings with regard to land. The explanation is to be found in a study of the procedures by which Indians regulated the use of their territories.

This is a sensitive area, in which any discussion must proceed with an awareness that the term "property" is susceptible of many shades of meaning. It is difficult to avoid terminological confusion where the only available language has been infused with connotations drawn not only from the Anglo-American legal system but also from popular conceptions that are often at variance with the realities of that system. Thus, in the popular mind, private ownership is often conceived in the absolute sense in which it was understood by eighteenth- and nineteenth-century theorists. If, therefore, it requires an effort of imagination tempered by historical analysis to arrive at a realistic assessment of our own property institutions, it is evident that a correspondingly greater effort is required to comprehend a system where

6. F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 139 (1962) [hereinafter cited as PRUCHA].

7. J. SULLIVAN, *THE HISTORY OF LAND TITLES IN MASSACHUSETTS* 22 (1801) [hereinafter cited as SULLIVAN].

8. Ray, *Maine Indians' Concept of Land Tenure*, 13 ME. HIST. SOC'Y Q. 28, 41 (1973) [hereinafter cited as Ray].

9. *Id.*

the concept of ownership of land may not have existed in any form. A second terminological warning should perhaps be noted at this point: where the adjective "primitive" appears in the following discussion, it refers to the relative complexity of the social organism, as well as its level of technological achievement. It carries no implication of inferiority in any sense whatsoever. Where such terms are used in the discussion following, it will be necessary to enlist the indulgence and imagination of the reader.

It has been argued that the Algonkian tribes of the north-eastern woodlands recognized private property rights in land, even in pre-Columbian times.¹⁰ Frank Speck, a long-time student of Algonkian cultures, discerned a strong tendency toward individual ownership of land in an institution he described as the family hunting territory. Speck found this phenomenon in existence among various tribes, including the Penobscot and the Montagnais, during field work in the early part of this century. Although their lands had been lost for practical purposes centuries earlier, Speck was able to map the boundaries of the Penobscot hunting territories—another indication, perhaps, of the Indian conviction that their land had not been alienated.

We may define the family hunting group as a kinship group composed of individuals united by blood or marriage, maintaining the right to hunt, trap, and fish in a certain inherited district bounded by rivers, lakes and other natural landmarks. . . . With a few exceptions the whole territory claimed by each tribe was subdivided into tracts owned from time immemorial by the same families and handed down from generation to generation in the male line. The almost exact bounds of these territories were known and recognized, and trespass, which was indeed of rare occurrence [*sic*], was summarily punishable.¹¹

Speck appears to have assumed that the family hunting territory had existed in pre-Columbian times on the grounds that the small fauna (*e.g.*, beaver) of these forest regions could be successfully husbanded only by individual families,¹² and that "sociological

10. Speck, *Land Ownership Among Hunting Peoples in Primitive America and the World's Marginal Areas*, 22d INT'L CONG. OF AMERICANISTS 2, 323 [hereinafter cited as Speck].

11. *Id.* at 327.

12. Speck & Eiseley, *Montagnais Naskapi Bands and Family Hunting Districts of the Central and Southern Labrador Peninsula*, 85 PROC. OF AM. PHILOS. SOC'Y 215, 241 [hereinafter cited as Speck & Eiseley].

factors are slow developers."¹³ He maintained that this institution should be placed at the core of northeastern Algonkian culture.¹⁴

However, this thesis has now been discredited to the point where it is inconceivable that it will be rehabilitated. It should be noted that even in Speck's formulation, the hunting territory could not be described as private property: the land could not, for example, be bought or sold. Speck claimed nonetheless that the institution represented the emergence of a private property system *sui generis* in a primitive hunting society.

It now appears that whatever attributes of a private property system were in fact exhibited by the Algonkian hunting territory were the result of acculturation over a 400-year period, rather than a spontaneous development. The fallacy of Speck's argument was exposed in Eleanor Leacock's classic study¹⁵: it lay in his failure to recognize the early and pervasive importance of the fur trade in relations between the colonists and the Algonkian tribes. Leacock, who based her study on extensive field work among the Montagnais, concluded that "such private ownership of specific resources as exists has developed in response to the introduction of sale and exchange into the Indian economy which accompanied the fur trade and . . . that it was these private rights—specifically to fur-bearing animals—which laid the basis for individually inherited rights to land."¹⁶ The evidence marshalled in support of this conclusion is compelling.

Trespass could only occur where the encroachment on another's territory occurred for the purpose of hunting beaver to sell: it was entirely permissible to kill for food. In short, the concept of trespass as we understand it did not exist. Today in Maine, private property is an established fact: the owner has a right to prevent trespass. However, during the hunting season, an unwritten custom (enforced by informal community sanction) dictates that the hunter may range over any private land in search of game. Among the Algonkian tribes affected by the pressures of the fur trade, the reverse was true: the use of what was essentially common land could be restricted only for the purpose of hunting fur-bearing animals. Thus berrying, fishing, and bark-gathering, as well as hunting for food, were in no way restricted

13. F. SPECK, *PENOBSCOT MAN* 208 (1940) [hereinafter cited as SPECK].

14. *Id.*

15. Leacock, *The Montagnais Hunting Territory and the Fur-Trade*, 56 *AM. ANTHRO. ASS'N*, No. 5., pt. 2, Mem. No. 78 [hereinafter cited as Leacock].

16. *Id.* at 2.

and could be conducted anywhere on the territory occupied by the tribe.¹⁷ Among the Parry Island Ojibwa, maple groves, unconnected with the fur trade, continued to be communally owned.¹⁸ Moreover, Leacock demonstrates that the Algonkian hunting territory developed in a geographical pattern centered on the earliest trading marts. "The inescapable fact is that the strength of individualized land-holding patterns characteristic of the western Montagnais decreases not only northward toward the tundra, where the Naskapi used to depend almost entirely upon the migratory caribou, but also outward from the centre of the earliest and most intensive fur-trade."¹⁹

As early as 1534, Cartier was trading in furs with the Micmacs of Chaleur Bay—almost 400 years before Speck's study.²⁰ After 1575, as A. G. Bailey has noted, "the fur trade became of prime concern to many European merchants."²¹ When Champlain encountered the Penobscot in 1603, they were already heavily involved in the fur trade.²² Even the Jesuit missionaries who carried Christianity into the Algonkian heartland sought beaver pelts as zealously as they did new converts. As Frontenac wrote to Colbert in 1672, "they think as much of the sale of beaver pelts as of the conversion of souls."²³ Both Bailey and Diamond Jenness have adduced evidence that the Jesuits sought early to locate each family on a separate territory.²⁴

That such efforts were not always successful appears from the persistence of communal regulation of land use among Algonkian tribes. It now seems clear that individual ownership of property rights in land of any kind was unknown in the pre-Columbian era.²⁵ Early sources give no indication of the existence of family holdings: they are not mentioned in Le Jeune's account of a winter among the Montagnais 1633-1634, nor in Pere Drullette's record of a month-long visit in 1647.²⁶

Prior to contact with the immigrant culture, communal owner-

17. *Id.*

18. *Id.* at 41.

19. *Id.* at 6.

20. A. BAILEY, *THE CONFLICT OF EASTERN ALGONKIAN CULTURES* 6 (1969) [hereinafter cited as BAILEY].

21. *Id.* at 8.

22. Leacock, *supra* note 15, at 12.

23. Quoted in BAILEY, *supra* note 20, at 111.

24. *Id.* at xix, 89. See also Jenness, *Indians of Canada*, NAT'L MUSEUM OF CANADA, Bull. 65, at 124 (1932).

25. BAILEY, *supra* note 20, at 85.

26. Leacock, *supra* note 15, at 14.

ship vested in the band prevailed. It is probable that, like the Micmacs, most Algonkians allotted their lands semiannually before the fall and winter hunts.²⁷ The band, not the family or tribe, was the primary unit of social organization: private family holdings in this context would be anomalous.²⁸ Only after the development of the fur trade did this communal solidarity begin to break down, and then only with respect to the production of furs. In this area of Algonkian economic life, "the individual's most important ties. . . were transferred from within the band to without, and his objective relation to other band members changed from the co-operative to the competitive."²⁹ The eastern Algonkian tribes, therefore, held their land on the basis of communal tenure, with a later development of usufruct rights to specific resources in smaller family groupings. In signing the deeds that conveyed coastal Maine, and in later treaty arrangements with the settlers, Algonkian tribes intended to share their lands, not to alienate them. They could not be alienated.

The Cheyenne, a nomadic Plains tribe, and the westernmost representative of the Algonkian linguistic group, recognized no private property in land. George Bird Grinnell, among the earliest and most sensitive observers of Plains Indian culture and an expert on the Cheyenne, wrote: "They cannot conceive of the individual ownership of land; they think of their land as held by the tribe for those who shall come after them, who in turn may occupy it."³⁰ (Grinnell was writing of the attitudes of Indians in general, but we may assume that he drew largely on his experience with his beloved Cheyenne.) Even the tribe, therefore, was not considered the owner of its territory but rather a trustee for future generations. "A primitive Indian can no more understand such private monopolies than the average American can understand how there could be a private monopoly of air or light."³¹ Where whites interpreted land transactions as absolute purchases, Grinnell concludes, the Plains Indian considered—like the eastern Algonkian—that he had granted a permit to use the land, for a term and on conditions, though these were nowhere explicitly stated. Grinnell cites an instance where members of the

27. BAILEY, *supra* note 20, at 85.

28. *Id.* at 86.

29. Leacock, *supra* note 15, at 7.

30. Grinnell, *Tenure of Land Among the Indians*, 9 AM. ANTHRO. 1, 2 (1907) [hereinafter cited as Grinnell].

31. *Id.* at 6.

Blackfoot Tribe inquired when the land would be returned.³² It could not be alienated.

Among the Iroquois, similarly, no individual could obtain absolute title to land. Although these tribes were not horsemen of the Plains, like the Cheyenne, and unlike the eastern Algonkians, practiced agriculture on an extensive scale, still the land was held in common by the tribe.³³ The individual could cultivate unoccupied land and was regarded as the owner of any improvements made, which could be bequeathed or sold.³⁴ To this extent, individuals, families, and clans could hold usufruct rights.³⁵

The Iroquoian Cherokees, also an agricultural people, resembled their northern relatives in many respects. There is no reason to question the accepted view that the Cherokees held their land in common.³⁶ It seems likely that in the pre-Columbian era, Cherokee towns, which "physically resembled the open field villages of medieval England,"³⁷ allotted fields annually.³⁸ Later, perhaps as a result of acculturation, holdings began to crystallize, but private ownership of land did not emerge. Nineteenth-century Cherokee law defined the relationship of the individual to the land in unmistakable terms: the nation held the land; individuals owned and could sell improvements made to the land they occupied but could not alienate the soil.³⁹ Hunting grounds remained strictly communal.⁴⁰

A broad uniformity in institutions of land ownership is discernible, whether on the plains or in the forests of the Northeast, among hunters and tillers of the soil. None of these tribes recognized private ownership of land. The pattern is one of communal tenure, in each case vested in and regulated by the most important socio-governmental unit, whether tribe, town, or band. Where individual occupancy of land emerged, either as an adjunct of an agricultural way of life, or as a result of trade and ac-

32. *Id.* at 4.

33. Quain, *The Iroquois*, in *COOPERATION AND COMPETITION AMONG PRIMITIVE PEOPLES* 240-48 (M. Mead ed. 1937) [hereinafter cited as Quain].

34. L. MORGAN, *LEAGUE OF THE IROQUOIS* 317 (1904) [hereinafter cited as MORGAN].

35. Quain, *supra* note 33, at 248 n.1.

36. R. COTTERILL, *THE SOUTHERN INDIANS: THE STORY OF THE CIVILIZED TRIBES BEFORE REMOVAL* 13 (1954) [hereinafter cited as COTTERILL].

37. J. REID, *A LAW OF BLOOD: PRIMITIVE LAW OF THE CHEROKEE NATION* 29-30 (19--)
[hereinafter cited as REID].

38. *Id.*

39. *Id.* at 130-32. See A. DEBO, *AND STILL THE WATERS RUN* 14 (1973) [hereinafter cited as DEBO].

40. REID, *supra* note 37, at 134-35.

culturation, usufruct rights to the products of the land and in some cases ownership of improvements made were recognized. This uniformity, standing in striking contrast to the many differences and idiosyncrasies of these tribes, suggests that despite those differences their institutions of land use might be better understood as part of an overarching cultural pattern, common to them and perhaps to many other primitive peoples.

III.

In the simple question of how we treat the land, next to people our most precious resource, our entire way of life is involved.⁴¹

Whomsoever cometh in, when they are eating, they offer them to eat of that which they have. . . .⁴²

Institutions regulating the ownership and use of land were closely linked in the Algonkian and Iroquoian cultures to an attitude to social welfare that permeated every facet of tribal existence. The welfare of each member was a matter of immediate concern to the tribe or band as a social unit. Hospitality, generosity, and sharing were indeed characteristic of all Indian societies.⁴³ In a cultural system where law and custom merge, and public opinion is often an extraordinarily effective sanction, it is difficult to avoid the conclusion that the pressure to share with one's neighbor rose to the level of the equivalent of a legal duty.⁴⁴ Moreover, if the refusal to share could be visited with unendurable reprobation, to excel in compliance with the norm could be a source of great prestige.⁴⁵ Often, such sharing was not a parcelling out of identifiably private goods or food but the culmination of a course of cooperative activity, whether venatic or agricultural. Perhaps the system is best described, in J. H. Steward's words, as "a kind of subsistence insurance."⁴⁶ Its universality is attested to by the literature.⁴⁷

41. E. SCHUMACHER, *SMALL IS BEAUTIFUL* 107 (1973) [hereinafter cited as SCHUMACHER].

42. Williams, *Key Into the Language of America*, 3 COLLECTIONS OF THE MASSACHUSETTS HIST. SOC'Y FOR 1794, 208 (1810) [hereinafter cited as Williams].

43. P. FARB, *MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA* 262 (1968) [hereinafter cited as FARB].

44. K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* 235 (1967) [hereinafter cited as LLEWELLYN & HOEBEL]; BAILEY, *supra* note 20, at 86; REID, *supra* note 37, at 70.

45. Quain, *supra* note 33, at 280.

46. Quoted in Leacock, *supra* note 15, at 7.

47. LLEWELLYN & HOEBEL, *supra* note 44, at 235; BAILEY, *supra* note 20, at 85;

The link between land and welfare is not far to seek: the food supply went with the land. A communal regulation of land use offered the only means of assuring the welfare of the members of tribe or band. Where the land was used on a cooperative basis by the social unit as a whole, this link is clearly visible in its purest form. Less obviously, perhaps, it also helped to shape other regulatory methods employed by Algonkian and Iroquoian tribes. Where the land was allocated to individuals or smaller groups on a seasonal or annual basis, as among the eastern Algonkians or the early Cherokee, considerations of equity and the needs of the disadvantaged could operate freely.⁴⁸ In both instances, where later developments, including acculturation, resulted in a crystallization of holdings, communal rights to use the land for purposes essential to welfare persisted. Among the civilized tribes in Indian Territory (including the Cherokee), timber and mines became an important source of public revenue.⁴⁹

Moreover, the development of rights in the individual to occupy the land he worked and to own, bequeath, and sell improvements made, as among the later Cherokee and Iroquois, is in no way inconsistent with this pattern. Nineteenth-century Cherokee leaders explicitly avowed that the policy underlying this system of land tenure was the prevention of monopoly. D. W. Bushyhead, Principal Chief of the Cherokee, stated in 1881 that "the only difference between your land system and ours is that the unoccupied surface of the earth is not a chattel to be sold and speculated in by men who do not use it."⁵⁰ J. P. Reid has suggested that this explanation for the rule that ultimate ownership of the land remained vested in the nation was a rationalization, and that the original aim was to prevent the alienation of land to non-Cherokees.⁵¹ This interpretation simply does not make sense, in view of the facts that at no time in Cherokee history could the land be alienated, and in any case, the rule did not prevent the alienation of rights of occupancy and improvements to non-Cherokees, often with deleterious results. Bushyhead's statement can be viewed as a rationalization only in the sense that it represented a relatively sophisticated formulation of a principle that had been implicit in the land use systems of the Iroquoian

Quain, *supra* note 33, at 280; DEBO, *supra* note 39, at 14-15; MORGAN, *supra* note 34, at 318; Williams, *supra* note 42.

48. Ray, *supra* note 8, at 34.

49. DEBO, *supra* note 39, at 15-18, 25.

50. Quoted in REID, *supra* note 37, at 131-32.

51. *Id.* at 133.

and Algonkian tribes. The principle might be restated as follows: to the extent that the individual is differentiated from the group in his economic activities, he has a vested right to the products of his labor,⁵² insofar as these rights are not in derogation of similar rights in others, or the welfare of the community.

* * *

When a field is to be broken up, they have a very loving, sociable, speedy way to dispatch it: all the neighbors, men and women, forty, fifty, a hundred &c., join and come in to help freely. With friendly joining they break up their fields, build their forts, hunt the woods, stop and kill fish in the rivers; it being true with them as in all the world, in the affairs of earth and heaven: By concord, little things grow great; by discord, the greatest come to nothing: concordia res parvae crescunt, discordia maximae dilabuntur.⁵³

Institutions of land tenure were similarly linked to the cooperative work patterns that were to be found in all Algonkian and Iroquoian tribes in the pre-Columbian era. Early Cherokee townspeople worked their fields together and stored their produce in a common warehouse.⁵⁴ The Iroquois had developed tightly knit mutual aid societies: planting, cultivation, and the harvest were highly organized cooperative activities.⁵⁵ Among the eastern Algonkian, too, "the spirit of mutual helpfulness appears to have prevailed" in all matters related to the food supply.⁵⁶ This spirit persisted throughout the history of Indian relations with the settler culture, and was often their shield in the face of overwhelming adversity.

"Faced by hundreds of special restrictions which do not apply to their white neighbors, Indians have survived on land where the white man would starve to death, and under regulations which would drive any race of men to insanity," Felix Cohen has written: "The secret of this survival may perhaps be found in the Indians' perennial and drought-resistant spirit of generosity and cooperation. Commissioners have tried in vain, as one commissioner put it, to teach the Indians to say 'I' instead of 'we'. Their failure has been the Indians' success."⁵⁷ It should be noted that

52. *Id.* at 129.

53. Williams, *supra* note 42, at 221.

54. REID, *supra* note 37, at 138.

55. Quain, *supra* note 33, at 250-51.

56. BAILEY, *supra* note 20, at 85.

57. Cohen, *The Erosion of Indian Rights, 1950-53: A Case-Study in Bureaucracy*, 62 YALE L.J. 348, 352-53 (1953) [hereinafter cited as Cohen].

cooperation in its pre-Columbian form depended to a large extent on the existence of little more than a rudimentary division of labor. In this perception at least, Friedrich Engels did not err.

Cooperative work patterns were a primary factor in forging the systems of land tenure analyzed above. Even where acculturation broke down those patterns in some areas of economic life, and the division of labor became more complex,⁵⁸ the spirit of social responsibility remained a deep-rooted feature of Iroquoian and Algonkian institutions. "The Sachems, although they have an absolute monarchy over the people, yet they will not conclude of aught that concerns all, either laws or subsidies or wars, unto which the people are averse, and by gentle persuasion cannot be brought."⁵⁹

It is apparent that these elements of Iroquoian and Algonkian culture were reciprocally interdependent. Another such element, and perhaps the keystone of the cultural arch, is to be found in an approach to government which, again in spite of many superficial differences, was common to all these tribes. In essence, government took the form of a primitive democracy based on consensus.

Until the nineteenth century, the Cherokee Tribe had no national government, consisting only of a grouping of townships bound together by a common culture, law, and language.⁶⁰ The only regular government institution was based on the township.⁶¹ It took the form of a council, consisting of an assembly of all adult citizens, male and female, meeting every night except during the hunting season. The council's function was deliberative in that its decisions were ad hoc rather than legislative or adjudicative; its procedure was democratic in that all speakers were heard with respect, but decisions were reached by consensus rather than majority vote. No decision was taken until all opposition had disappeared. Since this system survived centuries of contact with the immigrant culture, it must be assumed that it was an extremely effective guarantor of social harmony. As J. P. Reid has commented, "What is anarchy to us may have been order to them."⁶² There was no official authority with executive powers:

58. The Cherokees practiced slavery. See REID, *supra* note 37, at 129. So did the Eastern Algonkians, but slavery was a prelude to adoption into the tribe. BAILEY, *supra* note 20, at 91.

59. Williams, *supra* note 42, at 230.

60. REID, *supra* note 37, at 36.

61. *Id.* at 28-30.

62. *Id.* at 50.

leadership was exercised through influence and persuasion rather than command. To a colonial militia captain, writing in 1754, this feature of the Cherokee system was worthy of remark:

The Savages are an odd kind of People; as there is no law nor subjection amongst them, they can't be compelled to do any thing. . . . So what is called great and leading Men amongst them, are commonly old and middle-aged People, who know how to give a Talk in favour of whom they have a Fancy for. . . .⁶³

The Iroquois system of government was characterized by a more sharply defined institutional framework. Nonetheless, Frank Speck has described this system as "decidedly democratic."⁶⁴ Other scholars have attacked this view on the ground that the fifty sachem (chieftainship) titles were rigidly controlled, that only males belonging to certain matrilineages could hold them, and that sachems were chosen only by women of the lineage.⁶⁵ While it is true that this procedure is not democratic in the modern sense, it should be remembered that corresponding Anglo-American procedures are not the only method of arriving at a representative system. And indeed, some of the more important institutions in the American constitutional framework—notably the Supreme Court—are not democratic, and yet play a central role in the formation and interpretation of a national consensus. Similarly, there is no reason to suppose that the Iroquois system was not highly effective in producing a representative council and in interpreting consensus. Every citizen was eligible for some position of responsibility, including women; and outstanding skill in hunting or war was often recognized in the selection of leaders.⁶⁶ It seems likely that the comparative rigidity of Iroquois institutions was designed to internalize whatever tendencies toward intratribal conflict may have existed, while at the same time producing a system as representative, as open, and as consensus-oriented as that of the Cherokees.

Chieftainship among the eastern Algonkian tribes was not institutionalized to the same degree and depended on continued influence and respect.⁶⁷ Decisions were reached by persuasion and

63. Letter from Raymond Demere to N.H. Lyttleton, quoted in REID, *supra* note 37, at 53.

64. Speck, *The Iroquois*, CRANBROOK INST. OF SCI., Bull. 23 (1955), at 26.

65. FARB, *supra* note 43, at 99.

66. Quain, *supra* note 33, at 244.

67. BAILEY, *supra* note 20, at 91-92.

consensus. A Jesuit observer noted in 1612 that among the eastern Algonkians, "each man is his own master and his own protector. They have sagamores . . . but their authority is most precarious, if indeed that may be called authority to which obedience is in no wise obligatory."⁶⁸ The Cheyenne Council of 44 was a more permanent political structure, but again, it was grounded on a concern for representation and consensus.⁶⁹ There was always one alien member of the council, as a guarantee of representation for those Cheyenne living among the Sioux, and overall, one representative for every hundred persons or less. Contact between the council member and his constituency was carefully maintained. The chiefs were dominant figures within their family groups and have been described as the embodiment of public opinion.⁷⁰ The judgment of R. H. Lowie that "in general the absence of central authority is one of the most impressive features of North American society,"⁷¹ is therefore unexceptionable.

A coordinate feature of these cultures was the limited role played by coercion in the enforcement of decisions. Coercive powers did exist in some instances, for example, in the Cheyenne military societies, whose function was to keep order on the march and to select and organize camping sites.⁷² But it is likely that their power had grown considerably in response to the recurrence of crisis, threatening the very survival of the tribe, which dogged the Cheyenne throughout the history of their relations with the settler culture. Even in these circumstances, it remained true that where different groups within the tribe or band failed to reach agreement on a course of action, they went their separate ways.⁷³

Contact with the white man had a similarly disruptive effect on other Indian cultures in this respect. B. H. Quain notes that the European presence and influence gave rise to a militaristic tendency in Iroquois society: "the identity of their culture was being submerged in a pathological development of military opportunism."⁷⁴ Among the Algonkian Penobscot and Abenaki,

68. Quoted in R. LOWIE, *PRIMITIVE SOCIETY* 384 (1920) [hereinafter cited as LOWIE].

69. LLEWELLYN & HOEBEL, *supra* note 44, at 67 *et seq.*

70. *Id.*

71. LOWIE, *supra* note 68, at 385.

72. LLEWELLYN & HOEBEL, *supra* note 44, at 99 *et seq.*

73. See the history of the celebrated march of Dull Knife and Little Wolf, as rendered in G. GRINNELL, *THE FIGHTING CHEYENNES*, 384-411 (1977); and see MARI SANDOZ, *CHEYENNE AUTUMN*.

74. Quain, *supra* note 33, at 247.

French officers acted as self-appointed war chiefs in leading the Indians against the English.⁷⁵ Instances were recorded of Scotsmen joining Montagnais-Naskapi bands and becoming leaders.⁷⁶ The Cherokee ultimately developed a sophisticated constitutional system on the Anglo-American model.⁷⁷

But until the nineteenth century, the role played by coercive enforcement in Cherokee society was minimal,⁷⁸ and this was so in other Iroquoian and Algonkian tribes to an even later date. Public opinion was a powerful force, raising social obligations to a near-legal level;⁷⁹ where it was ineffective, either the nonconformity was simply ignored, or people agreed to disagree.⁸⁰ This configuration can be observed, for example, in attitudes to personal property and theft. It is generally accepted that ownership of personal property was recognized in Algonkian and Iroquoian tribes.⁸¹ Theft, however, rarely occurred;⁸² a contemporary wrote of the Montagnais that "the doors of the French are open to them because their hands are to be trusted."⁸³ Where it did occur within the tribe it was usually overlooked, perhaps on the assumption that the thief stole because of need—a reflection of the concern for social welfare. For this reason, it is necessary to speak cautiously of a private property system even in the area of personalty.⁸⁴

The interconnections between consensus government and the absence of coercive enforcement on the one hand, and institutions of land tenure on the other, are fairly evident and may be briefly traced. First, the division of land into private holdings leads to attachments and makes possible the growth of central authority. Montesquieu expressed this with characteristic clarity (translated): "These peoples enjoy great freedom: because they do not cultivate the soil, they are not tied down: they are wanderers, vagabonds;

75. BAILEY, *supra* note 20, at 92.

76. Leacock, *supra* note 15, at 40.

77. REID, *supra* note 37, at 36.

78. *Id.* at 36, 231.

79. *Id.* at 70. See also LOWIE, *supra* note 68, at 186; LLEWELLYN & HOEBEL, *supra* note 44, at 264; Malinowski, *A New Instrument for the Interpretation of Law—Especially Primitive* 51 YALE L.J. 1237, 1247 (1942).

80. See note 73 *supra*.

81. REID, *supra* note 37, at 140-41; LLEWELLYN & HOEBEL, *supra* note 44, at 233; BAILEY, *supra* note 20, at 85.

82. See, e.g., D. JENNESS, *THE INDIANS OF CANADA* 139 (1934) [hereinafter cited as JENNESS].

83. Quoted in BAILEY, *supra* note 20, at 91.

84. LLEWELLYN & HOEBEL, *supra* note 44, at 226.

and if a chief were to try to take away their freedom, they would immediately look for another leader. . . ."⁸⁵ Montesquieu was referring only to nomadic cultures, but the observation holds good for agricultural peoples with a communal tenure system. Where the land is held by the community, the individual is not bound to any particular plot, and the formulation of policy with regard to the land is a communal function not requiring the mediation of central authority.

Second, the growth of a system of private property in land promotes the development of central authority in that it becomes necessary to regulate it and protect it. Consequently it results in the parallel growth of a law enforced by coercive sanction. Montesquieu also understood this point: "It is land division that primarily increases the civil code. Among nations where this division has not taken place, there are very few civil laws. One could call the institutions of these peoples customs rather than laws."⁸⁶ The relative absence of central authority in Algonkian and Iroquoian society also was dependent upon other facets of their cultural system: it is impossible to conceive that consensus government could have functioned without the social emphasis on cooperation and shared welfare concerns.

* * *

"They adore him in everything they see. When they see anything that's fine or curious, especially when they look upon the sun or stars, they cry out, O Great Spirit, we discern thee in everything."⁸⁷ The cultural ethos surrounding Iroquoian and Algonkian institutions of land tenure was also expressed in a religious world-view, which stood in a dialectical relationship to other cultural elements, both deriving from them and at the same time strengthening and informing them.

The idea that the Godhead was immanent in all created works permeated Indian culture, and found expression in an attitude of deep reverence for nature and for the earth.⁸⁸ In contrast to the Christian theology of the settler culture, the Indians did not recognize any discontinuity between man and nature, nor between nature and supernatural.⁸⁹ Jesuit missionaries found that

85. MONTESQUIEU, *DE L'ESPRIT DES LOIS* 300 (Classiques Garnier, 1961).

86. *Id.*

87. BARON DE LAHONTAN, *2 NEW VOYAGES TO NORTH AMERICA* 437 (R.G. Thwaites ed.).

88. Grinnell, *supra* note 30, at 3, 6.

89. Ray, *supra* note 8, at 36; BAILEY, *supra* note 20, at 133.

their Algonkian pupils encountered difficulties in comprehending the concepts of heaven, hell, and the soul,⁹⁰ while on the other hand they took practical strictures, such as "love thy enemy" quite literally—rather to the embarrassment of their mentors.⁹¹

The concepts of immanence and transcendence were understood by the Indian as a synthesis rather than a dichotomy. In the words of Black Elk, a holy man of the Oglala Sioux:

We should understand well that all things are the works of the Great Spirit. We should know that he is within all things, the trees, the grasses, the rivers, the mountains, and all the four-legged animals and winged peoples; and even more important, we should understand that he is also above all these things and peoples.⁹²

For this reason, material wealth beyond the requirements of subsistence meant little to the Indian.⁹³ In a very real sense, his wealth was spiritual, but his spirituality was in no way divorced from life in the world.

In contrast, the settler culture regarded nature as secular and despiritualized. A secular view of nature was central to the *Weltanschauung* of European expansion and industrialism. This cannot be better appreciated than in the words of Francis Bacon, the earliest prophet of that western instrumental rationality, which has been the driving force in the development of science and technology. Bacon's trumpet summoned men to arms, that they might turn "with united forces against the nature of things, to storm and occupy her castles and strongholds, and to extend the bounds of human empire as far as God Almighty in his goodness may permit."⁹⁴

To the Indian, this ideology constituted sacrilege. That Indians held land in communal tenure of one form or another was a reflection not only of the view that the land was a communal resource but also that the land itself was part of a broader community—between man, nature, and the Creator. Man was the divinely appointed guardian of the land, and to appropriate it would have meant a betrayal of trust.⁹⁵

90. BAILEY, *supra* note 20, at 20 *et seq.*; *id.* at 145.

91. *Id.* at 97.

92. Quoted in Epes Brown, *The Spiritual Legacy of the American Indian*, in SOURCES 344 (T. Roszak ed. 1972) [hereinafter cited as Epes Brown].

93. BAILEY, *supra* note 20, at 91.

94. F. BACON, from DE AUGMENTIS.

95. Epes Brown, *supra* note 92, at 345.

The misunderstandings that surround transactions in land between Indian and settler were therefore also religious misunderstandings. The result was a spiritual tragedy of incalculable proportions. Hopi religious leaders wrote to President Nixon to express their assessment of this tragedy:

The white man, through his insensitivity to the way of nature, has desecrated the face of Mother Earth. The white man's advanced technological capacity has occurred as a result of his lack of regard for the spiritual path and for the way of all living things. . . . The white man's desire for material possessions and power has blinded him to the pain he has caused Mother Earth by his quest for what he calls natural resources. All over the country, the waters have been tainted, the soil broken and defiled, the air polluted. Living creatures die from poisons left because of industry. . . . We have accepted the responsibility designated by our prophecy to tell you that all life will stop unless men come to know that everyone must live in peace, and in harmony with nature. Only those people who know the secrets of Nature, the mother of us all, can overcome the possible destruction of all land and life.⁹⁶

IV.

They have got as far as they can go, because they own their land in common. It is Henry George's system, and under that there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization.⁹⁷

In describing the way in which legal systems arise, . . . our aim ought to be to strike averages and to discover the balance of forces, not to trace the innumerable fluctuation of the growth and decay of actual laws.⁹⁸

Algonkian and Iroquoian institutions of land tenure were an integral part of a cultural configuration common to many Indian tribes. The diversity of languages, history, geography, and cultural heritage which the tribes exhibit in many other respects makes this uniformity all the more striking. Its very existence suggests that it might best be analyzed as a phase of human cultural development, and that it may be possible to construct a model of

96. Excerpted in M. PRICE, *LAW AND THE AMERICAN INDIAN* 670 (1973) [hereinafter cited as PRICE].

97. Senator Henry Dawes, 1884, quoted in DEBO, *supra* note 39, at 22.

98. P. VINOGRADOFF, *2 OUTLINES OF HISTORICAL JURISPRUDENCE* 10 (1920).

social evolution, and within it, a theory for the development of property rights. For many reasons, this is a controversial area. Many attempts have been made to construct such a model, based on radically differing epistemology. These theories have differed widely as to the role to be assigned to the development of property rights in cultural evolution. Moreover, one model—encapsulated in the nineteenth-century idea of progress—is still current in the popular mind and dies hard even in the works of reputed scholars. Others, often in response to the obvious ethnocentrism of the popular concept of civilization, have denied that it is either useful or possible to construct a model of evolution.

Claude Levi-Strauss, the great structural anthropologist, stands among the latter group. He attacked evolutionism primarily on the ground that it represented an unscientific attempt to extend the Darwinian theory of biological evolution into the area of anthropology, based on ethnocentric nineteenth-century preconceptions.

It is really an attempt to wipe out the diversity of cultures while pretending to accord them full recognition . . . prior in date to the scientific theory of biological evolution, social evolutionism is thus too often merely a pseudo-scientific mask for an old philosophical problem, which there is no certainty of our ever solving by observation or inductive reasoning. . . .⁹⁹

Certainly, it is clear that crypto-social Darwinism can no longer be accorded a place in any theory of evolution. It may also be true that no scientific theory of social evolution is possible: but the point should be made that a theory of evolution can be a useful framework for historical analysis, without laying claim to scientific validity. While it is proper that the social scientist should insist upon recognition of the diversity of cultures, it remains that the historian would ultimately be left with no field of analytic activity if it were denied that a historically conceived theory of evolution was possible.

Earlier diffusionists who attacked unilinear evolutionism often had axes of their own to grind. R. H. Lowie, a professed diffusionist, in criticizing the Marxist conception of a stage of primitive communism, sought to demonstrate that the nuclear family was the oldest and most universal social unit.¹⁰⁰ Frank

99. C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 282 *et seq.* (n.d.) [hereinafter cited as LEVI-STRAUSS].

100. LOWIE, *supra* note 79, preface to 1947 ed.

Speck attempted to establish that at least some primitive societies recognized private property rights in land.¹⁰¹ It is not difficult to detect, in both of these instances, an effort to render institutions central to Western industrial society—the family and private property—immune from social criticism, by proving that they were the result of innate and irrepressible drives common to all mankind.¹⁰² Diffusionism could thus conceal a more insidious form of ethnocentrism.

Other scholars simply never came to grips with either the epistemological premises underlying theories of evolution, or with the core of the evolutionist argument itself. Such confusion is apparent in the work of Melville Herskovits, who wrote that “it is difficult to see how the fact of the total absence among a given tribe of private ownership of any good, should it be established, could serve as the basis of an argument to abolish individual tenure in our particular society.”¹⁰³ This shaft falls wide of the mark: the baseless prescriptivism which Herskovits denounced forms no part of Marxist evolutionism, nor of any other theory that has been advanced in scholarly circles.

An evolutionist theory need not be based on the nineteenth-century idea of progress. It need not regard one society as more advanced than another in any evaluative sense. Nor is it necessary for such a theory to postulate development toward an inevitable goal; nor to lay claim to scientific validity; nor to indulge in mindless prescriptivism. Objections based on contrary suppositions, while they may constitute valid criticisms of a particular theory, therefore do not really reach questions as to the utility or possibility of a theory of evolution.¹⁰⁴ It is here maintained that the construction of such a theory is both useful and feasible in precisely the same sense as history is both useful and feasible. The study of history is an effort to attain some level of collective self-knowledge: to constrict its field is to hinder the exercise of practical wisdom in the affairs of men and women. It should be emphasized that a theory of evolution is a tentative theory of history, not an exhaustive account of history. But without such a theory, history becomes an unintelligible jumble of unrelated particulars.

It is with this in mind, and in terms of the foregoing discussion

101. See section II *supra*.

102. See FARB, *supra* note 43, at 56-57, for an assessment of Speck's work.

103. M. HERSKOVITS, *ECONOMIC ANTHROPOLOGY* 330 (1952).

104. These arguments have been made, with differing emphasis, by FARB, *supra* note 43, at 9 *et seq.*, 414, and by E. HOEBEL, *LAW OF PRIMITIVE MAN* 288 *et seq.* (1954).

of Iroquoian and Algonkian institutions of land tenure, that this essay turns to an assessment of two theoretical systems: those of Friedrich Engels¹⁰⁵ and Harold Demsetz.¹⁰⁶

* * *

The dissolution of society bids fair to become the termination of a career of which property is the end and aim, because such a career contains the elements of self-destruction. Democracy in government, brotherhood in society, equality in rights and privileges, and universal education, foreshadow the next higher plane of society to which experience, intelligence and knowledge are steadily tending. It will be a revival, in a higher form, of the liberty, equality and fraternity of the ancient gentes.¹⁰⁷

Lewis H. Morgan, lawyer and railroad lobbyist and author of the *League of the Iroquois* (1851), and *Ancient Society* (1877), is still regarded as the greatest pioneering thinker in the area of social anthropology. Levi-Strauss has acknowledged a debt to Morgan,¹⁰⁸ who has been described as an early structuralist.¹⁰⁹ However, his work has been discarded in many of its details, and he has been attacked by numerous scholars for his rigid unilinear evolutionism.¹¹⁰ It is no exaggeration to say that it was Morgan's work that brought evolutionism into disrepute in Western social theory.

Morgan drew heavily on the work of Charles Darwin in the construction of his theory.¹¹¹ It was in a sense a theory of the natural selection of institutions, resulting in the development of those most favorable to the evolution of the species. Morgan's thesis did not end, however, in the Social Darwinism that Grinnell reluctantly accepted when he wrote that in the final analysis, Amerindian history reflected "the inexorable natural law that the weaker must perish while the fitter shall survive."¹¹² Instead, Morgan advanced a cyclical or spiral view of history, beginning in

105. F. Engels, *Origin of the Family, Private Property and the State*, in MARX & ENGELS, *SELECTED WORKS* 509-83 (1970) [hereinafter cited as Engels].

106. Demsetz, *Toward an Economic Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) [hereinafter cited as Demsetz].

107. L. MORGAN, *ANCIENT SOCIETY* 562-63 (1877) [hereinafter cited as MORGAN].

108. LEVI-STRAUSS, *supra* note 99, at 282.

109. E. TERRAY, *LE MARXISME DEVANT LES SOCIÉTÉS PRIMITIVES* 37 (M. Klopffer tr. 1972) [hereinafter cited as TERRAY].

110. See LEVI-STRAUSS, *supra* note 99; LOWIE, *supra* note 68.

111. TERRAY, *supra* note 109, at 19.

112. Grinnell, *supra* note 30, at 6.

the primitive communism and democracy that he had discerned among the Iroquois, passing through a series of "ethnic periods" in the development of private property institutions, and culminating in a revival of "the liberty, equality and fraternity of the ancient gentes."¹¹³

The ambivalence in the responses Morgan has evoked among modern social scientists can be explained by reference to his irresolvable theoretical confusion. It is certainly true that Morgan saw himself, like Darwin, as an empirical scientist: he maintained that social evolution could be analyzed in the same terms as animal evolution, and claimed that his theory was scientifically valid. It was this claim that so irked Levi-Strauss and others.¹¹⁴ Emmanuel Terray has attempted to rehabilitate Morgan, arguing that it was not his purpose "to write a history of humanity, but to construct a theory of that history. . . ."¹¹⁵ Terray, however, betrays his own disorientation in this argument. "When Morgan was examining the transition from one form to another, he was not concerned with the various pathways followed by any particular society: he left such facts to the historian."¹¹⁶ And at another point: "he left the study of accidental circumstances to the historian."¹¹⁷

But surely the construction of theories of history is peculiarly the province of the historian: and since the prediction of causal sequences is of the essence of modern science, it must be admitted that the task of making sense of the innumerable variations in the institutions of particular societies is the province of the social scientist. To the extent, therefore, that Morgan's claim to scientific validity is taken seriously, his theory must be judged by reference to these variations, and its utility as an instrument for prediction. Not surprisingly, the theory is totally inadequate, viewed in this light.

Morgan was not always true to his scientific pretensions. While materialist determinism is perhaps the most consistent theme in his work, he could appear in a variety of different guises. Thus in the space of two pages, he states that "the Aryan family represents the central stream of human progress, because it produced the highest type of mankind, and because it has proved its intrinsic superiority by gradually assuming the control of the

113. MORGAN, *supra* note 107.

114. LEVI-STRAUSS, *supra* note 99; LOWIE, *supra* note 68.

115. TERRAY, *supra* note 109, at 24.

116. *Id.* at 32.

117. *Id.*

earth"; that "civilization must be regarded as an accident of circumstances"; and in the same breath, speaks of "the plan of the Supreme Intelligence to develop a barbarian out of a savage."¹¹⁸ Elsewhere, he asserted that "it will be recognized generally that the substance of human history is bound up with the growth of ideas. . . ."¹¹⁹ Morgan could appear as scientist or historian; as racist, Deist, or Idealist; and he could implicitly deny the possibility of constructing any theory of evolution when that was the very task he had set himself.

While Morgan can never be extricated from this morass, and many of his conclusions, including those relating to kinship systems, must be rejected out of hand, his work remains a rich mine of inspiration for historians and social scientists alike. Karl Marx took 98 pages of notes from *Ancient Society*;¹²⁰ and it was to Morgan that Friedrich Engels, Marx's great collaborator, turned in formulating his theory of the origins of private property and the state.

Two central features of Morgan's work immediately recommended themselves to Engels. The first was the view that "the arts of subsistence" was the sphere of human existence which determined whether a given society could progress to a higher stage in the hierarchy of evolution. As Terray has noted, "Morgan's arts of subsistence are, in fact, no different from Marx's productive forces; the 'ethnic period' is the mode of production together with the juridical and political superstructures it has called forth."¹²¹ In a letter to Kautsky, Engels stated that "within the limits set by his subject, Morgan spontaneously discovered Marx's materialist conception of history."¹²² It is not often remarked that Marxist social theory had these Darwinian antecedents. Engels also seized upon the cyclical, or spiral view of history, for obvious reasons: it was in perfect harmony with theories already advanced by Marx and derived from Hegel.

However, Engels dealt selectively with Morgan's work, and his theory is in no way vitiated by inconsistency. While he did repeat many of Morgan's mistakes, particularly in his discussion of kinship structures, these need not concern us here. What is most impressive is the accuracy with which Engels portrayed early Indian society in relation to those cultural elements discussed above:

118. MORGAN, *supra* note 107.

119. *Id.* at 311.

120. TERRAY, *supra* note 109, at 21.

121. *Id.* at 66.

122. Quoted *id.* 21.

communal land tenure, consensus democracy, the concern for social welfare, and cooperative work patterns.

Everything runs smoothly without soldiers, gendarmes or police; without nobles, kings, governors, prefects or judges; without prisons, without trials. All quarrels and disputes are settled by the whole body of those concerned—the gens or the tribe . . . the household is run in common and communistically by a number of families, the land is tribal property, only the small gardens being temporarily assigned to the households. . . . Those concerned decide, and in most cases, century-old custom has already regulated everything. There can be no poor and needy—the communistic household and the gens know their obligations to the aged, the sick and those disabled in war. All are free and equal, including the women. . . .¹²³

In Engels's theory, this cultural unity represented a universal stage of primitive communism. It was a system which, however, was doomed to extinction,¹²⁴ because it was based on a rudimentary division of labor. In brief outline, Engels held that changes in the means of production brought inevitable class divisions, beginning with the institution of slavery, and necessitating the development of private property. Conflict between social classes could only be contained by the rise of the state.¹²⁵ Ultimately, Engels concluded, the state was incapable of reconciling these antagonisms—rather, it exacerbated them: and it would inevitably fall.¹²⁶ Class divisions had arisen originally in response to the need of a more efficient system of production: with the inability of the state to resolve the attendant social conflicts, class divisions would become a hindrance to production,¹²⁷ and would disappear with the fall of the state.

A criticism of Engels's theory is a formidable task. At its core is the concept of historical materialism, which permitted Marx and Engels to claim that they had discovered a science of history which could serve as a basis for prediction and was universally applicable. There are obvious difficulties with such a claim, for it can never be exhaustively verified: and if it cannot be verified, where is its scientific utility? But, nor can the theory be disproved simply by picking holes in its particular conclusions—the holes

123. Engels, *supra* note 105, at 519.

124. *Id.* at 520.

125. *Id.* at 570.

126. *Id.* at 577.

127. *Id.* at 579.

can always be patched. It is for this reason that the only useful criticism of Engels will be on epistemological grounds.

It is characteristic of the materialist view of history that it excludes from its analysis any consideration of the capacity of the human mind for reflexive self-consciousness. Marxist social theory, again like Social Darwinism at the opposite extreme, begins and ends in determinism—and polemical ideology. Marx expressed this tendency in his early writings: “La devenir-philosophie du monde doit maintenant se transformer dans le devenir-monde de la philosophie.”¹²⁸

Marxist social theory, like Social Darwinist evolutionism, results in the assimilation of history into the social sciences. This means the death of history as an independent discipline. But it is too early to write such an epitaph for history. It is through history that we attain some measure of collective self-knowledge on the basis of which to act wisely: and polemics cannot contribute to self-knowledge, nor determinism serve as a basis for action. The historian should approach his field with humility, in an awareness that he cannot transcend the limitations of his own historical point of vantage: like the philosopher, he “cannot leap over Rhodes.”¹²⁹ The only historical method that permits this approach is some variant of the Hegelian dialectic. Unlike theories of causation drawn from the natural sciences, the concept of the dialectic allows an appreciation of the quality of free play which human consciousness brings to the relationship between the environment, man, and ideas in history.¹³⁰ This is the only approach to history that can lead to a political orientation that is not *a priori*, and to a coherent philosophy of action.

Engels’s theory of the origins of private property and the state, notwithstanding these epistemological flaws, has contributed more to our understanding of the historical relationship between primitive cultures and modern civilization than any other that has been advanced. If it is shorn of the claims to scientific validity and universality, it can be regarded as a model, rather than as an exhaustive account of evolution. Few historians would deny that the division of labor and the mode of production are central factors in the analysis of any society, or that class conflict is an important motive force in history. The idea that history moves in spirals is the logical outgrowth of the Hegelian dialectic: in the

128. Quoted in J. HYPOLITE, *ETUDES SUR MARX ET HEGEL*.

129. G. HEGEL, *THE PHILOSOPHY OF RIGHT*.

130. Marx rejected the dialectic *sub silentio*: dialectical materialism is simply a contradiction in terms.

flow of history, each current contains its antithesis, and is ultimately absorbed by it to produce a new synthesis. But it should be emphasized that the process is not a mechanical one. It was Marx's and Engels's postulate of a final and total synthesis that resulted in the reduction of the dialectic to a tireless mechanical three-step, and in the death of history.

Even without the claims to universality and scientific validity, Engels's concept of a stage of primitive communism seems to have been substantially accurate.

* * *

"This is the basic explanation, I believe, for the preponderance of single rather than multiple owners of property."¹³¹ Harold Demsetz tacitly accepted the existence of a stage of primitive communism in human cultural development,¹³² but he failed to appreciate its significance as a cultural unity. His view was warped by the assumption that primitive society can be analyzed and explained solely in terms of economic theory.

Demsetz's theory of the development of private property rights in land is really rather simple, once the economic jargon is penetrated. In essence, he holds that property rights developed because of the overwhelming advantages they offered in terms of material benefits to society. In his view, cultures that remained anchored to a system of communal land tenure were incapable of economic development, and therefore primitive, because the costs of managing such a system rendered progress impossible. In his own words, "a primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities."¹³³ Demsetz painted an interesting picture of primitive society based on communal land tenure, which can be briefly reproduced. "Communal ownership," he wrote, "means that the community denies to the state or to individual citizens the right to interfere with any person's exercise of communally owned rights."¹³⁴ It follows, that, for example, individuals will overhunt communal hunting grounds with a view to deriving the maximum possible benefit for themselves. In order to obviate the impasse created by such a situation, the members of the society are forced to negotiate an agreement governing the use of the land. Because it is difficult to reach an agreement satisfactory to all, the costs of

131. Demsetz, *supra* note 106, at 357.

132. Insofar as he accepted the conclusions of Leacock, discussed in section II.

133. Demsetz, *supra* note 106, at 348.

134. *Id.* at 354.

negotiation will be very high, "especially when each hold-out has the right to work the land as fast as he pleases."¹³⁵ Demsetz adds that the society will incur tremendous costs in policing the agreement.¹³⁶

Finally, it is said to be impossible for a society recognizing communal rights in land to plan for the future. "With communal rights . . . the claims of the present generation will be given an uneconomically large weight in determining the intensity with which the land is worked."¹³⁷ In contrast, Demsetz believes, all these costs are "internalized" under a system of private ownership. The individual owner may not need to negotiate with anyone over the use of his land; there is no problem in policing because his rights are recognized in law; and because he knows that no one else can interfere with those rights, he can plan for the future. Thus development of private property rights leads society into the promised land of economic development, flowing with the milk and honey of material wealth.

On closer inspection, Demsetz's theory appears not only simple but simplistic. The Hobbesian view of primitive society as a nasty, brutish collection of individuals, all intent on amassing for themselves as large a share of the communal wealth as possible, endlessly haggling over arrangements as to who gets what, and then proceeding to violate their covenant as often as possible, is so unrealistic as to be laughable. Presumably, in speaking of the costs of negotiating and policing an agreement, Demsetz is referring to the amount of time consumed. But he does not cite any example of a society recognizing communal rights in land that indulged in interminable and stormy pow-wows over the use of such rights, nor in which disproportionate numbers of individuals were detailed to police any agreements reached. No such society has ever existed.

A study of Iroquoian and Algonkian institutions reveals that the cost of negotiations relating to land use was not high because of the characteristic shared concern for equity and welfare. The cost of policing the use of land was minimal, where much economic activity was conducted on a cooperative basis. Indian children were not cheated of their economic rights by their parents' failure to plan for the future: their plan was implicit in a static way of life and found expression in the idea that the tribe

135. *Id.* at 354-55.

136. *Id.*

137. *Id.* at 355.

held the land as a trustee for future generations. "That he has been expelled from the land, which was too sacred to become even his own, is a bitter hardship, but it seems to him worst of all that the unborn children of his race have been robbed of their birthright. . . ." ¹³⁸

Demsetz's theory is vitiated by a fundamental epistemological error. Just as Morgan and Engels sought to describe historical evolution in scientific terms, so Demsetz assumed that history could be explained in terms of economic theory.

Classical economic theory was concerned with the question as to what forces determine prices in a market economy.¹³⁹ It therefore assumed the existence of a market organization, as well as a scarcity of resources—without which there could be no call to economize.¹⁴⁰ In primitive society, production and distribution are generally organized by "transactional principles essentially different from market exchange."¹⁴¹ Henry Maine understood this facet of primitive culture: his theory that the trend of history has been from status to contract has stood the test of a century of anthropological research.¹⁴² Moreover, George Dalton has made the crucial point that a scarcity of resources exists only in a society where man's material wants are regarded as insatiable, and "which places great value on material acquisition, relative to other goal attainments. . . ." ¹⁴³ in short, a society oriented to economic growth.

These arguments should effectively dispose of any attempt to analyze primitive cultures, or their relationship to modern society, in terms of economic theory. Economic anthropologists, however, have refused to capitulate. E. E. LeClair, for example, thought to embarrass Dalton by inquiring "what other goal attainments he has in mind."¹⁴⁴ The query is easily answered, in reference to Iroquoian and Algonkian cultures. The welfare of all members of society, cooperation in work, consensus government, and communal land tenure were the elements of a way of life and a spiritual path that were their own reward.

138. Grinnell, *supra* note 30, at 6.

139. Dalton, *Economic Theory and Primitive Society*, in *ECONOMIC ANTHROPOLOGY* 147 (LeClair & Schneider ed. 1968).

140. *Id.*

141. *Id.* at 152-53.

142. H. MAINE, *ANCIENT LAW* (1924); Redfield, *Maine's Ancient Law in the Light of Primitive Societies*, 3 *W. POL. Q.* 579 (1950).

143. Dalton, *supra* note 139, at 148.

144. LeClair, *Economic Theory and Economic Anthropology*, in *ECONOMIC ANTHROPOLOGY* 193 (LeClair & Schneider ed. 1968).

It is apparent that Demsetz's theory assumes a continuity between primitive culture and modern Western society that simply did not exist—the orientation toward economic development was absent among the Iroquoian and Algonkian tribes. The failure of these societies to achieve a higher standard of living in terms of material wealth cannot, therefore, be explained solely by reference to their institutions of communal land tenure. Rather, a more inclusive theory should be attempted, based on an understanding of the fundamental interdependence of Indian land institutions, systems of government, work patterns, social goals, and religious cosmology. Such a theory, if one can be constructed, must be grounded on a deeper continuity.

It should perhaps be noted that in assuming economic development to be the universal goal of all societies, Demsetz betrays an unpardonable ethnocentrism. If his theory could be justified, it would be necessary to regard societies that did not develop private property institutions as innately inferior in a very real sense. This is another result of the hubris which Henry Maine detected in the mind of the economist: "the bias indeed of most persons trained in political economy is to consider the general truth on which their science reposes as entitled to become universal."¹⁴⁵

Demsetz's theory is open to criticism even in its own terms. It is difficult to see how the relative cost-benefit advantages of private property institutions can be compared to those of communal systems at all. Should the comparison focus on costs and benefits to the individual, or to the society as a whole? Assuming *arguendo* that the focus is on the individual, it becomes necessary to determine which individual. A private property system that permits owners who do not work the land to appropriate it, and to purchase the labor of those who do, obviously offers tremendous benefits to some individuals, while others must bear heavy costs. It is not clear that the value of the opportunity to derive great benefit is ascertainable; and even if it were, it is doubtful that such an evaluation would be meaningful. Furthermore, how can the costs and benefits to the individual of a purely communal system be calculated? It could be said that the individual within such a system derived no benefit, since whatever benefits accrued were in no sense personal to him; or it might be maintained that the entire social benefit of the communal endeavor belonged to

145. H. MAINE, ANCIENT LAW 296 (1924),

the individual by virtue of his participation in the community.¹⁴⁶ These alternatives would, of course, produce radically different cost-benefit ratios: and both are patently inadequate descriptions of reality. A third solution might simply divide costs and benefits into equal shares among the participants in a communal system. However, this would in effect require one to regard communal and private systems as essentially identical, ignoring obvious differences, and rendering the utility of a cost-benefit comparison questionable, to say the least.

On the other hand, the analyst might focus on costs and benefits to the society as a whole. It should be relatively easy to quantify the material costs and benefits of administering a given communal system, though it will not be clear whether that system had reached its maximum potential in terms of generating material wealth, unless other cultural elements are taken into account. It is not so easy to arrive at a cost-benefit ratio for a society adhering to private property institutions, where most calculations as to the economic desirability of pursuing a given course of activity are made on the basis of costs and benefits to individuals. Demsetz simply ignores this problem: he accepts without qualification the conventional view that "the externalities that accompany private ownership of land do not affect all owners," or, presumably, potential owners.¹⁴⁷ If this view is rejected, and if it is acknowledged that the actions of private owners can entail great social costs, it becomes an open question whether the affluence of modern society is not a tragic illusion.¹⁴⁸

It is even possible that Demsetz's theory is upside down. It is in modern society that endless negotiation over the use of land is to be observed. It seems likely that the cost of policing the land is higher today.¹⁴⁹ Finally, it is only within a society where economic growth is the established religion that it is necessary to construct plans for future development: we have many plans, but there is still a danger that we will end by cheating our children. Is it possible that classical economic theory will cease to be of value

146. See Lao Tzu, *Tao te Ching*, (The Way of Life), Canto 77, (W. Bynner; Lyrebird Press, 1972), at 95.

147. Demsetz, *supra* note 106, at 357.

148. B. COMMONER, *THE CLOSING CIRCLE* 295 (1971),

149. One is reminded, by way of allegory, of a scene from Werner Herzog's recent film, "Stroszek," in which two Wisconsin farmers were involved in a dispute over the boundary separating their fields. They spend all day riding up and down the disputed territory on gargantuan tractors, each training a powerful rifle on the other to ensure that he could not plow up the land.

not only in historical analysis but in coping with the problems of modern society? It has been suggested that "economic growth renders many things obsolete, and one of the main things is economic theory."¹⁵⁰

These possibilities must be confronted, in spite of the evident fact that modern Western societies have achieved enormous technical progress. All that can really be said with any degree of accuracy is that primitive communism and modern industrialism—whether of the private or state capitalist variety—have had different forms of wealth and impoverishment.

Demsetz did not succeed in explaining "the preponderance of single rather than multiple owners of property."¹⁵¹ His theory fails because it is based on a false continuity, and because it is logically impossible to construct comparative cost-benefit ratios for communal and private systems of land tenure. His arguments testify to the persistence of an intellectually moribund tradition—Social Darwinism.

In view of their common nineteenth-century origins, it is perhaps not surprising that the theories of Engels and Demsetz are deficient in similar respects. Both are grounded on an ahistorical materialist determinism. While Demsetz, following Adam Smith, remains convinced of the economic beneficence of individualist capitalism, Engels considered that ultimately, economic efficiency would require the abolition of private property. Ironically, though both theories are clothed in the mantle of scientific *Wertfreiheit*, it is clear that both are the result of ideological apriorism.

Engels's theory is the more sophisticated, and a richer source of inspiration to the historian, for two reasons. First, he was capable of conceiving history as embracing a broader range of determining forces, within the confines of historical materialism. The Marxist appreciation of the power of material determinants, in particular in the manifestation of class conflict, did much to liberate history as a discipline from the clutches of Idealists. That contribution should not be underestimated. In contrast, Demsetz's materialism is so limited that it finally appears to be a perverse form of crypto-Idealism. Second, Engels's formal acceptance of the concept of the dialectic, though incompatible with his materialist determinism, permitted him to appreciate the continuity of history. The spiral as a conceptual vehicle for arriving

150. Kapp, quoted in COMMONER, *supra* note 148, 254.

151. Demsetz, *supra* note 106.

at a comprehension of the significance of historical change is far superior to the unilinearism which results from the consistent application of scientific theories of causation to the study of history. In the process of historical change, the past is absorbed into the present, and the forces that shaped both past and present continue to give life to the future. In contrast, Demsetz is incorrigibly unilinear: the past is irrevocably past, and continuity is lost.

While it is not the purpose of this article to construct any comprehensive model of evolution, a brief consideration of the interaction between Indian and settler cultures in America may be useful to a broader understanding of their relationship in history.

V.

When the last Red man shall have become a myth among the white men . . . when your childrens children think themselves alone in the field, the store, upon the highway, or in the silence of the pathless woods, they will not be alone. In all the world there is no place dedicated to solitude. At night when the streets of your cities are silent and you think them deserted, they will throng with the returning hosts that once filled them, and still love this beautiful land. The white man will never be alone. Let him be just, and deal kindly with my people, for the dead are not powerless. Dead—say I? There is no death. Only a change of worlds.—*Chief Seattle*, 1855¹⁵²

Because institutions of land tenure form an integral part of a coherent way of life, the conflict over land in American history cannot be understood outside the context of a broader cultural interaction. A comprehensive analysis of Indian-settler interaction is beyond the scope of this article, but it is suggested that its history is colored by four major themes, which may be briefly outlined. The disintegration of the Indian cultural milieu was certainly an important aspect of the relationship, though its tenacity in the face of an assault on all fronts is not always appreciated. A second feature, the influence of the Indian on the margins, and even on the mainstream of the settler culture, has often been neglected. That influence can to some extent be explained by a third factor: for Indian institutions of land tenure had their parallel in European history. Finally, the historical experience of

152. Speech to Gov. Isaac Stevens, at the signing of the Port Elliott Treaty; quoted in *THE NORTH AMERICAN INDIANS, A SELECTION OF PHOTOGRAPHS BY EDWARD S. CURTIS* 66 (J. Epes Brown ed. 1972),

industrial capitalism in Western civilization has given rise to a revival of communitarian insights, as well as communitarian tendencies within Western institutions—a phenomenon which may owe something to the role of the Indian in American history, and at the very least renders the study of aboriginal society, with its emphasis on egalitarian community, an area of immediate relevance.

The fur trade was only one factor in the disintegration of Algonkian and Iroquoian institutions. The important influence of the fur trade itself resulted from the growing dependence of the Indian on European commodities and technology: arrows, fishhooks, axes, knives, kettles, hemp, wool, foodstuffs, and firearms.¹⁵³ Disease, widespread miscegenation, religious indoctrination, the introduction of new methods of warfare and military leadership, and alcohol, were all attended by powerful disintegrative effects on Indian culture.¹⁵⁴

In later periods, the United States government made acculturation and assimilation an explicit legislative policy. The reservation was conceived as a school where the Indians could receive instruction in the ways of civilization.¹⁵⁵ The most important part of the curriculum offered in these schools related to institutions of land tenure. T. Hartley Crawford, then Commissioner of Indian Affairs, gave classic expression to the views of the dominant settler culture in 1838:

Unless some system is worked out by which there shall be a separate allotment of land to each individual whom the scheme shall entitle to it, you will look in vain for any general casting off of savagism. Common property and civilization cannot co-exist If . . . the large tracts of land set apart for them shall continue to be joint property, the ordinary motive to industry (and the most powerful one) will be wanting . . . the

153. BAILEY, *supra* note 20, at 10.

154. *Id.* at 13. It appears that Louis XIV's great minister, Colbert, actively encouraged intermarriage in order to ensure population levels which could compete with the burgeoning English colonies. *Id.* at 16, 111.

Religious indoctrination occurred despite the language barrier, though missionaries were sometimes taught indecent epithets, which they preached as Gospel. *Id.* at 102.

Prior to European contact, Algonkian tribes observed a prohibition on night attacks, and posted no sentries about their encampments. *Id.* at 92, 96-97; *id.* at 43. See also Quain, *supra* note 33, at 245.

155. United States v. Clapox, 35 F. 575, (D.C. Or. 1888). See PRICE, *supra* note 96, at 525.

indolent and dishonest will subsist at the expense of the meritorious.¹⁵⁶

Thus the reservation was to become the scene of an attempt to inculcate the tenets of Social Darwinism: laissez-faire competition was incompatible not only with communal land but also with cooperation in work and the idea that welfare was a concern of the community. Under the General Allotment Act of 1887,¹⁵⁷ vast tracts of land were subdivided, resulting in a legal and cultural dislocation that is still evident today.¹⁵⁸ Indian opposition to the allotment policy was widespread, not only because Indians valued their cultural institutions but also because they feared the rapacity of the immigrant society.¹⁵⁹

Their fears were justified. The professed concern to raise the Indians from barbarism to civilization was by no means the only aim of the allotment policy—and in most cases it was a transparent rationalization. As Angie Debo has written, “unquestionably, land hunger was the real motive behind most of the agitation to terminate the tribal regime. . . .”¹⁶⁰ Allotment threw the reservation open to economic development and left allottees a prey to chicanery of all descriptions. “The general effect of allotment was an orgy of plunder and exploitation probably unparalleled in American history.”¹⁶¹ Many of those who profited at the Indians’ expense openly justified their actions as in the best tradition of laissez-faire.¹⁶² Like the black freedman, the Indian must find his own level, and should not expect to derive special favors from the law.

The allotment policy was finally reversed by the Wheeler-Howard Act of 1934,¹⁶³ which was characterized by a recognition of cultural relativism; self-determination and continuity were regarded as the most important elements of constructive development. Later administrations, however, abandoned the ideals of the Roosevelt era. The termination policies of the Eisenhower

156. Quoted in PRICE, *supra* note 96, at 533.

157. 25 U.S.C.A. §§ 331 *et seq.*

158. In at least one instance, Indian opposition was overcome by federal troops. PRICE, *supra* note 96, at 547.

159. *Id.* at 549.

160. DEBO, *supra* note 34, at 24.

161. *Id.* at 91.

162. *Id.* at 92 *et seq.*

163. 25 U.S.C.A. §§ 461-476. See PRICE, *supra* note 96, at 576 *et seq.*; DEBO, *supra* note 39, at 368 *et seq.*

years represented a return to the goal of assimilation.¹⁶⁴ The city was to replace the reservation as the school: the Indian was to enter civilization as a member of the urban work-force rather than be an independent farmer.¹⁶⁵ The policies of the Nixon administration followed the same approach, though an effort was made to bring jobs to the reservation.¹⁶⁶ Indian land was once again to be opened to development, while the Indian himself became part of a labor pool at the disposal of the developer.¹⁶⁷ As M. E. Price has noted, "there is the possibility that economic development—as widely understood—is itself chimerical, as remote, romantic and false a goal as civilization was in the nineteenth century. . . ."¹⁶⁸ Throughout the period, the professed desire to educate and the urge to exploit and destroy have often coincided perfectly in the mind of the settler culture. The Indian has paid dearly for the privilege of participation in a modern system grounded on private property and capitalism: he has borne heavy costs and received few benefits. It has been suggested that he owes his survival to his own traditions of cooperation and community.¹⁶⁹

America has been a school for the European as well as the Indian. The influence of the Indian on American culture has been subtle, more of an ambush than a frontal assault: but that it has often gone unperceived has not diminished its reality. In certain areas that influence has been observed within the mainstream of the American way of life. Felix Cohen wrote that:

It is out of a rich Indian democratic tradition that the distinctive political ideals of American life emerged. Universal suffrage for women as for men, the pattern of states within a state that we call federalism, the habit of treating chiefs as servants of the people instead of their masters, the insistence that the community must respect the diversity of men and the diversity of their dreams—all these things were part of the American way of life before Columbus landed.¹⁷⁰

164. W. BROPHY & S. ABERLE, *AMERICA'S UNFINISHED BUSINESS*, 193-99 (1977).

165. PRICE, *supra* note 96, at 612.

166. *Id.* at 607.

167. The parallel with black emancipation is not to be overlooked: many antislavery advocates regarded the slaves as a valuable labor pool for the industrial north, and for that reason, opposed and defeated proposals for a radical redistribution of land in the south after the Civil War. See generally K. STAMPP, *THE PECULIAR INSTITUTION* (1956).

168. PRICE, *supra* note 96, at 611.

169. Cohen, *supra* note 57.

170. Cohen, *Americanizing the White Man*, 21 *AMERICAN SCHOLAR*, No. 2, Spring 1952, 179-80.

The influence of Indian democratic traditions was also felt in the central currents of European political thought, through Montaigne's noble savage, who played a significant role in the theories of Rousseau, Voltaire, Diderot,¹⁷¹ and Grotius.¹⁷²

Perhaps the Indian influence has been deepest in marginal areas of American and European culture, particularly in the development of a tradition of utopian radicalism. Thomas More's utopia was itself a depiction of Indian society held up as a mirror for Christians:

for not the hearers of the law are just before God, but the doers of the law shall be justified; for when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves: which show the work of the law written in their hearts, their conscience also bearing witness. . . .¹⁷³

Radicals standing in the tradition of Rousseau, Engels, and Kropotkin have looked to the communal institutions of the Amerindian tribes as models of social harmony. Utopian communities that have flourished and failed in nineteenth- and twentieth-century America have often incorporated the most important characteristics of tribal society, whether by accident or by design. Communal property, cooperation in work, a rudimentary division of labor, all were features of these social experiments.¹⁷⁴ Public opinion and gossip took the place of coercive sanctions.¹⁷⁵ Like the Indian religious outlook, communitarian philosophy has tended to emphasize the continuity of natural and spiritual worlds. "For the Shakers, for example, this integration of values and everyday events meant that even getting out of bed was an act infused with meaning by community dictates . . . every domestic act from baking to sweeping has spiritual meaning."¹⁷⁶

During the first few centuries of contact between the two cultures, many Europeans simply joined Indian tribes, finding no difficulty in integrating with the communal way of life. Maurault noted of the French colonists of Acadia that "la plupart se marierent a des sauvagesses, et passerent le reste de leurs jours

171. BAILEY, *supra* note 20, at 25.

172. H. GROTIUS, *DE JURE BELLI AC PACIS*, Book II, ch. 2.

173. THE EPISTLE OF PAUL THE APOSTLE TO THE ROMANS, ch. 2, 13-15.

174. R. KANTER, COMMITMENT AND COMMUNITY, COMMUNES AND UTOPIAS IN SOCIOLOGICAL PERSPECTIVE 43-44, 94 (1972),

175. *Id.* at 46.

176. *Id.* at 39-40.

avec les sauvages, adoptant leur maniere de vivre."¹⁷⁷ Michel de Crevecoeur, an astute observer of the early United States, remarked in 1782:

It cannot be, therefore, so bad as we generally conceive it to be; there must be in the Indians' social bond something singularly captivating, and far superior to be boasted of among us; for thousands of Europeans are Indians, and we have no examples of even one of these aborigines having from choice become European.¹⁷⁸

Perhaps the best explanation for this phenomenon is to be found in the strong parallel between Indian institutions and the remnant of a once vigorous communal tradition in Europe. Agriculture in medieval England was organized communally by each village. Under the open field system, land for cultivation was not subdivided but was allotted to the husbandmen on an equitable basis; pasturage rights were accorded on unallotted common lands.¹⁷⁹ As Vinogradoff has written:

It is a remarkable arrangement; the more remarkable because with all its inconveniences of communication, all its backwardness in regard to improvements, all its trammels on individual enterprise and thrift, all its awkward dependence of the individual on the behaviour of his neighbors, it repeats itself over and over again, not only over the whole of England but over a great part of Europe. Powerful influences must have been at work to originate and support it. . . .¹⁸⁰

The primitive communism of Algonkian and Iroquoian tribes had its counterpart in England and throughout Europe.¹⁸¹ Important features of the European communal systems survived the growth of feudalism: in England, the commons continued to provide the margin of subsistence to small tenants, and to a landless proletariat, well into the eighteenth century. However, the rise of capitalism and the Industrial Revolution brought the final assault: the process of enclosure by Act of Parliament in interests of private landowners began early, but reached its height in the period 1750-1850. During that century, six million acres of com-

177. Quoted in BAILEY, *supra* note 20, at 107.

178. Quoted in FARB, *supra* note 43, at 262.

179. See generally C. ORWIN, *THE OPEN FIELDS* (1938).

180. P. VINOGRADOFF, *THE GROWTH OF THE MANOR 165-66* (1970).

181. See, e.g., P. KROPOTKIN, *MUTUAL AID* (1972).

mon land were enclosed by more than 4,000 separate parliamentary bills.¹⁸² Thus throughout the early period of contact between settler and Indian cultures, communal institutions of land tenure were under attack on both sides of the Atlantic.

During the English Revolution the defense of the communal tradition found its earliest theoretical justification in the writings of the philosopher of the Diggers, Gerrard Winstanley. Winstanley regarded private property as the primary cause of social conflict and crime in his society;¹⁸³ and he understood the link between common land and welfare. "A man had better to have no body than to have no food for it; therefore is this restraining of the earth from brethren by brethren oppression and bondage; but the free enjoyment thereof is true freedom."¹⁸⁴ He also anticipated Montesquieu's clear statement of the connection between the growth of written law backed by coercive sanction and the development of private property,¹⁸⁵ and grounded his defense of communal institutions on an interpretation of Christianity which emphasized the immanence of God in all created works, and an attitude of reverence toward the land itself.¹⁸⁶ His words testify to the currency in seventeenth-century England of values very similar to those implicit in the Indian way.

The course of history in the west has not been completely defined by the liberal tradition, nor by the ideological primacy of private property, central in the theories of Locke and Blackstone. Rather, the rise and decline of that tradition has brought modern society to a historical crossroads. There are many indications that this development has an epochal significance.

The contrast between primitive and modern law can no longer be drawn in terms of the emphasis on group or individual responsibility. As Karl Llewellyn and E. A. Hoebel have remarked, "modern law has been moving uninterruptedly into the expansion of group relations and of group responsibility: the party, the corporation, the union, the co-operative, workmen's compensation and respondeat superior."¹⁸⁷ It would seem that Henry Maine's description of a linear evolution in legal history from status to

182. F. PIVEN & R. CLOWARD, *REGULATING THE POOR* 18 (1972).

183. G. WINSTANLEY, *THE LAW OF FREEDOM IN A PLATFORM* 71 (1973).

184. *Id.* at 67.

185. *Id.* at 69, 133.

186. *Id.* at 112-13, 136; "To know the secrets of nature is to know the works of God; and to know the works of God within the Creation is to know God himself, for God dwells in every visible work or body."

187. LLEWELLYN & HOEBEL, *supra* note 44, at 50.

contract should be revised in the light of modern developments. For today, contract is dead. Grant Gilmore has summarized its fate in the following terms:

For good or ill, we have changed all that. We are now all cogs in a machine, each dependent on the other. The decline and fall of the general theory of contract, and in most quarters of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond.¹⁸⁸

Maine was actually describing a partially completed spiral rather than a linear evolution.

Moreover, the rule of law itself is increasingly drawn in question. There is an inherent instability in the concept of formal equality. In the words of Roberto Mangabeira Unger, "there is in liberal society a pervasive contrast between the experience of personal dependence or domination and the ideal of organization by impersonal rules."¹⁸⁹ Unger's magisterial analysis of the decline of liberalism in *Knowledge and Politics* leads him to the perception of an emerging new social order, communitarian in form.¹⁹⁰ As a Hegelian, Unger conceives of historical development as a helix: his work pursues the spiral which Maine began.

The history of interaction and conflict between Indian and settler cultures appears as a clash of cultures a world apart. Today, this is no longer true: the gyre has come full circle.

The ecological crisis presents another clear indication of instability in the structure of modern society. The hidden costs to the public of the exercise of private power can no longer be ignored. Barry Commoner is not alone in asserting that the environmental crisis is a crisis of survival,¹⁹¹ and that "the ecological imperative calls for the governance of productive processes by social thrift—a criterion which is likely to conflict with private gain."¹⁹²

Finally, it is inconsistent with international equity for the United States, representing 5.6 percent of the world's population, to continue to consume 40 percent of the world's resources.¹⁹³ Equity is itself a force to be reckoned with: and in any event, the

188. G. GILMORE, *THE DEATH OF CONTRACT* 95-96 (1976).

189. R. UNGER, *KNOWLEDGE AND POLITICS* 186-87 (1976). Or as William Blake put it, "One law for the lion and the ox is oppression."

190. UNGER, *supra* note 189, at 294-95.

191. COMMONER, *supra* note 148, at 299-300.

192. *Id.* at 287.

193. SCHUMACHER, *supra* note 41, at 109.

shift in the balance of international economic power which became apparent with the Arab oil embargo will sooner or later compel Western societies to accept lower living standards.

There are no foregone conclusions as to how Western societies will adjust to these developments. Certainly, some change in the structure of ownership of property as far-reaching as those effected by the great medieval English statutes, or the enclosure movement is a possibility. This need not imply a massive centralization of power in the state, or the abolition of private property. It is possible to conceive (as did the late E. F. Schumacher, among others) of a system recognizing property rights only insofar as they secure to the owner the product of his labor. "Precisely in proportion as it is important to preserve the property which a man has in the results of his labor, it is important to abolish that which he has in the labor of someone else."¹⁹⁴ This was the very principle that governed the evolution of Algonkian and Iroquoian property institutions.

These modern developments suggest that an understanding of the fitnesses of Algonkian and Iroquoian cultures may have a practical relevance for those who find in history a guide to creative action. These Indian peoples were experienced in methods of communal organization incorporating egalitarian principles,¹⁹⁵ in their institutions of land tenure, in their daily working lives, in their solutions to welfare problems, and in their concept of man's relationship to nature and its ecology.

194. R. Tawney, quoted in *id.* at 248.

195. Other tribes, such as the Natchez, may have demonstrated the inner workings of a community founded on rigid hierarchy. LOWIE, *supra* note 68, at 385.