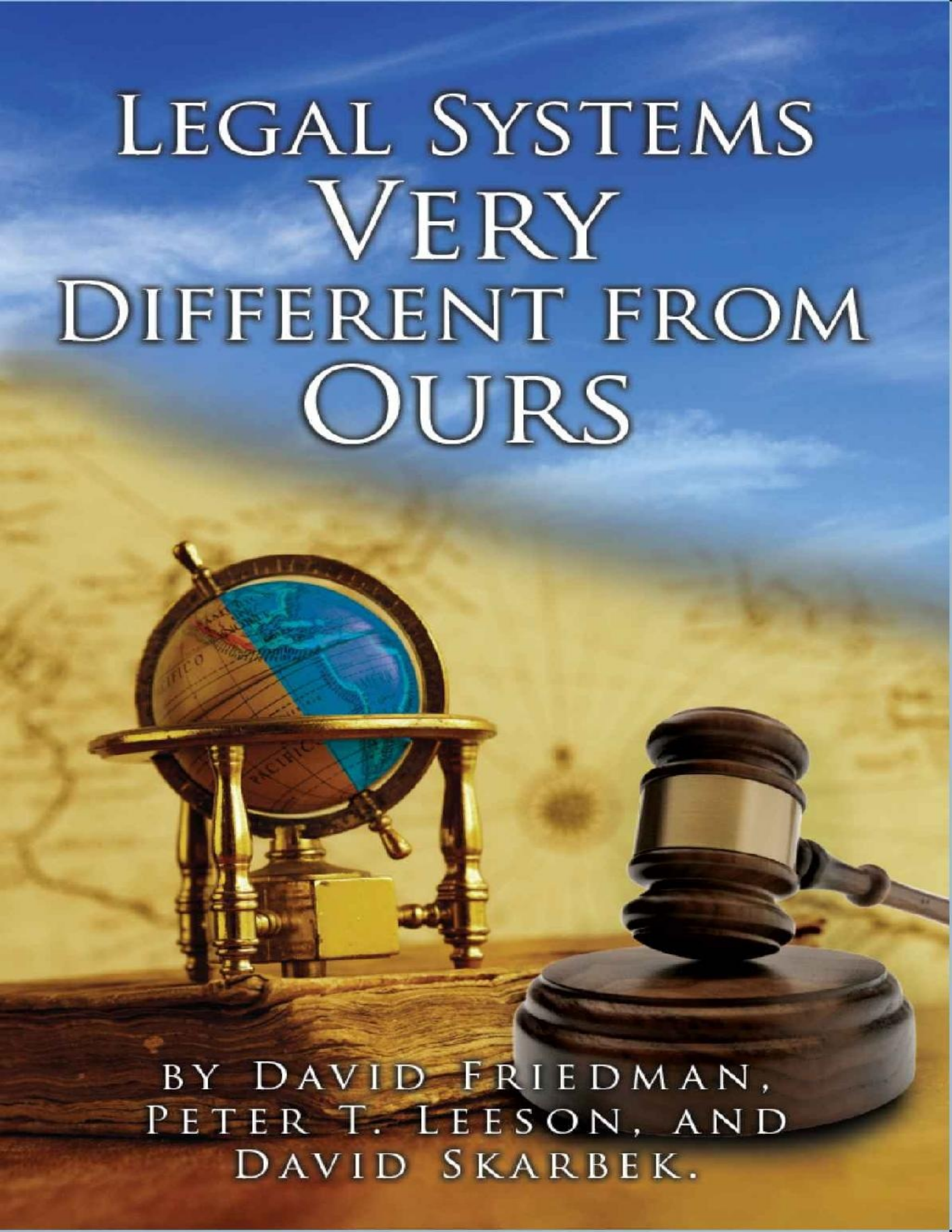
Legal Systems Very Different from Ours



By David Friedman, Peter T. Leeson, and David Skarbek.

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How far, in the formation of the laws of the Chinese, the ends of substantial justice are even consulted, there must, also, no doubt, be some variety of sentiment. There are certainly many points upon which these laws are altogether indefensible. We shall look in vain, for instance, for those excellent principles of the English law, by which every man is presumed innocent until he is proved guilty; and no man required to criminate himself. Such maxims the Chinese system neither does nor indeed could recognize. But it will scarcely escape observation, that there are other parts of the code which, in a considerable degree, compensate these and similar defects, are altogether of a different complexion, and are perhaps not unworthy of imitation, even among the fortunate and enlightened nations of the West. It is sufficiently obvious, indeed, that the intrinsic merits of any code of laws, which is not professed to be, either the result of the meditations of a philosopher, or the untried theory of a legislator, but which, on the contrary, actually is in force, forms the basis of the government of a nation, and as such, has been fairly submitted to the important test of experience, are not to be estimated by any imaginary standard of perfection.

(Staunton 1828)

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Introduction

Almost forty years ago I became interested in the legal system of saga-period Iceland, a society where if you killed someone his relatives sued you. Trying to make sense of it taught me interesting things not only about that legal system but about law enforcement more generally. Some fifteen years later I got interested in criminal law in eighteenth-century England, a system where prosecution of crime was private, usually by the victim, where all serious crimes were capital but only a minority of those convicted of capital crimes and a small minority of those charged with them were actually executed. It too was interesting.

After another ten years or so it occurred to me that it would be worth doing more work along similar lines, so I invented a seminar on legal systems very different from ours. That meant I had to learn about more legal systems. With the assistance of my school's librarians, I did. Over the years since I have expanded my knowledge with the help of Google, Amazon.com, and the papers of my students. This book is the result. Most of it is mine but it includes two chapters by other authors, each on the subject of that author's research.

The underlying idea is simple. All human societies face about the same problems. They deal with them in an interesting variety of different ways. All of them are grownups—there is little reason to believe that the people who created the legal systems of Imperial China, Periclean Athens, or saga-period Iceland were any less intelligent than the creators of the U.S. legal system. All of the systems should be taken seriously, each as one way in which a human society dealt with its legal problems.

People I describe the project to often ask which is the best legal system. I doubt there is one. What I am trying to do is to make sense of a large number of different legal systems, how they worked, what problems they raised, how those problems were dealt with.

Adequately studying even one legal system and the society it was embedded in is a large, possibly a lifetime, job. I cannot do it for eleven different ones. To deal with that problem I attempted, for each system, to find someone who was an expert, send my draft to him, and let him tell me what I got wrong. This book is dedicated to those who responded—none of whom is responsible for whatever errors I failed to correct.

John Beattie
Jessie Byock
Joseph Dellapenna
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William Gelley
Paul Gowder
Kyle Graham
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Daniel Klerman
Timur Kuran
David McConnell
Thomas Meyers
Jón Viðar Sigurðsson
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Also to the students whose seminar papers, over the years, have introduced me to many more legal systems than I cover here.[1] And, finally, to the librarians of the law school of Santa Clara University.

David Friedman

1. Imperial Chinese Law

The Chinese legal system originated over 2000 years ago in the conflict between two views of law, Legalist and Confucian. The Legalists, who believed in using the rational self-interest of those subject to law to make them behave in the way desired by those making the law, were accused by later writers of advocating harsh penalties to drive the crime rate to near zero.[2] They supported a strong central government and equal treatment under law. Confucianists argued for modifying behavior not by reward and punishment but by teaching virtue. They supported unequal treatment based both on the unequal status of those to whom the law applied and on their differing relationships.

The conflict was briefly resolved in favor of the Legalists in 221 B.C. when the kingdom of Qin defeated all rivals, creating the first united Chinese empire. The dynasty collapsed in 208 B.C. after the death of its founder. It was succeeded by the Han dynasty, whose legal system was nominally Confucian but in practice a hybrid of the two approaches. Positive law continued to be enforced by penalties but the penalty for an offense depended on the status of the offender, both absolute status (official, commoner, slave, …) and status vis a vis the victim.

The disagreement between Legalists and Confucianists to some degree resembles the conflict between 18th and 19th century British approaches to crime and punishment. The dominant view in the eighteenth century saw criminal penalties as deterrence, their purpose to make crime unprofitable. The dominant view in the nineteenth century saw criminals as victims of their own ignorance and irrationality, the purpose of penalties to reform them, make them wiser and better. That view was reflected in terms such as “reformatory” and “penitentiary” and associated practices. Both approaches survive in modern legal theory and modern legal systems.

For the original draft of this chapter my main source was *Law in Imperial China* by Derk Bodde and Clarence Morris, an account of the legal system of the last Imperial dynasty, the Qing,[3] which ruled from the mid-17th century to the beginning of the 20th. Some of my conclusions had to be revised on the basis of later books based on case records from local courts that became available as a result of the opening up of China. I concluded that while Bodde and Morris had correctly interpreted their sources, documentary evidence produced by the Confucian elite, those sources misrepresented their own legal system, describing what it ideally should have been rather than what it actually was.

The Law Code[4]

Laws originated as statutes proclaimed by Emperors and passed down from dynasty to dynasty; one source estimates that forty percent of the Qing code came from the Tang code, created about a thousand years earlier.[5] They were expanded by the addition of substatutes based on Imperial decrees or on precedents set by officials at a high level, expanded further by official commentary printed along with the statutes, further expanded by unofficial commentary. While some early writers argued against making the law code publicly available, that policy does not seem to have been followed, save possibly under the Song dynasty.[6] But in a society where most people were illiterate and where anyone giving legal advice or assistance without official authorization risked severe penalties, ordinary people depended largely on government officials and their employees for information about legal rules.

One striking feature of the cases in Bodde and Morris, official records from the equivalent of high-level appeals courts, is that they were not about whether the defendant was guilty—the facts of who did what were generally taken as known—nor, as in an appeals court in the modern U.S. system, about whether the lower court acted correctly in convicting the defendant, but about what punishment was appropriate. The legal code was not so much an account of what was forbidden as an attempt to specify, for every possible offense, the proper punishment.

That was not the case for the lower level cases described in Bernhardt and Huang, which often depended on documentary evidence, including evidence that documents were forged, physical inspection of disputed land holdings, or the testimony of witnesses.[7]



Punishing Offenses

Neither imprisonment nor fines were part of the normal list of punishments,[8] although a defendant might be imprisoned for substantial periods of time in the process of passing through the legal system and payment of a fine was sometimes permitted as a substitute for a more serious penalty or as compensation to a family injured by a crime. Punishments ranged from a sentence to wear the cangue,[9] a device whose purpose was in large part

humiliation, through various numbers of blows by the light or heavy bamboo, differing degrees of penal servitude or life exile,[10] to nominally or actually capital sentences.

One oddity of the punishments was that they were not always all they claimed to be. A sentence to fifty blows of the light bamboo in fact meant twenty, due to changes of law after the Manchu conquest, and similarly for all sentences of similar form.[11] Some nominally capital sentences—decapitation after the assizes or strangulation after the assizes—ended up in most cases as serious but non-capital.[12]

At the annual assizes, convicts with death sentences were divided into four categories. Those sentenced to deferred execution usually had their sentence commuted to penal servitude, sometimes after a two-year delay to have the revised sentence confirmed. Those found worthy of compassion, either because they were young, old, or because there were extenuating circumstances to their offense, had their sentence commuted to exile or penal servitude. A convict found to be an only son who needed to remain at home to care for his parents or, his parents being dead, to tend their shrine, might have his death sentence reduced to forty blows plus two months wearing the cangue.

There remained a fourth category, convicts "deserving of capital punishment." According to one account, their names were written on a sheet on which the Emperor drew a circle, separating those who would be executed from those to be held over for another year.[13] A defendant guilty of offenses against a member of the same family or clan who survived this process twice had his sentence commuted to deferred execution; for other offenses it took ten times. One source suggests that a single round of the process selected fewer than ten percent of the names for execution. Given the multiple possible outs, it seems likely that most nominally capital sentences led to serious punishments but ones short of execution.

Meijer, who is skeptical of the "drawing a circle" story, describes the assizes as a rational approach to problems created by the attempt to fully specify the punishment for every offense, permitting the high level bureaucracy to adjust sentences on the basis of considerations not included in the statutes.[14]

There were three sentences that were actually rather than only nominally capital: Strangulation before the assizes, decapitation before the assizes, and death by slicing ("the death of a thousand cuts"). Strangulation was considered a less severe punishment than decapitation since mutilation of the body was held to have undesirable post-mortem consequences.

A further disconnect between nominal and actual sentences occurred through the process of redemption. The court could, but need not, permit a convict to substitute a money payment for the penalty he had been sentenced to; the payments appear small relative to the penalties they replaced. In some cases, such as a doctor who unintentionally killed his patient, the reason for permitting redemption seems natural enough to the modern reader. But in other cases where it would seem appropriate to us, such as a son killing the killer of his father or someone who unintentionally killed a would-be rapist in the process of preventing his crime, it was not granted.

Why would a defendant be sentenced to capital punishment and then permitted to buy his way out for a nominal sum instead of being sentenced to some much lower penalty? One possible answer is that cosmic balance required the payment of a life for a life, but it could be a nominal life. That would also explain another oddity in the law. If several people were jointly responsible for a murder and one of them sentenced to death, his sentence could be commuted to something non-capital if one of the other offenders happened to die while the legal process was still ongoing—presumably because cosmic balance had thus been satisfied. A final oddity is that executions could only occur at certain times of the year, with the details of the restriction varying over time but apparently linked to religion.

These rules and others raise the question of to what extent the legal system was based on religion broadly defined, to what extent on consequentialist considerations. One can interpret nominally capital sentences as reflecting the needs of cosmic balance, provided one believes that the cosmos can be balanced by purely nominal executions.[15] Alternatively one might view the pattern as a result of punishment becoming less severe over time in a system with barriers to explicit change. Or one might view it as a way of frightening potential criminals[16] and so deterring them while preserving convicts to serve as state slaves. The rhetoric of balance might also be seen as a way of maintaining respect for the existing hierarchy of status and authority.[17] It is harder to find consequentialist explanations for some other features of the legal code, such as the requirement that an official whose parent died abandon his position for twenty-seven months of required mourning (under the T’ang code, reduced to one year under the Qing).[18] One possible explanation is that its function was to prevent any official from accumulating too much power, since control over a bureaucratic empire could at any time be interrupted by the death of a parent.[19]

Similar questions are raised by another feature of the legal system, the degree

to which it depended on outcomes rather than blameworthiness. It was, for example, a particularly serious offense to kill several members of the same family. In one case a defendant found guilty of doing so was sentenced to severe punishment despite the fact that the men he killed had attacked him and his companions and one of them had just killed his father. In another case an official was found guilty of a serious offense because the servants bearing his sedan chair carried it through the gate of a temple in a rainstorm rather than setting it down outside the gate so that the official could enter the temple in the proper manner.[20]

> "His failure to dismount from the chair in time, though occasioned by the great accumulation of rainwater on the ground and the error of the chairbearers, nevertheless constitutes a violation of the established regulations. Accordingly, he should be sentenced to 100 blows of the heavy bamboo under the statute on violation of imperial decrees … . Because he has already been dismissed from his position … ."[21]

In this and other cases, intent was not required for criminal liability; the verdict was based on outcome, not motivation.[22] That again could be interpreted as a policy driven by the fear that if balance was not maintained by punishing someone for a violation of the cosmic rules, the result might be an increased risk of natural catastrophes. On the other hand the equivalent—strict liability torts—exists in modern legal systems as well, which suggests that there may be explanations, possibly functional, that do not depend on peculiarities of Chinese culture.[23]

Filling in the Blanks

The law code was designed to provide a specified punishment for every possible offense—the mission of the U.S. sentencing commission carried to the Nth degree. Despite the size and detail of the code, it failed to do so. Gaps could be filled by interpolation, with court verdicts taking a form such as "the offense is similar to XYZ, for which the punishment specified in the code is life exile at a distance of 2500 Li from the offender's home province, but somewhat less serious. The defendant is sentenced by analogy to exile at a distance of 2000 li."[24] Where the offense could not be fitted into any category in the code, the court could find the defendant guilty of doing what ought not to be done[25] or of violating an Imperial decree—not an actual decree but one that the Emperor would have made had the matter been brought to his attention.[26] The underlying assumption was that people ought to know right from wrong without the assistance of the legal code, that the Emperor, and by delegation his officials,

had unlimited power, hence it was proper to punish those who did wrong even if the absence of a specific legal rule against what they had done raised difficulties in determining the appropriate punishment.

Another problem raised by a law code that attempts a complete mapping from offense to punishment is that there may be cases where the punishment prescribed by the code is clearly too harsh for what actually occurred, where the offense fits the letter but not the spirit of the law. An example might be a killing that, according to the law, required capital punishment but was due to an accident involving no fault in the person held responsible. One solution was to find the offender guilty of a capital offense but permit the penalty to be commuted by a fine.[27]

The Structure of Authority

The key figure in the bureaucracy that ran China was the district magistrate. The population of his district could range from 80,000 to more than 250,000; the magistrate functioned as the single representative of imperial authority, a combination mayor, chief of police, and judge. He qualified for the position by performing well first in the examination for the civil service and then in administrative positions at a lower level. He was assisted by a staff of officials, some his own employees who moved with him from place to place, some permanently located in the district.

One risk of putting so much power in one pair of hands was that magistrates might take advantage of their position to build local support and thus convert the empire, in theory a centralized bureaucracy, into a *de facto* feudal system, as tended to happen in the periods of breakdown between dynasties. Precautions to prevent that included forbidding a magistrate from being assigned to any district within his home province or within 165 miles of his native district,[28] shifting magistrates from district to district every few years, and forbidding a magistrate from marrying a woman from his district or owning land in it. Further, the fact that the legal code specified in detail the punishment due for each offense restricted the discretion of the magistrate and so limited his power.[29]

The Ottoman Empire had a somewhat similar approach to the problem of maintaining central control. After conquering territory, the usual pattern was to appoint the surviving members of the defeated dynasty as local rulers in some distant part of the empire. The knowledge that defeat would not deprive the losers of life, wealth or elite status reduced the incentive to resist conquest, and a governor with no local ties was dependent on the Sultan for his authority, hence likely to be loyal.

As a final precaution in the Chinese system, there was a department of the imperial bureaucracy, the censorate, charged with investigating misdeeds by officials. The officials were chosen from those who did extraordinarily well on the imperial exams. The censors were chosen from those who did even better.

The Examination System: A Puzzle

Officials, including magistrates, were largely but not entirely selected from those who had successfully passed through a series of ferociously competitive exams.[30] The first level gave one the rank of licentiate, which carried with it

status and the right to take the second level of exams. Passing the second ("provincial") provided a significant chance of eventual appointment to office as well as the opportunity to take the third level of exam ("metropolitan"). Passing the third level was a near guarantee of official appointment.

In the early part of the final dynasty, there were about half a million licentiates out of a population of several hundred million, only about 18,000 people who had reached the next level. The provincial exam that separated the two groups had a pass rate of about one percent. It was offered every three years and could be, and often was, taken multiple times. The metropolitan exam produced 200 to 300 degrees from as many as 8000 candidates each time it was given. While a few unusually talented candidates made it through before they were twenty-five, a majority were in their thirties, some older.

The exams did not test administrative ability, knowledge of the law, expertise in solving crimes or other skills with any obvious connection to the job of district magistrate or most of the other jobs for which the exams provided a qualification.[31]

> "The content of the provincial examinations presented an exacting challenge, especially to the novitiate. Its syllabus called for compositions on themes from the four core texts of the Neo-Confucian canon and a further five or more classics, extended dissertations on the classics, history, and contemporary subjects, verse composition, and at various times the ability to write formal administrative statements and dispatches. To be at all hopeful of success, the candidate should have read widely in the extensive historical literature, thoroughly digested the classics, developed a fluent calligraphy, and mastered several poetic styles. Above all he should have mastered the essay style, known as the 'eight-legged' essay from its eight-section format, which was the peculiar product of the examination system." (Watt 1972, 24-25)

This raises an obvious question: Why? Why require the ablest men in the society to spend an extended period of time, often decades, studying to pass the exams instead of applying their skills to running the empire? Why test a set of skills with little obvious connection to the jobs those men were expected to do?

One possible explanation is that the exams were the equivalent of IQ tests, designed to select the most intellectually able (and hardworking) members of the population for government service. But it is hard to believe that there was no less costly way of doing so or no approach along similar lines that would have tested more relevant abilities.

A more interesting explanation focuses on the content of what they were studying—Confucian literature and philosophy. There are two characteristics one would like officials to have. One is the ability to do a good job. The other is the desire to do a good job—instead of lining their pockets with bribes or neglecting public duties in favor of private pleasures. One might interpret the examination system as a massive exercise in indoctrination, training people in a set of beliefs

that implied that the job of government officials was to take good care of the people they were set over while being suitably obedient to the people set over them. Those who had fully internalized that way of thinking would be better able to display it in the high-pressure context of the exams.

The conflict between the Confucians and the Legalists, at least as presented by the former, was in large part over how to get people to do good instead of evil. The Legalist solution was incentives, arranging the world so that good paid and evil did not. The Confucian solution was education and example, making people want to be good and teaching them how. The ideal Confucian Emperor would never punish anyone for anything, merely set an example of virtuous behavior so perfect that it would inspire all below him. Seen from that standpoint, it made some sense to set up a system designed to produce good men, put them in power and then leave them alone.

Although that explanation fits Confucian theory it is inconsistent with the practice of the Confucian state. In the system as it actually existed, crime was prevented not by moral example but by an elaborate penal system. The same approach was applied to the control of officials. They were subject to detailed rules mandating and evaluating their performance, with the threat of punishments ranging from a black mark on their record up to dismissal and flogging.[32]

Perhaps selecting officials was not the main purpose of the system. Judging by the pass rates on the exam, for every student who got far enough through the system to have a significant chance of employment a large number, possibly several hundred, studied and failed at either the first or second stage. One could interpret that as a system for making sure that a significant fraction of the population, in particular of its upper classes, got indoctrinated in Confucian ideology.[33]

Alive and Well

It may have occurred to you that Imperial China is not the only society whose elite members are expected to qualify for high-status positions by studying for, and passing, exams on subjects having little or nothing to do with the positions they are qualifying for. It may even have occurred to you that you yourself have done, perhaps are presently doing, almost precisely the same thing.

In modern-day America, one requirement to be considered for most of the best jobs, both in government and in the private sector, is a college degree. Some of what a college student studies and is tested on may be relevant to the job he applies for but much of it, in the case of many jobs most of it, is not. Neither

American history, Shakespeare, or geometry has much use in the daily work of a lawyer, doctor, or accountant. Geometry and algebra will be useful to an engineer, but literature, art history, and sociology probably not. Yet the students who plan to go on to those jobs are likely to have spent a good deal of their time in such classes, and their job opportunities will depend in part on the grades they got in them. The same is, to a significant degree, true of high school classes as well.

There is abundant statistical evidence that someone with a degree will, on average, make substantially more than someone without it. It is not clear why. There are three popular theories, corresponding at least loosely to theories I have offered for the Chinese system.

One is the human capital theory, the idea that a college education teaches useful things. The problem with that explanation is that much, arguably most, of what the typical college graduate studies is irrelevant to the job he ends up with. A further problem is that there is a fair amount of evidence indicating that many students graduate from college knowing little more than they knew when they entered. As almost any college professor will have observed, many students memorize as much as they need to pass the final exam and forget most of it as rapidly as possible thereafter.

A second theory is signaling. By graduating from college a student demonstrates to prospective employers that he is smart enough and hardworking enough, sufficiently obedient to the demands of his professors, to do so. He may be no better qualified than before, but he has better evidence of his qualifications. The problem with this theory is that there should be much less expensive ways of generating the same evidence. So far as intelligence is concerned, a few days of testing should do it. For self-discipline, willingness to work, a few years of productive employment should provide at least as much evidence.

That leaves us with a final theory: indoctrination. The claim of a liberal arts education is that it makes the student into an educated man, the sort of person who has read Shakespeare, knows the dates of the Norman Conquest and the American Civil War, can at least pretend familiarity with the ideas of Adam Smith and Karl Marx, Aristotle and Kant. Why employers would want those characteristics, however, is less clear than the reasons why the Chinese emperor would want subordinates indoctrinated in Confucian philosophy.[34]

The Imperial examination system is alive and well. In America.

Appeals and Accusations

A sentence of bambooing could be imposed by the district magistrate but had to be reported one level up to the prefecture and could be appealed to the provincial governor. Cases that led to a sentence of penal servitude were investigated by the district magistrate, reported to the prefecture, decided at the provincial level with the verdict confirmed by the provincial governor and then reported yet another level up to the board of punishments in Peking which, if unhappy with the verdict, could send the case back down for retrial. A non-capital homicide case was treated similarly, save that the final verdict was by the board. Capital cases were reviewed by the board, judged at a yet higher level by the three High Courts and required confirmation by the Emperor, as did any case involving an official. Given the size of the population and the existence of only one Emperor, the implication is either that cases in the last two categories were rare[35] or that most of what was nominally done by the Emperor was in fact done by his staff. Arguably, the mechanism of confirmation of verdicts at a higher level was designed to make it possible to fine tune a system that, in the Code, specified a specific punishment for every offense.[36]

A private individual could appeal a verdict to a higher court either by lodging an accusation that the lower court had refused to consider or by protesting its decision. The appellant was subject to punishment if he was judged either not to have exhausted all lower level options or to have made a false accusation. In one case included in *Law in Imperial China*, the court found valid the accusation of a defendant against whom charges had been dismissed but punished the accuser much more severely than the accused. The defendant, a physician whose incorrect treatment had resulted in the death of his patient, was sentenced to strangulation after the assizes, a sentence then commuted to a payment of 12.45 ounces of silver.[37] The accuser, the father of the victim, was sentenced to a hundred blows of the heavy bamboo for having “embellished the facts” in his accusation. In another case, a higher court found that lower courts had been deliberately misreading a statute in order to punish those who appealed their verdicts. Both cases suggest that the opportunity to appeal decisions may have existed more in theory than in practice.

The State and the Family: Subcontracting Enforcement

In Qing law, as in the law of earlier dynasties, legal consequences depended in part on the status of the parties, both absolute status—the rules for government officials and Manchus[38] were different than the rules for ordinary commoners and those in turn different than the rules for groups of especially low status—and relative position within the extended family. All relatives were classified as senior or junior to each other. For two individuals at the same level of the family tree such as siblings or first cousins, the senior relative was the older. For two at different levels, such as first cousins once removed or uncle/nephew, the senior was the one at the higher level of the tree; an uncle was senior to his nephew even if the nephew was older.[39] The closeness of the relation was defined by the rules determining for how long one was obliged to mourn the death of a relative, which depended on the relationship—longest for a parent, shorter as the relation became more distant.[40] Relative status in turn affected penalties. For an offense committed by a junior relative against a senior relative, penalties were increased; for an offense committed by a senior relative against a junior, decreased.[41]

It is common to include among the offenses of oppressive polities forcing children to inform on their parents. Imperial China had precisely the opposite approach. It was a criminal offense for a child to accuse his parent of a crime even if the parent was guilty, a capital offense if he was innocent.[42] Under the Han, the first Confucian dynasty,

> "If a son did report his father's crime to the authorities, he would receive the same punishment as his father because the son lacked filial piety, and the father reverence toward the government."[43]

Like some other features of the legal system, the treatment of relations within the extended family can be viewed either as an expression of Confucian ideology[44] or as a functional design feature. By the mid-19th century, the Qing were relying on a small bureaucracy of elite scholar-officials to rule a population of about four hundred million.[45] One way of doing so was to subcontract as much as possible of the job to authority structures such as the extended family.[46] Biasing criminal penalties in favor of the more senior members of the family reinforced the familial authority structure. Forbidding children from informing on their parents removed a threat that could be used to undermine it.

Other features of the legal system served similar purposes. Repeated disobedience by a child to his parent could be punished by exile. It was legal for a parent to beat his child or a husband his wife. If beating a child resulted in his death and there was no excuse for the beating, the punishment was one year of penal servitude. If the beating was of a disobedient son but unreasonably severe the penalty was a hundred blows of the heavy bamboo.[47] There was no punishment for a reasonable beating of a disobedient son that resulted in death. At some periods a father could get official approval to kill a disobedient son.

Two incidents from about the 13th or 14th century illustrate the tension between the requirements of imperial and familial authority:

> A family member, Hsu Kung-chu, was being brought to the magistrate's office for punishment for committing incest with his niece. The *tsu* head [family patriarch] recognized that the public nature of the official proceedings would bring shame upon the family, so he ordered Kung-chu to be thrown in the river where he drowned. However, the *tsu* head was punished by the authorities for murder.[48]

In another case from the same period a different result was reached:

> "Wang ch'i's eldest son, Wang ch'ao-tung hated his younger brother. At one time, the former chased the latter, knife in hand. The father caught Wang ch'ao-tung, tied his hands together and scolded him. The son answered back. This so angered Wang Ch'i that he buried his son alive.[49] He was sentenced by the General of Chi-lin for killing his son inhumanely after the son had disobeyed instructions. But the Minister of Justice held that since a son who scolded his father was punishable by death, the case should not be considered under the article that dealt with a child who was killed because he had disobeyed instructions. As a result, Wang Ch'i went unpunished."

There were serious penalties for killing a child without cause, but a husband who killed his wife because she had struck or reviled his parents received only 100 blows of the heavy bamboo. The court's only reservation in such cases seems to have been uncertainty as to whether the parents were telling the truth or lying in order to protect their son from the penalty for wantonly killing one's wife, which was nominally capital—strangulation after the assizes.

In both the familial and other contexts, causing someone to commit suicide was treated as a serious offense.[50] A son who pushed his parent into suicide by theft or acts of turpitude was subject to immediate strangulation, an actually rather than only nominally capital punishment. If the theft or act of moral turpitude had been committed at the parent's orders, the penalty was reduced to three years' penal servitude. Disobedience to familial superiors was an offense, the fact that an offense had been committed under orders from a familial superior might, but did not always, reduce punishment.[51] An inferior was expected to obey orders from a superior to commit an illegal act but might still be liable for

committing it, subject to two different authority structures, familial and legal, with penalties for disobeying either even if there was no way of obeying both.

Another approach to dealing with the disproportion between the population to be controlled by the legal system and the resources commanded by that system was to discourage resort to law. One way of doing so was to treat most private practice of law as criminal. Practitioners, "litigation sticks," were viewed as troublemakers out to stir up unnecessary conflict. Individuals who wanted help with their legal problems were expected to get it from the district magistrate and his staff.[52] Another way of discouraging litigation was by making involvement with the legal system unpleasant for all concerned.[53] It was legal to torture witnesses in the process of extracting information from them. Participants in the legal process were expected to act as humble petitioners, recognizing the vastly superior status of the officials they were interacting with.

> Shouted at and reviled by the magistrate, growled at and beaten by the constables, the position of the accused was a most unfavorable one indeed. Small wonder that having to appear in court was considered by the people at large as a terrible misfortune, an experience to be avoided if at all possible. … In general people tried to settle their differences as much as possible out of court, by effecting a compromise or by referring the case to one of the age-old organs of private justice, for example the council of the family—or clan-elders, or the leaders of a guild.[54]
>
> Law was a headache for any magistrate sitting as a judge. Among the public it was generally ruinous for all concerned. The fees paid to yamen runners [criminal catchers] might bankrupt plaintiff as well as defendant. Consequently, litigation played a rather small role in the Chinese society of the Qing. Imperial edicts even urged the populace to avoid the courts rather than crowd into them. The prejudice against going to court extended to those who wrote briefs. They were condemned for fomenting litigation. The legal profession was not recognized in this land without lawyers. Most of all, the law was seen as a buttress of the personal relationships that should obtain in the family and lineage. The law expressed Confucian social norms. When they were being properly observed, recourse to law should be unnecessary.[55]

Making it costly to interact with the legal system reduced the amount of work required of the bureaucracy but risked providing an individual with the opportunity to injure an enemy by accusing him of an offense. If the accusation was found to be false the accuser was subject to the penalty that would have been imposed on the accused if found guilty, a risk that might be avoided by making the accusation anonymously. That problem was dealt with in a straightforward fashion by Qing law: For an official to act on an anonymous accusation was a criminal offense, for an individual to submit an anonymous accusation a capital offense.[56] Under one emperor an exception was made for matters of grave concern to the state. Under the next, the exception was removed.[57]

Between Civil and Criminal

What I will refer to throughout as civil cases were, to the Chinese courts, merely "minor matters" that were handled with procedures that differed only slightly from those used in criminal cases.[58]

The older secondary sources I first looked at portrayed the legal system as entirely criminal, with no procedure by which a wronged party could bring suit. That accurately reflected the way in which the legal system was viewed by the Confucian elite and portrayed in the cases decided at a high level and reported. But when records of lower-level cases became available, they showed a system criminal in form but to a considerable degree civil in substance when dealing with what it considered minor matters: land, debt, marriage and inheritance.

Consider, for one example, the obligation of a debtor. The relevant statute[59] began by limiting the legal interest rate to three percent a month and stating the criminal penalty for a lender who exceeded it. The statute went on to require a debtor to pay his debt and stated the penalties for failure to do so. A lender who charged a debtor with being in default was accusing him to the magistrate of violating that part of the statute.

If the magistrate found the accusation to be valid[60] he would require the debtor to agree to pay while generously waiving the criminal punishment for the violation, and similarly for other "minor" disputes. A debtor who failed to agree to pay could be punished.[61]

The case was still criminal in form. The parties did not, as in a modern civil case, have the right to end it by an out-of-court settlement. They could, however, humbly request the magistrate to cancel the hearing. He was free to refuse but, with a heavy schedule of unresolved cases, unlikely to. A majority of village disputes were settled by either informal mediation not involving the court or bargaining after charges had been submitted to the court and the magistrate had commented on them but before the court session.[62]

A similar pattern applied to other minor, which is to say civil, offenses. The statute on dividing a household among sons forbade it while the parents were alive. A substatute permitted it with the parents' permission. The customary practice of equal division appeared only in the middle of a substatute of another statute ostensibly dealing with a different issue. Other substatutes implied the enforcement of contracts, of property rights to land, of rules with regard to marriage.[63]

One difference between the treatment of civil cases in western legal systems

and the treatment of minor matters in Imperial law shows up in a shift in the interpretation of the law when, early in the twentieth century, the final dynasty was replaced by the Chinese Republic. The Imperial law code was for the most part carried over unchanged. Local courts continued to rule much as they had before. But the Supreme Court, influenced by western law, treated minor cases as civil disputes between the parties.

An example discussed in detail by Bernhardt was the procedure for appointing an heir for a man who had died without male issue. The decision, under both Imperial and Republican law, was made by the widow and the man's kin. The heir had to be a relative of the dead man of the same generation as his son would have been. If no suitable relative was available a candidate of the same surname, presumed to be a distant relative, could be substituted.

There were cases under the Republic in which the widow selected an heir who did not meet those requirements and one of the kinsmen objected. A local court faced with such a case would remove the appointed heir. But when the case was appealed to the Supreme Court, if neither the plaintiff nor his son or grandson was qualified as heir the court would rule against the plaintiff for lack of standing. That left the widow's selection in place even though the court recognized that he did not meet the legal requirements.

Like a modern American court judging a tort case, the Supreme Court was providing justice only between the parties. An Imperial magistrate, with a broader view of his obligations, would have arranged for the replacement of the heir selected by the widow with one who met the legal requirements. An Imperial magistrate dealing with a sufficiently tangled property dispute might resolve it by awarding ownership to neither party, converting the land to state property with its income dedicated to some good cause such as supporting a school. His job was doing justice. The plaintiff was merely the person who had brought an instance of injustice to his attention.

Contract Without Law

In 1895, as part of the Treaty of Shimonoseki, China ceded the island of Taiwan to Japan. The Japanese government wished to maintain the existing legal system. To do so it had to discover what it was. A scholarly commission was established. Its report provides us with a detailed picture of the legal system of a province of Imperial China at the end of its last dynasty.[64]

One feature of that system was the combination of elaborate contractual practice with an almost total absence of contract law, at least at the Imperial level.[65] The code contained only a handful of provisions dealing with matters of contract, some of which, such as the statute specifying a maximum interest rate, appear to have been ignored in practice.

Non-state hierarchical structures provided a possible mechanism for settling contract disputes within family, clan or guild. But merchants in Taiwan engaged in extensive large-scale dealings that cut across all such categories, buying bulk agricultural products to ship across the straits for sale in the mainland, importing mainland products to Taiwan, and much else.

The problem of settling commercial disputes outside of state courts was dealt with in medieval Europe in part by the development of private courts at the major trade fairs, run by merchants and relying heavily on reputational enforcement.[66] No equivalent seems to have developed in China, perhaps due to Imperial hostility to any rival authority. There were brokers and shipping agents who functioned as middlemen between buyers and sellers, but they were officially appointed and kept records of transactions on behalf of the government. It was a criminal offense to fill their role without government authorization.[67]

Nonetheless, Chinese merchants developed an elaborate set of contractual forms, including a variety of form contracts, supporting an extensive and sophisticated network of commercial relations. Part of the explanation of how they did so was presumably the need to retain a firm's reputation, part the availability of state courts for dealing, when all else failed, with parties engaged in deliberate and obvious violations. But much of the explanation lies in the details of the private contract law that developed within that framework—a system of rules designed to minimize the reliance on courts and external enforcement.

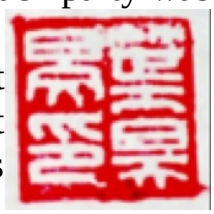
One example was the rule we call *caveat emptor*. Under any circumstances short of explicit fraud—gold bars that turned out to be gold plated lead, for

example—a merchant who had accepted delivery of goods had no recourse if they turned out to be defective. Another was the linkage between possession, ownership, and responsibility. Goods in my warehouse were mine whether or not they were about to become yours, and I bore the risk of any damage that occurred to them.[68] The rules appear to have been designed, wherever practical, to let a loss lie where it fell, eliminating the need for legal action to shift it.

Problems with such a system arise if canceling a contract and leaving everything in the possession of whomever at the moment has it will advantage one party, a situation that encourages opportunistic breach. One solution is to redesign the contract so that the two parties' performance is more nearly synchronized, reducing the incentive of either to breach. An alternative is to rely on reputational enforcement, structuring the contract so that the incentive to breach, if it occurs, is likely to be on the party who would suffer reputational penalties from breaching.

An example in the Chinese case is provided by contracts for future purchase of commodities at a pre-arranged price. Such contracts were not considered binding until there had been at least partial performance by one party. Typically that consisted of a deposit paid in advance by the purchaser. By adjusting the size of the deposit, the parties could take account both of how large the incentive of the seller to breach might become, depending on the range of likely price changes between contract formation and delivery, and how much each party was constrained to keep to the deal by reputation.





A buyer who breached forfeited his deposit, a result that required no judicial intervention since the deposit was in the possession of the seller. That left an obvious problem—a seller who breached but kept the deposit. Presumably that was prevented by some combination of reputation and the threat that such an obviously criminal act would provide the buyer sufficient grounds for going to court.

Important elements in making the system work were the existence of a system of written forms using standard boilerplate terminology understood by the parties and others in the trade and the use of seals—chops—to provide clear evidence of assent to a contract. So long as issues of fact were simple, such as whether a shipment of grain had been delivered and accepted but not what its precise quality was, that made it possible for third parties to determine at a low cost which party to a contract had violated its terms. The third party might be another merchant interested in knowing who could be trusted or, in extreme cases, a district magistrate interested in who had committed a criminal offense

and should be punished accordingly.

Whatever the mechanisms responsible,[69] Chinese merchants more than a century ago succeeded in maintaining a sophisticated system of contracts with little use of state enforcement.

2. Romani Law

The total number of Romani, more commonly known as gypsies,[70] is variously estimated at from three to fifteen million.[71] If current scholarship is correct they are descendants of a population that left northern India about a thousand years ago.[72] They first appear in Western European history in the 15th century at the court of the Holy Roman Emperor Sigismund, claiming to be from Lesser Egypt in Greece on pilgrimage as penance for the temporary abandonment of Christianity by their ancestors.[73] Multiple accounts describe them as traveling through Europe bearing letters of safe conduct from Sigismund giving them judicial autonomy, the right to be punished only by their own authorities.

The letters may have been forgeries created by their bearers to protect them from local law enforcement authorities but they need not have been. Polylegal systems, systems in which different people in the same country were under different legal authorities, existed in medieval and Renaissance Europe. The status of Jewish communities in the diaspora, discussed in Chapter 4, is one example, the millet system of the Ottoman Empire another. It is possible that fifteenth century Romani persuaded Sigismund that they were entitled to similar treatment.

Whether or not fifteenth century Romani obtained a grant of *de jure* judicial autonomy from a fifteenth century emperor, Romani communities through the centuries have been strikingly successful in maintaining *de facto* autonomy, staying below the radar of the official legal system while imposing their own rules on their own members.[74]

Romani x 3: Vlach Rom, Romanichal, Kalle

Over the thousand years since they left India, the Romani have divided into multiple communities, each with its own institutions. Many speak variants of their original language containing loan words from the lands they traveled through; the different dialects are not always mutually comprehensible. Others speak a dialect of the local non-Romany language, such as English or Spanish, with Romany loan words. The rules different communities enforce on themselves and the mechanisms by which they enforce them are in some ways similar, in some different.

I will begin with the Vlach Rom, the descendants of Romani enserfed for four centuries in Romania, and then describe the somewhat different institutions of the Romanichal, the largest of the British Romani groups, and the Kalle, the Finnish Romani.

Vlach Rom

After serfdom was abolished in Romania in the 19th century many of the Vlach Rom emigrated. Their descendants are now scattered around the world, making up the largest Romani population. My main source for information on them is a book by Anne Sutherland based on her interactions with American Vlach Rom over a period ending in October of 1970, during nine months of which she was the principal of a Romani school in Richmond, California. While her observations were of American Rom, much of her description probably applies to Vlach Rom groups elsewhere, some to other Romani groups.[75]

Social Structure

The basic unit is the *familia*: a couple, their adult sons, daughters-in-law, unmarried daughters and grandchildren. Above the *familia* is the *vitsa*, a larger kinship group descended from an ancestor some generations back. An individual can choose to be considered part of either father or mother's *vitsa*; a woman may choose to identify with her husband's *vitsa*. Above the *vitsa* is the *Natsiya*, nation. The Vlach Rom are divided into four *natsiya*: Machwaya, Lowara, Kalderasha and Churara.

Marriage is by purchase, a payment from the family of the groom to the family of the bride. Payments are substantial, typically several thousand dollars as of 1970. While consent of bride and groom is required, it is up to a man's parents to find him a wife and negotiate with her parents. The wife lives in her

husband's *familia*; in the early years of the marriage she is expected to do much of the work of the household. As she produces children, her status in the household gradually rises. Her parents retain the ability to cancel the marriage and retrieve their daughter; disagreement over how much, if any, of the bride price must be returned is a frequent source of conflict. The Romani term for the daughter-in-law, *bori*, is used not only by her husband's parents but by other members of their household—she is their *bori*.

Familia, *Vitsa*, and *Natsiya* are all kinship structures. The geographical unit above the *Familia* is the *kumpania*. The original meaning seems to have been an encampment, a group of households camping together. In the modern American context, it describes a unit such as the Romani settlement in Richmond. A *Kumpania* usually has a *Rom Baro*, a "Big Man," who plays an important role in interactions both with authorities such as the police and welfare department and among the Rom.

A *Kumpania* may consist of households of a single *vitsa*, with households of other *vitsa* unwelcome. It may contain households of several *vitsa*, in which case its leader will probably be the leading figure of whichever *vitsa* has the most households. It may be a closed *Kumpania*, meaning that Romani families require permission to move in, likely to be based on *vitsa* membership and kinship to those already there, or it may be open. Restrictions on entry are typically enforced by the *Rom Baro's* influence with local authorities. An unwelcome family can be reported to the police for crimes they did or did not commit, to the welfare department for violations that would otherwise go unreported. Restrictions on entry serve in part to protect current residents against competition in income-earning activities such as fortune telling.

Legal System

Romania, the system of rules, can be grouped into two categories. One consists of ordinary legal rules covering the obligations of Romani to each other, including extensive obligations of mutual help, especially but not exclusively between relatives. If a member of the *kumpania* needs medical care and cannot afford it, other members are expected to take up a collection for the purpose. If there is to be a feast for a saints day, a funeral, or some similar occasion, it is likely to be funded by a similar collection. If an impoverished family arrives at a *kumpania*, it is assumed that someone will feed them and provide them with a place to stay.

Obligations apply to fellow Rom not to outsiders, *Gaje*. Swindling or stealing from a fellow Romani is an offense to be dealt with and uncommon,[76] swindling or stealing from an outsider comes under *Romania* only to the extent that it

creates problems for other Rom. “They steal too much, get caught at it too much, and generally spoil an area for others.”[77]

As Sutherland explains, in the Romani language:

> “*Rom* refers to a particular individual Romani man and *romni* to a Romani woman. *Gadjo* refers to a man who is not a Romani and *gadji* to a non-Romani woman. There is no word for all men and women. Human beings are either *Roma* or *gadje*.” (Sutherland 2017, 9)

It is only a mild exaggeration to say that Romani view the non-Romani population not as part of their society but as part of their environment. Romani of other communities, such as the Romanichal, have a somewhat ambiguous status between Rom and *Gaje*.

Marushiakova and Popov, who have done extensive research among European Vlach Rom populations, describe two cases where a group of Romani acted in a way that offended the locals and then left; the locals responded by punishing a second group of Romani for the offenses of the first. The second group’s response was to claim damages via a *kris*, a Romani court, from the responsible parties—not the locals who attacked them but the first group of Romani.[78]

The second category covered by *Romania* is an elaborate system of purity and pollution, Orthodox Judaism on steroids.[79] Its central tenet is that the human body is clean from the waist up, unclean from the waist down. One consequence of the rules is that different wash tubs are supposed to be used for men’s lower garments, men’s upper garments, women’s lower garments, women’s upper garments, children’s garments, and eating utensils—six in all.[80] Contact with the unclean is polluting—“*marimé*”—and the pollution is contagious. Someone who is polluted will find others reluctant to associate with him, even to permit him to touch their possessions, providing an automatic enforcement mechanism for the rules against pollution and an incentive to go through the rituals required to remove it. Thus *marimé* is really two things, the state of being polluted and the status of ostracism due to being polluted.

Because pollution is contagious and *Gaje* neither know nor follow the rules to prevent it, association with them is sharply limited. Vlach Rom in America, if they have to eat in a non-Romani setting such as a restaurant, prefer paper plates; they may eat with their fingers instead of utensils for fear that the latter may be polluted.

Excretion and reproduction, being associated with the lower half of the body, are the subject of extensive rules and restrictions. A pregnant woman is expected to eat alone, consume food cooked in her own pots, and after childbirth destroy the garments she wore while pregnant. A woman can pollute a man by skirt tossing—exposing her genitals—obliging the victim to engage in costly

procedures of purification. Children prior to puberty and seniors are viewed as pure, largely free from the restrictions of the pollution rules.

Enforcement

The mechanisms by which the rules are enforced are feud and the threat of ostracism. Sutherland reports an account of a feud from John Marks, one of her informants:

> When I got one [a *bori*] for Danny [his son] she wouldn't sleep with him as a wife, only a sister. Her father had put her up to it. So I got in touch with her father and said I wanted my money back. He said no, that I was trying to make love to my daughter-in-law, and he made his mistake when he said that. Now I knew that she had committed a crime before and was wanted for picking a man's pocket of $300. I went to the sheriff there and said that I would bring her in if he would bring her father down and cost him a lot of trouble and money. …

As Marks interpreted the situation he was the victim of a swindle, an attempt to sell a daughter and then reclaim her without refunding the money. He was particularly angry at the excuse offered by the father, since for a man to make advances to his son's wife was considered a very serious offense. He retaliated with an approach common in Vlach Rom feuds, using the *gaje* authorities to impose costs on his opponent. Typically charges, true or false, are dropped once the opponent concedes.

In a society where income and power depend in large part on the ability to manipulate both outside authorities and fellow members of the community, that ability and the ability to defend against it are important life skills. As Sutherland reports:

> The Rom often lie to each other about everyday matters, but they almost always lie to the *gaje*. There is no particular shame attached to lying to each other (except in specific circumstances, such as when one swears in front of the 'public' in a *kris*, swears on a dead relative, …), but to lie to the *gaje* is certainly correct and acceptable behavior, and even one's dead grandfather might forgive a broken oath in this circumstance. Consequently, from the very beginning I decided to cross-check three times every piece of information that I received, no matter how trivial or unimportant it might seem. I might challenge several people at different times with the same piece of information or try alternative stories to test their reactions, and usually the contradictions could be ironed out and the most plausible solution gained. … Most people were at least not up to date on other people's lies, and in this way eventually most things leaked out. …
>
> My cross-checking technique was all the more acceptable since the Rom employ the same tactics with each other. They rarely accepted a statement from me or any other Rom without some kind of corroboration from someone else. When 'caught out' in this way, I never saw anyone show embarrassment. They enjoyed it when a good story was put over on them as much as they enjoyed putting one over on someone else.

When one party to a conflict is unable to force the other to yield, an alternative approach is avoidance. The Romani are by tradition a nomadic culture; even those with a fixed address such as the inhabitants of Richmond are likely to

spend much of their time on the road. A *familia* unable to resolve a conflict in an acceptable way has the option of leaving town and avoiding all contact with their opponents, at least until both sides have cooled down.[81]

Another option, the one eventually used by John Marks to settle the conflict over his son's wife, is a *kris Romani*, a Romani court. Details of how the *kris* functions vary across accounts and probably across communities, including to what degree the judge or judges produce a verdict and to what degree they function as chairmen presiding over an open discussion.[82] The Kris that John Marks described, an unusually large one, had two judges, selected for their reputation, and a jury of twenty-five. Judges and jurors were chosen from a much larger number attending, ideally coming from all parts of the United States and including a man and wife from each *vitsa*.

The verdict of the *kris* is imposed on the parties to the dispute, if necessary enforced by the threat of ostracism via a sentence of *marimé*. Ostracism can also occur, with or without a court procedure, as a result of pollution due to violation, even involuntary violation, of the *marimé* restrictions. A *familia* one member of which has violated the rules, for instance by running away to work for a year in the *gaje* world, may be declared *marimé* for some period of time.

> The Rom say that *marime* means being 'rejected' from the Rom as a group and being 'dirty' or polluted. For the moment, it is the sense of rejection that is most relevant. When a person is declared *marime* publicly, whether by a group of people (such as families in the *kumpania*) or more formally in a *kris romani* (trial), he is immediately denied commensality with other Rom. Anything he wears, touches, or uses personally is polluted (*marime*) for other Rom, and he is generally avoided in person as his *marime* condition can be passed on to others. *Marime* in the sense of 'rejected' from social intercourse with other Rom is the ultimate punishment in the society just as death is the ultimate punishment in other societies. For the period it lasts, *marime* is social death.[83]

Ostracism is a way in which an embedded legal system, one that exists under the rule of a state with much greater resources of coercion than the community possesses, can function. Refusing to associate with someone is not illegal, so the *marimé* penalty can be enforced without coming into conflict with state law.

Status

> Age is directly correlated with power and respect — the older one gets, the more power and respect one is given. The oldest person in the family, who is still physically and mentally capable, will be the final authority in all family matters and decisions.[84]

Within the *familia*, parents have authority over their children and grandchildren, husbands over their wives. Within the *kumpania*, the sexes are largely segregated, males interacting with males, females with females. Political

matters are mostly in the hands of men, although old women may also play a role. While both men and women may bring in money, women are viewed as the primary earners, often through fortune telling, men as their assistants.

Outside of the family structure, the Romani are strikingly unwilling to engage in hierarchical relationships. Men who work together in groups do it as partners, not employer/employee. When Romani find it necessary to work for the *gaje*, picking crops for example, they do it as day labor not long-term employees.

Legislation

Romania is a combination of law, religion, and medical belief—violation brings social sanctions but also bad luck and ill health. It is unwritten, existing in the memory of the individual Romani, especially the old—one of the sources of their status. There is no legislature. But it is possible, although uncommon, for a large meeting of Romani to agree on a change and have the agreement generally accepted.

> In the autumn of 1969 a meeting was called of all the *vitsi* and all *natsiya* represented in Los Angeles to discuss the 'new rules' on the following issues: bride price, informing to *gaje* authorities about people who trespass on a *kumpania*, and the kinds of *marimé* sentences that will be effective. A man and wife from each *vitsa* were required to be present since the rules could not be effective unless accepted by all.[85]

Romanichal

The Romanichal, the largest of the British Romani communities, speak a dialect of English with many Romani words, practice marriage by elopement,[86] and function in nuclear families. They have no *kris*.[87] Like the Vlach Rom they enforce their rules through feud, although in a somewhat different form.

A Romanichal who believes his rights to have been violated responds by demanding, with threats of violence, compensation. Both parties know that if rights as defined by the norms of that community have been violated the violator's friends will be reluctant to support him, the victim's friends willing to support him. That makes it in the guilty violator's interest to offer compensation or, if unwilling or unable to do so, to remove himself from the neighborhood of the victim just as, a thousand years earlier, an Icelander at risk of outlawry for failing to pay the fine imposed on him by a court might find it in his interest to leave Iceland. As with any well-functioning feud system, while the incentive to obey the laws or norms is provided by the threat of private violence, actual violence is the exception rather than the rule.

Kaale

The Kaale, the Finnish Romani, a small population isolated for centuries, carry the Vlach Rom attitude towards the lower half of the body even further than other Romani, refusing to openly admit the facts of human reproduction.[88] They have no institution of marriage. Couples that wish to reproduce are expected to first leave their family households, flee far enough away so that the woman's kin cannot find them and retrieve her, and return only when their child is weaned and so no longer requires a visible association with its mother. On returning, the father is expected to show the humility appropriate to one who has violated the norms of his society while the women of the mother's generation smuggle mother and child into the household, where the child will be expected to treat all the women of his mother's generation as equally mothers.

One result of the Kaale rejection of sexuality is to eliminate many of the taboos associated with it among other Romani groups. There can be no restrictions associated with menstruation since enforcing them would require recognition of the fact of menstruation, and similarly with pregnancy. A Kaale woman living in the household of her or her partner's kin conceals the fact of pregnancy until shortly before delivery and arranges for her child to be born somewhere outside of the household—in modern times in a maternity hospital.

For Kaale feud, the relevant unit is the household, not, as among the Romanichal, the individual. All households are considered peers and there exists no mechanism above the household for peacefully settling disputes. Conflict within the household is settled internally in a society in which authority is centered in male elders. Violation of *marimé* rules leads to a loss of status and honor by the group whose member is responsible, providing an incentive to prevent such violations by enforcement within the household. The same is true for the Vlach Rom at the level of the *vitsa*.

Conflict between individuals of different households, if sufficiently serious, leads to duels between the parties under rules designed to reduce the risk of death or serious injury. If death or serious injury does occur, the result is a blood feud between the kin groups of the parties. The feud can be pursued by any member of the group one of whose members was killed or injured against any member of the other group, although in practice women or children are unlikely to be targeted, the responsible individual in the other group particularly likely to be. Successful retaliation exchanges the position of the two kin groups. There is no equivalent of the court procedures or arbitrated settlements that terminated Icelandic feuds. While these rules could lead to a succession of killings, in practice feud mostly takes the form not of violence but of avoidance—of all members of each kin group by all members of the other.

As these examples demonstrate, the different Romani groups have much in common. What seems at first glance to be a difference in kind is often only a difference in degree. All three groups have similar rules of pollution, differing in detail. The Vlach Rom may settle their disputes in a *kris* but they conduct them, like the disputes of Kaale and Romanichal, largely by feud. Marriage by elopement is the norm for Romanichal and, in a stronger form, the Kaale, marriage by purchase among the Vlach Rom, but elopement exists for them as a disfavored option.[89]

Explaining the Differences

What are the reasons for the differences among the different Romani groups, all coming out of the same original population and culture? A number of scholars have proposed theories; it is not clear which, if any, are correct.

Thomas Acton, Susan Caffrey, and Gary Mundy, the authors of Chapter 3 of *Gypsy Law* whose account of the Romanichal system is reflected in my description above, offer a conjectural explanation of differences between the Romanichal and the Vlach Rom. They argue that the feud system depends in part on the ability, when all else fails, of one party to walk out on the other and their dispute; absent that, the risk of serious violence becomes too large. Romani have, for most of their history, been a migratory population. But, they argue, there was at least one large exception, the period of four centuries during which the Vlach Rom were enserfed in Romania. Serfdom meant the loss of mobility. They conclude that the feud system represents the original institution, the *kris* and associated institutions an adaptation to the special circumstances of serfdom arising among the Vlach Rom and based on institutions of the Romanian peasantry.

It is an ingenious conjecture, but Marushiakova and Popov, who have studied a much larger variety of Romani groups, find that the pattern does not hold:

> "Some authors have looked at the Gypsies' marriage traditions, which are connected to their way of life. Allegedly, the two possibilities are (a) nomadic life style + elopement = feud system of private vengeance, or (b) settled way of life + arranged marriages = kris (Acton, Caffrey, and Mundy 2001: 89—100; Acton 2003: 646). However, our data refute this model and show that the reality is much more complicated, not allowing such simplified conclusions."
>
> "… it is certain that most (but not all) Gypsies who are or used to be nomadic have or had a Gypsy court, while the court is not known among permanently settled Gypsy groups."[90]

Marushiakova and Popov argue that enserfment in Romania did not necessarily conflict with nomadism, undercutting the explanation of why they had to develop the *kris*. Some Romani were tied to the land but others remained

mobile, owing annual dues to their owner[91] but with a considerable degree of both freedom and legal autonomy.[92]

A similar issue arises for the difference between feud as practiced by the Romanichal and feud as practiced by Kaale—more generally, between the individualism of the Romanichal and the household-based society of the Kaale. Martti Gronförss, on whose account of the Kaale mine is based, suggests that the pattern of Kaale blood feud is one reason for Kaale non-marriage. Mating among the Kaale is exogamous, pairing within the household strictly forbidden. The recognition of a stable relationship created by sexual partnership and reproduction would create kinship links between households, subverting institutions based on autonomous and coequal households. Under institutions of non-marriage, one partner resides in the household of the other's kin as a sort of resident alien. Blood feud involving the household of one partner does not concern the other or his kin either as participants or potential targets. If a blood feud arises between the households of partners the result is the immediate and complete severing of the connection between them, with the one who was dwelling in the household of the other's kin returning to his or her own kin's household.

Peter Leeson offers a different explanation of differences among Gypsy groups, in his case between the Kaale and the Vlach Rom.[93] The Vlach Rom law enforcement system depends on a crucial feature of the *marimé* rules: contagion. The fact that *marimé* is contagious makes it in the private interest of each individual Rom to shun anyone infected with it. That makes it less likely that members of the society will break ranks in order to take advantage of opportunities for interaction with someone who has been ostracized.

Since all non-Rom are carriers of *marimé*, the fact that it is contagious also blocks interaction with non-Rom and so makes the individual Rom dependent on his ability to associate with his fellow Rom. Thus contagious *marimé* solves, for the Vlach Rom, some of the problems of enforcing rules of intra-Rom behavior. It is, however, a costly solution. Each individual must be careful to obey the elaborate pollution rules of *Romania*. Each individual must monitor those around him to avoid associating with someone who has violated those rules and is thus polluted.

There are, Leeson argues, two major sources of intra-Rom conflict among the Vlach Rom—marriage relations, in particular disputes over the return of bride price when a marriage fails, and economic associations beyond the *familia*, the extended family. Neither exists among the Kaale. With no institution of marriage there is no issue of bride price. With economic interaction almost entirely within,

not across, households, there are few opportunities for disputes across households. The Kaale version of *marimé* is not contagious and cannot be caught from non-Romani. Male *Kaale* are free to have sexual relations with non-Romani women and under no obligation to conceal them. For male Vlach Rom, such relations would be polluting and openly admitting them would result in ostracism. The *Kaale*, with less need for mechanisms to enforce rules outside the household, have no institution of *kris*.

One question raised by the *marimé* system is to what extent it is supported by religious/magical belief, to what extent convention. Insofar as people believe that pollution brings bad luck and disease, the rules are in effect self-enforcing. On the other hand:

> "In private a woman may step over her husband's clothes, pass in front of him, or touch him with her skirts, but she would be very ashamed to do this in public, and if she lapsed in her conduct several times her husband would risk becoming *marime*.[94]

That is not how you would expect moderns to treat a contagious disease. The same issue is raised by other societies and legal systems we will be looking at in later chapters. One is reminded of George Orwell's comment that "Never, literally never in recent years, have I met anyone who gave me the impression of believing in the next world as firmly as he believed in the existence of, for instance, Australia."[95]

Defensive Strategy

One way in which an embedded system can defend itself against the system it is embedded in is to use control over information to substitute for control over physical force. I started this chapter by reporting a range of estimates for the world population of Romani. That the estimates range over almost an order of magnitude is not an accident. Romani do not wish to be controlled by *gaje*. It is hard to control people if you cannot count them and it is hard to count people when there is no one to one correspondence between person and name.[96] Romani, at least the Vlach Rom, the largest and most studied group, treat a name used in dealing with outsiders as fungible, belonging to the extended family to be used by any member who finds it useful. By this tactic and others, modern Romani have made it difficult for the states that claim authority over them to monitor and control them.[97] That may explain the fact that although the Nazis targeted Romani as well as Jews for extermination, they seem to have been considerably less successful in the former case. Both the total number of European Romani and the number killed are uncertain, but it is estimated that about three-quarters of the Romani survived.[98]

> It soon became clear that these are people who, through centuries of experience in avoiding the prying questions of outsiders, have perfected their techniques of evasion to an effortless art. They delight in deceiving the *gajo*, mostly for a good reason, but sometimes just for the fun of it or to keep in practice.[99]
>
> Anonymity and invisibility combined with intense secretiveness are keys to the ability of the Rom to adapt and survive in an alien culture. Most are not registered at birth, in school, in a census, or with draft boards. Outside police records and welfare departments officially they do not exist. Even when they do have a name officially registered, it is usually not their own, and they may claim to be Mexican, Indian, or anything else besides Gypsy.[100]

This approach has become more difficult as increasingly bureaucratic states have made increased efforts to keep track of their residents, taking advantage of a variety of modern technologies.[101]

3. The Amish[102]

> "Amish communities are not relics of a bygone era. Rather, they are demonstrations of a different form of modernity." (Hostetler 1980)

The Amish are a protestant sect that split off from the Swiss Anabaptists in the late seventeenth century; starting in the mid-eighteenth century, many of them settled in America. Over the past century their population has expanded rapidly, due to the combination of a high birth rate, modern medicine, and a high retention rate; there were about 5000 Amish in 1920 and about 249,000 in 2010.[103] They are notable for plain dress and their selective rejection of many of the devices of modern technology, such as automobiles and telephones. Their view is not that modern technology is wicked but that some specific technologies are likely to disrupt their social system and should be rejected on that account. Thus Amish use battery powered devices but refuse to connect to the power grid, permit (in some affiliations) tractors but only if they have metal rather than rubber wheels and so are not suitable for on road transportation, in some cases use power hay bailers pulled through the fields on horse-drawn wagons.

While subject, with a few narrow exceptions, to U.S. and Canadian law,[104] the Amish have succeeded in maintaining their own systems of rules (*Ordnung*) and enforcing them on their members, ultimately by the threat of excommunication and shunning (*Meidung*). The details of what technologies may be used in what way depend on the *Ordnung* of the particular congregation.

The Congregation

The basic unit of an Amish community is the congregation, typically of twenty-five to forty households; there is no higher level with authority over the individual congregation. Since the Amish are unwilling to build churches or meeting houses, the number of households in a congregation is limited to the number that will fit in a large farmhouse or barn.[105] Each congregation has its own version of the *Ordnung*, some stricter and some less strict than others. Congregations whose *Ordnungen* are about equally strict may be in fellowship with each other, making them part of a single affiliation. Potential marriage partners are largely, but not entirely, from the same affiliation. A member banned from one congregation is unlikely to be accepted by another of the same affiliation, while a member banned from a particularly strict ("low") congregation for violating their *Ordnung* may be acceptable to a less strict ("higher") congregation.[106] A settlement, a group of congregations in the same geographical area, may consist of a single affiliation or of several different affiliations;[107] an affiliation may be limited to one settlement or scattered across several.[108]

The typical congregation has a bishop,[109] two ministers, and a deacon, all of whom normally serve for life and none of whom have any formal training. They are unpaid. Ministers and deacons are selected by lot out of a group of men nominated by the congregation; church members whisper a candidate's name to the deacon. Nomination requires two (in some districts three) votes.[110] The bishop is selected by lot from among the ministers.[111]

When a congregation becomes too large to fit in a house it splits, often along some convenient boundary such as a road or stream.

The *Ordnung*

The *Ordnung* specifies the rules that members of the congregation are required to abide by. Typically they include prohibitions on activities such as filing a law suit, serving on a jury or joining a political organization, along with the use of those modern technologies viewed as likely to disrupt the Amish social system;[112] the details of what is prohibited and how strictly vary from one congregation to another.

Thus, for example, the Ordnung of an Old Order Amish congregation will forbid members from owning or driving automobiles or having a telephone in the house. Both rules encourage an inward focused social structure, with people interacting primarily with those close to them. For a smaller scale example of the same approach:

> "A young woman explained why the church frowns on central heating systems: 'A space heater in the kitchen keeps the family together. Heating all the rooms would lead to everyone going off to their own rooms.'"[113]

One can argue that the existence of such rules makes the Amish more modern than the rest of us, not less, since they are making deliberate decisions about what modern technologies do or do not fit into their social structure.

The *Ordnung* will also specify features of dress, again varying by congregation. Buttons may be forbidden entirely or permitted only on working clothes, bright colors are for the most part forbidden. Male and female hair styles are prescribed (uncut hair for women, hair down to the earlobe, beard and no mustache for married men). Owning a television, attending college, wearing makeup or jewelry, or flying on an airplane, are all likely to be forbidden. The death of relatives requires women to wear black for a length of time depending on the closeness of the relation.[114] The principle offered to justify many of the rules is that individuals ought to be humble, avoiding anything associated with pride, such as fancy clothing. For similar reasons, Amish are usually unwilling to be photographed. One effect of the rules is to create clear boundaries between ingroup and outgroup, since members are distinguished from nonmembers by dress and appearance.

Twice a year, all members of the congregation gather to take communion. Two weeks before, each is asked "whether he is in agreement with the *Ordnung*, whether he is at peace with the brotherhood, and whether anything 'stands in the way' of his entering into the communion service." Communion does not take place until all members agree. This gives the members an opportunity to openly

express disagreement with the current *ordnung*—but, as a rule, the members accept the clergy leaders' position.

The *ordnung* is specific to the congregation, which has no legislature. What changes the *ordnung* is the practice of the members and the response to it by the leadership. If enough push at the boundaries of the existing rules without complaint, they are likely to change. Reaching a consensus may take several years and can be prevented if the leaders disapprove of the change. In some cases the congregation retains a rule, such as a ban on owning freezers or telephones, but reduces the resulting inconvenience by permitting members to use freezers or telephones of their non-Amish neighbors. In some other cases, the leadership may decide that something that had been permitted for several years was a mistake and require members to give it up.

Enforcement

If the bishop or ministers learn that a member is violating the *ordnung*, their first step is to visit him. If he expresses regret, the offense will be ignored; this is what Kraybill describes as a "level one" punishment.

If violation continues, the ministers hold a meeting at the next Sunday worship service—worship services are held on alternate Sundays—at which the bishop recommends a punishment. That is followed by a public hearing in the presence of the members of the congregation at which the defendant can offer his side of the controversy. He is then asked to step out and, if his defense has not changed the bishop's conclusion, the bishop proposes the punishment to the congregation, which votes on it.[115] In order for the punishment to be imposed it must be unanimously accepted by the congregation—and it usually is.

> "For a small offense—wearing jewelry or joining a public baseball team—a "sitting" confession (level two) can be made. For more serious offenses—such as traveling by airplane or hiring a car on Sundays—the person may be asked to make a "kneeling" confession (level three) in front of the congregation and to promise to abide by the Ordnung in the future.
>
> "The most severe form of punishment (level four) is a six week ban. During this time, the congregation avoids social contact with the wayward person. … At the end of the ban, offenders are invited to make a "kneeling" confession in a members' meeting. They are asked two questions: Do you believe the punishment was deserved? Do you believe your sins have been forgiven through the blood of Jesus Christ? Those who confess their sin and promise to 'work with the church' are reinstated into it. The meeting concludes with some fitting words of comfort."[116]

If the disobedient member is unwilling to confess his sins and cease violating the rules, the ultimate punishment, after milder sanctions have failed, is excommunication, shunning, *Meidung*. The excommunicated individual is not required to leave the community but is strictly limited in his interaction with other Amish. A young adult can continue to live with his parents and attend church but cannot sit at the dinner table with baptized adults and must eventually leave home in order that his parents can again take communion. The wife of a member who is being shunned must eat at a separate table from her husband and refrain from sexual relations with him; in such cases, the spouse may request excommunication in order that the couple will not have to shun each other. A member who knowingly eats with someone who is shunned is likely to be himself shunned, but not if he did so unknowingly. "Although interaction with expelled people is severely restricted, it is not completely terminated. Limited social conversation is permitted, but church members are advised not to deal directly with the outcasts or accept anything from them. For instance, members will not accept a ride in the car of a former member who joins the Mennonites.

Members avoid business dealings with those 'under the ban.' If a member sells something to an outcast, the member does not accept payment directly from the other person's hand. Sometimes a third party will handle a necessary business or social transaction. In other cases, the stigmatized person places the money on a table or counter, after which the church member picks it up" (Kraybill 1989, 116).

An excommunicated member who is willing to confess his sins and repent will normally be readmitted to the congregation, usually within a few weeks.

Shunning can be used not only against violations of the terms of the *Ordnung* but also, as with the Vlach Rom, against a community member who refuses to accept the congregation's settlement of a dispute with another member.[117]

Youth

Amish children are expected to help the rest of the family with chores within their ability—babysitting younger siblings, weeding, milking—from an early age. They go to school, but only through eighth grade, the Amish having successfully persuaded first state authorities and then the Supreme Court to give them a partial exemption from compulsory schooling laws. After eighth grade they are, in effect, apprenticed to adults in the community, most commonly their parents, learning how to run a farm and a household and, in some cases, learning a trade.

The *ordnung* only becomes accepted by, and binding on, members of the congregation when, as adults, they are baptized. There is thus a period from about sixteen until twenty or so when a young adult is, to some degree depending on the congregation, free to act in ways normally forbidden, a period referred to as *Rumspringa*. That may include going to town to see a movie, party, work in town at jobs that would otherwise be seen as inappropriate, even (covertly) get a driver's license and drive a car.[118] This provides an opportunity for youth to compare life outside the Amish community with life inside before making their final decision. For the most part, however, Amish youth on *Rumspringa* are interacting only with other Amish youth.

That final decision is whether to accept baptism and submit to the *ordnung*. Prior to the ceremony, ministers offer the young adult the opportunity to back out, telling him that "it is better not to make a vow than to make a vow and later break it …" A large majority, by one estimate four out of five, choose to take the vow.

The period of *rumspringa* is also the time of life during which the young Amish are courting their future mates. The process is accepted but nominally secret. The young man will drive to the group social gathering with his sister in daylight, back with his girlfriend at night, and refers to her as "she" rather than by name; the fact of who he is courting only becomes public knowledge when they are about to marry. In order to marry within the Amish community, the couple must have first been baptized, which may be the incentive to finally decide on that commitment. Intermarriage is permitted among congregations that are in fellowship with each other; an individual from a less strict group can marry into a more strict group only if the couple is willing to adopt the latter group's rules.

Democracy or Competitive Dictatorship?

Decisions made by the congregation, considered as a miniature state, are punishment and the contents of the *Ordnung*. Control over those decisions implies control over the membership of the polity and the content of its legal system. In most congregations—the exceptions are some of the most extreme ("lowest") groups,[119] in which the power is in the hands of the bishop—both decisions require the unanimous assent of the members, so one might view the congregation as a very small democracy. Alternatively, observing that the members almost always support the decision of the bishop, one might describe the congregation as a de facto dictatorship, with a dictator chosen in part by chance and ruling for life.

If it is a dictatorship, it is a competitive dictatorship. A member who is sufficiently unhappy with the *ordnung* of his congregation as interpreted by its clergy is free to shift to a nearby congregation better suited to his tastes. Some congregations are, in effect, territorial sovereigns, so that changing congregations requires a geographical move. In other communities, especially where there are congregations with substantially differing *Ordnungen* near each other, it may be possible to shift allegiance with no shift of residence.[120] A bishop whose interpretation of his congregation's *ordnungen* is at odds with what the members want is not subject to impeachment or a recall election but could conceivably find himself with no membership.

In the case of a major split within the Amish, such as occurred in the Lancaster settlement in 1910 and again in 1966, the initial members of the more liberal ("higher") group are not subject to excommunication and shunning by the more traditional ("lower"). But if the higher group accepts members who are under ban and have not confessed, anyone who thereafter joins it will be banned.[121]

Such a system can be viewed as a competitive market for legal rules, constrained, like other competitive markets, to produce the product that the customers want.[122] Competitive dictatorship is the mechanism we routinely use to control hotels and restaurants; the customers have no vote on what color the walls are painted or what is on the menu but an absolute vote on which one they patronize.

The oldest major settlement, in Lancaster County, has developed a semi-formal level of government above the congregation level, a biannual meeting of bishops to discuss issues such as changes in the *ordnung*. While the meeting has

no formal authority over the individual congregations, the opinions of the senior bishops carry considerable weight, so that a decision to (for example) forbid some controversial practice is likely to be implemented by most congregations. Similar meetings of bishops and other clergy occur on an annual basis in some other settlements.[123] One might view that as a first step in the direction of creating a level of government above the congregation.

Relations with the “English”[124]

In some ways, such as the maintenance of their own rules and enforcement by the threat of shunning, the Amish resemble the Romani described in the previous chapter. One difference is their relation with non-members. Romani in most places have been subject to hostility from outsiders and themselves regarded outsiders as ignorant and unclean. The Amish, in contrast, appear to get along with their neighbors in both directions. Non-Amish may view them as quaint but for the most part without hostility and even with some admiration.

Perhaps for that reason, the Amish have done surprisingly well in their relations with the U.S. government. In 1955 Social Security became mandatory for self-employed persons. The Amish objected to participating, in part on the basis that they believed they were religiously obligated to take care of each other and should not be transferring that obligation to the state, in part on the grounds that insurance programs, which Social Security at least purported to be (“Old Age and Survivors' Insurance”), are “gambling ventures that seek to plan and protect one's fortune rather than yielding it to God's will.”[125] Many refused to pay Social Security taxes, with the result that the IRS eventually began filing liens on farm animals and other assets. The conflict was only ended in 1965, when federal legislation exempted self-employed Amish from having to pay Social Security taxes, an exemption later extended to Amish employees in Amish owned businesses.

The Amish, who are pacifists, have usually been granted conscientious objector status by the Selective Service System.[126] As conscientious objectors they were required to engage in civilian service, such as emptying bedpans in urban hospitals. That meant spending two years outside the Amish culture, rooming with non-Amish roommates, possibly dating, even marrying, non-Amish nurses, with the result that only about half of them chose to return to their communities when their service was done and not all of those chose to join the church.[127]

> “Many boys go with good intentions but by having so much idle time, become involved with amusements, with the nurses or in other ways are led astray to the extent that when they could return home and become church members there are so many that no longer prefer to, or are in a position where they find they can hardly do so, with maybe a nurse of a different faith for a wife or similar circumstances.”[128]

Part of the Amish response was the National Amish Steering Committee,

whose primary function was to negotiate with the U.S. government over issues where its rules clashed with requirements of the Amish religion.[129] The Committee's negotiations with the Selective Service System resulted in putting many Amish conscientious objectors on farms run by Amish or Mennonites, growing food as their war work.[130]

Another conflict was over schooling. In the nineteenth century most Amish attended rural public schools, typically one-room schoolhouses; many of the students were themselves Amish, the rest from rural families not too different in their culture and attitudes. Children normally attended school only through eighth grade, thereafter assisting their parents.

In the course of the twentieth century, the age of required schooling was raised by state law and school districts were consolidated, replacing rural one-room schoolhouses with much larger urban schools to which children had to be bussed. The result was one that most Amish saw as intolerable, both because their children were to be kept off the farm too long and because they would be attending schools dominated by cultural attitudes very different from those of their parents.

> "The paramount fear lurking beneath all the other concerns was that modern education would lead Amish youth away from farm and faith, and undermine the church. The wisdom of the world, said Amish sages, 'makes you restless, wanting to leap and jump, and not knowing where you will land.'"[131]

Many Amish parents refused to send their children to large, consolidated schools or to any school past eighth grade. Some went to jail as a result. In Pennsylvania, where the Lancaster County settlement was located, the conflict began in 1937 and was finally settled in 1955 by a reinterpretation of the school code.

> "Under the vocational program, an Amish teacher held classes, three hours per week, for a dozen or so fourteen-year-olds in an Amish home. The youth submitted diaries of their work activities around the farm and home and studied English, math, spelling, and vocational subjects. … in essence, the children were under the guidance of their parents for most of the week … ."[132]

Finally, in 1972, the Supreme Court, in *Wisconsin v. Yoder*, ruled in favor of the Amish right to have their children leave school after eighth grade.

The Amish dealt with the problem created by school consolidation by building and staffing their own local schools. Problems with state regulation of private schools and teachers—the schools were typically one-room schoolhouses without central heating or running water, most of the Amish teachers had only an eighth-grade education—arose but were for the most part eventually worked out.

Conflicts between the Amish and the state over Social Security, schooling,

conscription and a variety of other issues were eventually dealt with in a fashion acceptable to the Amish.[133] In part, this may have been due to the tendency of non-Amish to view the Amish in a favorable light—as a remnant of idealized 19th century rural virtue surviving into the twentieth century.

The relationship is friendly in the other direction as well. Amish frequently have non-Amish friends and often engage in business transactions with non-Amish. Some non-Amish operate "Amish taxi services," providing automobile or van transportation for Amish when they need to go farther than horse and buggy can conveniently carry them. Amish in some affiliations routinely use the telephones of non-Amish neighbors when there is urgent need for communication.

In an earlier chapter, I suggested that in North America toleration might eventually destroy the status of the Romani as self-governing communities by making it too easy for unhappy or ostracized members to defect into the surrounding community. Along similar lines, it is arguable that the emancipation of European Jews, starting in the late eighteenth century, was responsible for the decline of the Jewish communities as effectively self-ruling polities. Yet the Amish have maintained their identity, culture, and *ordnung*, enforcing the latter by the threat of ostracism, despite the lack of any clear barrier to prevent unhappy or excommunicated members from deserting. Such desertion is made easier by the existence of Mennonite communities, similar to the Amish but less strict, which Amish defectors can and sometimes do join.

A critic of the Amish might argue that their upbringing, with schooling ending at eighth grade, leaves potential defectors unqualified for life in the modern world. The obvious response is that there are a lot of jobs in the modern world for which the willingness to work and the training produced by an apprenticeship starting at age fourteen are better qualifications than a high school diploma. As some evidence of the adequacy of Amish education, Amish seem to do quite well at starting and running their own small-scale businesses.[134]

One might more plausibly suggest that a social system in which courting your future mate may start as early as fourteen leaves many young people locked into a future marriage well before the point at which they have to decide whether or not to commit themselves to the Amish lifestyle—and it is a future marriage with a spouse raised Amish. It would be interesting to know whether, when Amish do choose to leave prior to baptism, they usually do it one by one or in couples.

One could also argue that the close bonds of Amish families create a form of lock-in. Shunning applies only to those who have sworn to obey the *Ordnung*

and been baptized but then fail to live up to their commitment. But, given how much of the life of the Amish is determined by their religion and culture, refusing to commit must create a substantial barrier between those who leave the religion and those who don't. The barrier is higher still for those who have been baptized and so would face shunning if they left the church.[135]

Finally, one might interpret the low defection rate as evidence of successful indoctrination into the negative view held by the Amish of the lives lived by non-Amish.[136] Reading books on the Amish, all positive, all written by sympathizers,[137] one is struck by how dark their picture of the outside world is. It is a world where people spend most of their efforts in competitive endeavor and display, in keeping up with the Joneses, where lives are divided among the almost wholly separate circles of work, family, and church, where little meaningful happens or can happen, a world of boredom and alienation.[138]

There is, of course, one other possibility. Perhaps the Amish are correct in believing that they have a superior lifestyle, as judged by most of those who have lived it and observed the alternative—albeit superior only for those who have had the good fortune to be brought up in it.

4. Jewish Law: A Brief Account

Jewish law may be the best-recorded legal system in the history of the world; there are hundreds of thousands, perhaps millions, of pages of surviving primary sources covering about twenty-five hundred years. They include scriptures, compilations of legal rules, treatises, and *responsa*—the equivalent of cases.[139] This chapter provides only a brief account, based mostly on one medieval source, Maimonides' *Mishnah Torah*, and one modern source, *Jewish Law: History, Sources, Principles* by Menachem Elon.

History

The dynasty of kings of Israel of whom Solomon and David are the most famous was ended and the first Temple destroyed by the Babylonians in 586 B.C. After the end of the Babylonian captivity, Israel was under Persian and then Greek (Seleucid) rule, with local power in the hands of successive pairs of religious authorities. The Maccabean revolt against the Seleucids, 167-160 B.C., reestablished Israel as an independent kingdom with its own king.

After the Roman conquest in 63 B.C. the kingdom of Israel ceased to exist as an independent state, becoming subject to first indirect and then direct Roman rule. The second Temple, which played an important role in legal and religious matters, was destroyed by the Romans in 70 A.D. The Bar Kochba revolt of 132-136 A.D. resulted in many Jews being killed, emigrating, or being sold into slavery, ending the role of Israel as the effective center of Judaism. Thereafter, until the establishment of the State of Israel in the 20th century, the Jewish population consisted of dispersed communities living under the authority of non-Jewish rulers.[140]

Such communities were subject from time to time to persecution or even expulsion. But for the most part, they enjoyed judicial autonomy. Gentile rulers, Christian and Muslim, found it convenient to subcontract the job of ruling—and taxing—their Jewish subjects to the local Jewish authorities. The ruler set the total tax burden to be imposed on the community, the local authorities were responsible for allocating it among the residents and settling disputes among the community's members. Thus Jews in the diaspora lived largely under Jewish law.

In some cases the delegation of authority seems to have been carried to extraordinary lengths. Under Jewish law, informing, giving Gentiles information about a fellow Jew injurious to him, was a crime. At some times and places, informing three times was a capital offense. Someone convicted of a capital crime was executed by the mundane authorities. It follows, if Elon's account of the situation in Spain is correct, that under some circumstances the Gentile authorities were willing to execute a Jew for the crime of betraying information about other Jews. Betraying it, presumably, to the Gentile authorities.

> "If the guilt of the informer is proved by two witnesses, he shall receive one hundred lashes for the first offense and be banished from the place of the offense, in accordance with the decision of the rabbi, the judges, and the communal leaders; for a third offense, the Court Rabbi may order him to be put to death, in accordance with Jewish law, through the legal officials of the king.[141]

This situation was ended by the emancipation, the freeing of European Jews from legal restrictions, beginning in Europe in the late eighteenth century. Increasingly, Jewish inhabitants of European states were treated as ordinary citizens subject to the same laws as everyone else. Jewish law remained relevant to issues such as marriage, divorce, and dietary rules but became increasingly irrelevant to most of the ordinary subjects of civil and criminal law.

Problems of Divine Law

Jewish law was, in theory, based on a single unchangeable source—the Torah, aka the Pentateuch, the first five books of the Old Testament. Basing the law in this way rather than on custom, precedent, or legislation raised two problems shared with other legal systems similarly based, including *Fiqh* (Islamic Jurisprudence) and American Constitutional law.

One was the problem of legal uniformity: If judges, who were also legal scholars, disagreed about the meaning of the possibly ambiguous text, how were their disagreements to be settled? In a system that views law as the creation of a legislature, king, or court of last resort, the same authority that made the law can settle disagreements about it. That does not work for a legal system viewed not as created but as discovered, deduced from divinely inspired sources. No scientist believes that whether a scientific theory is true can be determined by majority vote, that if enough scientists had disagreed with Newton stones would have fallen up instead of down. No more can an Islamic legal scholar believe that whether a *hadith*, a tradition of the prophet, is true or spurious is determined by majority vote of the scholars of tradition or a Jewish sage hold a corresponding belief with regard to an interpretation of the *Torah*. Yet, in order for a legal system to function, there must be some way of determining what the law is.

A second problem was how to change the law. If legal authorities[142] concluded that some of the divinely inspired rules were mistakes or had been rendered obsolete by changed circumstances, how could they be revised? The history of Jewish law is in large part the history of solutions to those two problems.

The Problem of Legal Uniformity

The initial solution to the problem of legal uniformity was a simple one. Truth is not determined by majority vote but law can be. Basing their view on a verse in the Torah advising people, if there were disagreements about difficult legal issues, to accept the view of the majority, the legal scholars took the position that the interpretation to be followed by judges was determined by the view of the majority of legal scholars. Starting in 191 B.C., this doctrine was implemented through the Great Sanhedrin, a combined legislature/supreme court made up of a fixed number of legal authorities. Disputed questions of law reached it through a series of lower courts to be decided by a majority vote of its members. Judges who disagreed were free to continue to argue for their position but required to

judge cases according to the majority view.[143] With the demise of the Great Sanhedrin—its last official judgment was given in 358 A.D.—the doctrine that the law was in accord with the views of the majority was implemented through less clearly defined reputational mechanisms.

Defining law by the views of the current majority—one part of the doctrine as it developed was that the law was in accord with the views of the later, hence in the limit still living, authorities—created a tension between law and religion. If a legal scholar disagreed with the majority view on what made food pure or impure, was he obliged to consume offered food that, in his view, God forbade him to eat? To destroy food that, in his view, was entirely kosher?

> Raban Gamliel accepted the testimony of witnesses with regard to when the New Moon for the month of Tishrei appeared. R' Yehoshua and R' Dosa, observing the New Moon on the following night, rejected R' Gamliel's establishment of when the month of Tishrei began. As a result, this would have prompted followers of the dissident Rabbis to observe the High Holidays on different days than the followers of the official calendar. R Gamliel ordered R' Yehoshua to appear before him on the day R' Yehoshua deemed Yom Kippur with his walking staff, wearing leather sandals, and carrying his money purse. i.e., publicly treating the day R' Yehoshua proclaimed Yom Kippur as a non-holiday. R' Yehoshua accepted the verdict and appeared before R' Gamliel as specified. R' Gamliel comes forth and embraces him and calls him “My master and my disciple, My master in wisdom, but my disciple for you must accept my words.”[144]

It is more important that there be a single answer than that the answer be correct and it is the view of the majority faction—Gamliel was the head of the Great Sanhedrin—that prevails.

That case involved a factual disagreement. The same issue for legal disagreements arose in the disputes between the schools of Hillel and Shammai, two prominent legal scholars who, in the first century B.C., taught different interpretations of the law, a disagreement continued by their students through several generations.

For some time, the two schools, while debating their views at length—sometimes with one persuading the other, sometimes not—maintained amicable relations. Members of each were willing to eat in the houses of members of the other school and to marry their daughters, despite potential problems with differing views on ritual purity, the law of marriage and divorce, and similar issues.

Both the final breakdown of toleration and the policy of preferring legal uniformity over religious truth are summed up in the Talmudic account of the debate concerning the oven of Akhnai between Rabbi Eliezer, a leading figure viewed as sympathetic to the school of Shammai, and the sages, led by Rabbi Joshua. An object of clay such as an oven that had been rendered impure,

polluted through some agency such as contact with a corpse, could be purified by being broken up. The question was whether a clay oven that had been broken up and then reassembled with sand between the pieces was ritually pure or impure.[145]

After R. Eliezer had brought out multiple arguments for his position without persuading his opponents, he finally put the question to God. “If the Halakhah is in accord with me, let this carob tree prove it.” The carob tree promptly uprooted itself and was moved 100 cubits away—by some sources 400 cubits. R. Joshua's reply? “No proof can be brought from a carob tree.”

The debate continued and R. Eliezer produced two more miracles in support of his position; R. Joshua remained unconvinced. Finally, Eliezer called out for more direct support, and a heavenly voice responded: “Why do you debate with Rabbi Eliezer, seeing that in all matters the *Halakhah* is in accord with him.”

R. Joshua replied, “It is not in heaven.” His position was summed up by another Rabbi as “The *Torah* has already been given at Mount Sinai. We pay no attention to a heavenly voice because You have already written in the *Torah* at Mount Sinai, 'Follow the Majority.'” The law had been entrusted to the care of man. It was no longer God's view that mattered but the view of the human sages, not objective truth but a human decision rule. God's view might determine what was true but the view of men, halakhic authorities, determined what was law.

A third Rabbi, wanting a view of the story from the other side, asked the prophet Elijah what God had been doing in heaven during the debate. “He smiled, saying, 'My children have bested me. My children have bested me.'“

The sages, unconvinced by either arguments or miracles, put Eliezer under ban, excommunicated him. In the talmudic account, the ban on R. Eliezer has catastrophic consequences. A third of the wheat crop, a third of the barley crop, and a third of the olive crop are destroyed, followed by additional signals of divine wrath. A gigantic wave almost sinks the ship carrying Rabbi Gamliel, the head of the Great Sanhedrin and a leader of the majority faction; he saves himself by informing God that what was done with regard to R. Eliezer was not for his own honor or that of his kindred but to preserve the people of Israel.

R. Eliezer’s wife is the sister of R. Gamliel. She forbids her husband from falling on his face in petitionary prayer. Eventually, when she is distracted, he does—and Gamliel promptly dies.[146]

A second story describes how the conflict between the two schools was finally ended—by a heavenly voice that said “the words of both are the words of the living God, but the law is in accordance with the school of Hillel.”[147]

Seen from inside the belief system, the story of the oven of Akhnai suffers

from a consistency problem: Why did the sages not take God's word for which side of the argument was right and change their votes accordingly? Seen from the outside, however, the story can be interpreted as the solution to a serious danger. The basis of Jewish law was supposed to be divine authority transmitted through the prophet Moses. What prevented a charismatic leader who claimed to speak for God from setting himself up as a new final authority on the law? Real miracles are in scarce supply but apparent miracles may not be. Hence the story can be seen not only as justification for the suppression of the school of Shammai but as a prophylactic measure to prevent future splits due to charismatic leaders.[148]

There is an interesting parallel between the conflict between the two schools of Jewish law, ending in the victory of one of them, and the development of Muslim law almost a thousand years later. In the early centuries of Islam, Sunni legal scholars divided themselves into four schools of law named after, and to some degree based on the teaching of, four of the early legal scholars. The schools differed in details of legal interpretation but regarded each other as mutually orthodox—and still do.

While the Great Sanhedrin functioned, it provided a mechanism for settling disputes over the law. For some centuries thereafter, the prestige of the Babylonian academies was sufficient to provide a substitute. As that declined, the problem reappeared.

One solution to the problem of legal diversity was the development of geographical schools. Judges in France mostly went by the legal opinion of whoever was currently the most prominent legal scholar among French Jews, and similarly in the other centers. Many legal authorities produced books summing up their views; judges in one area might decide to accept the conclusions of one such book as their law, judges in another area decide to accept another. Eventually a broader split developed between Ashkenazim, mostly in Europe, and Sephardim, mostly, after the expulsion from Spain in 1492, in North Africa and the Middle East.

Such a book might, like the Mishnah, cite arguments for alternative interpretations of the law from a variety of sages, possibly giving the author’s opinion on which was to be preferred, leaving the judge free to choose among them. It might, like the *Mishnah Torah* of Maimonides, give to each question only one answer, leaving a judge to either accept that answer or research alternative views on his own. The argument for doing it that way was that few judges had the abilities needed to extract an answer from the enormous and disorganized mass of halakhic scholarship. The argument for reporting multiple

views was that Maimonides was no more an authority than other great scholars of the past, so a judge should look at all of their opinions, not just his.

The eventual solution was to do both. Joseph Caro wrote one volume, the *Bet Yosef*, that provided multiple arguments from different authorities and a second and shorter volume, the *Shulhan Arukh*, the "Set Table," that gave only the conclusions.[149] A judge could look up the answer to any legal problem in the *Shulhan Arukh* and, if unhappy with it, go to the *Bet Yosef* to see the variant opinions of other authorities.

To reach the conclusions presented in the second book Caro should, with infinite time and knowledge, have gone through the entire literature relevant to each legal question and worked out for himself the right answer to each. Recognizing that doing that was beyond his powers, he took a short cut. He selected three scholars whom he considered the leading authorities, Maimonides among them. On any question where at least two of the three agreed on an answer, he accepted it. Where no two agreed, he extended his search to a few slightly lower-level authorities and based his conclusion on their views as well.[150]

Two of the three authorities Caro relied on were, like Caro, Sephardic. Moses Isserles wrote a supplement to the *Shulhan Arukh* giving the conclusions of the Ashkenazi authorities where they differed from those of the Sephardic. He called it the *Mappah*, the "Tablecloth" on Caro's table. The two works, along with some additional commentary on the *Shulhan Arukh*, eventually became and still remain the standard sources of Rabbinic law for most of the diaspora. It did not fully solve the problem of legal uniformity, both because a few areas failed to accept Caro's work[151] and because it was still possible for a judge to reject Caro's conclusion in favor of the view of one of the authorities that he had rejected. But it provided a single source that, for most questions, gave answers that most judges were willing to accept.

One problem raised by legal diversity, starting in about the 13th century, was an argument that could be offered by the defendant in a civil case—a *Kim Li* plea. In order for the court to rule against him it had to be certain that he was guilty. Even if the facts of the case were clear, there might remain legal uncertainty. So long as at least two of the recognized authorities, living or dead, supported a reading of the law under which the defendant was innocent there was reasonable doubt, hence he could not be convicted.[152]

This can be seen in the responsa of Samuel Di Medina, a sixteenth-century Ottoman Rabbi and one of the first to employ the Kim Li plea: "it is common parlance of the contemporary decisor, that where there is disagreement among the Rabbis, a civil defendant can say 'I hold' (Kim Li)

> like X (decisor), even if it is a minority view…since the law is uncertain and we maintain the burden of proof is upon he who seeks to extract from another, and since we cannot adduce it, since no one exists in this generation who can (conclusively) decide, therefore the money should stay where it is…"[153]

The need to resolve that problem was one argument in favor of recording and teaching the law in the form of an unambiguous account of what the rules were rather than an account of arguments for and against alternative interpretations.

The Problem of Legislation

A second problem faced by a system based on a fixed and authoritative legal text is how to change rules unsuited to current conditions or add new rules to deal with issues not covered in the original. The biblical answer is clear: no commandment is to be removed, no commandment is to be added,[154] the law must remain as God made it.

The first and simplest solution to this problem was interpretation (*Midrash*). Much of the text was arguably ambiguous, so scholars could and did interpret it to fit what they believed it ought to say. Since the text itself authorized the scholars to resolve ambiguity by majority vote, they could reasonably claim that they were not modifying Torah but obeying it. Over time, elaborate rules of interpretation developed, some of which made it possible to read into details of the wording of biblical verses additional commands.

Support for this practice was provided by the doctrine of the oral Torah. This, it was held, was a supplement to the written Torah transmitted by God to Moses on Mount Sinai and from Moses in a chain of oral transmission down to later scholars. The oral Torah provided, among other things, interpretations of the text of the written Torah. Hence scholars could defend on its basis interpretations that could not have been plausibly derived from the actual language of the text.[155]

Consider the case of the disobedient son. The Torah prescribes death by stoning for a son who defies his parents. Some legal authorities chose to read into the wording of the biblical verse requirements that could not in practice be satisfied—for instance that the mother and father bringing the accusation must have identical voices and be identical in appearance. Maimonides argued that a boy below the age of thirteen could not be held responsible, that a boy of thirteen might impregnate a woman, a fact that would be known in another three months or so, at which point he would be a father not a son, hence that the prescription could only apply to a boy aged more than thirteen and less than thirteen and a quarter.[156] In his view, supported by a passage in the Babylonian Talmud, the

combined effect of the restrictions that could be read into the biblical passage was that the stated rule never had been and never would be applied.[157]

The next step was to interpret Torah[158] as authorizing not merely interpretation but rabbinic legislation, including legislation permitting acts forbidden by the Torah or forbidding acts permitted, even required, by the Torah. A variety of arguments were offered for the appropriateness of such legislation. They included the claim that additional prohibitions constructed a fence around the Torah, preventing people from doing things even close to what was forbidden, and thus made forbidden acts less likely. Also the argument from necessity, that "It is better [one letter of] the Torah should be uprooted so that the [entire] Torah will not be forgotten by Israel." Also the claim that the legislation in question was only temporary.[159] The prohibition against adding to or subtracting from the rules of the Torah was held to imply only that other legislation was on a lower level, did not claim the same biblical authority as the law of the Torah. Such legislation however could and did authorize the performance of acts forbidden by biblical law[160] and the omission of acts required by it.[161]

Under biblical law, all debts were to be cancelled every seventh year. This raised a problem for someone who wanted to borrow money in the sixth year from a lender who could not expect ever to get it back. The problem was recognized in the original text, which urged lenders to lend to their fellows even in the sixth year. It was eventually dealt with by Hillel, who constructed a legal form, *Prosbul*, which permitted the creation of a debt immune from cancellation in the seventh year.[162]

The Torah forbids Jews from lending to other Jews at interest. Contractual forms were designed to evade that restriction in substance while obeying it in form. Rules about the sharing of profit between partners one of whom contributed capital and one labor were developed in part in an attempt to control such evasions.[163]

The result of these developments was a legal system based in theory on Torah but in fact largely on rabbinic interpretations of Torah, many of them far from the literal meaning of the text,[164] and rabbinic legislation, some of it in direct violation of the text.[165]

While law existed in the written Torah and the teaching and writing of legal scholars, there was no written code, at least none that we know of, until the production of the Mishnah in about 200 A.D. Unlike a modern law code, the Mishnah did not state what the law actually was. Instead it offered arguments attributed to sages of the past for alternative interpretations of the law, rather like

a modern case book. Later scholars believed that Rabbi Judah haNasi, the author of the Mishnah, signaled which of the interpretations he thought correct by the way in which he referred to them.[166]

The Mishnah was followed by several centuries of scholarship and debate, mostly in the Babylonian academies but also in centers of Jewish learning elsewhere, especially in Israel, over its meaning and implications. The record of those debates, along with the Mishnah itself, made up the two Talmuds—the Babylonian Talmud, produced in the Babylonian academies, and the shorter, less complete and less authoritative Jerusalem Talmud.

One might expect several centuries of argument over the meaning of a law code to result in some degree of clarification, but the actual result was the opposite. The Mishnah is ambiguous because it reports the different views of different sages. The Talmud adds additional ambiguity by presenting variant interpretations of those views.

Consider the question of tort liability when someone stumbles over a jug left in the public path.

> *Mishnah*: He who leaves a jug in the public domain, and someone else came along and stumbled on it and broke it—[the one who broke it] is exempt.[167]
>
> *Babylonian Talmud*: *They said in the household of Rab in the name of Rab*, "We deal with a case in which the whole of the public domain was filled with barrels."
>
> Samuel said, "We deal with a case in which the jugs were in a dark place."
>
> R. Yohanan said, "We deal with a case in which the jug was at a corner."[168]

All three conclude that the traveler normally is liable for the damage, in direct contradiction to the plain language of the Mishnah which they interpret as applying only to a special case.

Once the Talmud was complete, legal scholarship was built on top of three layers. The first was the *Torah*. That was followed by rabbinic legislation and commentary and interpretation based on the *Torah*, culminating in the Mishnah. That was followed by commentary on the Mishnah, culminating in the Talmud. Scholarship thereafter consisted largely of commentary on the Talmud, which had the previous two layers embedded in it, along with additional legislation. Further layers were added as one or another work based on those sources—the *Mishneh Torah* of Maimonides is one example—itself became the subject of further commentary.

Communal Authority

Over time a further issue arose in the communities of the diaspora—communal legislation. Both biblical and rabbinic law applied to all Jews everywhere. If the special circumstances of a community required special legal rules, how were they to be produced? If the community did not contain a sufficient number of individuals learned in the law, who was to produce them?

The solution was to hold that the communal authorities could function both as a court and as a legislature. One basis for that was the Talmudic dictum holding that the judiciary has an absolute right to transfer and annul ownership and other monetary rights.[169] While this was limited to the high court or the generation's greatest authority, it was argued that each community was its own high court for the issues pertaining to itself. Another basis was the idea that the community could be considered like a legal partnership, hence could determine issues just as disputes between partners could be resolved by a majority vote.[170]

A final and perhaps most telling justification was that the communal regulations were necessary for the survival of the Jewish community in an environment very different from that in which the religious law had developed.

How far the argument was carried varied from time to time and place to place. According to one version, if there was at least one legal scholar in the community the communal authorities could legislate only with his approval.[171] If there were none, they had a free hand.

A further distinction had to do with what the limits were. It was argued that the communal authorities had a free hand with regard to *mammon,* laws dealing with the relation between man and man, such as tort, crime, and contract. The rules of *mammon* could be modified for themselves by the parties to a contract, so if the community was thought of as bound by a sort of social contract unanimously assented to, it too could modify those rules for its members. But humans had no power to modify their obligations to God, hence the community was not free with regard to *issur*, religious law.[172]

Some legal authorities held that the communal authorities could forbid what religious law permitted but could not permit what it forbade or forbid what it required. In practice, at least in matters of *mammon*, that restriction was frequently violated. Thus, for instance, courts enforcing secular rules were able to accept witnesses not acceptable under religious law,[173] such as those related to a judge or one of the parties—arguably necessary in a small community where practically everyone was related to everyone else. Courts were permitted to

impose the death penalty without satisfying the extremely restrictive conditions of religious law, such as the requirement that in order for the defendant to be liable to capital punishment he must be shown to have been told, independently by two different people, that what he was about to do was a capital offense.[174] Courts were permitted to imprison debtors for failure to pay their debts, something explicitly forbidden under religious law. The final result was to add, on top of the Talmud and interpretation thereof by legal scholars, a final layer of communal law, varying from community to community.

Attempts by the communal authorities to revise marriage law provide an example of the problems arising from the limited nature of their authority. Under biblical law, marriage required only the assent of the parties, two witnesses, a written contract, and the giving of a ring or similar token by groom to bride.[175] In many of the communities of the diaspora these requirements were seen as inadequate. The solution was to supplement the requirements of biblical law with additional requirements of communal law.

This raised a problem. Suppose a marriage took place that was legal under biblical law, illegal under communal law. The communal authorities held that the bride was not married and so free to marry someone else. But under biblical law she was married; for her to marry someone else was a violation of *Issur*, religious law, which the communal authorities had no power to change.

One solution was to argue that while the marriage was *Issur*, the wedding ring, being a piece of property, was *mammon*. If a marriage was celebrated without satisfying the requirements of the communal authorities, the ring was forfeit to them. Since the groom did not own the ring the requirements of biblical marriage had not been satisfied, hence the bride was not married and was free to marry someone else.

What I find interesting about this solution, other than its ingenuity and somewhat dubious logic, is the reluctance of the communal authorities who offered it to follow through in practice on their legal theory. Over time, fewer and fewer held that it was an appropriate solution to marriages they disapproved of.[176] One possible reason was that marriage law raised issues that cut across communities. Communal authorities could, on this theory, annul a marriage between two members of their own community, but not a marriage between a woman of their community and a man of a different community, since they would have no authority over his property.

Perhaps to avoid this problem, communal authorities fell back on a solution arguably more consistent with biblical law. A marriage under conditions in violation of the communal rules was still a marriage but, like almost any other

marriage, could be ended by a divorce. A divorce required the assent of the husband, but that assent could be compelled by imprisonment, flogging, and similar methods.[177] Once the divorce was given, the wife was free under biblical law to marry in any community. The same solution made it possible for courts to decide that a divorce could be claimed by a wife as well as given by a husband. The wife could not divorce her husband but she could persuade a court to compel her husband to divorce her.

Controlling Whom Your Daughter Marries: Two Legal Systems

Why were the communal authorities so interested in expanding the biblical requirements for marriage? Responsa refer to women married by trickery or fraud, but an alternative explanation is suggested by some of the surviving accounts:

> …but what is not good are the tales God's people spread about, and their gossip and complaints against the young man, Naḥshon, concerning whom there are rumors spreading through the Jewish community that he married her in the dead of a dark night in the presence of two competent witnesses and with the consent of that young woman. …
>
> She herself stated to the court during her interrogation that, looking through the window, she saw two or three men with Naḥshon, the groom … This being so, she was married in the presence of two witnesses … Consequently her contention that she was only jesting is not credible, because it is not a frivolous matter to lower down a crimson cord from the window to get the ring, considering the tenor of what they were saying at the time this was done.
>
> … The girl's father should be persuaded to agree that this is a good match, and this would be to his credit; … (Resp. Naḥalat Ya'akov #57, responsum written in 1615, cited in Elon 1994, 872-3)

> Since the first man did negotiate a marriage to her, perhaps the girl agreed to the marriage even though she later threw away the ring as directed by her mother; … (Resp. raban, IH, III, P. 47b (ed. Jerusalem), 12th century, cited in Elon 1994, 848-9)

Both these accounts and the form of some of the communal restrictions suggest that the restrictions were intended to increase parental control over their daughters' marriage. There are obvious reasons why parents would want such control. The biblical rules, which set twelve years and six months plus signs of puberty[178] as the age of female adulthood and required nothing beyond two witnesses, consent, and the transfer of some item of value from groom to bride with the appropriate words, provided them no way of getting it.

The issue struck me as interesting in part because I had come across it before in the very different context of Anglo-American common law. I quote from my *Law's Order*:

A few years back, while investigating the history of punitive damages, I stumbled across an odd and interesting bit of nineteenth-century law. In both England and America, when a man discovered that his daughter had been seduced he could sue the seducer—even if the daughter was an adult. The grounds on which he sued were that he, the father, had been deprived of the daughter's services. Suits for seduction were thus treated as a special case of the doctrine under which a master could sue for injuries to his servant.

In one case a judge held that it was sufficient basis for the action if the daughter occasionally acted as hostess at her father's tea parties. Once the father had standing to sue as a master deprived of his servant's services he could base his claim not on the actual value of the services but on the reputational injuries suffered by the family as a result of the seduction.

The obvious question is why, given that seduction was considered a wrongful act, the law took such a roundabout approach to dealing with it. The explanation I found in the legal literature was that one party to an illegal act cannot sue another for damages associated with the act. If you and I rob a bank and you drop the loot on the way out, I am not entitled to collect damages for your negligence. Fornication was illegal, hence a seduced woman was party to an illegal act, hence she could not sue for damages. So the law substituted the legal fiction of the father suing as a master deprived of his daughter's services.

It occurred to me at the time that there was another, and perhaps more plausible, explanation. In traditional societies, including eighteenth- and nineteenth-century England, fathers attempt to control whom their daughters marry. One tactic available to a daughter who disagrees with her father's choice is to allow herself to be "seduced" by the man she wants to marry, in the expectation that her father, faced with a fait accompli and possibly a pregnancy, will give his consent. That tactic appears explicitly in Casanova's Memoires, which provide a vivid and detailed first-hand account of life in eighteenth-century Europe.[179]

A legal doctrine that gave the daughter the right to sue would make the daughter's tactic less risky by making it possible for her to punish a seducer who refused to marry her. A legal doctrine that gave the father control over the action gave him a threat that could be used to discourage unacceptable suitors.[180]

Explanations of What May Not Be Obvious

There are a number of features of the legal system that may seem puzzling to a modern reader. They include:

The Burden of Proof and the role of Oaths

Burden of proof is a familiar issue in our legal system, but Jewish law adds an additional complication in the form of oaths. The pattern appears in many places; the following is an example.

Jacob says “I am missing a cow and I suspect that Isaac stole it.” Isaac denies stealing it and there are no witnesses or other evidence. Jacob's case is dismissed by the court.

Jacob says “I am missing a cow and I saw Isaac steal it.” Isaac denies stealing; again there are no other witnesses. It is still a “he said/he said” case, but Jacob is now making a claim certain rather than a claim uncertain; if Jacob is an honest man Isaac is a thief, which was not true in the previous case. The rule this time is that Isaac may “swear and be quit.” If he is willing to swear to his innocence in the prescribed form, Jacob's case is dismissed. If, however, Isaac is unwilling to swear, Jacob prevails; Isaac is found guilty and owes damages.[181]

Shift the facts to make Jacob’s case a little stronger, and now it is Jacob who swears and takes. If he is willing to swear that what he says is true, he wins the case. If he is unwilling to swear, he loses. Shift the facts even further, perhaps by adding two witnesses to the act, and Jacob prevails even without swearing. A further complication, in some but not all cases, is for the party who is obligated to swear to be given the option of shifting the oath. Instead of Jacob swearing to the truth of his claims he requires Isaac to swear to the truth of his. If Isaac does so, he prevails.

A suspect party, one who is known to have sworn falsely in the past or to have violated any of various rules of religious law, is not permitted to swear and so loses in a case where his oath is required for him to prevail—provided that the other party is willing to swear.[182]

This suggests one way in which requirements such as the *kashrut* rules, rules determining what a religious Jew is or is not permitted to eat, may serve a secular purpose. Careful observance of such rules is evidence that the observer believes in the religion, since he is willing to bear substantial costs in order to conform to its requirements. The fact that he believes in the religion means that he will be reluctant to swear falsely, for fear of supernatural punishment. Hence

the requirements provide courts with a lie detector, very useful in settling disputes.

The treatment of these cases in Maimonides suggests two things. First, parties are reluctant to swear falsely, so the willingness to swear provides some evidence of the truth of what they swear to. Second, parties may be reluctant to swear even to what they believe is true, perhaps because they are afraid that if they have made a mistake they will be subject to supernatural punishment or that, if the court mistakenly concludes that they were lying, they will not have the option of swearing in some later and more important case.[183] Oaths play a similar role in other legal systems as well, including Islamic, Romani and Plains Indian law.

"The main part is the enumeration of all the terrible misfortunes which would befall on a perjurer and his entire family should he fail to tell the truth." (Marushiakova and Popov 207, 89, describing oaths among the Romani)

Legal Inertia: Letting the Money Lie Where It Falls

Sometimes the just resolution of a legal dispute is unclear. A tortfeasor owes damages to his victim but it is not certain whether the case belongs in a category that implies half damages or quarter damages. The document describing the amount of a loan is worded ambiguously due to careless drafting. What is the court to do?

The court awards the smaller sum, on the theory that it is not entitled to force someone to give something up unless it has clear proof that he is obliged to, hence it can force the defendant to pay a quarter but not a half, the debtor to pay only the smaller amount consistent with the document. If, however, the plaintiff has seized property of the defendant worth half damages or the lender has seized property corresponding to the reading of the document more favorable to him, the court will not force him to give any of it back.

That seems odd to a modern reader but it makes logical sense. The court is not sure the defendant owes more than a quarter, so will not force him to pay more than a quarter. The court is not sure the plaintiff is entitled to less than a half, so if he has taken half the court will not make him give any of it back. It is no more illogical than a modern court that is confident that one or the other of two suspects is guilty of a crime but acquits both on the grounds that neither can be shown guilty beyond a reasonable doubt.

That feature of the law suggests that the rules we see may have been constructed on top of a system in which parties vindicated their rights themselves rather than relying on courts to do it for them, what I describe in

chapter 14 as a feud system.

Guaranteeing Debts and Uncertain Ownership

A debt can be guaranteed with a pledge—the modern practice of pawning property. It can be hypothecated, guaranteed with the equivalent of a mortgage against a specific piece of property. But the default rule is that a debt is guaranteed by all of the owner's property, initially only his real property but in later law movable property as well.

The effect of that rule runs through substantial parts of the law. Abraham borrows a hundred zuz from Rueben. Abraham subsequently sells a field he owns to Isaac. When the debt comes due, Abraham tells Rueben that he does not have the money to pay it. Rueben goes to court to claim property of Abraham's worth a hundred zuz, only to discover that Abraham's remaining property is worth only fifty. He claims that and in addition claims from Isaac the field that Abraham sold him, or at least fifty zuz worth of it. The field was encumbered by Abraham's debt, hence Abraham could not give Isaac clear title to it.

Isaac, having lost the field he paid Abraham for, now has the right to demand his money back. But he won't get it if, as the sequence implies, Abraham at this point has neither money nor property.

One implication is that it matters when money was borrowed and when land was sold. Land that was sold before the debt was incurred is not encumbered; land sold afterwards is. Another implication is the opportunity for putative creditor and putative debtor to collude in order to swindle a third-party purchaser.

Abraham sells his field to Isaac and then conceals his assets. Rueben claims that Abraham previously owed him money. Rueben has no documentary evidence of the debt—but Abraham does not contest it. If the court believes the claim, Rueben now can seize the field that Abraham sold Isaac, leaving Rueben and Abraham together in possession of both the field and the money paid for it.

Because of such possibilities, the court may be reluctant to accept the existence of an undocumented debt even if both putative creditor and putative debtor support it.

A somewhat similar fraud occurs in modern Internet law. Paul puts up a web page critical of Eugene. Eugene, or a reputation management firm acting for him, commences a legal action for defamation, naming Alexander as defendant. Alexander agrees to an injunction forbidding him from defaming Eugene. The court, not knowing that the page was put up by Paul not Alexander, issues the injunction. Eugene, or a firm acting for him, shows that injunction to Google and

asks it to deindex the page supposedly containing the defamation. Google does so.[184] Someone using Google to search for information about Eugene will no longer find it.

Legal Substance

This chapter so far has focused almost entirely on how the law developed and was justified. Readers interested in the substance of the law can find a detailed account in the *Mishnah Torah* of Maimonides. Volume 4 covers marriage law, volumes 11-14 cover other topics of a modern law code including tort, criminal, contract, and property law, evidence and punishments. Most of the rest of the other volumes deal with religious law. The following sections sketch a few parts of the law.

Momsers and Bastards

The Hebrew "*momser*" is sometimes translated as "bastard" and has that meaning in some modern contexts. In Jewish law, however, it meant someone whose parents not only were not married but could not be. One example would be the child of an incestuous union. Another would be a child produced by his mother's adultery. His father could not have married his mother because she was already married; Jewish law permitted multiple wives but not multiple husbands. A third would be the child of a man by his wife's sister; the law did not permit a man to be married to two sisters. A bastard who was not a *momser*, the child of a couple who were not married but could have been, had the same legal rights as the child of a married couple.

I May Have a Wife Around Here Somewhere

You appoint an agent to find you a suitable wife and betroth you to her. He goes off, doesn't come back, turns out to have died. You now have a problem. He may have completed his mission, in which case you are now betrothed—but you don't know to whom. A betrothal is in effect a marriage not yet consummated and can only be ended by death or divorce.

Why is this a problem? Jewish law permitted a man to marry more than one wife, but not two wives who were sisters or mother and daughter. The solution, assuming that further enquiry neither locates a putative wife nor demonstrates that there is not one, is simple. You are free to marry, but only a woman who has no sister, mother or daughter to whom you might, for all you know, already be married.[185]

And if you think that is an odd problem to worry about, take a look at Maimonides' elaborate discussions of the legal implications of circumstances in

which it is unclear which child belongs to which mother.

> "If five women, each having an assured son, betake themselves jointly to the same secret place and there give birth to five other sons, who then become confused with each other; and if these confused sons grow up, take wives, and die, … ." [186]

The context is levirate marriage, the requirement that the widow of a man who has died without issue be married to one of his brothers in order that he may father a child to be considered the son of her first husband. Avoiding the requirement requires a special ceremony to free the brothers from the obligation.

If someone dies, and it is not known which of five different men is his brother, … .

Tort

Jewish law classifies torts by analogy to four examples: The goring ox, the grazing ox, the pit, fire.[187]

Consider an ox that gores another animal. Under ordinary circumstances, the owner of the ox owes half the damage done to the injured animal up to the value of the animal that did the goring; the assumption is that the owner could not have anticipated the act and so is not fully liable. If, however, the ox has gored repeatedly in the past, the owner has been forewarned of the danger and so is liable for the full amount of the damages—the equivalent of negligence in Anglo-American common law. And there are five species, including wolf and lion, for which the owner is considered automatically forewarned, hence always responsible for the full damage. The modern equivalent is strict liability for ultrahazardous activities—such as keeping a pet lion.

If the ox does damage by grazing on someone else's crop or stepping on someone else's property and injuring it, the owner is liable for the full amount of the damage; those are things oxen normally do, hence the owner is automatically forewarned. That does not apply if the ox is on his owner's property, the public road, or a courtyard used by both parties. But even in such places the owner is liable if the ox gores, kicks, or bites—for half damage if he is not forewarned, full damage if he is.

A pit, unlike an ox, is a fixed hazard. The rule on liability by the owner depends on whether the damage suffered by falling into a pit was predictable. There is no liability if an animal falls into a shallow pit and somehow dies but there is liability for injury due to falling into such a pit.

The fourth category is fire, a hazard that spreads. If the fire starts on your property, the basic rule, as in much of modern tort law, is negligence; you are not

liable if you took what should have been adequate precautions. If you are responsible for kindling a fire on someone else's property, on the other hand, you will be liable for the damage whether or not you were negligent.

Theft and Robbery

Jewish law distinguishes between theft (secret taking) and robbery (open taking). A thief owes the victim twice the value of what was taken[188] unless he confesses voluntarily, in which case he is only obliged to pay the value.

A steals something from B, sells it to C. When the theft is discovered, who has what rights to the property?

The simple answer is that B gets the property back but must compensate C for what he paid for it; it is then up to B to sue A to get his money back. This does not apply if A is a notorious thief, presumably because C should have realized that he was buying stolen property. In that case B gets the property back from C and it is up to C to sue A to try to get his money back. Nor does it apply if the owner has given up hope of recovering his property; in that situation the buyer gets good title to the stolen property. If the thief was notorious, the buyer must compensate the original owner for the value of the property, but not otherwise.

One interesting feature of these rules is that the thief owes compensation but does not receive any other punishment, except in the special case where he is a minor or slave. Not only is there no additional punishment, Maimonides describes situations where the thief has improved the stolen property and is entitled to compensation for doing so.

Perhaps more surprising from the modern perspective, the penalty for a robber is merely the obligation to return what he has taken; unlike the thief, he does not have to pay twice its value.[189] This has one possible downside; on a strict reading of biblical law, a robber who has stolen a rafter and built it into a building must pull down the building in order to return the rafter to its owner. Rabbinic law modified that rule "for the benefit of penitents" to permit the robber in that case to simply repay the value of what he took.

Wounding

Maimonides begins the chapter "On Wounding and Damaging" by listing five effects of an injury that require compensation: Damage, pain, medical treatment, enforced idleness, and humiliation. He then explains under what circumstances the person responsible for the wounding owes compensation for some or all of those categories and how the compensation is to be calculated. For instance:

> "How are damages determined? If one cuts off another's hand or foot, we determine—as if he were a slave being sold in the market—how much the injured man was worth previously and how much he is worth now. The offender must then pay the amount by which he has diminished the other's value, for when scripture says, *an eye for an eye* … it is known from tradition that the word translated *for* signifies payment of monetary compensation."

And, in a passage anticipating by seven centuries the principle of subjective value in modern economics:

> "How is pain assessed in a case where one has deprived another of a limb? If one cuts off another's hand or his finger, we estimate how much more a person of his status would be willing to pay for having his limb removed by means of a drug than for having it cut off with a sword, should the king decree that his hand or his foot be cut off. The difference thus estimated is what the offender must pay for the pain."

Maimonides also considered the situation where the whole was less than the sum of the parts. If a man suffered a sequence of injuries for each of which he was owed damages, the total was capped at the value of his life.

The difference between intentional injury and accidental injury, crime and tort in our system,[190] seems to have been of only secondary importance to Maimonides. Intentional injury makes the party liable for all five effects but so do some (but not all) forms of accidental injury. What we think of as criminal punishments appear to come in only when for some reason a damage payment is not owed. Thus "If one gives another a blow which does not injure him to the extent of a pĕrutah (a coin of small value), he incurs flogging, for there is no compensation in this case (to exempt him on the grounds) that the negative commandment is rectified by monetary compensation."

Murder

Ordinary murder is a capital offense not redeemable by a money payment, but there are possible complications. Someone who kills indirectly, for instance by hiring an assassin, is not subject to the death penalty under religious law, although a king of Israel may put him to death by royal decree for the good of society or the court as an emergency measure.[191]

> "If the king does not kill them, and the needs of the time do not demand their death as a preventive measure, it is nevertheless the duty of the court to flog them almost to the point of death, to imprison them in a fortress or prison for many years, and to inflict every punishment on them in order to frighten and terrify other wicked persons, lest such a case become a pitfall and a snare, enticing one to say, 'I will arrange to kill my enemy in a round-about way, as did So-and-So; then I will be acquitted.'"[192]

One of my favorite bits of legal logic concerns someone dying of a fatal organic disease. Maimonides starts by saying that the killer of such a person is

legally exempt—although, of course, one must be very sure that the disease is incurable and fatal. He goes on to add that if someone suffering from such a disease kills he is to be put to death, provided he is so considerate as to do the killing in the presence of a court.

What if he doesn't? Convicting him then depends on witnesses. Witnesses can only be trusted in a capital case if they themselves are at risk of punishment if their testimony is false. In this case conspiring to use false testimony to convict someone who is innocent would result in no legal penalty, since the victim would be someone dying of a fatal organic disease and there is no penalty for killing such a person. Since the witnesses are at no risk of being put to death if their testimony is false their testimony cannot be trusted. Since their testimony cannot be trusted, there is no way of convicting the murderer. So someone dying of a fatal organic disease can commit murder with impunity, providing he takes care not to do it in the middle of the courtroom.

Personally, after reading how the court is to deal with a different sort of rules lawyer, I don't think I'd try it.

There is an interesting parallel in Chinese law:

> Persons upwards of eighty or under ten years of age, persons totally and incurably infirm, and females, in all cases, are incapacitated from presenting and prosecuting any informations, excepting … . — On any other subjects the informations of such persons must be rejected, because in all ordinary cases they are entitled to redeem themselves from punishment by a fine, and therefore not deterred from making false accusations by the apprehension of the consequences to which, under the same circumstances, other persons would become liable.

Maimonides goes on to describe in some detail the rules associated with the avenger of blood, the heir of a killer's victim, and the cities of refuge—of which, like kings of Israel, there had been none for more than a thousand years. A killer was supposed to go to one of the cities of refuge, be brought from there to the court of the city where the killing occurred, tried and, if guilty of deliberate murder, put to death by the avenger of blood. If found guilty of unintentional killing he was to be sent back to the city of refuge to remain there until the high priest, also nonexistent in Maimonides' day, died. En route to or from the city of refuge he could be killed by the avenger of blood without penalty.[193]

That looks rather like the remnant of a pre-existing feud system, untidily integrated into its replacement.[194] We will see something similar in the next chapter, when we look at how murder is treated under Islamic law.

Another similarity to later Islamic law is in the treatment of non-Jews under Jewish rule. Rabbinic law specifies in some detail what laws are or are not binding on them. If two heathens come to court and both request that their dispute be adjudicated under Jewish law it is done. But if either of them prefers,

the case is decided under heathen law. Some constraints that apply to Jews are not binding on heathens, some other constraints are binding only on heathens. A heathen and a Jew are not permitted to marry. Unlike the situation in Islamic law, the restriction applies both to a Jewish woman marrying a non-Jewish man and to a Jewish man marrying a non-Jewish woman. Just as in Islamic law, conversion is not required but is irreversible.[195]

5. Islamic Law

The first and most important thing to realize about Islamic law is that, seen in its own terms, it is the law of God not of man. No society since the death of Mohammed could enforce *Shari'a* because, absent divine inspiration, no human had complete and correct knowledge of its content. Strictly speaking, what traditional Islamic courts enforced was not *Shari'a*, God's law, but *fiqh*, jurisprudence, the imperfect human attempt to deduce from religious sources what human law ought to be.[196] That fact helps explain how Sunni Islam was able to maintain four different but mutually orthodox schools of law. There could be only one correct answer to what God wanted humans to do but there could be more than one reasonable guess. According to a widely accepted tradition, a *Mujtahid*, a legal scholar deducing the law from the Koran and the traditions of what Mohammed did and said, got two rewards in heaven if he got it right, one if he got it wrong.

That also explains the nature of the five-fold division of acts in Islamic law. An obligatory act is an act that God will reward you in the afterlife for performing, punish you for not performing. A recommended act is one which God will reward you for performing but will not punish you for not performing. A permissible act is one for which God will neither reward you nor punish you. An offensive act is one which you will be rewarded for refraining from but will not be punished for performing. An unlawful act is one which you will be punished for performing, rewarded for avoiding. From the standpoint of a believing Muslim, while no society's legal system enforced *Shari'a*, *Shari'a* was enforced in all societies at all times and places—by God not by man.

In many cases, taking an unlawful act or refraining from an obligatory act might result in legal punishment as well as divine punishment, but that is not what defines the act as unlawful or obligatory.[197] To put the point differently, Islamic law is more nearly a system of morality than a system of law, since its rules primarily describe how one ought to act, only secondarily the legal consequences of action. It is a system of law only from a standpoint that regards God, not the human legal system, as the ultimate judge and enforcer.

To better see the distinction between *Shari'a* and *fiqh*, consider the two different meanings of "constitutional" in our legal system. For a law professor teaching constitutional law to his students, what is constitutional is defined by what decisions the Supreme Court has made in the past or what decisions he expects it to make in the future. There is no inconsistency in holding that the New Deal farm program was unconstitutional in 1936, when the Supreme Court

ruled against it, but constitutional after 1942, when the Supreme Court approved a revised version—a change due, arguably, not to changes in the legislation but in the position of the Court.

That is a natural view of what "constitutional" means from the standpoint of a law professor but not from the standpoint of a justice of the Supreme Court. The question for him is not how he and his colleagues will vote or have voted but how he should vote. In deciding whether something is constitutional he has to go back to whatever he sees as the sources of constitutional law, his equivalent of Koran and *hadith*, to engage in what a Muslim scholar would describe as *ijtihad*, deducing law. The law professor's constitutional law corresponds to *fiqh*, the Justice's to *Shari'a*.

How was *fiqh* deduced and applied? The scholar started with the sources of revealed knowledge—the Koran itself and the words and acts of Mohammed and his companions as reported in *hadith*, traditions. From that information a sufficiently learned religious scholar, a *mujtahid*, deduced legal rules. Over time, the scholars separated into four schools, each made up of multiple generations of scholars building on the work of their predecessors, each school (*madhab*) identified with the name of the scholar thought of as its founder. The schools were generally similar but differed in the details of their approaches to interpretation and the rules they deduced; each regarded the others as orthodox.

As scholarship accumulated, more and more questions could be answered by looking at the work of previous generations of scholars. Some modern historians argue that the result, sometime around the tenth century, was the end of the process by which law was deduced, the closing of the gates of *ijtihad*. In the view of others, while efforts may have gradually shifted from *ijtihad* to studying the work of previous generations of scholars, there was never a time when original research entirely disappeared, if only because new circumstances sometimes brought up new questions to be answered.[198]

Deducing law involved a number of different problems. To begin with, it was not always clear what the Koran commanded. A verse might be taken either as one example of a general principle or as itself the legal principle to be followed. In some cases, such as the rules with regard to wine, later verses were inconsistent with earlier ones. To resolve such questions the scholars developed elaborate rules of interpretation, varying somewhat across the schools.[199]

Deducing legal rules from *hadith* presented another set of problems. The traditions were at first transmitted orally, only later written down. Each came with its *isnad*, its pedigree, a list of the chain of transmitters starting with the person who first saw or heard what was done or said. It was necessary to decide

for each *hadith* how certain one could be that it was neither invented by someone at some point down the purported chain nor inaccurate due to an error in transmission.

The basic rule accepted by all schools was that if there were a sufficient number of independent chains supporting the same *hadith*, it could be accepted as genuine with certainty. Short of that, the reliability of each *hadith* depended on the number of independent chains and how reliable the transmitters in each chain were believed to be. Part of what was necessary to be a *mujtahid* was extensive knowledge not only of *hadith* but of the information needed to evaluate them, including the pedigree of each and the reputation for reliability of its transmitters. Eventually several collections of authenticated *hadith* were produced by scholars who went through a much larger number, eliminating those they thought insufficiently well supported.

In addition to the Koran and *hadith*, there was one more source of information on divine law—consensus. According to multiple traditions, the Prophet had at some point said that his people would never be all agreed upon an error. While there were not a sufficient number of identical traditions to that effect, it was agreed by scholars of all four schools that there were enough different traditions with the same implication to meet the requirement, hence that it could be taken as certain that the Prophet had made some such statement. It followed that if at any one time all of the scholars were agreed upon a question, that question was permanently settled. Exactly what it meant for all the scholars to be agreed, whether it must be all qualified scholars of all schools or of one, whether it was necessary that all expressed positive agreement with a proposition or only that none expressed disagreement, were questions on which different scholars held different opinions. But all agreed that once consensus had been established it provided an additional source of authority.

The Separation of Law and State

Law, in theory, was not made by the ruler but deduced by legal scholars. In the view of at least some modern scholars, that was largely true in practice as well. After the first few centuries and until the rise of the Ottomans, political authority in the Islamic world was fragmented. The local rulers were frequently foreigners to the populations they ruled, often Turkish princes who had made the transition from mercenaries in service to Arab dynasties to de facto rulers. What they wanted from the legal scholars was support for their legitimacy. While they might occasionally meddle in some legal question of immediate relevance to themselves, they were willing for the most part to leave the legal system in the hands of the scholars. They were even willing to subsidize the scholars by endowing mosques and madrissahs, colleges which provided employment for legal scholars. Think of the resulting system as what Anglo-American common law would be if law professors ran the world, law defined not by the precedents set by judges but by the medieval equivalent of law review articles.[200]

Between the scholars who deduced the law and the courts that applied it there was an additional layer—the *muftis*. A *mufti* was a legal expert who offered advice on legal questions to any who wanted it. It appears to have originally been an unpaid position defined by reputation rather than appointment by the ruler, like the Roman jurisconsult.[201] Someone who wanted an opinion on a legal issue could put the question to a local *mufti* and be given a *fatwa*, an advisory legal opinion. Initially the *mufti* was expected to himself be a *mujtahid*, a scholar qualified to derive rules from their original sources. But by about the thirteenth century it had become accepted for someone to issue *fatwas* who was familiar with the doctrine of a legal school but was not himself a *mujtahid* capable of deriving it.[202]

The *fatwa* might amount to moral advice, an opinion as to what action it was right to take. It might be legal advice in our sense, a statement of the legal implications of the situation described. It was not the *mufti*'s job to find out what had actually happened, only to report what would be the legal implications of the facts as described to him.

The final actor in the progress from divine revelation to a functioning court system was the *qadi*, the judge. Unlike everyone above him in the chain, he was appointed and paid by the ruler. While it was desirable that he be an expert in the law it was not essential, since he could rely for the law on *fatwas* presented to him by the litigants or provided at his request by a *mufti* in response to questions

about the relevant law.

From the perspective of modern American law, the final two stages of the process look like our system turned upside down. In ours, the court of first impression applies the law to the facts and produces a verdict. If the case is appealed, the appeals court takes the facts as already decided and gives a second and authoritative opinion on the law. In their system, the opinion on the law came first, provided by the *mufti*, followed by the *qadi's* application of the law to the facts as he saw them. Under most circumstances there was no way to appeal the *qadi's* verdict.

An Alternative View

What I have so far described is the traditional account of how Islamic law, *fiqh*, was derived. A number of modern scholars, of whom the most influential was Joseph Schact,[203] have argued that that account is in large part fictional. He pointed out a large number of cases in which companions of the Prophet, who would surely have been familiar with the legal rules he followed, made decisions that appeared inconsistent with the rules later deduced from *hadith*. His conclusion was that all or almost all of the *hadith*, including the authenticated ones, were bogus, invented in the early centuries in the course of conflicts over the law. In his view Muslim law was actually an amalgam of pre-existing Arabic legal rules, administrative regulations created by the first Muslim dynasty, and legal rules taken over from the rules of the conquered provinces. Once disputes arose among different schools of law the authority of the Prophet provided the most decisive evidence available, so both sides to such disputes invented traditions to support their positions. Scholars who argued for derivations of the law not based on divine revelation eventually lost out to those with the opposite position. Later scholars have criticized parts of Schacht's argument but most, at least among non-Muslim western scholars, appear to accept much of his thesis.[204]

The Schools of Law

The schools of law into which Sunni legal scholars divided themselves were each associated with the work of a single scholar from whom they took their name: Maliki, Hanbali, Shafi'i, and Hanafi.[205] They agreed on the broad outline of the law, disagreed on the details. Thus, for example, the punishment for drinking wine was eighty lashes according to three of the schools, forty according to the fourth (Shafi'i). Three schools interpret the rule as forbidding the consumption of any intoxicant, one (Hanafi) as forbidding only wine drinking and intoxication. The Shafi'i school requires *zakāt*, the religious tax, to be distributed equally among the eight categories of recipients while the Hanafi school permits it to be distributed to all, some, or only one category.[206]

While the schools differed in detail they regarded each other as mutually orthodox.[207] In this respect as in others, the history of Islamic law both resembles and differs from that of Jewish law. The schools of Hillel and Shammai tolerated each other for several generations, but eventually the majority school suppressed the minority. In the parallel Islamic case, the four schools of Sunni law have continued their mutual toleration up to the present day.

The two major branches of Islam are Sunni and Shia, a division that goes back to a dispute over the succession to the caliphate after the death of the Prophet. The Shia believe that Ali, the Prophet's cousin and son-in-law, ought to have been the first successor and that the succession should properly have run through his descendants. The Sunni support the succession that actually occurred, with Abu Bakr, one of Mohammed's closest companions, chosen to be his successor, followed by Umar, Othman, and finally Ali. The split became permanent when Muawiya, nephew of the third caliph and governor of Syria, refused to accept Ali's succession to the caliphate, setting off the first Muslim civil war and eventually establishing the first Islamic dynasty.

The four schools of law are all Sunni; the Shia have their own schools and legal rules, in most respects similar. While different schools were dominant in different areas, a medieval Muslim city could have had separate courts for the four Sunni schools, the Shia, and the other tolerated religions.[208] It was a polylegal system; disputes within each community would go to that community's courts. Non-Muslims had to use Muslim courts for criminal cases but had choice of law for civil matters. In at least some times and places, parties creating a contract, a partnership, a marriage, could choose which school's legal system they wished to create it under and would be bound to the rules of that legal

system in any future dispute. What happened in a dispute between parties adhering to different legal systems is not entirely clear and probably varied across time and space. According to at least one authority, the most common rule was for the dispute to go to the defendant's court.[209]

While law was in theory independent of the state, in practice, in most historical Islamic societies, state-created rules played a significant role. It was up to the ruler to appoint the *qadi* and to enforce his judgments. The ruler could, by his control over jurisdiction, determine what court a case went to. Under the Abbasids, the second Islamic dynasty, the police (*shurta*) began to investigate, try and punish offenders outside of the *fiqh* courts. The inspector of the marketplace (*muhtasib*) created and enforced commercial regulations. The *mazalim* courts were created to investigate misconduct by officials, including *qadis*, but over time expanded to take jurisdiction over additional areas. Finally, the ruler was entitled to create administrative regulations to implement *fiqh* or fill in gaps in the law through the mechanism of *siyasa*, creating rules additional to and even to some degree contradictory to the rules of *fiqh*.[210] In theory all such courts functioned in *Siyasa Shari'a*, the general spirit of *Shari'a*, but they were not bound by the specific rules of *fiqh*, just as the Jewish communal courts were supposed to be faithful to the spirit of Jewish law but were not always consistent with Rabbinic law.

One reason for the development of parallel state courts may have been the desire of the ruler to maintain control. A second was that *fiqh* had serious limits as a legal system. It provided explicit rules for only a limited set of offenses and its evidentiary standards were in some contexts too hard to meet and in some, perhaps, too easy. For most controversies, proof required the eyewitness testimony of two adult, competent, male Muslims to the same illegal act; once their good character was established the testimony could not be impugned by cross examination or other means.

One further feature of *fiqh* echoes a pattern we earlier saw in Jewish law, the role of oaths. For some cases, an oath by one party could replace one of the two required witnesses. In addition, after the *qadi* had ruled in favor of one party, that party still had to take an oath to the truth of his position. If he failed to do so the other party was given the option of swearing to the truth of his account and, if he did so, won the case.

What Happened to Islamic Law?

Wael Hallaq, one of the most prominent of the modern scholars, argues that the Islamic legal system functioned better than most modern systems, providing legal services for free to all, defending the poor and powerless against the rich and powerful. While rulers played some role, biasing the system in their own favor or filling in its gaps, its rules were primarily the creation of scholars making an honest and well-informed attempt to learn and implement the divine will. The scholars maintained their independence in part through the existence of *waqfs*,[211] the medieval equivalent of foundations or trust funds, providing mosques and madrassahs with a permanent income some of which could be used to support legal scholars. While the original funds frequently originated with a ruler or a ruler's close kin, those being the people most likely to have large sums available for the purpose, past donations were out of the control of the current ruler. And the rulers, being for the most part more interested in keeping the support of the legal scholars than in the content of the law, were willing to leave the latter mostly in the hands of the scholars.

In Hallaq's view it was the breakdown of this system in the nineteenth and twentieth centuries, due to the rise of the nation state under western influence, that destroyed the traditional system. In Islamic territories under colonial rule, such as India, Indonesia, and Algeria, the colonial rulers replaced the traditional system of decentralized law independent of the state with a system of statutory law incorporating elements of traditional law, in some cases elements interpreted in ways favorable to the ruling power. After the end of the colonial period, the newly independent states followed the same path. Thus, in his view, modern "Islamists" who view themselves as wishing to reinstitute *Shari'a* are proposing something quite different and less desirable, a centralized system of state-made law with rules to some degree modeled on traditional *fiqh*.[212]

One problem with Hallaq's thesis that the destruction of the traditional system was due to western colonialism is the case of the Ottoman Empire.[213] It was never colonized, yet in it as well the traditional system of independent and decentralized law was replaced by centralized state law.

Hallaq blames that change on indirect western pressure, sees it as a response of the Ottomans in the 19th century to the increasing power of the Christian states of Europe. But the shift began much earlier. The Ottomans gave the Hanafi school of law a legal monopoly within the core areas of the empire and a superior position in areas where other schools had been dominant prior to the

Ottoman conquest. *Qadis* of the other schools were subordinate to the Hanafi *qadi*, who could reverse judgments that strayed too far from Hanafi doctrine. Over time, more and more of the legal scholars in those areas defected to the Hanafi school, that being where the money, jobs, and power were to be found.

The Ottoman Sultans claimed the right, when Hanafi teaching permitted alternative interpretations of the law, to tell judges which they must follow. And the Sultans proclaimed their own legal rules, *kanun*, in theory in support of *fiqh* but in practice sometimes inconsistent with it. Thus *fiqh*, according to all four schools, forbade loans at interest. *Kanun* provided for a maximum interest rate.

Interference by the authorities was not limited to the courts. Under the Ottomans there was a Grand Mufti appointed by the Sultan with ultimate authority over the appointment of *qadis* and the running of mosques and madrassahs. While Hallaq may be correct in his view of the independence of the legists outside the Ottoman Empire, within it that independence had been eliminated long before the beginning of the 19th century, at a time when the Ottoman Empire was a great power with neither reason nor inclination to take lessons from its western neighbors.

The breakdown of the traditional legal system may, as Hallaq argues, be due to the rise of the nation state, but the connection between that and western imperialism is accident not essence. The causes that led to the rise of the nation state in the west,[214] the replacement of feudalism by absolute monarchy, operated in the Islamic world as well, most notably in the Ottoman Empire. The annexation of the *waqfs* by the Ottoman authorities parallels the earlier confiscation of the lands of the monasteries by Henry VIII. The result in both cases was to eliminate institutions that competed with the state for power and resources.

The Content of *Fiqh*

The parts of Islamic religious law that deal with criminal offenses recognize three categories, defined by the nature of the punishment. *Hadd* offenses, mostly derived from Koranic rules, have fixed punishments. *Ta'zir* offenses have punishments set at the discretion of the judge. *Jinayat* offenses, homicide and bodily harm, have outcomes determined in part by law, in part by decisions made by the victim or his kin, and appear to be based on the rules of pre-Islamic Arabic blood feud.

Hadd

There are five *hadd* offenses: Unlawful intercourse (*zina*), false accusation of unlawful intercourse (*kadhf*), wine drinking (*shurb*), theft (*sariqa*), and highway robbery (*qat'al-tariq*), which includes armed robbery of a home. All are considered offenses against God, although in some cases against a human victim as well, and so cannot be pardoned.

Zina is defined as voluntary sexual intercourse with anyone who is not your lawful spouse or concubine. The punishment is either execution by stoning, for an offender who has previously had lawful intercourse, or a hundred lashes (fifty for a slave—half the number of lashes for a slave is a common pattern and I will not bother to note it hereafter) for one who has not. Proof of the offense requires either four eyewitnesses to the same act of intercourse, all four of whom must be competent adult male Muslims of good reputation, or confession; the pregnancy of a never-married woman can also be taken as sufficient proof. The confession is retractable; according to some authorities, an attempt to escape qualifies as a retraction and so voids conviction and punishment. The witnesses must be present at the trial and execution. In the case of stoning, if they do not throw the first stones the punishment is not carried out.[215]

Such severe requirements of proof suggest that fornication and adultery would in practice be almost impossible to prove, but this applies only to the *hadd* offense.[216] Unlawful intercourse might also be prosecuted as a *Ta'zir* offense, with weaker standards of proof and less severe punishment.

Kadhf is defined as a false accusation of *zina*, where "false" is interpreted as "not proven," making the role of witness to *zina* a hazardous one. If, for example, one of the four witnesses turns out to be a minor, the other three can be charged with *kadhf*. The charge must be brought by the person falsely accused. The penalty is eighty lashes. A false accusation of illegitimacy also counts as

kadhf.

The case of a husband accusing his wife of adultery, directly or by challenging his paternity of her child, falls under a special set of rules. The husband who cannot prove the charge can protect himself from being charged with *kadhf* by swearing four times by Allah that he is speaking the truth and once calling down a curse upon himself if he is lying. The wife can defend herself against the accusation by the same series of oaths. If she is unwilling to do so that is taken as a tacit confession of guilt, subjecting her to the penalty for *zina*.

Shurb is narrowly defined as wine drinking or intoxication, more broadly as the drinking of any intoxicant, with the detailed definition varying among the different schools of law. The punishment is eighty lashes (forty in one school). Proof is by retractable confession or the testimony of two adult male Muslim witnesses.[217]

The *hadd* offense of *sariqa* is defined as theft, but theft that meets a variety of requirements. The thief must be a competent adult. The theft must be intentional, accomplished by stealth, of an item of more than a specified minimum value. The item must be one protected by its owner, so stealing an animal grazing at a distance from its barn does not qualify, nor does stealing from a house where you are an invited guest. Stealing perishable food does not count because it is presumed that the theft is out of hunger and so permitted. If the thief thought the property was at least partly his, whether correctly or not, it did not count as theft. It could be argued that theft of public property never counted, since all Muslims were in some sense joint owners. The victim of the theft must attend both trial and punishment.[218]

Arguably the list of requirements is so extensive because legal scholars, like many non-Muslim commentators, regarded the punishment, amputation of the right hand, as excessive. Since the punishment was Koranic it could not be changed, but it could be hedged around with enough qualifications so that it was unlikely to be applied—the same approach that Jewish legal scholars applied to the rule about stoning a disobedient son. A theft that did not meet the requirements for the *hadd* offense could still be prosecuted and punished under *ta'zir*.[219]

Qat'al-tariq is defined as either robbery of travelers far from aid or armed entry into a private home with the intent to rob it. The punishment is amputation of the right hand and left foot. If combined with murder, the punishment was death by the sword;[220] if the theft was not only attempted but accomplished and combined with murder, the punishment was crucifixion. Unlike the case of a homicide prosecuted under *jinayat*, punishment was mandatory; the victim or

victim's kin did not have the option of canceling it or of accepting blood money instead.

Ta'zir

For *ta'zir* offenses, the punishment was up to the judge, with options ranging from a private admonishment to death but limited, in the view of most of the schools, to less than the punishment that would be imposed (according to some on a slave, to some on a free man) for the corresponding *hadd* offense. Proof is by the testimony of two witnesses, one of whom can be a woman, or by a non-retractable confession; some legal scholars held that the judge could act on the basis of his own knowledge even without such proof.

The bulk of criminal offenses in *fiqh* are treated as *ta'zir* offenses, including both non-*hadd* offenses and *hadd* offenses that for one reason or another do not meet the strict *hadd* standards. *Kadhf* is only a *hadd* offense if committed against a Muslim, but *ta'zir* can be used to protect non-Muslims against unproven accusations of unlawful intercourse.

Jinayat

The part of *fiqh* that applies to homicide or bodily injury is called *jinayat* and appears to be based on the pre-Islamic rules of Arab blood feud. The charge is brought by the victim if he is alive or his nearest relative if he is dead. The punishment is either retaliation or blood money (*diya*). Retaliation occurs only at the request of the victim if alive, his nearest kin if the victim is dead, and is to be inflicted by victim or kin. In the case of homicide, retaliation means death, in the case of injury it means imposing an identical injury. Where retaliation is one of the options, the victim or his closest kinsman may demand blood money instead or negotiate an out-of-court settlement. *Jinayat*, like modern tort law, is based on private action; there is no official responsible for initiating the case.[221] But if the victim has no living relatives, the right of retaliation falls to the state.

The formula for blood money is based on either the heavy *diya*—a hundred female camels, evenly divided among one-, two-, three-, and four-year-olds—or the lighter *diya*, eighty female camels again evenly divided in age plus twenty one-year-old male camels; it can also be 1000 dinar or 10,000 dirham.[222] Blood money for homicide consists of the full *diya*, heavy or light depending on the circumstances. For injury the payment is scaled by a simple, if somewhat arbitrary, formula—half a *diya* for the loss of something of which the victim has two, such as a hand, arm, foot, or leg, a tenth of a *diya* for the loss of a finger.

This has the odd result that the payment for the loss of a nose, of which the victim has only one, is a full *diya*, twice the payment for the loss of an arm or leg. Where no such formula is applicable, the payment is that percentage of a full *diya* corresponding to the percentage by which a slave's value would be reduced by the same injury.[223]

The law distinguishes among degrees of homicide. In the case of willful homicide—no legal excuse, intentional and committed with a weapon that normally causes death—the victim's nearest kin is entitled to demand retaliation or the heavier *diya*. Most schools include as homicide false testimony at trial that results in death.[224] Where the homicide was accidental or the killer believed he was acting legally, retaliation is not an option and the penalty is the lighter *diya*. In all cases, conviction is by confession or the testimony of two adult male witnesses.[225]

In some cases, the payment of blood money is in theory shared between the offender and his *'Akila*, corresponding to the dia-paying group[226] of Somali law described in chapter 11. According to Schact, "the whole institution fell into disuse at an early date."

That claim is apparently mistaken, a fact I discovered when a group of Saudi LLM students took the course from which this book developed, providing me with primary sources in the classroom. Each was a member of an *'Akila*, which they translated as "clan." As one of them explained in a paper written for the course, his *'Akila* would be responsible for a third of the diya due for an accidental homicide or injury.[227]

Ridda

There is one crime that does not fit clearly into the categories I have listed—*ridda*, apostasy, the crime of converting away from Islam. Some view it as a *hadd* offense, others as an offense to be treated under *siyasa*, administrative regulations created by the state.

The usual view is that apostasy is a capital offense, a position based on the purported practice of Mohammed. Some authorities hold that it may be punished without trial, others that the apostate is entitled to a trial and one school that the apostate must be given three days to repent and return to Islam. Women apostates are to be imprisoned and, according to some schools, beaten until they recant.

The Koran sentences the apostate to hell but prescribes no punishment. Some scholars argue that the death penalty was a punishment not for abandoning Islam

but for the (historically closely connected) offense of rebelling against it, and that belief alone was not to be punished. On the other hand, one school holds that not only is apostasy from Islam forbidden, so is apostasy from any of the other religions of the book.[228]

Marriage Law

Under Islamic law, marriage is treated as a contract. Husband and wife are legally distinct, each entitled to own property. The wife's property includes the dowry agreed to as part of the marriage contract. Part of it is paid at the time of the marriage but part, sometimes a large part, may be due only after divorce or the death of the husband. Thus, while a husband is free to divorce his wife, doing so may be costly. A wife does not have the right to divorce her husband but can bargain for a divorce by offering to give up part of what he would owe her as a result. At some times and places, the wife could also apply to have the court, for cause, act in the husband's stead to divorce her. And the marriage contract could include conditions such as the right of the wife to be divorced if the husband took a second wife.

The wife owes her husband obedience and sexual access, the husband owes the wife adequate intercourse and support at a level suited to her station, defined by the status of her family.

Taxation

The two Koranic taxes are *jizya*, an annual head tax paid by non-Muslims under Muslim rule, and *zakāt*, a property tax on productive property owned by Muslims.[229] The latter is supposed to go to a specified set of categories of recipients. The taxpayer may pay it to the ruler to distribute for him, to a middleman who takes a share to pay him for the work of handing out the money, or to the designated categories of recipients himself. In Twelver Shia law the payment goes to the high-level religious scholar whose interpretation of law the individual taxpayer has chosen to follow, to be distributed by him.

In addition to these two, Islamic states have imposed a variety of more religiously dubious taxes to fund their activities.

Jewish and Muslim Law: Similarities

Studying both, I was struck by how much they had in common. For example:

Islamic law permits a man only four wives. According to Torah law "a man may marry several women, even a hundred of them, either at the same time or one after another … provided that he is able to supply each one of them with the food, raiment, and conjugal rights due her." However Maimonides reports that "The Sages have therefore ordained that a man should not marry more than four wives, even if he has a great deal of money, in order that each wife's schedule should be at least once a month."[230]

Here the "schedule" is of intercourse with her husband, the "conjugal rights due her." Maimonides offers a detailed account of how often a man is obliged to sleep with his wife, depending on his circumstances. "For men who are healthy and live in comfortable and pleasurable circumstances, without having to perform work that would weaken their strength, and do nought but eat and drink and sit idly in their houses, the conjugal schedule is every night. … for sailors, once in six months; for disciples of the wise, once a week, because the study of Torah weakens their strength."

According to *fiqh*, at least one Shafi'i version, "One should make love to one's wife every four nights, as is fairest, since the number of wives one may have is four … though one should make love to her more or less than this, according to the amount she needs to remain chaste and free of want for it, since it is obligatory for a husband to enable her to keep chaste."[231]

In Islamic law, a man has the right to intercourse with his wife as long as there is no good reason, such as menstruation or a medical problem, not to permit it. In Jewish law a wife who refuses intercourse with her husband is a "rebellious wife."[232] She cannot be compelled but her husband is to divorce her and she forfeits her *ketubah*, the money that would normally go to her when divorced or widowed.[233] A man who is unwilling to have intercourse with his wife is obligated to divorce her and pay her *ketubah*. The rules around marriage are similar, but not identical, in a variety of other ways between the two systems.[234] Thus "He may not, however, compel them to reside in the same courtyard, but must let each one reside by herself. … ."[235] and "It is unlawful for a man to house two wives in the same lodgings unless they both agree."[236]

Marriage rules are not the only points of similarity. A major source of Islamic law is the Sunna of the Prophet, the practice of Mohammed as reported in

hadith. In Jewish law, the act of a person of acknowledged eminence as a halakhic authority can be the basis of a legal norm.[237] Both systems sometimes allow oaths as part of the legal process. One view of the role of custom in Jewish law is that it has no independent force but its existence is evidence of the existence of a legal rule now lost.[238] Islamic legal scholars take a similar approach to acts of Mohammed that do not appear to be based on the text of the Koran—that they imply the existence of lost portions of the text.

Another similarity is in the source of the law. Jewish law is based on the written Torah and the oral Torah, the latter based on rules of law and interpretation believed to have been revealed to Moses and transmitted orally down the generations until finally written down in the Mishnah. Islamic law is based on the written Koran and the *hadith*, statements and practices of Mohammed believed to have been based on revelation and passed orally down the generations until finally written down. Two differences are that the *hadith* were transmitted orally for a century or two before being written down, the Oral Torah for more than a millenium, and that each *hadith* is accompanied by a chain of transmitters back to its origin, whereas rules of the oral Torah are cited on the authority of only the later transmitters.

During the period when there were two schools of Jewish law, some authorities held that one could choose either but should then follow all of its rulings, both lenient and strict, rather than feeling free to pick and choose.[239] A similar position is argued by some Muslim authorities with regard to the four schools of Sunni law. Later Jewish scholars faced the problem of choosing among differing opinions by different eminent scholars of the past. The solution chosen by Joseph Caro for the *Bet Yosef* was to base his position on the view of the majority of the three most eminent authorities. Muslim scholars came up with similar rules for deciding which among divergent opinions of the scholars of a school should be taken as the school's doctrine.

Both systems had to come to terms with the limited ability of those applying the law, rabbis, *muftis*, *qadis*, to engage in the elaborate scholarship by which the law was derived from religious sources and came up with similar solutions: permitting reliance on conclusions reached earlier by authorities believed competent to produce them.

Appendix: Two Stories

A Convenient Tradition

Ten Traditionists, Ghiyath ibn Ibrahim among the rest, were summoned to an audience. Now Mahdi was very fond of pigeon-racing; and when Ghiyath was presented, and somebody said: Pray recite some tradition to the Prince of the True Believers, Ghiyath recited: So-and-so told us that he had it of So-and-so on the authority of Abu Hurayra that the Apostle of God (God's Prayer and Peace be on him!) said: There must be no betting save on a hoof or an arrow or a lance-head; and then Ghiyath added: or on a wing.

Mahdi at once ordered him a bounty of ten thousand dirhams; but as Ghiyath rose bowing to thank him, he exclaimed: By God, the nape of your neck looks like the nape of a liar's neck—I'll swear you interpolated those last words! And he gave order immediately that all his racing pigeons should be killed.[240]

Working Around God's Law

The poet ibn Harma performed for the Prince of the Muslims and so delighted was the Caliph with his performance that he said "name your reward."

The poet replied, "the reward I wish from the Prince of the Muslims is that he should send instructions to his officials in the city of Medina, commanding that when I am found dead drunk upon the pavement and brought in by the city guard, I be let off from the punishment prescribed for that offense."

"That is God's law, not mine; I cannot change it. Name another reward."

"There is nothing else I desire from the Prince of the Muslims."

Al-Mansur thought a little, then sent instructions to his officials in Medina commanding that if anyone found the poet ibn Harma dead drunk upon the pavement and brought him in for punishment, ibn Harma should receive eighty strokes of the lash as the law commands. But whoever brought him in should receive a hundred.

And ever after, when someone saw the poet lying dead drunk upon the pavement, he would turn to his companion and say "a hundred for eighty is a bad bargain" and pass on.[241]

6. When God is the Legislator

Two of the legal systems we have looked at claim to be based on rules laid down by God—Jewish law on the Torah, Islamic law on the Koran and the divinely inspired practice of the Prophet Mohammed. That claim raises problems which are less serious in legal systems based on the decisions of a ruler or legislator. Similar problems occur with a system such as U.S. Constitutional law. The Constitution does not claim to be divinely inspired but is often treated in legal culture as if it were. Although it is possible to change it through human action, the process is cumbersome.

One problem occurs when God gets it wrong, when the humans implementing the legal system are reluctant or unwilling to go along with some of its commands. Consider the instructions in Deuteronomy (21:18-21) for dealing with a disobedient son:

> If a man have a stubborn and rebellious son, which will not obey the voice of his father, or the voice of his mother, and that, when they have chastened him, will not hearken unto them: Then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; And they shall say unto the elders of his city, This our son is stubborn and rebellious, he will not obey our voice; he is a glutton, and a drunkard. And all the men of his city shall stone him with stones, that he die: …

The punishment seems a little extreme not only to modern sentiments but to ancient sentiments as well. If it is, however, God's command, what is one to do?

A similar issue is raised for Muslims by Koran 5:38, which establishes the punishment for the *Hadd* offense of theft.

"As for the thief, whether man or woman, cut his hand as punishment from God for what he *had* done"[242]

A similar problem in U.S. Constitutional law is raised by the Second Amendment,[243] which holds that:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Further, the Fourteenth Amendment holds (among other things) that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; […].

That is interpreted[244] as imposing the restrictions in the Bill of Rights on the states as well as the federal government. In U.S. law, cities and counties are creations of the state government, so the restrictions apply to them too. It appears to follow that any law at any level of U.S. government prohibiting or restricting individual ownership of firearms—or, arguably, tanks, fighter planes

or nuclear weapons—is unconstitutional.

For a different sort of example, consider the requirement in Torah law that all debts be cancelled every seven years, which converts any loan that would expire after the seventh year into a gift. A less extreme problem was created by the doctrine in Jewish, Islamic, and Christian law forbidding loans at interest.[245]

Authorities of all three legal systems found ways of working around the fixed point created by the nominally authoritative rule. The halakhic scholars did it first. Maimonides, basing his view on the work of earlier authorities, writes of the disobedient son:

> He is not liable for stoning until he steals from his father and buys meat and wine at a cheap price. He must then eat it outside his father's domain, together with a group that are all empty and base. He must eat meat that is raw, but not entirely raw, cooked but not entirely cooked, as is the practice of thieves. He must drink the wine as it is thinned as the alcoholics drink. He must eat a quantity of meat weighing 50 *dinarim* in one sitting, and drink half a *log* of this wine at one time. …
>
> … According to the Oral Tradition, we learned that this law concerns a youth of thirteen between the time he grew two pubic hairs and the time at which his entire male organ is surrounded by pubic hair. After the entire male organ is surrounded by pubic hair, he is considered as independent and is not executed by stoning.
>
> If his father desires to convict him and his mother does not desire, or his mother desires and his father does not desire, he is not judged as a "wayward and rebellious son," as implied by Deuteronomy 21:19: "His father and mother shall take hold of him."
>
> If one of the parents has had his arm amputated, was lame, dumb, blind, or deaf, the son is not judged as a "wayward and rebellious son." These concepts are derived as follows: "His father and mother shall take hold of him" - This excludes parents with amputated arms" "And bring him out" - this excludes the lame. "They say" - this excludes the dumb. "This son of ours" - This excludes the blind. "He does not heed our voice" - This excludes the dumb.[246]

It was a matter of debate whether anyone had ever satisfied all the conditions and been stoned.

Islamic scholars followed a similar, if less extreme, strategy, as described in the previous chapter. To qualify as a Hadd offense, a theft had to meet a long list of requirements. A theft that failed to meet any one of them might still be punishable under *tazir* law but did not require the *Hadd* punishment of amputation.

In the U.S., a variety of arguments were used to limit the effect of the Second Amendment. The reference to a militia could be interpreted as restricting the right to members of the National Guard, provided one was willing to ignore the broader sense of unorganized militia, consisting, when the Constitution was written, of all adult males, and also the fact that the reference was put as a reason, not a restriction. It could be argued that since the purpose was to maintain the militia, only weapons suitable for military use counted. On that

basis it was held that a law banning sawed-off shotguns did not violate the amendment.[247] As long as a majority of the members of the Supreme Court favored restrictions on firearm ownership, it was always possible to find some basis for justifying them.

A similar issue arose during the New Deal with the constitution's restraint on the power of the federal government. The tenth amendment reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

That appears to make the federal government one of enumerated powers, only allowed to do those things that the Constitution specifies. This raised a problem for an administration that wanted to do things that did not appear to fit in any of the enumerated categories, such as imposing restrictions on agricultural output in order to push up its price. The solution was found in the interstate commerce clause of the Constitution, which holds that: "The Congress shall have Power … To regulate Commerce … among the several States … ." In *Wickard v. Filburn*, the federal government argued that a farmer growing crops to feed to his own livestock was substantially involved in interstate commerce since if he had not grown those crops he would have had to buy feed for animals, which would have affected the price of feed on the interstate market. The Supreme Court, recently threatened with packing if it continued to block New Deal policies, accepted the argument. Cases since—most recently *Gonzales v. Raich*, which held that the interstate commerce clause justified a federal ban on marijuana produced and consumed within a single state—have very nearly repealed the tenth amendment, since almost anything the federal government wants to do can be justified to a sympathetic Supreme Court as a regulation of interstate commerce.[248]

A modern example of the problems that can be raised by the attempt to work around an inconvenient rule of divine origin is provided by the case of momsers in modern Israeli law. Under religious law a momser, someone whose parents not only were not but could not have been married such as a married woman's child by a father other than her husband, cannot marry. In order to prevent such children from being legally identified as momsers and thus forbidden religious marriage, the Israeli Justice Ministry instructed courts to refuse to authorize tests of tissue evidence of disputed paternity. This raised a problem for mothers seeking child support from the fathers of such children.[249]

These examples demonstrate the ability of legal scholars in three different legal systems to work around legal rules they disapprove of but cannot change. In each case, the solution was interpretation. No set of legal rules is sufficiently complete to answer all questions and eliminate all ambiguity, a point illustrated

by the failure of the body of statutes of the Imperial Chinese system, very much more extensive and detailed than the rules of the Torah, the Koran, or the Constitution, to do so. When there are two or more plausible readings of a rule's implication, someone must decide which to accept.

Once that point has been established, the next step is to find some basis in the original set of rules to justify not merely the particular interpretation but the unrestricted power to interpret. In the case of Jewish law, Torah explicitly commanded that, when the law was unclear, the opinion of the majority, interpreted as the majority of halakhic scholars, more specifically of the Sanhedrin, was to prevail. One might object that since that applied only when the law was unclear it could not trump a command as explicit as the one requiring a disobedient son to be stoned. That objection was answered by the doctrine of the oral Torah.[250] The interpretation of the halakhic scholars might seem implausible, but it was based on what God told Moses on Mount Sinai passed down in oral tradition to the scholars of the present day and so had the same authoritative status as the original rule.

Islamic law was based not only on the Koran but on the practice (*sunna*) of the Prophet as revealed in the traditions of what he and his companions did and said. Which traditions were to be trusted was a question to be resolved by scholarship, a process that could be biased in favor of traditions that supported the interpretations the scholars wanted. According to several traditions, Mohammed held that the Muslims would never be agreed on an error. By suitable interpretation of that, scholars got the doctrine of *ijma*, according to which, once there was a consensus in favor of an interpretation, the matter was settled.

In U.S. constitutional scholarship, the Supreme Court's power to interpret the Constitution, even to overrule Congress if it held that Congress was violating the Constitution, originated with *Marbury v. Madison*, a decision of the Supreme Court. It was made plausible by the obvious need for someone to interpret ambiguities. Once established, it could be gradually converted into the doctrine that the Constitution was whatever the Court said it was.

A second solution to the problem of working around rules that cannot be changed is to impose a different set of rules through a different mechanism. Rabbinic authorities invented a legal form, *Prosbul*, that made it possible to create a debt that would not be canceled in the seventh year. Halakhic scholars defended the right of communal authorities in the diaspora to do things forbidden by Torah and/or rabbinic law as an authority inherited from the kings of Israel, who had enforced their own law in a fashion sometimes inconsistent with the constraints of religious law. Islamic rulers created their own courts

separate from the *Shari'a* courts and used them to enforce rules inconsistent with *Shari'a*, for example by convicting defendants without the eyewitness testimony of two Muslims. An equivalent in U.S. law is the use of the regulations of executive agencies to create and enforce their own legal rules without requiring congressional authorization.

All of these solutions had to be implemented by judges or legal scholars. Another approach is for the people subject to the rules to work out, possibly with the help of legal scholars, ways of obeying the letter of the law while evading the spirit. That describes how people within Jewish, Christian, and Muslim systems dealt with the prohibition on interest common to all three systems. One way was by setting up a partnership contract in which one partner provided capital, one labor, and they shared the resulting profit. Another was to structure a loan contract to make the return uncertain, for instance by borrowing in one currency and agreeing to repay in another. The amounts could be set up to yield an expected return implying interest but not a guaranteed return.

The issue still exists in modern day Saudi Arabia, probably the state closest to the traditional Islamic legal system. One solution there is for a bank to combine an interest free loan with a second transaction in which the borrower buys something, such as a car, from the bank, then sells it back at a lower price.

Orthodox Judaism provides other examples. Jews are forbidden to carry things on the Sabbath outside the boundaries of their courtyard. A courtyard is defined by the wall that surrounds it. A wall is still a wall even if it has doorways. Two telephone poles with a wire strung between them can, with a little effort, be interpreted as a doorway. String enough wire from pole to pole around your neighborhood and the entire neighborhood can be interpreted as a single courtyard, an *eruv*, making it legal to carry things around it on the Sabbath.

The Catholic church does not permit divorce. It may, however, be possible for a couple that wishes to separate to get an annulment on the grounds that the original marriage was in some ways defective. One way of doing so in the medieval aristocracy, which was heavily intermarried, was to find in a couple's genealogy evidence that they were related closely enough to trigger the church's broadly defined incest rules.

All of these were and still are ways in which individuals could work around inconvenient restrictions of unchangeable law.

One problem is dealing with cases where God got it wrong. Another is maintaining judicial uniformity. What happens if two halakhic scholars, both judges, disagree about the interpretation of Torah? What they are disagreeing about is not what the law should be but what it is—and truth is not determined by majority vote. If each follows his interpretation, the result is a legal system

where what outcome you get depends on which judge you go to.

The solution to that problem is, arguably, part of the point of the story of the oven of Akhnai. The instruction in the Torah to deal with ambiguous questions by accepting the view of the majority was interpreted to mean that, while truth was not determined by majority vote, law was. A judge who held to a minority interpretation after the Sanhedrin had voted it down could continue to argue for his position but was required to judge according to the opinion of the majority.

That solution depended on the existence of a well-defined body of authorities to decide legal disputes. The Sanhedrin gave its last decision in 358 A.D. Thereafter, legal uniformity depended on judges in the diaspora agreeing about what authorities they were willing to accept. The eventual result was the breakdown of legal uniformity, with different communities accepting the doctrines of different scholars and much law made by local communal authorities. That problem was ameliorated by the fact that most legal controversies were intra-communal so under a single set of rules.

Islamic law never had a doctrine of majority rule; differing interpretations coexisted and, in the form of the four orthodox schools of Sunni law, still do. But the doctrine of consensus provided a basis for the claim that certain issues had been settled and could not be reopened.

U.S. constitutional law need not be, often is not, consistent across federal circuits, but inconsistencies seen as problematic can be eliminated by a Supreme Court decision.

As these examples show, both the problems of divinely inspired law and the solutions are similar across a considerable range of societies and legal systems.

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It is, perhaps, a fact provocative of sour mirth that the Bill of Rights was designed trustfully to prohibit forever two of the favorite crimes of all known governments: the seizure of private property without adequate compensation and the invasion of the citizen's liberty without justifiable cause… . It is a fact provocative of mirth yet more sour that the execution of these prohibitions was put into the hands of courts, which is to say, into the hands of lawyers, which is to say, into the hands of men specifically educated to discover legal excuses for dishonest, dishonorable and anti-social acts. (Mencken 2006, 180-2)

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“Nature, we see, teaches the most Illiterate the necessary Prudence for their Preservation, and Fear works Changes which Religion has lost the Power of doing.”

—(Johnson 1726-1728, 527)

7. Pirate Law

The Caribbean pirates of the early eighteenth century (c.1716-1726) are history's most notorious criminals. Their ranks included Blackbeard, whose real name was Edward Teach, Black Bart Roberts, who seized more prizes than any other pirate of the golden age, and Calico Jack Rackam, who inspired Johnny Depp's character, Jack Sparrow, in Walt Disney's *Pirates of the Caribbean* movie franchise. Only the Mafia approaches Caribbean pirates' criminal celebrity, but large numbers of children do not dress up as mobsters to collect candy on Halloween.

Caribbean piracy was jointly produced. A one-man pirate ship would have had difficulty undocking, let alone overwhelming an armed merchant vessel. Successful piracy required the cooperation of a sizeable pirate crew. The average Caribbean pirate ship was crewed by 80 men, and the largest crews consisted of several hundred. This raises the question of how pirates, who, as criminals, could not rely on government to provide their crews law and order and had no compunction about murdering and stealing for private gain, managed to cooperate with one another to engage in piracy.[251]

A Word on Sources

The chief historical source for early eighteenth-century Caribbean piracy is Captain Charles Johnson's *A General History of the Pyrates*, published in two volumes, the first in 1724 (revised in 1726) and the second in 1728. At one point, Johnson was widely believed to be the *nom de plume* of none other than Daniel Defoe, author of *Robinson Crusoe*. In the 1980s, literary scholars thoroughly demolished the Defoe theory, leaving Johnson's identity a mystery.[252]

Some think Johnson may have been a maritime worker, others a journalist, still others a pirate. Whoever he was, no one doubts that he "had extensive first-hand knowledge of piracy" (Konstam 2007, p. 12), and while *A General History of the Pyrates* contains several errors and apocryphal accounts, "Johnson is widely regarded as a highly reliable source for factual information" on Caribbean pirates (Rediker 2004, 180).

Several other historical sources, which corroborate and expand on Johnson's information, furnish additional insight into early eighteenth-century Caribbean piracy. These include works published by released pirate captives; published accounts of pirate trials; contemporary newspaper reports relating to piracy; and correspondence from colonial governors and other government officials dealing with pirates.

Piratical Problems

Pirates were outlaws. Governments branded them *hostes humani generis*—enemies of all mankind—and denied them the legal protections of life and property that legitimate citizens enjoyed. A pirate "can claim the Protection of no Prince, the privilege of no Country, the benefit of no Law," one British colonial official declared. "He is denied common humanity, and the very rights of Nature, with whom no Faith, Promise nor Oath is to be observed, nor is he to be otherwise dealt with, than a wild & savage Beast, which every Man may lawfully destroy" (*The Trials of Eight Persons* 1718, 6).

Pirates' inability to rely on government-created law posed a crucial problem for their crews, whose ability to plunder merchant vessels depended on their members' ability to live and work together for extended periods at sea. If pirates' proclivity for theft and violence extended to their interactions with one another, cooperation within their crews would be impossible, making successful piracy impossible too.

The nature of pirates' living and work spaces—pirate ships—exacerbated this problem. Pirate ships were converted merchant ships, which differed from their previous incarnations in two important respects: they carried about six times more men and vastly larger quantities of guns and gunpowder. Thus, pirate ships were highly explosive, inside of which seadogs were packed more like sardines. In this environment, a shipboard conflict between two pirates that ended in banging blunderbusses or even clashing cutlasses posed a risk to the ship and other members of the crew.

Piracy was dangerous business. Pirates' prey were armed, and although most surrendered peacefully, not every victim submitted without a fight. Merchant crews had fewer men, but their swords and guns were just as lethal.

A pirate could avoid much danger personally by staying back in violent confrontations between his crew and its victims. If a pirate ran screaming below deck at the sight of his crew's adversaries, his colleagues would probably notice. But if he evaded riskier situations in close-range combat, they probably would not; in close-range combat, his colleagues were preoccupied with avoiding their adversaries' swords and shots themselves.

This posed another problem for pirate-crew cooperation. Apart from the captain, who directed battle, the success or failure of a pirate crew in confrontations with merchantmen did not depend significantly on the participation of any individual crewmember, who therefore expected to earn the same sum whether he fought bravely or barely fought. This gave individual

crewmembers an incentive to stay back in confrontations. But if many crewmembers did that, pirate crews could not take prizes.

Certain decisions on a pirate ship, such as when the vessel should chase or run, how to maneuver when approaching a quarry, and when to fire a broadside, required snap decision making and unilateral directive. A pirate with the power to make such decisions on behalf of the crew was indispensable. Other important decisions on a pirate ship were less time sensitive but also benefited from having a pirate-in-charge. Provisions, for example, which were extremely important to men who spent months at sea, had to be rationed and distributed; someone needed to divide the spoils of seized prizes among the crew; and if rules were created to regulate crewmember conduct, pirates would require an authority to enforce them.

The need for such administrators created a further problem for pirates. A crewmember endowed with authority over important tasks could abuse his power, using it against other crewmembers for personal benefit. The consequences of officer abuse were more than hypothetical for pirates, many of whom had formerly sailed in the employ of merchantmen whose captains, pirates claimed, cheated them in payment, skimmed their victuals, and used disciplinary power to settle personal scores. If pirates could not control the officers who wielded authority over similar decisions on their ships, it would not pay to combine their efforts for piracy.

Piratical Solutions, Part I: The “Pirate Code”

Unable to rely on government-created law to regulate their behavior but in at least as much need of regulation as legitimate citizens, pirates created their own law “for the better Conservation of their Society, and doing Justice to one another” (Johnson 1726-1728, 210). Hollywood pirates call this the “pirate code;” actual pirates called it their “articles.”

Each crew drew up and assented to its own set of articles, but since the problems that pirate crews confronted were similar, their articles were similar too. The following articles, which governed the pirate crew aboard the *Royal Fortune*, captained by Bartholomew Roberts, exemplify the key elements of pirate law:

> I. Every Man has a Vote in the Affairs of Moment; has equal Title to the fresh Provisions, or strong Liquors, at any Time seized, and may use them at Pleasure, unless a Scarcity make it necessary, for the Good of all, to vote a Retrenchment.
>
> II. Every Man to be called fairly in Turn, by List, on board of Prizes, because, (over and above their proper Share) they were on these Occasions allowed a Shift of Cloaths: But if they defrauded the Company to the Value of a Dollar, in Plate, Jewels, or Money, Marooning was their

Punishment. If the Robbery was only betwixt one another, they contented themselves with slitting the Ears and Nose of him that was Guilty, and set him on Shore, not in an uninhabited Place, but somewhere, where he was sure to encounter Hardships.

III. No person to Game at Cards or Dice for Money.

IV. The Lights and Candles to be put out at eight a-Clock at Night: If any of the Crew, after that Hour, still remained enclined for Drinking, they were to do it on the open Deck.

V. To keep their Piece, Pistols, and Cutlash clean, and fit for Service.

VI. No Boy or Woman to be allowed amongst them. If any Man were found seducing any of the latter Sex, and carry'd her to Sea, disguised, he was to suffer Death.

VII. To Desert the Ship, or their Quarters in Battle, was punished with Death or Marooning.

VIII. No striking one another on board, but every Man's Quarrels to be ended on Shore, at Sword and Pistol.

IX. No Man to talk of breaking up their Way of Living, till each shared a 1000 l.[253] If in order to this, any Man should lose a Limb, or become a Cripple in their Service, he was to have 800 Dollars, out of the publick Stock, and for lesser Hurts, proportionately.

X. The Captain and Quarter-Master to receive two Shares of a Prize; the Master, Boatswain, and Gunner, one Share and a half, and other Officers one and a Quarter.

XI. The Musicians to have Rest on the Sabbath Day, but the other six Days and Nights, none without special Favour (Johnson 1726-1728, 211-212).

Evidently, pirate ships were not the chaotic messes depicted in popular pirate fiction. Far from it: pirate ships were highly regulated, and the laws their crews designed to provide such regulation were a strange brew of the progressive and the puritanical.

Article I establishes democracy as the crew's collective decision-making rule for important affairs; more about this below. All crewmembers were permitted to participate in pirate democracy, including black pirates, who composed a substantial part of many crews. One pirate, one vote.

Articles II and VIII prohibit theft and regulate violence between crewmembers. Article VIII also provides for the resolution of crewmember disputes. When a conflict could not be resolved peacefully, the quarreling parties were to duel on shore, protecting the rest of the crew and its ship. Johnson elaborates:

> when the Parties will not come to any Reconciliation, [a crewmember] accompanies them on Shore with what Assistance he thinks proper, and turns the Disputants Back to Back, at so many paces Distance: At the Word of Command, they turn and fire immediately … If both miss, they come to their Cutlashes, and then he is declared Victor who draws the first blood. (Johnson 1726-1728, 212)

Articles III and VI prohibit gambling and bringing aboard sexual companions —behaviors likely to lead to crewmember conflicts.

Articles IV, V, VII, and IX regulate externality generating behaviors, which, left unregulated, would negatively affect the entire crew. Thus, late-night drinking was permissible only above deck, allowing tired pirates to get their sleep; proper maintenance of one's weapons was mandatory, rendering crewmembers continually ready for combat; and exit from the company was prohibited until the crew had seized booty of sufficient value, preventing pirates who had a change of heart mid-cruise from depleting their crew of manpower.

In a similar spirit, one of the articles that governed the pirate crew aboard the *Revenge*, captained by John Phillips, regulated smoking: "*That Man that shall … smoak Tobacco in the Hold without a Cap to his Pipe … shall suffer the same Punishment as in the former Article*" (Johnson 1726-1728, 342-343). The *Revenge*'s crew did not create this law to spare its non-smoking members from the currently imagined effects of second-hand smoke; it did so to prevent its members from being blown to smithereens. The hold was the part of their ships where pirates stored gunpowder.

Articles IX, X, and XI stipulate the material terms of crewmembers' piratical employment. Article X addresses pay: apart from the crew's officers, who were paid a bit more, each member was entitled to a single share of seized booty. Article XI addresses vacation days: the crew's musicians, who provided pirates entertainment at sea, were entitled to one day off per week.

Article IX addresses employment insurance. Pirates were not unionized. Nevertheless, they managed to establish a policy for which labor unions commonly claim credit: workers' compensation. Pirates compensated crewmembers injured on the job out of the "publick stock." After seizing a prize, but before paying shares, the specified sums were taken off the top and distributed to injured pirates according to the damages they sustained. Losing his right arm, for example, might entitle a pirate to more compensation than losing his left, reflecting the former's higher value to pirates, most of whom were presumably right-handed. Such insurance reduced crewmembers' incentive to stay back in violent confrontations with prey.

Pirate articles stipulated punishments for crewmembers who broke their crew's laws. Punishments were usually corporal and ranged from highly undesirable to extraordinarily so. Marooning, bodily mutilation, and execution were common penalties for legal infractions, each of which is found in the *Royal Fortune*'s articles. Other pirate crews penalized legal offenses with lashing, or "Moses' law," as the *Revenge*'s articles called it; "keel-hauling," which involved dragging a lawbreaker across the sharply barnacled hull of the ship; and the loss of one's share of booty.

A crew's articles did not and could not anticipate or unambiguously address

every legal issue it might encounter. Pirates' solution to this problem was judicial interpretation: "in Case any Doubt should arise concerning the Construction of these Laws, and it should remain a Dispute whether the Party had infringed them or no, a Jury was appointed to explain them, and bring in a Verdict upon the Case in Doubt" (Johnson 1726-1728, 213). Similarly, for legal infractions whose punishments their articles did not specify, pirate crews invoked a rule their articles did specify—democratic decision making, the lawbreaker "suffer[ing] what Punishment the Captain and Majority of the Company shall think fit" (*Boston News-Letter* August 1-August 8, 1723).[254]

Piratical Solutions, Part II: Pirate Democracy and Divided Power

Laws that cannot be enforced are of little use for regulating behavior. To enforce the laws their articles contained, pirates created the office of quartermaster. As Johnson described that office:

> For the Punishment of small Offences … there is a principal Officer among the Pyrates, called the Quarter-Master, of the Men's own choosing, who claims all Authority this Way, (excepting in Time of Battle:) If they disobey his Command, are quarrelsome and mutinous with one another, misuse Prisoners, plunder beyond his Order, and in particular, if they be negligent of their Arms, which he musters at Discretion, he punishes at his own dare without incurring the Lash from all the Ship's Company: In short, this Officer is Trustee for the whole, is the first on board any Prize, separating for the Company's Use, what he pleases, and returning what he thinks fit to the Owners, excepting Gold and Silver, which they have voted not returnable. (Johnson 1724-1728, 213)

Additionally, the quartermaster distributed booty and provisions per the terms of his crew's articles and mediated conflicts between quarreling crewmembers, acting as "a Sort of civil Magistrate on board a Pyrate Ship" (Johnson 1726-1728, 213).

Under pirate law, the quartermaster was democratically elected by his crew, which could also popularly depose him for any reason. Being democratically recalled often resulted in more than the loss of office. When pirate captain John Gow's second-in-command, James Williams, grew violent and unruly, his crew "loaded him with Irons" and "resolved to put him on Board" a captured vessel "with Directions to the Master to deliver him on Board the first English Man of War they should meet with, in order to his being hang'd" (*An Account of the Conduct and Proceedings of the Late John Gow* 1725, 23).

In conjunction with their articles, pirate democracy greatly restricted the scope for quartermasters to abuse their authority. By specifying legally proscribed behaviors and penalties for those who engaged in them, pirates' articles clarified whether a quartermaster's punishment of some crewmember was justified or

instead an abuse of office. Armed with this knowledge, pirates could use the reward of election and threat of deposition to ensure that quartermasters faithfully executed their office's duties—and no more.

Democracy not only kept quartermasters honest; it encouraged the selection of crewmembers most skilled for that office. Aspiring quartermasters had to compete for crewmembers' favor. Pirates who exhibited superior qualities for the job, such as fairness and skill in mediation, were the most likely to be elected.

I have emphasized the powers that quartermasters exercised on pirate ships, giving short shrift to the powers of captains. So did pirates. Only while pirate crews were "in Chase, or Battle" did their captains wield special authority, when, "by their own Laws," "The Captain's Power is uncontroulable" (Johnson 1726-1728, 139, 214). At all other times, pirate law treated the captain like any other member of the crew.

The modest scope of pirate captains' authority was intentional. To avoid repeating their unhappy experiences as merchant sailors, pirates divided the authority traditionally concentrated in the office of captain between that office and the office of quartermaster, "so very industrious were they to avoid putting too much Power into the hands of one Man" (Hayward 1735, 42). Pirates' idea was a now-familiar one: to constrain authority, it is useful to divide authority, enabling one office to "check and balance" the other.

Keen to prevent any encroachments that might deprive them of their authority, quartermasters had a strong incentive to monitor captains' behavior and resist unlawful captain overreaching. As a result, Johnson remarked, "the Captain can undertake nothing which the Quarter-Master does not approve. We may say, the Quarter-Master is an humble Imitation of the Roman Tribune of the People; he speaks for, and looks after the Interest of the Crew" (Johnson 1726-1728, 423).

The quartermaster's role in this regard was really a belts-and-braces approach, for pirate law provided crewmembers a more direct mechanism for controlling their captains—the same one it provided them for controlling their quartermasters: democratic elections. Crewmembers popularly elected their captains and could, and did, popularly depose them "as suited Interest or Humour" (Johnson 1726-1728, 194). It therefore behooved pirate captains to make good on the promises they made their crews, such as that which pirate captain Nathanial North made following his election to do "every Thing which may conduce to the publick Good" (Johnson 1726-1728, 525).

To say that pirate captains faced severe limits on their authority is not to say that they were unimportant members of pirate crews. Captains were vitally important. Their importance, however, derived from the necessity of a skilled military commander for successful piracy rather than from any sort of kingly

status. An overly timid pirate captain would take too little risk in attacking potential prizes; an overly aggressive one would take too much. Profitable piracy required appropriately bold captains. It also required strategically clever captains who knew how to corner pirate-wary merchantmen. Pirates called these qualities of “superior … Knowledge and Boldness, Pistol Proof” (Johnson 1724-1728, 214).

Democracy helped pirates find “pistol-proof” captains. If the first captain that a crew elected turned out to be unfit for the task, the crew was not stuck with him, as it might have been if the captainship were an autocratic office. In such a case, crewmembers could recall their captain and elect a new one in his place, which is exactly what they did.

Piratical Precedent for the American System of Government

The institutional features of pirate law should sound familiar. They are more-or-less those of the American system of government: constitutional democracy, separated powers, and checks and balances.

The reasons that pirates introduced these institutions on their ships should also sound familiar. They are more-or-less the reasons that America's Founding Fathers gave in the *Federalist Papers* for introducing such institutions in American government: the need to empower authorities to facilitate the protection of life and property and the simultaneous need to constrain authorities so that they do not misuse their power.

The most notable difference between pirate law and the American system of government is not their substance but when they were created and by whom. Pirate law was created by mostly illiterate, violent criminals in the early eighteenth century. The American system of government was created by the most educated and respected Europeans of their era more than half a century later. Perhaps the Founding Fathers cribbed from pirates. Or perhaps Captain Charles Johnson was the *nom de plume* of the spirit of the not-yet-born James Madison.

Was Pirate Law Successful?

Pirate law must have been at least somewhat successful in governing pirates or early eighteenth-century Caribbean piracy would not have existed. Left unsolved, the cooperative problems that pirates confronted would have precluded piracy. More than simply existing, however, for a brief period at least, Caribbean piracy flourished, much to the chagrin and vociferous consternation of Europe's governments and international merchant community.

One way of evaluating pirate law's success in governing pirates is to evaluate the success of pirate crews. It is impossible to know what the average early eighteenth-century pirate earned, and the scant available figures must be interpreted with caution: surely the largest pirate hauls were the most likely to be recorded. Still, these figures suggest that at least some pirate crews were incredibly successful.

The members of the early eighteenth-century pirate crew captained by John Bowen, for example, earned £500 per man in a single cruise—the equivalent of 20 years' income for an average early eighteenth-century able seaman. The members of the pirate crew captained by Thomas White did better yet: each earned £1,200 from their expedition. In 1720, the pirates captained by Christopher Condent earned £3,000 apiece. And in 1721, those captained by John Taylor and Olivier Levasseur earned an astonishing £4,000 per man.

Many pirates, of course, were not so lucky. Nevertheless, those whose crews were fortunate enough to come across remarkably rich prizes were only able to take advantage of their fortune because they managed to cooperate for long periods at sea. And they only managed to do that because of pirate law.

Piratical Ploys

Unsurprisingly, criminals clever enough to anticipate the American system of government were clever in other ways. Take, for example, the so-called "pirate press." As most fans of pirate fiction know, pirate crews were composed predominantly of pressed sailors—pirate conscripts. Except they were not. Like many other pirate myths, the popular perception that pirate crews pressed most of their members into their service is the result of a pirate ruse—a crafty public-image campaign engaged in to improve the profitability of piracy.

Eighteenth-century governments punished piracy with hanging. Interested in avoiding this fate if captured, pirates discovered a legal loophole: courts would not convict persons whom pirates forced to join their crews. Banditry on the high seas was criminal, but being taken prisoner by persons who were engaged in banditry on the high seas and forced to do their bidding at sword point was not.

Pirates exploited this loophole by pretending to conscript sailors who joined their ranks voluntarily. Since pirates actually did compel some men to join their companies, the impressment defense was plausible—provided that the person claiming it could supply convincing evidence that he had been coerced.

Such evidence was not hard to concoct. After pirates overwhelmed their ship, merchant sailors who wanted to join up would pull aside the pirate captain or quartermaster and inform him of their desire to enter the company. The pirates would then make a spectacle of compelling the sailors' service to convince those who did not desire to join that their comrades had been conscripted.

"[T]he pretended Constraint," as Johnson put it, was in fact "a Complotment between Parties equally willing" (Johnson 1726-1728, 248). If a pirate crew were subsequently captured, its members could call credible witnesses who observed their supposed impressment to provide compelling testimony at their trials.

Some pirates took this idea a step further. They had witnesses to their ostensible conscription publish advertisements declaring it in popular newspapers. After being "forced on Board" a pirate ship captained by Bart Roberts, Edward Thornden, for instance, "desired one of his Ship-Mates … to take notice of it, and incert it in the *Gazette*".[255]

Pirates' impressment ploy was far from perfect. Courts grew wise to it, and many pirates who claimed to have been conscripted were nevertheless convicted. Still, some managed to escape the gallows because of this ruse.

A much better-known piratical ploy is pirates' infamous flag: Jolly Roger. Similar to their articles, each pirate crew had its own flag, but the flags were

similar. The typical pirate ensign was black and featured a man, or some part of him, often in skeleton form. Hollywood pirates' favorite variation depicts a skull and crossbones.

Most bandits do not announce their presence to their victims and potentially the authorities by publicly displaying a distinctive bandit logo. Yet that is what pirates did. From afar, pirate ships would fly legitimate colors—the flags of various European nations—so as not to alert their prey prematurely. Once they were closer, they would hoist the Jolly Roger, making their piratical identity known.

Such identification was very important to pirates. Their ships were not the only hostile vessels that eighteenth-century merchantmen might encounter at sea. Government-commissioned coast-guard vessels in search of "interlopers"—ships trading in violation of mercantilist prohibitions—also stalked the lanes that merchantmen plied. Coast guards seized allegedly contraband cargo from merchantmen they stopped, which their licenses permitted them to do. Often, however, their behavior shaded into piracy—or at least that is how it seemed from the perspective of accosted merchantmen and their governments.

As government-commissioned ships, coast-guard vessels were limited in how they could respond to merchant crews that resisted them. A coast guard could not murder fleeing sailors in cold blood if it ultimately caught up with them. Consequently, merchantmen were often willing to resist coast guards.

Faced with a pirate attacker, merchantmen's calculus was different. Pirates had a well-deserved reputation for mercilessness toward resistors, which they earned by adhering to a simple policy: surrender or die. Pirates adopted this policy to minimize the cost of taking prizes. Violent confrontations with prey were expensive. They could injure or kill pirate crewmembers, damage the pirate ship, or damage the prize. More-peaceful piracy was therefore more-profitable piracy, secured, ironically enough, by pirates' promise to slaughter resistors.

Convicted pirates faced the same punishment—execution—whether they murdered resistant victims or not, and pirates' superior manpower and firepower strongly favored their victory in violent conflicts with prey. Thus, pirates' deadly promise was credible, and they followed through on it, advertising this fact to the seafaring community by releasing captives who spread word of their deeds. Consequently, most merchantmen were unwilling to resist pirates.

To profit from this fact, pirates needed to ensure that their victims knew when they were being accosted by pirates rather than by coast guards. A victim could not discern its attacker's identity from the appearance of its attacker's ship; pirates and coast guards used the same vessels. But they did not use the same flags. With few exceptions, only pirates flew the Jolly Roger, which is precisely

why they did so.

Coast guards overwhelmingly eschewed flying the Jolly Roger despite its ability to elicit merchantmen's compliance because, for most of them, to do otherwise was to take an unacceptable risk. Pirates did not have valid government commissions that licensed them to accost merchant ships. If authorities captured a crew engaged in such activity without a valid commission, its members were tried as pirates. Coast guards, however, did have such commissions, which protected them from being prosecuted for piracy unless they engaged in flagrantly piratical behavior—such as flying the Jolly Roger. In that case, coast guards' commissions no longer protected them, and they, too, could be tried as pirates.

Because of this fact, there was no free lunch for pirate imitators. To act like a pirate was potentially to face the legal penalty for piracy. Those actually engaged in piracy already faced this penalty. But for those who only wanted to imitate pirates, the difference could be the hangman's noose. Thus, pirates flew the Jolly Roger, and most coast guards did not.

8. Prisoners' Law

How would you stay safe in prison? You might hope that prison officials would guarantee your safety. It's certainly their job to do so, and many men and women work very hard to do just that. The formal procedures, surveillance, and architecture of the prison provide some security. The same bars that would keep you locked in your cell at night would also keep out predatory prisoners. Nevertheless, across every period of prison life that we know about, we consistently find that officials provide only some – and sometimes very little – of the safety that prisoners crave. In fact, prisoners have developed a legal system of their own to order the society of captives.

There are three reasons why prisoners don't rely only on prison officials to do so. The first is that many prisoners feel physically unsafe. This is, perhaps, understandable. How would you feel living every hour of the day surrounded by rapists and murderers? On the margin, you would likely wish to spend some time and energy to make yourself less likely to be the victim of theft or violence from other prisoners.

Second, the nature of California prisons is that there are many resources that are held in common. The pull-up bars, tables and benches, handball courts, and basketball courts are freely open to all prisoners, at least officially. In reality, however, there is far more demand to use these resources than there is available supply. One prisoner explains the problem, noting "Somebody wanna control this basketball court or that basketball court. Or this weight bench or that weight bench. CO [The correctional officer] has nothing to do with that. That's amongst the inmates, the convicts. Sometimes you can maybe talk it out, get it settled without the violence. Sometimes you have to bring the violence."[256] One prisoner associated with a Northern Hispanic gang explains "If a new yard opens up, you're going to fight for that handball court, your going to fight for some tables…If you ain't a Northerner and you come into that areas, you're going to get stabbed."[257] Whether by words or action, prisoners must find ways to ration these scarce resources.

Finally, prisoners cannot rely on officials to regulate the underground economy. Some prisoners desire to have alcohol, tobacco, drugs, cell phones and other prohibited items. The illicit nature of these exchanges means that they can't rely on official legal institutions to enforce property rights and to adjudicate and resolve commercial disputes. As one Brazilian prisoner laments, "if I sell a rock of crack and the guy doesn't cough up, I got no judge to complain to or promissory note to claim."[258] Prisoners have to come up with

ways to overcome these problems.

For all these three reasons, in nearly any prison that scholars have studied, we find that prisoners create parallel, informal legal institutions.

The hidden nature of this legal regime makes it difficult to study, and it also operates differently in different times and places. To get a glimpse inside this underworld, I rely on reports from a wide range of sources, including former prisoners,[259] scholars of prison life[260], journalistic accounts, and a wide range of other documents and sources used in my book.[261] These varied sources allow me to get inside this mysterious, and sometimes dangerous, world to understand who makes law for the outlaws.

The Prisoners' Code

In California prior to the 1960s, the prisoners relied on a decentralized system known as the Prisoners' Code, or simply the Code. The code contained the accepted norms of behavior for interacting with other prisoners. Some of its key tenets were:

- Never rat on another convict
- Don't be nosy
- Don't gossip
- Don't lie
- Don't steal
- Pay your debts
- Don't be weak
- Don't whine

Those prisoners who adhered to these norms were known as "convicts" – prisoners in good standing. Those prisoners who consistently violated these norms, by contrast, were known as mere "inmates."

Convicts esteemed those prisoners who abided by the code in interactions with other convicts. This was partly because of the fact that it encouraged behavior that did not cause conflict. Violating the code – by stealing from, lying to, and gossiping about other people – was likely to cause trouble. To the extent that a convict followed these norms, he would have the respect of his fellow convicts. Their respect meant that he was less likely to be the victim of violence.

By contrast, an inmate who regularly violated the code would not have the support or mutual aid provided by others. Because of his isolation and low status, it was more likely that other prisoners would victimize him.

A deviant prisoner was subject to a range of possible punishments. Gossip and ostracism provided a relatively light, but important, penalty. Gossip and ostracism signal to other prisoners about who can be assaulted without repercussions. It tells predators which prisoners have no friends. Violators of the code might also be beaten, stabbed, or killed.

These enforcements were not centrally directed. It was up to individual

convicts to follow the Code, to choose to enforce deviations from the Code, and to choose to enforce the meta-norm of other convicts enforcing the Code.

The Code was not a written document that was distributed to new prisoners. It was not formally discussed and agreed upon. There was no central body in charge of monitoring and enforcing the code. It was an emergent legal system that was entirely decentralized. There was little organization, no clearly delineated and permanent groups, and no outstanding leaders among the prisoners.

The Code was a guide for how to treat other convicts, so preying on mere inmates was not typically seen to be a violation of the Code. Similar to Romani Law, convicts could prey on outsiders without the same ramifications that would arise if they did so against insiders. Related to this, at the heart of this system, it was the individual's actions and standing that mattered. Each man, for better or worse, was judged on his merits.

Interestingly, during this period, prisoners did not strictly segregate themselves by race and ethnicity. Prisoners tended to affiliate with other prisoners of their own racial background, with those who shared cultural interests, and with people they knew prior to incarceration. But there were no explicit rules about which prisoners a person could interact with and in what ways.

Edward Bunker, who served time in San Quentin prison in the 1950s and later, explains that "although each race tended to congregate with their own, there was little overt racial tension or hostility. That would change in the decade ahead… what I did for a black friend in the mid-fifties is something I would never have even considered a decade later."[262]

The Code Breaks Down

For the Code to operate effectively, prisoners had to be able to know the reputations of other prisoners. If prisoners could not easily know another person's reputation, then violation of the code would not be deterred as easily. An ostracized prisoner could simply interact with other prisoners who did not know his poor standing. Likewise, prisoners are more likely to free ride on enforcing the Code in larger populations. For the first 50 years that the California prison system existed, its prisoner population was always fewer than 5,000 inmates and the average prison population was about 1,000 people, so knowing other people's reputations was possible.

While the Prisoner Code worked relatively well during this period, it began to break down because of changes in the prisoner demographics. Starting in the late 1950s and through the 1960s, the prison population started to grow more rapidly than ever before and rose to an unprecedented level. By 1970, it had increased fivefold. By the 2000s, the California prison population had grown to more than 170,000. Likewise, the number of prisons increased from five to 35 prisons. Since a prisoner today will often serve his sentence across multiple prisons, the growth in the number of prisons further increases the relevant population that a prisoner must interact with.

This was compounded by the fact that the prison population was becoming much more ethnically and racially diverse. Whereas in 1951 there used to be two white prisoners for every one black or Hispanic prisoner, that ratio had reversed by 1980. Heterogeneity undermines decentralized legal systems because it confounds consensus. There is less agreement on what constitutes acceptable behavior, what constitutes a deviation from that behavior, and what the acceptable punishment for such a deviation is.

Coinciding with these changes, there was a significant increase in prisoner on prisoner violence. Disputes were not avoided and when they arose were not resolved in peaceful ways. In response to this increasingly chaotic environment, prisoners turned to groups that today we often assume are the sources of disorder – prison gangs.

Prison Gangs as a Source of Law

Since the 1960s, there has been a dramatic increase in the number of prison gangs, prison gang members, and perhaps most importantly, an increase in their influence over other prisoners. In California prisons, gangs are a dominant influence on the everyday life of prisoners.

Prison gangs are prisoner groups that operate in prison (and sometimes on the street), whose membership is restrictive, permanent, and mutually exclusive, and they typically have a corporate entity that exists into perpetuity. Each of these characteristics is costly to produce and maintain, but these features help to promote the informal legal systems that gangs now administer.

Gangs operate in a community responsibility system. Each prisoner must have an affiliation with a group, and each group is responsible for each member's actions. Prison gangs are the most important such groups in California today, but they are not the only ones. Other prisoners follow the orders of these gangs, but might maintain a relatively limited affiliation based on their race or ethnicity. Likewise, other prisoners who share the same religion sometimes form groups, with these groups then acting as the key community within the system of mutual responsibility.

While all inmates must affiliate with a group, they do not all do so to the same extent. Relatively few prisoners become "made" members of the oldest, most established prison gangs, groups like the Aryan Brotherhood, Black Guerilla Family, Nuestra Familia, and Mexican Mafia. Inmates who desire less influence within the gang can affiliate with subordinate groups. In these cases, prisoners simply go along with the gang rules decided by the gang leaders, who inmates call "shot callers". This allows them to fit into the community responsibility system because other prisoners know which group is responsible for them, but it doesn't require the same level of dedication.

Prison gangs often have written constitutions to order their internal workings. New prisoners are frequently given lists of rules that delineate acceptable and unacceptable behavior when interacting with other prisoners. There are clearly established leadership structures, and some of these positions are filled through democratic elections by a gang's members. Gang leaders self-police their members to ensure compliance with the rules.

When social and economic conflicts arise between gangs, rival gang leaders meet to discuss the conflict and seek a resolution. In practice, this takes place in several ways. For example, if a member of one gang is delinquent in a drug debt to another group, that prisoner's entire gang is responsible for it. He may be

forced to contact family on the outside to pay it off. The gang may pool their resources to pay it off. The gang may force the prisoner to work the debt off for the other gang; he may have to assault a prison guard or an enemy of the gang that is owed. Finally, the gang itself might assault their own member to the extent that it satisfies the shot caller of the other group that a message has been sent that this is not acceptable behavior.

One shot caller provides a description of such a system in action. He explains, "We need to keep the boys in line. If one of our guys is a hot head or something and is always shooting off his mouth it can get everyone into trouble. We don't want a lockdown, we don't want a riot so I've had to beat down my own guys to control the bigger picture. If one of my guys is messing up then we either offer him up to the other guys or we take him down ourselves. Like I had a guy that ran up a big drug debt, he owed money to the woods [peckerwood skin-head gang] and I had to turn him over to them. They took him to a cell and really beat the shit out of him. We had to do it. If not, then everyone fights which is bad for business and bad for us."[263]

One prisoner explains the incentives facing gang members and both the positive and negative consequences of their influence. He says, "Look, there is a lot of problems caused by the gangs, no doubt. The thing is, they solve problems too. You want a structure and you want someone to organize the businesses so the gangs have their rules. You don't run up a drug debt, you don't start a fight in the yard and stuff. Gangs are a problem but we took care of business. There is a code of silence, you don't talk about all the stuff with others, the cops split up gangs if there's a big problem so we keep to ourselves and mind our own business."[264] This quote also hints at the reason why gangs govern the prison. When riots or serious acts of violence take place openly in the prison, officials lock it down. When inmates are locked in their cells all day long for weeks on end ("split up" as the prisoner puts it) it is much more difficult to earn money in the underground economy.

This group responsibility applies to social interactions as well. One African American prisoner who was new to prison was a bit surprised at the repercussions when he insulted a white prisoner. He explains "the next thing I know, I'm told to make it right with him. I have to man up and take care of my shit. At first I thought, you gotta be kidding me. No way am I going to tell this guy that I'm sorry. Then they told me that I have no choice. That's the rule, you do what you're told. They made a very good argument about how I need to fall in line. Okay, so I made things right."[265]

At times, this can be a brutal method of enforcing rules, but it is successful

because it puts the cost of enforcement on those who can do so at the lowest cost —fellow gang members. Gang-based governance outperforms the Prisoner Code because it requires less information about other people's reputations. It is easier to know the reputation of a group than to know the reputation of every member of that group. This is crucial in the large prison population that now exists in California.

Understanding prison gangs as a source of governance helps to resolve two puzzles. The first puzzle is that people often attribute the promotion of violence as the *raison d'être* for gangs' existence. One high ranking prison official says that gangs have an "agenda of violence." But on the contrary, violence in state prisons has fallen dramatically over the last forty years. As Figure 1 shows, there was a nearly 90% decline in prisoner homicides from 1973 to 2012 (no data available from 1974-1979). During much of the 2000s, the homicide rate in prison was actually lower than outside of prison. If gangs form to promote violence, then we should see more violence during their rise to power, not less. Recognizing that gangs provide governance reconciles these apparently contradictory trends.

This explanation also resolves a second puzzle: despite a dramatic decline in the free world in racial prejudice since the 1940s, prison life is actually significantly more segregated today.[266] Showers, telephones, handball courts, and even areas in the yard to sit are claimed by different racial groups and other races are not allowed to use them. Members of different races are not allowed to share cigarettes or meals together, or even to live in the same prison cell.

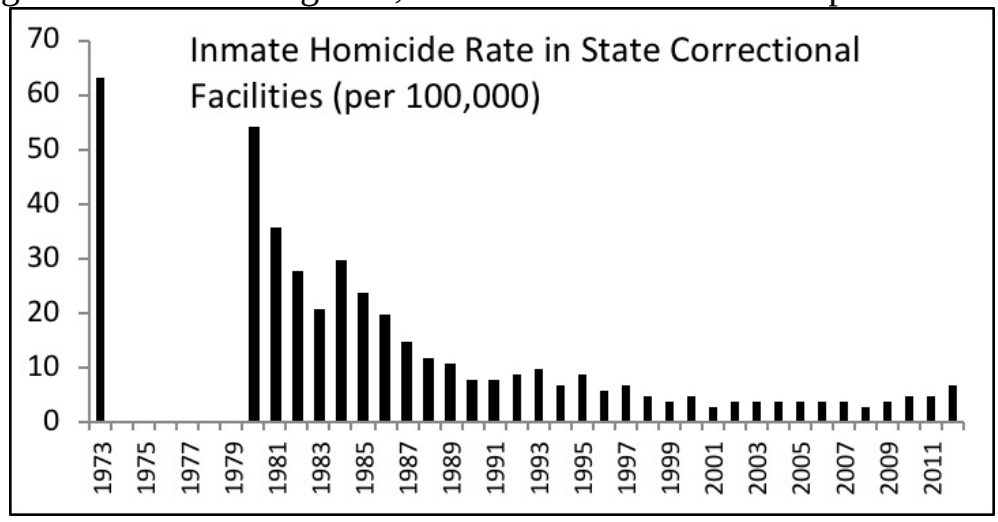


Figure 1

It would seem that the decline in racial prejudice in the outside world would correspond to a decline in racial prejudice within the prison, but that's not the

case. The puzzle is explained when one considers the increase in the prison population. In a society of strangers, the lowest cost way of identifying which group a person affiliates with is the color of his skin. Seeing a person is all it takes to have a good idea about who to complain to about his behavior. This ability to know which group is responsible for a prisoner's actions without knowing that prisoner facilitates the community responsibility system. In a time of small prison populations, it was far easier to know other prisoners, so strict segregation was not needed as a way to economize on information costs.

Conclusion

Gangs do not provide these legal services because of their good intentions. Gangs enforce their own law because orderly prisons are profitable ones. One prisoner explains that shot callers strove to avoid lockdowns, because "the gangs can't sell their stuff, drugs and stuff. They don't want a lockdown, that's true. … Leaders get pissed if there's a lockdown and we don't get yard time, I hated it. … It's best to handle things low-key. No one needs a riot."[267] Disruptions to prisoner life disrupt the underground economy that is a major source of revenue to gang leaders. It's not from the benevolence of the gangs that they govern the underworld but from their regard to their own interest.

The legal system operated by prison gangs is effective in facilitating social and economic interactions within a society of captive strangers, but it is far from ideal. Gang membership increases recidivism. It lacks a robust system of accountability and is a far cry from the rule of law. Moreover, it funnels power and money to people who most of us would prefer to have less of both. With the lack of exit options (either from the gangs or the prison), there is little check on predatory behavior by gangs. Nonetheless, they do accomplish the goal of providing law to people who can't rely on the state to do so.

9. Embedded and Polylegal Systems

Most of the legal systems we are familiar with were enforced by governments, but not all. Romani law, Amish law and, for most of the past two thousand years, Jewish law, are embedded legal systems, systems that enforce their own rules on their own people despite being under the legal system of a government with much greater access to force.[268] Other examples would be the legal systems of the church of Latter Day Saints (Mormons) and the Nation of Islam (black Muslims) in present-day America, the Sicilian Mafia, and the prison gangs described in Chapter 8.

An embedded legal system faces the same problems as other legal systems but additional ones as well. It must find ways of enforcing rules on its population despite the fact that the ways in which legal rules are usually enforced, by force or the threat of force, may violate the rules of the overgovernment. If it wishes to permit activities forbidden by the overgovernment's rules, it must somehow prevent the latter set of rules from being enforced against its population. If individuals are free to shift out of the population controlled by the embedded system, it must find some way of making it difficult or undesirable to do so.

The diaspora Jewish communities found the simplest solution to these problems: Persuade the overgovernment to delegate to the communal authorities legal sovereignty over their population. As described in Chapter 4, Gentile rulers, Christian and Muslim, found it convenient to subcontract the job of ruling, and taxing, their Jewish subjects to the Jewish communal authorities. Those authorities were permitted to enforce their rules as legal rules are conventionally enforced, by the use or threat of force, in some cases force provided by the overgovernment.

The Romani found a different set of solutions. The Vlach Rom enforced their rules by the threat of ostracism, a punishment that, unlike fines, imprisonment, or execution, did not violate the laws of the states they lived in. They also, judging by the historical evidence of the letters they carried in the 15th century, supposedly, perhaps actually, from the Holy Roman Emperor, at some times and places claimed to have had legal authority delegated to them. It seems likely that, where those methods were inadequate, they sometimes made use of covert force.

The Romanichal and the Kaale relied on that final approach—using illegal force while evading the observation and legal authority of the overgovernment. Both the private violence of the Romanichal and the duels and violent feuds of the Kaale were illegal, although the Kaale reduced the problem by conducting

their feuds mostly by legal avoidance instead of illegal violence. In both cases, the risk of government interference was held down by the reluctance of Romani to complain to the authorities about the activities of other Romani.[269] The Vlach Rom in America, in contrast, used the *gaji* legal system as a weapon, accusing their opponents of crimes, real or invented, charges that would be dropped if the feud was settled.

The prison gangs described in Chapter 8 provide a striking example of an embedded system enforcing its rules by illegal force. Not only are they doing things, such as assault and murder, that are illegal, they are doing them inside a prison, where one might expect enforcement of government law to be particularly effective. The earlier convict code was enforced by the threat of ostracism in a context where ostracism produced an increased vulnerability to violence.

Ostracism is a punishment that an embedded legal system can impose without violating the rules of the legal system it is embedded in. Another is excommunication, refusing to allow participation in religious rituals. Both are effective because of special characteristics of the subpopulation.

The effectiveness of the threat of ostracism depends on how easily the exiled Romani can function outside of his community. *Gaje*, non-Romani, do not know the marimé rules and so do not and cannot obey them. It follows that they are all polluted, unclean, carriers of a contagious spiritual disease and perhaps physical diseases as well, people with whom no Rom in his right mind would willingly choose to associate; when and if such association is unavoidable it must be taken with great care.[270] The Romani view of *gaje*, reinforced by the *gaje* view of the Romani as uneducated and illiterate thieves and swindlers,[271] eliminated the exit option and so empowered the *kris* to enforce Romani law by the threat of exclusion from the only tolerable human society. It was a particularly powerful threat in a culture where social interaction plays a very large role in individual life.

> Part of the painfulness of being denied contact with one's own people, whether to be in a jail, a hospital, or a job, is that of being alone. To be among a group of Rom is the natural everyday context within which a person lives, learns and expresses his personality; to be among a group of *gaje* is to be alone. Wherever he travels or lives, a Rom is rarely alone. More often he is surrounded by large numbers of relatives and friends.[272]

The survival of the embedded system depends on maintaining its special characteristics. Both the Romani and the Amish have a history of trying to keep control over the education of their children, as described in earlier chapters. It seems clear that the main concern of the Amish parents was that high school

education, or elementary education in a large school where the teachers and most of the students were not Amish, would weaken their children's connection to their religion and culture. Similar issues were raised by the interaction of the Amish with the Selective Service system during and after WWII, and again solved.

Romani have also been reluctant to put their children into the ordinary school system. A school run by *gaje* will not follow Romani rules of purity.[273] Children who spend a sizable part of their time taught by and interacting with outsiders may fail to be acculturated into their parents' culture.[274] Girls may have their reputations damaged by freely associating with boys past the age at which such association is acceptable in Romani culture.

The problem was not always insoluble:

> "Demands from school authorities that parents send their children to school, … usually are solved by an exodus of the family for as long as is necessary.
>
> It is surprising how well this technique works. A diligent truant officer has no authority or concern for a family once they have left town, and when they return he will generally have to begin all over again applying pressure to the family before threatening prosecution. Once the threat is made, the family takes off again." (Sutherland 1975, 50)

Although the number of Romani in North America is about twice as large as the number of Amish,[275] they have been much less successful in setting up their own schools. A Romani school in Richmond, California, initially unfunded and supported by volunteers, later funded with state money, lasted for seven years. Several other projects, all depending on state funding of one sort or another, survived for shorter periods of time.[276] More recently, California Romani have taken advantage of the state's loose control over home schooling, sending children to a public school until age 12 then homeschooling them, in part to keep the girls' reputations from being tainted by contact with boys after puberty. That solves part of the problem posed by compulsory schooling but not the risk of infecting children with the surrounding non-Romani culture.

The easier it is for members to move out of the subpopulation, the less effective ostracism is as a sanction. But the harder it is for members to defect, the greater the internal problems caused by members dissatisfied with the rules of the embedded system but unwilling to leave. That conflict is nicely illustrated by Amish experience. One of the lines along which Amish congregations divide is the division between strong and weak shunning. Under the rule of strong shunning, *streng meidung*, the shunning of a member only ends when he has been accepted back into his congregation of baptism, normally as a result of having confessed his error, mended his ways, and been forgiven. Under the

weaker rule, the acceptance of a shunned member into any Amish or Mennonite congregation is likely to result in the ban on associating with him eventually being lifted. That is a large difference for someone considering doing things that might get him banned, since the people required to shun him are likely to include most of his relatives and his spouse.

By Meyers' and Nolt's account, the Swiss[277] congregations, descendants of the nineteenth-century wave of immigration, usually include strict shunning in their *Ordnung*, as do the Schwartzentruber Amish, the lowest (most conservative) of the Old Order affiliations. Both groups have below-average rates of defection, with ninety percent or more of their children choosing to remain in the congregation. But the Swiss also have the reputation of more internal dissension and more frequent schisms than the High German Amish, the descendants of the earlier eighteenth-century immigration, many (but not all) of whose congregations practice weak shunning. And while only a small fraction of Schwartzentruber children defect from their congregation, those who do defect tend to defect very far, ending up, unlike defectors from more moderate affiliations, outside of the entire spectrum of Amish and Mennonite groups.[278]

The Fate of the American Romani

The easier it is for individuals to function in the surrounding culture, the weaker the threat of ostracism, hence the weaker the authority of the embedded legal system. Modern America is an unusually tolerant society. That is an advantage from the standpoint of the individual Rom but a threat to the Romani legal system and culture.

Sutherland's first book, based on research done between 1968 and 1970, described a culture in which elders had almost complete control over children and grandchildren, marriages were arranged by parents and grandparents, barriers between Romani and *gaje* were strictly maintained, the *kris* drew large numbers of Romani as observers and jurors and its verdict was almost invariably obeyed. It was a society in which the rules of *Romania*, the system of law and taboo, were enforced and obeyed, since a sentence of *marimé* for their violation resulted in social death for people whose human contacts were almost entirely with fellow Romani. It was a system whose members supported each other through a tightly knit system of kinship and mutual obligations while successfully evading the rules of the society it was embedded in, manipulating that society's authorities for their own purposes and making their living off of its members.

Her second book, written more than forty years later, paints a very different picture. For most Vlach Rom the kinship system, the *vitsa*, is largely gone. The funeral of a prominent figure no longer brings *vitsa* members from all over the country. Elder authority is sharply reduced, youths frequently choosing their own marriage partners, sometimes in defiance of parental authority.[279] Gypsy Evangelical churches provide new sources of authority, the minister and Jesus, undercutting the authority of elders and Big Men. The sentence of *marimé* is still imposed but "people are choosing whether to obey or not, so the blackballed person will have plenty of relatives and friends who ignore the *marimé* decision."[280] Conflicts that would once have gone to a *kris* often go instead to the court system. "The *kris* is no longer representative of several groups and therefore its authority to enforce its rulings is weakened. If it is mainly two families from two *vitsi*; *vitsa* members side with their family member, and there is not a larger contingency of Roma to exert authority over the *vitsa*."[281] Marriage, holidays, funerals increasingly follow the pattern of the surrounding society. The younger generation is fluent in English, less fluent in Romani. "Women who have converted [to Gypsy Evangelical churches] no longer have

fortune-telling as a way to contribute to their families' income [because the churches teach that it is sinful] and thus have lost their economic power. They are expected to stay home and raise children in nuclear families, obey their husbands, and behave modestly."[282]

Sutherland ends her description of the changes:

> "I see a strong and lasting sense of identity as Roma despite rapidly changing cultural practices. … I do not know what further changes may occur, but, Roma identity will survive. It has always survived."[283]

But the picture she paints is of an embedded society gradually collapsing into assimilation. In the words of a correspondent who had been a student in the school she briefly ran in Richmond, now a grandfather:

> Wow, Anne those were the best times—when Roma would get along and care for each other. If someone was sick they came to the hospital till the guards would tell them to leave. When someone would die, the whole Roma that was in town would come to the family and would stay round the clock not to leave them (the deceased) alone. I'm so glad Anne that I was in that time. A lot has changed, and for the worse. They forgot where we came from—our ways, our life, what we stand for, when our people fought to not change our way of life. Our freedom.[284]

Government as Threat

Another potential problem for an embedded legal system is the pressure on its institutions created by the need to interact with the overgovernment. Here again, the Amish provide an example. Issues such as the treatment of Amish conscientious objectors, schooling requirements, the Amish reluctance to participate in the Social Security system, requirements for marking Amish buggies as slow-moving vehicles, all require negotiation between a state or federal government and someone who can speak for the Amish inhabitants of the state or the nation—a requirement hard to satisfy, since the Amish recognize no authority above the individual congregation.

To solve that problem, organizations such as the National Amish Steering Committee and Amish state schooling committees were formed.[285] The Steering Committee successfully negotiated with the Selective Service system both to assure Amish draftees of conscientious objector status and to funnel them into agricultural war service that would keep them connected to the Amish culture. It was later instrumental in negotiating solutions to other conflicts between the Amish and the government.

The creation of such supra-congregational structures carried with it a threat to the decentralized nature of Amish institutions. The Steering Committee had no formal authority over the congregations, but the willingness of governments to treat it as the voice of the Amish gave it powers that might have been converted into *de facto* authority.

One of the things the committee did was to produce a set of recommendations for schools, designed to prevent them from being run in ways that would threaten the understandings with state authorities that made possible Amish schools staffed by uncertified teachers. If the committee had felt sufficiently strongly about the importance of having those recommendations followed,[286] congregations that ignored the recommendations could have been threatened with a refusal by the committee to assist their draftees in claiming conscientious objector status. By that tactic or others—the Committee also played a role in securing exemption from Social Security taxes for Amish employees—the Committee could have borrowed power from the federal government and tried to use it to control the congregations.

It did not, so far as we know, ever happen, perhaps because the ideological commitment of the members of the Committee, themselves Amish, was too strong to permit it.[287] But the fact that it could have happened suggests one

problem facing an embedded legal system based, as the legal system of the Amish is, on decentralized institutions.[288]

Romani kinship structures such as the Vlach Rom *natsiya* ("nation" or "tribe") can contain hundreds of thousands of individuals, but the highest-level political structure is the *kumpania*,[289] often led by a *Rom Baro*, a "Big Man." His power is likely to be based both on kinship with many of the families in the *kumpania* and on perceived ties with and influence over the *gaje*. A connection with the local chief of police or welfare officer, symbolized by his presence next to the *Rom Baro* at a feast, is an important political asset. Sutherland mentions one case where a family, encountering a temporary delay in qualifying for welfare benefits, mistakenly interpreted it as evidence that the local *Rom Baro* did not approve.[290] The willingness of local authorities to believe criminal accusations by one Rom against another can be a potent weapon in feud.

In the U.S., such dealings with *gaje* authorities support central power at the local level but not, as yet, at the national. The reason may be the difficulty of combining a national organization purporting to speak for all the Rom with the low-profile tactics used to evade government authority. Elsewhere, however, such attempts sometimes occur.[291] At the international level, the International Romani Union exists and provides its representatives with some claim to speak for the Romani:

> I was periodically involved with lawyers in Toronto to help with refugee cases because I was the Canadian Representative of the International Romani Union, an NGO of the United Nations, and was known to the Canadian government authorities as such. (Ronald Lee)[292]

Polylegal Systems

So far I have been considering legal systems unambiguously under the authority of an overgovernment. Somewhat different issues are raised by polylegal systems, societies where different people are under different legal regimes, none of which has superior status to the others. An example would be Sunni Islam, with four different and, at some times and places, coequal schools of law existing in the same city. Other examples existed in the Middle Ages. During the Reconquista in Spain, it was not uncommon for a Muslim village to pass under Christian rule but be allowed to remain for a considerable while under Muslim law. During the period when German traders were expanding their activities into Slavic areas along the Baltic coast, local rulers sometimes permitted the Germans under their rule to be under German law. Under the millet system of the Ottoman Empire, different ethnic communities, not only Jews but also various Christian groups, were given self-governing powers, subject to whatever requirements the Empire imposed upon them.[293]

Wales during the centuries before its union with England provides an interesting case. From Anglo-Saxon times on, the Welsh princes had viewed the English king as the overking to whom they owed fealty but not homage.[294] Normans holding land in Wales by right of conquest claimed a similar quasi-regal status, owing allegiance to the king of England but free to apply a mix of Welsh and English law and custom to the lands they ruled. Over time Welsh territory, whether held by Welsh princes or Norman lords, gradually came under the legal authority of the English crown, a process completed by the Acts of Union under Henry VIII.

Until then, in some cases and for some but not all legal purposes, English were under English law, Welsh under Welsh law.[295] A single lordship might include both Welsheries, areas where Welsh law applied to matters such as inheritance, and Englisheries where English law applied.[296] When Llewellyn ap Iorwerth, ruler of the northern kingdom swore fealty and liege homage to King John, the king "allowed either English or Welsh law to be utilized to resolve disputes in Llewellyn's land, according to whether they were held of Welsh or English lords." Late in the period, Welshmen were sometimes rewarded for service to the crown by being given denizen status, becoming honorary Englishmen. Under Henry VII, denizen status was sometimes given to whole areas or lordships.[297]

A polylegal system raises no special problems as long as the disputes it applies to are intracommunal, and in most such systems most disputes probably were.

The problem arises when a polylegal system must deal with cross cases, disputes between (say) a Maliki plaintiff and a Shafi'i defendant.

One possible solution is for one system, perhaps the system of the ruler, to have jurisdiction over such cases, but there are others. The rule might, for instance, be that a case always went to the legal system of the defendant.[298] Each pair of legal systems might have an agreement specifying the court to which disputes between them would go,[299] although that still raises problems for a dispute with multiple parties adhering to more than two systems. In the Islamic case, disputes between a Muslim and a Christian or Jew could be taken to a Muslim court.

The same issue exists in current U.S. law, which is in its own way polylegal. Each U.S. state has its own law. Most disputes have an unambiguous location in a particular state, but not all; consider the case of a customer in California who purchases a product produced in Massachusetts from a seller in Texas. What court gets to decide the resulting product liability dispute? U.S. legal theory includes an elaborate set of rules for solving such conflict of law cases.

One of those rules is diversity jurisdiction. A civil case that would normally be under state law can be heard by a federal court instead if plaintiff and defendant are from different states—a modern version of the rule that sends cross cases to the ruler's court. The answer is not simply that federal law controls—in some contexts it is the job of the federal court to resolve the case according to what it finds to be the relevant state law.

The same problem appears, *de facto* if not *de jure*, within the federal system, since the interpretation of federal law is mostly done by the appeals courts of the twelve federal circuits. There is thus a law of the circuit, and just as in the case of state law there may be ambiguity as to which circuit has jurisdiction over the case. Only when the Supreme Court agrees to hear a case is a rule produced that is binding on all circuits. Conflict between circuit opinions is one of the reasons for the Supreme Court to accept a case.

10. Saga-Period Iceland[300]

> Iceland is known to men as a land of volcanoes, geysers and glaciers. But it ought to be no less interesting to the student of history as the birthplace of a brilliant literature in poetry and prose, and as the home of a people who have maintained for many centuries a high level of intellectual cultivation. It is an almost unique instance of a community whose culture and creative power flourished independently of any favouring material conditions, and indeed under conditions in the highest degree unfavourable. Nor ought it to be less interesting to the student of politics and laws as having produced a Constitution unlike any other whereof records remain and a body of law so elaborate and complex, that it is hard to believe that it existed among men whose chief occupation was to kill one another.
>
> (Bryce 1901, 263)

About forty years ago George Stigler and Gary Becker, two prominent economists at the University of Chicago, published an article that pointed out a problem with the conventional system for enforcing criminal law.[301] I like to summarize their argument with a brief story.

I am a cop, you are a criminal. I have the goods on you, the evidence that will send you to jail. The cost of being convicted and jailed is, to you, the equivalent of a hundred thousand dollar fine. The benefit to me of getting you convicted is a gold star on my report card, a boost to my career that will raise my lifetime income by ten thousand dollars. Seen from the perspective of Dragnet, the rest of the story is obvious: I turn over the evidence to the D.A., you go to jail. Seen from the perspective of economics, it is also obvious. I have something worth ten thousand dollars to me and a hundred thousand to you. Markets exist to move assets to their highest valued use. You pay me fifty thousand dollars and I burn the evidence.

To keep this from happening, to make the system work as designed, we need a second layer of cops watching the first layer—and perhaps a third layer watching them. That raises the cost and complication of the system. Becker and Stigler suggested a simple alternative: Replace the salary of the policeman with a reward. When you pay a hundred thousand dollar fine or receive the equivalent prison sentence, I get a hundred thousand dollars. Now the only bribe I would be willing to accept is for at least a hundred thousand dollars, which would impose the proper punishment on you while saving the cost of a trial.

Two prominent legal scholars, Richard Posner and William Landes, also at the University of Chicago, responded, pointing out issues that the first set of authors had failed to deal with, including the question of who had the right to catch a criminal and collect the reward.[302] One possible solution was to make it a property right of the victim, a claim against the criminal. At which point, as

Landes and Posner pointed out, Becker and Stigler had reinvented the tort system. Under tort law, as under the hypothetical version of criminal law, the victim has a claim against the offender, collected by an in-court conviction or out-of-court settlement.[303]

I got interested and added two articles to the exchange. One offered a solution to a technical problem with a system of privately prosecuted criminal law that Landes and Posner had pointed out.[304] The other described an actual legal system similar to the imaginary one they were discussing. In saga-period Iceland a thousand years ago, if you killed someone his relatives sued you. Studying that system was what first got me interested in the broader subject of this book. This chapter is a greatly revised version of that article.

The Problem of Sources

Our knowledge of the Icelandic legal system is based on sources of two sorts: the sagas, histories and historical novels written down in the thirteenth and fourteenth centuries, many of which are set and may have been composed in the tenth and early eleventh centuries, and *Gragas*, a collection of legal texts written down in the second half of the thirteenth century. When I first tried to make sense of the system, *Gragas* had not yet been translated into English; since I did not read Old Norse, I based my article on the sagas and the secondary literature.[305] Returning to the subject more than thirty years later, one of the first things I did was to read *Gragas*, now available in English. I concluded that parts of it were inconsistent both with my old account of the system and with the sagas that account was based on.

To check the latter conclusion, I read though all of the sagas set in Iceland.[306] I concluded that while my article had been mistaken about some significant legal details, I had for the most part correctly described the system as shown in the sagas.[307] *Gragas* was inconsistent not only with the family sagas, written down two or three centuries after the events they described, but also with the Sturlung sagas, whose authors were describing events many of which had occurred during their lifetime, some of which they were participants in.[308]

The most important inconsistency had to do with out-of-court settlements. According to *Gragas*, an offence for which the legal penalty was full outlawry could be settled on less harsh terms only with the approval of the Lögrétta, the law council.[309] Most such cases in the sagas were resolved by settlement,[310] but I found no examples either of settlements described as approved by the Lögrétta or of ones blocked by its failure to approve. Further, many settlements occurred when the Althing was not in session and so the Lögrétta, which met only at the Althing, did not exist to approve or disapprove them.

According to *Gragas*, once someone had been charged with a serious offense it was illegal for anyone to harbor him—give him food or shelter. Equally strange, at least to modern sensibilities, it was illegal for him to attend any assembly, including the one at which he was to be tried.[311] His defense had to be conducted by someone else in his absence. I have found only one passage in the sagas where someone was penalized for harboring a killer before he had been tried and convicted and that was part of a settlement, not a court verdict.[312] Defendants often but not always appear at the assembly at which they are to be

tried.

Gragas specifies acts by which someone forfeited his immunity, could be killed without legal consequences. That included any attack, even a blow that failed to land, and applied not only to the perpetrator but to companions who knew of or assisted the intended attack.

> It is prescribed that a man on whom injury is inflicted has the right to avenge himself if he wants to up to the time of the General Assembly at which he is required to bring a case for the injuries; and the same applies to everyone who has the right to avenge a killing. Those who have the right to avenge a killing are the principals in a killing case. The man who inflicted the injury falls with forfeit immunity at the hands of a principal and at the hands of any of his company, though it is also lawful for vengeance to be taken by other men within twenty-four hours.

The legal pattern in the sagas is more complicated. There are passages where an attacker is held to have fallen with forfeit immunity.[313] There is one that seems to imply that immunity is forfeit only if someone on the other side was killed or wounded.[314] There are others where the attack is treated as a separate tort, with damages to be set off against those owed for killing the attackers.[315] But in most cases where there is an unambiguous attack by one person or group against another the rule of forfeit immunity is ignored, with deaths on each side set off against deaths on the other side and either wergeld (the damage payment for a killing) or outlawry owed for any excess deaths.[316]

According to *Gragas*, almost anything of a sexual nature between people not married to each other was a serious offense.

> “If a man kisses a woman in private, with no one else present and with her consent, then he incurs a penalty of three marks, and the case lies with the same man as an intercourse case would. But if she takes offence at it, then the case lies with her and the penalty is lesser outlawry. If a man gives another man's wife a secret kiss, the penalty for that is lesser outlawry whether she allows it or whether she forbids it, … If a man asks a woman to sleep with him, the penalty for that is lesser outlawry.” (Gragas II K§155, 69)

But *Gragas* also gives rules for inheritance which take for granted the existence of illegitimate children. In some cases the mothers might have been vagrants, to whom the same rules did not apply, or thralls,[317] or the father might have been outlawed. But one of the bishops of Iceland was illegitimate and his mother was a sister of the previous bishop, clearly not a thrall or a vagrant.[318] In the Sturlung sagas practically every important man has a mistress; one chieftain is in bed between his two mistresses when attackers show up.[319] The mistresses are described as the daughters of respectable farmers.[320] Being the mistress of an important man was viewed by some as better than being the wife of someone less important. There are cases where someone is charged with an intercourse

offense, but with only a few exceptions they are cases where intercourse led to pregnancy.[321]

What explains conflicts between *Gragas* and the sagas? I can see at least four alternatives:

1. The sagas are wrong. They do not accurately describe how the legal system functioned in the period they cover.

2. *Gragas* is wrong.

3. *Gragas* describes the system as it existed at the end of the period, the sagas as it existed in the first century and a half.

4. *Gragas* describes the legal system as it existed on paper but not as it existed in practice.

The first alternative gets us into an old scholarly controversy. The family sagas describe events in the late ninth through early eleventh centuries but their written texts date from the thirteenth and fourteenth. One possibility is that they were composed shortly after the events they describe, passed down in oral form for several centuries, then committed to writing. An alternative is that they were composed by the people who wrote them down, based on bits and pieces of tradition. If the latter is correct, their picture of the legal institutions of the earlier period might be no more reliable than the picture of the Wild West in modern westerns or of medieval Europe in bad historical novels.[322]

One argument against the oral tradition theory is that the sagas are prose not verse, hence more easily mutated in transmission.[323] On the other hand, the authors of many of them had lived under the legal system in which they were set, even if a later version—the major changes occurred after 1263, when the Icelanders turned over authority to the king of Norway.

Many years ago Jesse Byock, a leading American scholar of the sagas, published an ingenious piece of evidence in, of all places, *Scientific American*. He demonstrated that a collection of apparently unrelated details about Egil Skallagrimsson, the central figure in *Egil Saga*, and his father and grandfather all fit the theory that they suffered from Padget's disease, a hereditary disease first identified in the 19th century.[324] That makes sense if the saga was composed at a time when the relevant details were still in living memory, less sense if it was created two or three hundred years later.

Byock's view is that while details of the saga plot might be recreated each time they were told, the stories were based on a historical and institutional background known to both teller and audience.[325] Eventually someone did it one more time in writing. That suggests that they should be reliable as a source of

information on institutions if not always on historical details. Sigurdsson takes a similar position.[326]

Whether or not the family sagas can be taken as reliable historical documents, it is generally agreed that the Sturlung sagas, dealing with events much closer to their composition, can be. Hence where a rule in *Gragas* contradicts the Sturlung sagas, I think we can be reasonably confident that it does not describe the actual law code, at least in practice.

The second alternative gets us to the nature of *Gragas*. It was assembled from two long accounts of the law and several fragmentary ones, all presumably compiled by private individuals for their own use. The earlier account was written down about 1260, just before the end of the period of Icelandic independence, the later about 1280, after Iceland had come under Norwegian rule. One rule included is that, in case of conflict among written accounts of the law, the texts belonging to the bishops have priority, which implies that written accounts of the law differed.[327] So the *Gragas* texts may represent some mix of what the law was, what the person writing it thought it was and what the person for whom it was written wanted it to be.[328]

The third alternative, that the law changed over time, is true in at least one respect. Iceland went Christian in the year 1000. *Gragas* contains a long section dealing with churches, what things you are forbidden to do on a holy day and the penalties for doing them, and related issues. But the comparison of the Sturlung sagas to the family sagas suggests that although law in practice changed as the system broke down, law in theory, aside from the Christian additions, remained very much the same.

The fourth alternative strikes me as a plausible explanation in the case of intercourse offenses. Even if seduction was an offense that the woman's father could prosecute, it might have been more prudent not to, especially if no pregnancy had occurred. In one case we are told that the seducer responded to the father's complaint by offering to marry his mistress—and did so.[329] That alternative is also a possible but somewhat less plausible explanation of the conflict between the penalties imposed, according to *Gragas*, on a defendant prior to his trial and the behavior of defendants in the sagas. This is more of a problem for the family sagas than for the Sturlung sagas, since by the Sturlung period defiance of the law by powerful individuals had become common.

There is one additional inconsistency between *Gragas* and the sagas, in particular the Sturlung sagas, that supports the idea that *Gragas* is in part a wish list. In the Sturlung sagas, parties to legal disputes quite often arrive at the Althing with hundreds of supporters—the larger the force, the better the odds of

a favorable outcome. A common pattern is for neutral parties, sometimes led by one of the bishops, to intervene to find some acceptable compromise in order to prevent a battle.

According to *Gragas*, no litigant can bring more than ten men to court.[330]

I conclude that the claim in *Gragas* that settlement required the consent of the Lögrétta is inconsistent with massive evidence in both the family and the Sturlung sagas, hence almost certainly false. I take the rules on forfeit immunity and intercourse offenses as existing in some form but not consistently enforced. Where *Gragas* is not contradicted by events in the sagas, I take its legal rules as a reasonable guess at the rules in force.

History and Institutions

In the latter half of the ninth century, King Harald Fairhair unified Norway under his rule. A substantial number of the inhabitants, unhappy with the change, left;[331] many went either directly to Iceland, which had been discovered by the Norse a few years earlier, or indirectly via Norse colonies in England, Ireland, Orkney, the Hebrides, and the Shetland Islands. The political system they developed there was based on Norwegian[332] traditions with one important innovation—there was no king.

At the base of the system stood the goði (pl. goðar) and the goðorð (pl. goðorð). The original goðar seem to have been local leaders who built pagan temples and served as their priests. A goði received temple dues and provided in exchange both religious and political services. The goðorð was his congregation. The relationship between the goði and his thingmen (*thingmenn*) was contractual not territorial. The goði had no claim to the thingman's land and the thingman was free to transfer his allegiance.

Under the system of laws established in A.D. 930, these local leaders were combined into a national system. In 960, Iceland was divided into four quarters, each containing nine goðorð clustered in groups of three called things. In 965 three more goðar were added in the North Quarter and in 1005 an additional three “new goðar” each in the southern, eastern and western quarters. The new goðar had seats in the Lögrétta and played a role in appointing judges to the fifth court but not to the quarter courts.[333]

The one permanent official of this system was the *lögsögumaður* or lawspeaker; he was elected every three years by the inhabitants of one quarter, which quarter it was being chosen by lot. His job was to memorize the laws, recite them once during his term in office, provide advice on difficult legal points and preside over the Lögrétta, the legislature.

The members of the Lögrétta were the goðar, new and old, for each of these two advisors, plus, after Iceland went Christian in 1000, the two bishops. Decisions were made by majority vote subject to attempts to first achieve unanimity.

The laws passed by the Lögrétta were applied by a system of courts, also resting on the goðar. The thing court or *Vorþing* was held at the spring Assembly of each quarter. The judges[334] were chosen twelve each by the three goðar of the thing, making thirty-six in all. Next came the quarter-thing for disputes between members of different things within the same quarter; these seem to have been

little used and not much is known about them.[335] Above them were the four quarter courts of the Althing (*alþingi*) or national assembly, an annual meeting of all the goðar, each bringing with him at least one-ninth of his thingmen. There were procedures by which a party to a suit could veto its settlement in the *Vorþing*, forcing it up to the appropriate quarter court. Above the quarter courts, after the reforms credited to Njal, was the fifth court. Cases undecided at any level of the system went to the next level. At every level the judges were appointed by the goðar, each quarter court and the fifth court having judges appointed by the goðar from all over Iceland.[336] The fifth court reached its decision by majority vote; the other courts seem to have required that there be no more than six (out of thirty-six) dissenting votes in order for a verdict to be given.[337]

A court system requires some way of determining the facts of the case, made more difficult in a society where most people were illiterate. The Icelanders made use of a system of panels of varying size. In some contexts the panel consisted of the nine nearest neighbors to the site of an event, such as a killing. In others, it consisted of witnesses to a required legal act. There were requirements for who could be on a panel and procedures for dismissing unqualified members, such as anyone too closely related to plaintiff or defendant.

The goðorð itself was two different things. It was a group of men—the particular men who had agreed to follow that goði, to be members of that goðorð. Any man could be challenged to name his goðorð and was required to do so, but he was free to choose any goði within his quarter who would have him and to change to a different goðorð at will (but only at a particular time in the year).[338] The goðorð was also a bundle of rights, including the right to sit in the Lögrétta and appoint judges for certain courts. Perhaps most important, it was the right to be the person through whom ordinary farmers plugged into the legal system. The farmer who was the thingman of a goði owed him an annual thingtax, used to pay the expenses of those thingmen who accompanied the goði to the Althing. The amount of the thingtax was negotiated between goði and thingman.[339] The goðorð in this second sense was marketable property. It could be given away, sold, held by a partnership, inherited. Seats in the law-making body were quite literally for sale.

I have described the legislative and judicial branches of the Icelandic system but have omitted the executive. So did the Icelanders. The function of the courts was to deliver verdicts on cases brought to them. That done, the court was

finished. For serious offenses, conviction meant full outlawry. The outlaw's property was confiscated, part going as a damage payment to the victim or his heirs, part to support the outlaw's dependents. If more was available, the goði in charge of the confiscation court got a cow or a four year old ox. The remainder was divided between the prosecutor and the men of the quarter if he was outlawed at the Althing, the men of the assembly for the district where the confiscation court was held if he was outlawed at the *Vorþing*, to be spent on care of the outlaw's dependents and, if anything was left, on other itinerants. It was legal to kill an outlaw, illegal to feed him, shelter him, or help him to leave Iceland. For somewhat less serious offenses, conviction meant lesser outlawry. A lesser outlaw had the right to leave Iceland[340] and could return in three years. For still less serious offenses the punishment was a fine. If it went unpaid, the penalty was lesser outlawry if the fine was paid at the confiscation court, greater outlawry if it was not.

Prosecution was up to the victim or his kin. If they and the offender agreed on a settlement, the matter was settled. Most cases in the sagas were settled out of court, usually for money damages, sometimes for lesser outlawry or greater outlawry with permission to leave Iceland. Many were settled by arbitration, including the two most serious conflicts that arose prior to the final period of breakdown in the thirteenth century. Calculations by two different scholars suggest that only about a tenth of cases went to a final judgment by the court.

Where a clash resulted in deaths on both sides they were usually set off against each other, sometimes weighted by how important the man killed was, with the excess paid in wergeld or outlawries. In some cases part of the payment for killing one man was the cancellation of the outlawry imposed on another in a previous conflict. Some passages suggest that the prosecutor who got a man outlawed had the power to later lift the sentence from his outlaw.[341]

Icelandic law distinguished between killing and murder—secret killing. After killing a man, one was obliged to announce the fact immediately:[342]

> It is prescribed that where men go only one way from a killing, then the killer is to publish the killing as his work within the next twelve hours; but if he is on mountain or fjord then he must do it within twelve hours of returning. He is to go to the first house where he thinks his life is in no danger on that account and tell one or more men legally resident there and state it in this way: "There was an encounter between us," he is to state, and name the other man and say where it was. "I publish those wounds as my work and all the injury done to him; I publish wounds if wounds are the outcome and killing if killing is the outcome."(G1 K87, 153-4)
>
> "It is prescribed that if he publishes it in some other way than now told, then it is deemed murder, with the result that it cannot be claimed that the other man, no matter what offense he may have given, died with forfeit immunity, and no grounds of defense are to be accepted."

Murder cost the killer the ability to raise legal defenses, such as the fact that his victim was an outlaw or had forfeited his immunity by attacking. Concealed taking in some circumstances had a more severe penalty than open taking.[343] In addition, secret killing (murder) or secret taking (theft) was seen as shameful.[344]

Hreppur

In addition to the legal system based on goði and goðorð, there was a system consisting of groups of households called *Hreppur*. Unlike the legal system, it was geographically based, consisting of groups of neighbors, at least twenty households in each. Its functions included coordinating summer grazing, providing a system of mutual insurance for the members, allocating responsibility for local orphans and indigents and providing a forum for local disputes. The *Hreppur* were self governing. Not much is known about their internal structure.[345]

Analysis

One possible objection to a system of privately enforced law is that the poor or weak would be unable to enforce their rights. The Icelandic system dealt with this problem by making the victim's right to compensation transferable. The victim could turn over his case to someone else, either gratis or in return for a consideration.[346] A man who did not have sufficient resources, in wealth or allies, to prosecute a case or enforce a verdict could sell it to another who expected to make a profit in both money and reputation by winning the case and collecting the fine. This meant that an attack on even the poorest victim could lead to eventual punishment. A man might volunteer to take on a case not for money but in order to gain status or because the offender was an enemy he wished to harm.[347]

A second possible objection is that the powerful could commit crimes with impunity, since nobody would be able to enforce a judgment against them. Where power is sufficiently concentrated this might be true; that was one of the problems that led to the eventual breakdown of the Icelandic legal system in the thirteenth century. But so long as power was reasonably dispersed, as it seems to have been for the first two centuries after the system was established, this was a less serious problem. A man who refused to pay his fines or offer a reasonable settlement and as a result was outlawed would probably not be supported by as many of his friends as the plaintiff seeking to enforce judgment, since in case of violent conflict his defenders would find themselves legally in the wrong. If the lawbreaker defended himself by force, every injury inflicted on the partisans of the other side would result in another suit and every refusal to settle and pay would pull more people into the coalition against him.

There is a scene in *Njal Saga* that provides striking evidence of the stability of the system. Conflict between two groups has become so intense that open fighting threatens to break out during the Althing. A leader of one faction asks a benevolent neutral what he will do for them in case of a fight. He replies that he will draw up his people, armed, on one side. If the leader's men are losing they can retreat behind his, ending the fight. If they are winning, he will first block the other side from the best defensive position available and then break up the fight before the winners kill more men than they can afford.[348] Even when the system seems so near to breaking down, it is still assumed that every enemy killed must eventually be paid for. Each man killed will have friends and relations who are still neutral and will remain so if and only if the killing is made

up for by an appropriate wergeld.

A similar pattern holds even in the final period of breakdown, when coalitions are engaged in a virtual civil war. After it is clear which side has won a battle most of the losers are let go unharmed, with the exception of anyone against whom the winners have a particularly serious grudge. When one side manages a successful surprise attack on the home of the opposing leader they kill him, assuming he is present and does not manage to get away, but they let anyone not killed in the process go, again with the same exception. If he turns out to be absent, they may damage the home but are unlikely to massacre the inhabitants.

There are two explanations for restraint in what was in other ways a pretty unrestrained conflict. One is that you may want to ally next year with the faction you are currently fighting. Acquiring them as allies may require first paying your debts, including debts for people killed. The other is that the people you have just defeated have relatives, not all of whom are in the enemy coalition. To keep them neutral or, better yet, friendly, it may prove necessary to pay for those you killed.

After one attack in which a home was burned, the attackers eventually agreed to pay damages for most of those killed inside it but insisted that they owed nothing for one man since they not only offered him the opportunity to come out, they offered to pay him to.[349] It is one of many scenes in the Sturlung sagas in which people eventually agree to pay damages for those they have killed.

In order for a potential offender to be deterred, he has to believe that someone is committed in advance to act against those who wrong his potential victim. In Iceland this was done by a system of existing coalitions, some of them goðorð, some groups of friends and relatives. If a member of such a coalition was killed it was in the interest of the other members to collect wergeld for him even if the cost was more than the amount that would be collected; their own safety depended partly on their reputation for doing so. If the killer was unwilling to pay, it was in their interest to push the case through to outlawry and then do their best to kill the outlaw, even at some risk to themselves.

One difficulty with fines or damage payments is that criminals might be judgment proof, unable to pay enough to provide adequate deterrence. The Icelandic system dealt with this in three ways. First, most offenses were ones for which detection was almost certain, hence the cost imposed on offenders did not have to be increased to compensate for a low probability of having to pay it.[350] Second, the society provided effective credit arrangements. The same coalitions mentioned above provided their members with money to pay large fines.[351] Third, a person unable to discharge his financial obligation could be reduced to a

state of temporary slavery, debt thralldom, until he had worked off his debt. Convicted offenders had a strong incentive to find some way of paying for their offenses, since the alternative was thralldom or outlawry.

Causes of the Breakdown of the System

One cause of the breakdown of the Icelandic system seems to have been increased concentration of wealth and hence power. By the Sturlung period there were many areas where all or most of the goðorð were held by one family, reducing or eliminating the ability of the individual thingman to choose his goði and creating a de facto, if imperfect, form of territorial sovereignty.

Why did power become more concentrated? Possibly because a coalition controlling multiple goðorð could raise a larger force in support of legal claims. In addition, since a coalition controlling multiple goðorð in the same area would be subject to less competition for thingmen, it would be able to get them on more favorable terms. Those advantages would be balanced, as in the Somali case to be discussed in the next chapter, by the increased problems of internal conflict within a larger coalition. The Sturlung period is so called after the Sturlung family, which played a large role in its conflicts—frequently with one leading member fighting against another.

Another possible source of concentration of wealth and power was the introduction of Christianity. A church was under the control of the local landowner who had donated its land and paid for its construction. Individual farmers owed tithes to the church, some fraction of which might end up in the hands of its owner.[352] That provided the equivalent of taxation, a source of revenue to support the power of ambitious men.[353]

A second and related cause of the breakdown was the introduction into Iceland of a foreign ideology—monarchy. By the end of the Sturlung period the chieftains were no longer fighting over who owed what damages to whom but over who should eventually rule Iceland. The Norwegian king gave at least one of the Icelandic leaders the title of Jarl,[354] along with instructions to take over Iceland on his behalf and collect tribute. Many of the goðorð were transferred by their owners to the king. Several of the leading figures, when out of Iceland, usually as a result of a settlement that included temporary outlawry, became retainers of the king, in principle obligated to obey his orders. One of them, Snorri Sturluson, was killed in Iceland on the king’s orders as punishment for returning to Iceland without royal permission.

Conclusion

The sagas are perceived by many as portraying a violent and unjust society tormented by constant feuding. It is difficult to tell whether such judgments are correct. The sagas were written down during or after the Sturlung period, the final violent breakdown of the Icelandic system in the thirteenth century, and their authors may have projected elements of what they saw around them on the earlier periods they described. Also, violence has always been good entertainment, and the saga writers may have selected their material accordingly. Even in a relatively peaceful society novelists might be able to find, over the course of three hundred years, enough conflict for a considerable body of literature.

The quality of violence, in contrast to other medieval literature, is small in scale, intensely personal (every casualty is usually named), and relatively straightforward. In the rare cases when an attacker burns the defender's home, women, children, and servants are first offered an opportunity to leave. Rape and torture are uncommon,[355] the killing of women almost unheard of.[356] According to a calculation by a scholar who went through the Sturlung sagas counting bodies, during more than fifty years of the violent breakdown of the traditional system the number of people killed or executed each year, on a per capita basis, was roughly equal to the rate of murder and non-negligent manslaughter in the United States in 1975.[357]

Appendix: Wages and Wergelds

To compare penalties in the Icelandic system with those in more familiar legal systems, we need some measure of the value of the money the penalties were paid in. Two different monies were in common use in medieval Iceland—silver and *vaðmal*, woolen cloth. Silver was measured in ounces (*aurar*) and in marks; the mark contained eight ounces. *Waðmal* was of a standard width of about a meter and measured in Icelandic ells (*alnar*) of about 56 centimeters.[358] During the twelfth and thirteenth centuries the value of an ounce (*eyrir*) of silver varied between 6 and 7 1/2 ells.[359] The "law ounce" was set at 6 ells;[360] this appears to have been a money of account, not an attempt at price fixing.

Gragas contains a passage setting maximum wages,[361] possibly an attempt to enforce a monopsonistic cartel agreement by the landowning thingmen against their employees. Porkell Johannesson estimates from the passage that the farm laborer's wage, net of room and board, amounted to about one mark of silver a year and cites another writer who estimated it at about three-quarters of a mark. Johannesson also states that wages net of room and board seem to have been low or zero at the time of settlement but to have risen somewhat by the second half of the tenth century.

These figures give us only a very approximate idea of Icelandic wages. The existence of maximum wage legislation suggests that the equilibrium wage was higher than the legislated wage. But wages, as Þorkell Johannesson points out, must have varied considerably with good and bad years; the legislation might be an attempt to hold wages in good years to a level below the good year equilibrium but above the average wage.

For a second estimate of wages I have taken advantage of the fact that one of the two monetary commodities was woolen cloth, a material whose production is highly labor intensive. If we knew how many hours went into spinning and weaving an ell of *vaðmal* we could estimate an upper bound on the market wage rate; if it takes y hours to produce one ell, then the hourly wage of the women making cloth, including the value of any payment in kind they receive, should be less than l/y ells of *vaðmal*.

I estimated y in two ways—from figures given by Hoffman for the productivity of Icelandic weavers using the same technology at later periods[362] and from estimates given me by Geraldine Duncan, who has herself worked with a warp-weighted loom and a drop spindle, the tools used by medieval Icelandic weavers.[363] Both methods lead to imprecise results, the first because reports

disagree and the sources are vague as to whether the time given is for weaving only or for both weaving and spinning, the second because Mrs. Duncan did not know the precise characteristics of *vaðmal* or how the skill of medieval Icelandic spinners and weavers compared with her own. My conclusion is that it took about a day to spin and weave an ell of *vaðmal*; this estimate could easily be off by a factor of two in either direction. If we assume that, in a relatively poor society such as Iceland, a considerable portion of the income of an ordinary worker went for room and board, this figure is consistent with the maximum wage figure in *Gragas*.

A rough check on these estimates of wages is provided by the fact that the *lögsögumaður* received an annual salary of 240 ells of *vaðmal*[364] plus a part of the fines for certain minor offenses. While his position was not a full-time one, it involved more than just the two weeks of the Althing; he was required to give information on the law to all comers. Since the man chosen for the post was an unusually talented individual, it does not seem unreasonable that the fixed part of his salary (which, unlike the wages discussed before, did not include room and board) amounted to five year's wages or an amount of *vaðmal* which would have taken about ten months to produce. Thus this figure is not inconsistent with my previous estimate of wages.

During the Sturlung period, when wealth had become relatively concentrated, the richest men had a net worth equivalent, by my estimate, to three to four hundred years' production of *vaðmal* or about a thousand cows. Using wages to convert that to its modern equivalent, the former figure corresponds to about twelve million dollars. Using cattle, the latter corresponds to only a few hundred thousand—wages having risen considerably more, over the last millennium, than the price of cattle.

Table 1 gives values for a number of things in ounces, ells, years of production of *vaðmal* and years of wages. The ounce is assumed to be worth six ells, the year’s production of *vaðmal* to be three hundred ells (three hundred days at one ell/day) and the year's wage to be one mark of forty-eight ells.

Wergeld for a thrall, the price of a thrall and the manumission price of a thrall were all equal, as might be expected. The price of a thrall presumably represents the capitalized value of his production net of room and board. It seems at first surprising that this should amount to only a year and a half of wages (also net of room and board), but we must remember that wages, according to Thorkell Johanneson, were lower in the early period, when thralldom was common. Thralldom disappeared in Iceland by the early twelfth century, most of Gragas dates from the late thirteenth.

The wergeld for a thrall was much lower than for a free man. The value of a thrall to his master would be the capitalized value of his net product. But the value of a free man to himself and his family includes not only his net product but also the value to him of being alive. Food and board are expenses to the owner of a thrall but consumption to a free man. And the costs of the thrall to the owner would include costs of guarding and supervision that would not apply to the free man's calculation of his own value. In one passage in Njalsaga, a trusted household member, presumably a thrall, asks Njal to promise that if he is killed he will be paid for at a free man’s price and Njal agrees.[365]

Table 1

	Ounces	Ells	Years Production of Waðmal	Years Wages	Source
Normal Price of Male thrall	12	72	.24	1.5	Williams 1937, 29
Manumission price of thrall	12	72	.24	1.5	Johnson 1930, 225
Wergeld for thrall	12	72	.24	1.5	Id.
Wergeld for free man	100	600	2	12.5	Magnusson and Palsson 1960, 108
Wergeld for free man[366]	400	2400	8	50	Id.
Wergeld for important man	200	1200	4	25	Id. at 255.
Wergeld for important man[367]	800	4800	16	100	Id.
Law-speaker salary		240+	.8+	5+	Gragas I K‡l16 209
Wealth of very rich man (Sturlung Period)		120,000	400	2500	Sveinsson 1953, 45
Wealth of very rich man (Sturlung Period)		96,000	320	2000	Id.
Price of cow (c. A.D. 1200)		90-96	.3-.32	1.9-2	Id. at 56

If we interpret the ounce of Njal's Saga as a legal ounce the usual wergelds for free men again seem somewhat low, ranging from 12 l/2 year's wages for an ordinary man to twice that for a man of some importance.[368] Here again. we must remember that there is considerable uncertainty in our wage figures. Twelve and a half years' wages might be a reasonable estimate of the value of a man to his family, assuming a market interest rate of between 5 and 10 percent, but it hardly seems to include much allowance for his value to himself. If we accept the interpretation in Magnusson and Palsson[369] of the ounce in which the wergelds of *Njal's Saga* are paid as an ounce of unrefined silver, worth four legal ounces, the figures seem more reasonable.

11. Somali Law

> "Few societies can so conspicuously lack those judicial, administrative, and political procedures which lie at the heart of the western conception of government. The traditional northern Somali political system has no chiefs to run it and no formal judiciary to control it. Men are divided amongst political units without any administrative hierarchy of officials and with no instituted positions of leadership to direct their affairs." (Lewis 1961, vii)

Somalia was created in 1960 out of the colonies of British Somaliland (north) and Italian Somaliland (south). The exiting colonial powers set up a democratic central government, possibly not the best option for a society whose traditional institutions were decentralized and stateless. The democracy lasted for nine years, followed by the assassination of the president, a military coup, and the dictatorship of Siad Barre. He was ousted in 1991, the central government disintegrated and the Somalis were back with their traditional system.

With two differences. First, the experience of a past central government and the expectation of a future one encouraged some, especially near the capital of Mogadishu, to engage in a power struggle aimed at putting themselves in the profitable role of rulers instead of the unprofitable role of ruled. Second, outside powers, acting through the U.N. in the belief that the country needed a central government, attempted to reestablish one, using military force mostly provided by Ethiopia, Somalia's traditional enemy. The result has been an extended period of violence and chaos, especially in and near the capital, by groups acting outside of, and often in violation of, the traditional legal system.[370]

Elsewhere, especially in what had been British Somaliland and now calls itself the Republic of Somaliland,[371] the traditional system of customary law reestablished itself. While Somaliland has a government— arguably created in part as a so far unsuccessful attempt to persuade foreign states of its legitimacy —it is a government based on traditional institutions with an upper house of clan elders and one that appears for the most part to defer to customary law privately enforced in the traditional manner, the same policy followed earlier by the British officials.[372]

This chapter is based primarily on the work of I.M. Lewis, a British anthropologist who started studying the Somalis in the 1950's, especially on the detailed description of the institutions of the northern Somali pastoralists in his *A Pastoral Democracy: A Study Of Pastoralism And Politics Among The Northern Somali Of The Horn Of Africa*. My other source is *The Law of the Somalis*, written by Michael Van Notten, a Dutch legal scholar who married a Somali wife and lived as part of the Samaron clan of North-west Somaliland for twelve years

until his death in 2002. The book was edited and published by Spencer MacCallum, a social anthropologist with an interest in stateless societies. As Van Notten makes clear, his description applies in detail only to the area where he lived (Awdal), but traditional law elsewhere is generally similar.[373]

Both of my sources are concerned primarily with the pastoralists of northern Somalia and it is their legal system I will be describing. The institutions in the south, where camel herding is to a considerable extent replaced by agriculture, appear to be based somewhat less on kinship, more on geography.[374] Van Notten's observations were made from about 1990 to 2002; Lewis based his detailed account on observations made in the 1950's, when northern Somalia was still a British protectorate. The accounts are broadly similar, allowing for the difference in the time periods and the fact that Van Notten was dealing with a more restricted area.

There is, however, an important terminological difference between the two sources. Van Notten interprets kinship terminology in absolute terms, while Lewis argues that the terms describe relative position in the genealogical tree. He writes:

> The four terms, *qabiil*, *qolo*, *jilib* and *reer* which are commonly used to refer to different levels of grouping, and which have been consistently misinterpreted by most writers on the Somali, can legitimately all be applied to the same genealogical and political unit in different contexts. Generally speaking, apart from its restricted use to designate the descendants of a living man, reer means lineage in an extended sense. Thus the Dulbahante clan is a lineage (*reer*) of the Daarood clan-family and smaller units within the Dulbahante are lineages (*reers*) of the Dulbahante clan, and so on down to the minimal unit which consists of a man and his sons. The Arabic loan-word, *qabiil*, is generally restricted in use to the larger units such as clans, sub-clans, and primary lineage-groups. But here again its use is entirely relative. What, in relation to a smaller unit is referred to as a *qabiil*, in relation to a larger unit is spoken of as *qolo* or *jilib*. If a man of the Dulbahante, referring to his relations with other members of his clan, describes his *qabiil* as Dulbahante, his *qolo* as Barkad (a primary lineage-group) and his *jilib* as a smaller Barkad lineage, he may in another situation refer to Daarood as his *qabiil* his *qolo* as Harti (see genealogy at end of text) and finally his *jilib* as Dulbahante. None of these terms can be assigned any precise or fixed significance except by reference to other units. All are relative terms within the hierarchy of segmentation based on agnatic connection.[375]

Political Structure

The institutions through which the Somali enforce rights and settle disputes are based on two principles—kinship, primarily agnatic kinship (defined through the paternal line) and contract. Every Somali memorizes as a child his genealogy through the paternal line up many generations, an important piece of information since it defines his relationship to every other Somali. A clan, which may number in the hundreds of thousands, consists of individuals all of whom are believed to be descendants of a common ancestor in the paternal line, possibly twenty or thirty generations up.[376] The closer the linkage between two Somalis —the smaller the number of generations to a common ancestor—the more likely they are to be allies.[377] "As the Somali themselves put it, what a person's address is in Europe, his genealogy is in Somaliland."[378]

The system of alliances through which the legal system works is fluid in two senses. To begin with, coalitions are created by agnatic kinship at multiple levels. If, to simplify considerably, there is a conflict between two individuals whose common great-great-grandfather in the paternal line had two sons, the group that becomes engaged on the side of each will be the descendants of the son from whom he is descended. If a conflict arises involving a member of one of those groups against someone whose genealogy links with theirs higher up the genealogical tree, the two groups that were enemies in the first round may ally. In the case of a conflict between individuals in different clans, all of each clan is, in principle if not always in practice, allied in support of its member.[379]

The coalitions are not defined entirely by kinship. The nearest thing to a well-defined and stable unit below the clan level is what Lewis, following the practice of the British administrators, refers to as a "*dia*-paying group" ("*dia*" or "*diya*" is the Arabic term for blood money, the Icelandic *wergeld;* the Somali term is *mag*). The *dia*-paying group is responsible for paying for offenses by its members, collecting for offenses against its members, and, in the latter case, using force or the threat of force to obtain payment.[380] It also deals with conflicts between its members.

The *dia*-paying group's membership and internal rules are defined by explicit contract.[381] In most cases it is made up of a number of jiffo-paying groups, each of which may consist of the descendants in the paternal line of a single common ancestor or several such. Within the *dia*-paying group, the separate jiffo-paying groups have special responsibility for the offenses of their members defined by

the group's contract, usually paying all of the cost up to some limit, commonly a third of the payment for a killing.[382] The division of costs above that point among the components of the larger group is also defined by contract, usually in proportion to either the number of males in each Jiffo-paying group or its wealth in livestock.

The separate jiffo-paying groups within a *dia*-paying group may or may not be linked by agnatic kinship. If smaller groups not so linked wish to combine for the purpose, they may take advantage of links through maternal kinship to do so, producing a uterine alliance, and similarly for coalitions at other levels of the system. Sometimes coalitions are formed with neither agnatic nor uterine links as justification; such are referred to as *gaashaanbuur*, meaning literally 'pile of shields,'[383] since they are made in order to acquire sufficient fighting strength.

By Lewis' account, the size of a *dia*-paying group is limited at the low end, about 300 males, by the need for enough resources to pay blood-money when necessary without an undue burden on any individual and for sufficient military power to enforce claims for payment of blood-money. It is limited at the high end, about 3000 men, by the problems of internal conflict—too many able and ambitious would-be leaders, situations where one of the component groups feels it is being unfairly burdened by payments for offenses by members of other groups, and similar problems. Component groups can and do split off to form their own *dia*-paying group or to join with a different one. And if circumstances force an alliance among multiple *dia*-paying groups, they may temporarily constitute themselves as a single such group.

Somalis distinguish between general laws applying to all members of the clan and special laws applying to members of a particular group, in particular a *dia*-paying group. Special laws are established by explicit contract,[384] general law seen as a set of broad principles with the application up to the particular judge; thus there are, in principle, no situations on which the law is silent. Decisions are to be based on customary practice. A sufficient number of consistent decisions may result in a rule followed by judges coming to be treated as a law; in this sense it is a system of informal case law.[385] Within a clan, significant differences among judges tended to disappear over time, but such differences between the jurisprudence of different clans might persist.

Judges are not officials with a position and salary but arbitrators accepted by the disputants.[386] A judge has no special rights[387] such as the right to summon or cross-examine a witness. Nor is the judge viewed as an authoritative source of law. His job is to settle conflicts by applying the rules that people in the

community normally observe. A judge who produces verdicts that meet general disapproval is unlikely to be asked to judge cases in the future. To quote Van Notten:

> "A Somali judge is free to develop his own principles of law and his own doctrines. The test of whether such principles and doctrines are acceptable to the community comes as soon as he has given his verdict on a conflict. If a verdict deviates from what the community finds reasonable and just, there is little chance that its author will be asked again to sit as a judge." [388]

Folk wisdom includes "One can change one's religion; one cannot change the law" and "Between religion and tradition, choose tradition."

One notable exception to the separation of law and religion is that matters of marriage and inheritance are usually brought before a judge who applies Koranic law, almost all Somalis being Muslims.[389] A second exception is that a judge who needs to know the extent of injury of an assault victim will ask a religious leader to investigate the question and testify on it. The schedule of payments of blood-money for death or injury is based on that in Islamic law, modified by custom and contract, with the amount sometimes larger or smaller depending on the relationship between offender and victim. The contract for a *dia*-paying group may specify a lower charge for injuries of one member of the group by another, a larger sum may be paid for death or injury to a particularly well respected victim or occurring under especially ugly circumstances, and groups sometimes agree to increase the amount in order to reduce intergroup violence.

Somali political institutions at the clan level exist but are limited. Traditionally, most clans had a titular head, appointed for life, whose functions were mostly ceremonial. The position is apparently not essential, since in recent years several clans have failed to choose any replacement for one who died.[390]

Each clan also has an assembly (*Guurti),* made up of the heads of the most important families. It has the power to declare war or peace with other clans but not to conscript or hire soldiers. It can recommend changes in the traditional law but has no power to legislate them. [391] If a conclusion is reached that some members still oppose, they have no obligation to help implement it.

Mechanics

The mechanics of trial and law enforcement as described by Van Notten are straightforward. When a dispute arises between members of different *dia*-paying groups the elders (*oday*) from each side[392] form a court with themselves as judges, ask the parties to state their cases, hear witnesses and state a verdict. Judges may, before agreeing to judge a dispute, require the parties to agree, sometimes in writing, to obey their verdict. If force is needed to make the losing party obey the verdict in an intra-clan dispute, the judges can recruit all able-bodied male villagers for the purpose; anyone who refuses is considered an associate of the defendant and owes a fine to the plaintiff's family. In the case of an inter-clan dispute, however, enforcement is up to the clan of the victim.

What if no court is agreed on in time or the *oday* of one party's family refuses to participate (particularly likely if the parties are from different clans), or the court fails to give a verdict? At that point the victim and his family are entitled to self-help, imposing restitution or compensation by force. If the other party believes that excessive force was used or excessive compensation extracted he is entitled to sue for compensation.

Thus the Somali system is ultimately a feud system, one in which law is enforced by the private application of force or the threat of force, but a feud system with institutions for avoiding violence via widely respected mechanisms to arbitrate disputes.[393] Part of what makes it successful, according to Van Notten, is that families are obligated to help defend their kin but not to help attack their opponents, with the result that armed conflicts are likely to lead to stalemate and from there to arbitration.[394]

Conviction for what we would regard as a civil or criminal offense usually results in a fine, traditionally stated in camels. The offender's *dia*-paying group (like the Irish *fine*[395]) is a guarantor for payment of the fine. In inter-clan disputes, the clan is the guarantor. If an individual repeatedly violates the law and is unable to pay the resulting fines, his *dia*-paying group may publicly announce that it is no longer responsible for him. Since there is now not only nobody to guarantee his fines but nobody to defend him or threaten force in vindication of his rights, he is effectively an outlaw and likely to leave the territory for that of another clan. In less extreme situations the kin group, having had to pay for the offense of its member, may restrict him in ways designed to prevent a repeat offense, for example by forbidding him from going armed.

Both plaintiff and defendant have the right to appeal a verdict, with the

number of appeals permitted depending on the rules of their clan. The appeals court must have more judges than the court that produced the original verdict, drawn from a wider group of families or clans; if one party refuses to go along with an appeal, the family of the other is entitled to self-help.

In the course of a trial, a disputed fact is admitted as evidence only on the testimony of three witnesses. Parties can call in experts and character witnesses to support their case. Each party gets to state his case or have a representative do so for him, call witnesses and present evidence; witnesses are not normally subject to cross-examination. In some cases the judge of the defendant may simply agree, on behalf of his clan or kin group, to pay the required compensation. As in some other legal systems, oaths are sometimes required as part of the legal process. If a fact is disputed, or supported by fewer than three witnesses, parties may be required to swear one of several different oaths to the truth of their position. One such oath consists of the oath-giver swearing by his marriage; if it later turns out that his oath was false, the marriage is dissolved. If the plaintiff fails to establish his case, the defendant must still swear to his innocence before the case will be dismissed.

Content of the Law

If the convicted defendant refuses to pay within the specified time, he is subject to penalties ranging from a fine in honey to having one of his animals slaughtered, cooked, and eaten by the villagers each day.

As with Arabic *jinayat*, penalties are computed in camels—in the Somali case, healthy she-camels aged three to six years. It may be paid in other livestock at a fixed customary rate or in money by agreement between the parties. The payment goes to the victim if alive, his family if he is dead, and may be shared by other members of his dia-paying group.[396] There exists a standard schedule of fines for unintentional bodily injury. The family of the victim may, and often will, accept less, possibly as a good will gesture. For an intentional injury, fines are doubled.

For intentional murder, the penalty is a life for a life; if the murderer succeeds in fleeing abroad, a member of his family of equal status may be put to death in his stead, a rule that gives his family a strong incentive not to help him escape. In most cases the victim's family can choose to accept blood-money instead at a rate of 100 camels for a man and 50 for a woman, although if the murder was sufficiently outrageous the court may insist on execution of the murderer. If the killer and victim are of different clans, the victim's family are less likely to accept blood-money;[397] if the killer escapes, his family owes two lives instead of one.

The fines in Somali law are based on the fines specified in *jinayat*, on which the Somali system is based, although the rules differ in detail. The Somali rules do not, and the *jinayat* rules do, treat the loss of a body part of which the victim only has one as equivalent to the loss of life. Otherwise the patterns are similar but not identical.[398]

Somali legal rules for bodily injury have one other interesting feature. If a man seriously wounds another, his family must take the victim into their household and nurse him back to health—the same requirement as in ancient Irish law.

The rule for accidental damage to property, including animals, is the same as in modern tort law. The person responsible must make the victim whole by replacing the property or its value. The penalty for stealing an animal, however, is the return of two, the same as the penalty for theft in Jewish law.

Somali customary law also covers subjects such as breach of contract and defamation. The legal rules with regard to property are complicated by the fact that not all sorts of property can be privately owned. Grazing land is treated as a

commons with a rule of first come, first served—once one herd is grazing in a particular pasture or drinking at a water hole, it has temporary ownership. When water is scarce, grazing land and water sources in a clan's territory get treated as possessions of the clan that others are supposed to use only with permission. The definition of clan territory is based on past practice and imprecise. It sounds from Lewis's account as though the imprecise specification of borders between clans and the lack of well-defined property rights to grazing within clans result in a good deal of conflict.

Most of the people in the area studied by Von Notten were nomadic pastoralists but there were also partly or entirely sedentary populations that recognized individual ownership of small parcels of grazing land, with the restriction that they could only be sold within the clan and lent or rented only to clan members or outsiders with some tie with the clan, such as marriage to a clan member. Agricultural land in areas where the locals practice agriculture is similarly subject to a restricted form of ownership. Some land also belongs to groups or an entire clan and can be divided and allocated to individual members only with the assent of all male members of the group.

One odd feature of Somali customary law that is that a wealthy man is required, with detailed legal rules, to share his wealth with neighbors and relatives. Seen from one angle this can be viewed as a form of social insurance, from another as a disincentive to wealth creation.

Appendix:

Dealing With Foreigners: A Case

The state of Ethiopia dealt with as a clan: In 1992, a year after the Tigraens took control of the Ethiopian government, some federal soldiers wantonly killed a Somali merchant near the village of Sheddher. Their reason was that he had refused to give them some of his merchandise, which happened to be qhat. An hour later, the family of the victim killed two federal soldiers who happened to be passing through the village. The military commander of the Somali region thereupon ordered a punitive expedition and sent an entire platoon to Sheddher. On its arrival, the soldiers learned that the villagers could have killed several more federal soldiers that day but had not done so. They had acted according to their customary law, which stipulates that when someone of another clan murders a clansman, two members of that other clan will be killed. Shortly thereafter, a similar incident happened in the same territory, in the village of Lafaissa, where a federal soldier had sought refuge in a military camp after wantonly killing a Somali. The family of the victim went to a military camp in the nearby village of Herigel and killed two federal soldiers. The military commander in Harar chose to take no action against the clan and informed his soldiers that henceforth they had to respect the customary law. As a result, no more killings occurred in the territory. (Van Notten, 181-182)

A contract for a *dia*-paying group[399]

Hassan Ugaas are currently estimated to number about 1,500 men. They comprise four main segments (*jilibs*) which act as jiffo-paying groups.

A petition delivered to the District Commissioner and dated the 8th of March, 1950, states their *heer* to be as follows:

1. When a man of the Hassan Ugaas is murdered by an external group twenty camels of his blood-wealth (100) will be taken by his 'next of kin' (i.e. his sons, brothers, father, and possibly uncles) and the remaining eighty camels shared amongst all the Hassan Ugaas.

2. If a man of the Hassan Ugaas is wounded by an outsider and his injuries are valued at thirty-three-and-a-third camels (a standard rate for non-fatal but quite serious injuries),[400] ten camels will be given to him and the remainder to his *jiffo*-group.

3. Homicide amongst members of the Hassan Ugaas is subject to

compensation at the rate of thirty-three-and-a-third camels, payable only to the deceased's next of kin. If the culprit is unable to pay all or part, he will be assisted by his lineage.

4. In cases of assault within the Hassan Ugaas for which compensation up to the value of thirty-three-and-a-third camels is payable (i.e. according to the Shari'ah) only two-thirds will be paid.

5. *Haal* of 150 shillings (East African) is payable to the person attacked[401] when a man of the Hassan Ugaas joins another to fight with a third.

6. If one man of the Hassan Ugaas insults another at a Hassan Ugaas council (*shir*) he shall pay 150 Shs. to the offended party.

7. If a man of the Hassan Ugaas marries a girl already betrothed to another man of the group, or a widow whom it is the customary right of another to marry, he shall pay *haal* of five camels to the aggrieved party.[402]

8. If the Hassan Ugaas kill a man of another group they will pay his blood-wealth in equal shares (amongst the four lineages) by 'penis-counting' (*qoora tiris*).[403]

9. Compensation for serious wounds valued at thirty-three-and-a-third camels or more, owing to a person of another group, will be paid collectively by all the Hassan Ugaas by 'penis counting'.

10. This *heer* cancels all previous agreements of the Hassan Ugaas.

12. Early Irish Law

> "Irish law particularly may seem odd and unapproachable to those who come to it fresh from the perusal of a modern civil code. What survives today is a bewildering conglomeration of old and new, text and commentary, plain prose and obfuscatory verse."
>
> (Stacey 1994, 15)

Ireland at the beginning of the fifth century was a pagan country with a rich oral literature and an elaborate legal system, also oral. The subsequent conversion to Christianity made possible the composition of written legal texts. Some scholars believe that the authors were secular writers creating a written version of the traditional law to balance the competing system of canon law, others attribute the legal texts to clerical authors attempting to create a workable synthesis of old and new.[404]

Whoever the authors were, they showed a strong conservative bias, recording not only legal rules still in practice in the seventh and eighth centuries, when the texts were written down,[405] but older rules as well.[406] Their writing thus provides a somewhat blurred window on the pre-Christian legal system, which may have preserved institutions going back much further, possibly as far as the period before the different Indo-European languages separated. The evidence for that conjecture is in part linguistic, similar words in different Indo-European languages connected with the same legal/political institutions, and in part comparative, features that the early Irish legal system shared with ancient Indian law.[407]

None of the legal texts have survived in their original form. What we have are manuscripts dating mostly from the fourteenth to sixteenth centuries that quote chunks of the earlier works, along with extensive commentary. From those it is possible to reconstruct much, but by no means all, of the original, with risk of errors in transmission over the centuries. The texts quoted can be dated by language, Irish having changed over time, but authors may sometimes have used deliberately archaic language. The commentary, beginning in the ninth century and continuing thereafter, provides additional information, but in many cases the commentators may have misunderstood the original rules in their attempts to explain and justify them. We also have non-legal texts such as the Irish sagas,[408] biographies of saints, and wisdom texts, along with accounts of Irish institutions in Ireland under English rule, some of which may be survivals from the earlier period.

Our sources present a very imperfect picture of what must have been an elaborate legal system. The description that follows is based on interpretations of

the evidence by twentieth-century scholars. We cannot be sure which legal rules applied when and where, since surviving sources combine material from at least four centuries, possibly longer. Apparent inconsistencies may represent different institutions existing at the same time, rules from different times, the different views of traditional law held by different scholars, or errors in transmission.

Túath and *Fine*: Kingdom and Kin Group

The Ireland described in the law books was divided into a large number of small kingdoms (*túath*, plural *túatha*); modern scholars estimate that there were about a hundred of them, with a population of a few thousand in each. A king might recognize the overlordship of another and more powerful king. A king who is overlord of three or four *túatha* is referred to as a great king, one who is overlord of a large number of *túatha*, the provincial king of the Irish sagas, is a king of great kings. While the idea of a high king of all Ireland existed and the title was sometimes claimed, such a king is mentioned only rarely in the legal texts and nobody seems to have made the position a reality, had effective rule over the entire island, prior to the Norman conquest of Ireland in the twelfth century.[409]

For the most part, an individual had legal rights only within his own kingdom, although some special categories, such as poets and hermits, had rights elsewhere. One exception occurred when the subject of one king was killed by the subject of another, both acknowledging a common overlord; the procedure for collecting the fine for the killing was initiated by the victim's king taking a hostage, presumably a subject of the killer's king, in the court of their overlord. Another occurred when the inhabitants of two *túatha* were given rights against each other by treaty.

Within the *túath*, individuals were divided into kin groups (*fine*), defined as the descendants in the male line of a common ancestor. The most important such was the *derbfine*, a kin group of four generations, the descendants of a common great-grandfather. Farming land was largely, although not entirely, held by the *derbfine*, allocated to its adult male members; an individual could sell part of his share only with the consent of his kin.[410] He could obtain additional land with income from his share of the kin land, in which case one third of it would be entirely his, two thirds added to his share of the kin group land. If the purchase was made with income from his own exertions, half was entirely his, if income from his professional activities—blacksmith, poet, doctor or the like—two thirds. If the kin group went extinct, its land was redistributed within a wider kin group, descendants of a common ancestor farther up the genealogical tree.

The *derbfine*, like the much larger dia-paying group in the Somali system, was responsible for enforcing the rights of its members, if necessary by feud, sharing in the payment of damage payments by its members and the receipt of damage payments to its members. One result of this network of mutual obligations was

to limit the ability of an individual to make contracts that might impose costs or obligations on the other members of his kin group or reduce his ability to fulfill his obligations to them.

Marriage law recognized a range of possible relationships, depending both on the resources each party brought into the marriage and the degree to which the marriage had or had not been approved of by the woman's kin.[411] The greater the degree to which the marriage had been approved by the wife's kin the weaker her subsequent ties to them, as reflected in who got how much of her possessions when she died and who was entitled to collect how much of the fine if she was killed or obligated to pay how much of the fine for her offenses. A man would normally have a chief wife but could also have a secondary wife or concubine.

A woman was under the authority first of her father, then her husband, then her sons, and had very restricted rights. She could not, with some narrow exceptions, serve as a witness, swear oaths, make contracts or serve as a surety to guarantee the contracts of others, and she had only limited rights with regard to the control of property.

Fostering of children was a common practice that established a form of pseudo-kinship; a man's foster father had a claim to a fraction of the blood-money if his foster son was killed, and related responsibilities.

Status and Honor Price

The legal system described in the surviving texts included an elaborate system of status reflected in the honor price of each individual. An individual's honor price determined what he was owed for offenses against him but also the limits to his legal capacity, including the amount for which he could contract on his own authority and the weight of his evidence in a legal dispute.

The major categories of status were *nemed* (noble), non-noble freemen, and unfree. Within each there was a range of subcategories. The *nemed* class included kings, lords, clerics and poets—the honor price of a Bishop or the Abbot of a major monastery was the same as that of the highest category of king. One special category of *nemed* was a hospitaller (*Briugu*), a freeman sufficiently wealthy to undertake the obligation to offer unlimited hospitality to all comers. Sources describe the position as requiring from two to a hundred times the resources of an ordinary lord.

Nemeds had a variety of legal privileges, limiting the degree to which legal rights could be enforced against them and the mechanisms for doing so. Thus the ordinary procedure for distraint, discussed below, could not be employed against a *nemed*, although the alternative mechanism of fasting against him to enforce an obligation could be. One consequence of the legal advantages of high-status persons, due to both their high honor price and their *nemed* status, was to make contracting with them risky, since it might prove impossible to enforce the contract, a problem pointed out in the period sources.

The category of lord depended on the possession of clients, freemen who had agreed to a relationship in which the lord provided an advance of land and/or stock to the client in exchange for the client providing the lord with food rent and some services. Details varied with both the form of clientship, base or free, and the status of the client.

The distinction between base and free clients, along with the status of the client, determined the terms of the contract, including the duties owed and whether the fief eventually became the property of the client on the lord's death (yes if base, no if free). In all cases the relationship could be terminated by mutual agreement. If a lord wished to dismiss a base client, he had to compensate him with half his honor price plus what he was owed for rent and services; if it was the base client who wished to terminate, he owed a substantially larger penalty to the lord. In the case of a free client, either party could terminate the relationship without penalty. The status of the lord depended on the number and type of his clients

In addition to free clients and base clients, a lord might also have dependents of lower status (*fuidir)*, who could not make any legal contract without permission of their lord. The lord was required to support the client, to pay the fines for any crimes committed by him or his family and entitled to collect the fines for crimes committed against him. The *fuidir* was obliged to carry out any tasks assigned him by the lord. He was thus a sort of temporary and voluntary slave, free to leave at any time,[412] provided that he surrendered two-thirds of his produce and left no debts or obligations behind him. After three generations of clientship to a lord, however, the *fuidir* becomes a *senchléithe*, a client tied to the land and transferred with the land.

The main division among freemen was between the small farmer and the strong farmer, the latter having more extensive property and a higher honor price than the former. In this case as in many others, we do not know exactly how the categories were defined. Texts describe in implausible detail how many animals of what sort, what size of house, and what other possessions each category was supposed to possess, but do not tell us what the actual requirements were.

Dependents, such as a man's wife or children, had an honor price based on that of the freeman whose dependent they were—typically half his honor price according to at least one of the texts. A son who farmed independently but on his father's land was something between a freeman and a dependent, with his own honor price but limits to his legal capacity.

Among the unfree, the major divisions were between the semi-free (or "tenant at will"), who had no land of his own and no independent honor price, the hereditary serf, who was bound to the land, and the slave. Slaves might be prisoners taken in war, foreigners picked up by slave traders, people who had failed to pay a debt or fine and so been enslaved, or the descendants of such. They had no legal rights. The master was liable for the offenses of his slave and collected compensation for offenses against his slave.

Rank was largely but not entirely hereditary and fixed. At least in theory, a *nemed* who failed of his obligations, such as a king who displayed cowardice in battle, could be reduced to the status of a freeman, as could a lord who failed to maintain the required number of clients. A freeman could, by acquiring wealth and clients, achieve an intermediate status and a higher honor price; if his son and grandson maintained the position the grandson could enter the *nemed* class.

Private Law

The legal sources describe mechanisms for making and enforcing contracts that do not appear to depend on either royal courts or any centralized mechanism for judgment and enforcement. But there are also references to what appears to be curial law, law enforced in the court of a king.

Contract, Sureties, Pledges and Distraint

Private contract law depended on a system of sureties, third parties with rights and obligations connected to the contract.[413] If you lend me money, part of the procedure is for us to agree on a *naidm* surety, someone who is a witness to the contract and has agreed to compel me, if necessary by force, to fulfill my obligation.[414] We may further agree on a *ráth* surety, someone who has agreed to repay you, with an additional penalty of a third the amount due, if, despite the *naidm*, I default—at which point I owe the *ráth* the money he has paid on my behalf plus additional damages. The *ráth* cannot go surety for an amount larger than his honor price. We may also agree on an *aitire*, a hostage surety, someone who agrees to surrender himself to you if I fail to pay and will eventually ransom himself back by making the payment plus an additional ransom payment, at which point I owe him for both plus an additional penalty that includes the *aitire's* honor price.

It is unclear exactly how the *aitire* fitted into the system, with some sources suggesting that he was a standing surety, someone who had that obligation with regard to particular persons, such as members of his kin group, rather than someone appointed to be a surety for a particular contract, as seems to have been the case for *naidm* and *ráth*.[415] It has also been suggested that the hostage surety may have been associated primarily with agreements between kingdoms rather than ordinary private agreements.[416]

In addition to sureties to guarantee my fulfillment of my half of the contract, additional sureties are needed to guarantee your fulfillment of yours, for instance to prevent you from claiming I have not repaid you when in fact I have or, more generally, to force you to fulfill your part of a contract which entails mutual obligations, as many did.

Another mechanism used to guarantee the fulfillment of contracts was the giving of pledges, inanimate hostages. If the party who had received the pledge claimed the other had defaulted and the other was unwilling to agree to arbitration, the pledge would forfeit. Exactly what counted as a legitimate

agreement to arbitration is unclear. It might have been defined as agreeing to accept someone regarded as qualified to be a judge, which was a recognized profession. The same issue arises in the context of distraint, discussed below, where legal consequences again depended on whether or not a party accepted arbitration.

In some cases a contract was bound by a mutual exchange of pledges. This raises a puzzle; if you claimed that I had defaulted and seized my pledge, could I respond by seizing yours? One possible answer is that, as in the case of hostages more generally,[417] the pledge was something of more value to the person who gave it than to the person who held it, hence mutual forfeiture could leave both parties worse off. That fits some descriptions in the sources of what sorts of things were suitable for pledges but not all. Possible pledges included a champion's weapon and an embroideress's needle but also cattle, horses, drinking horns, … .

Freedom of contract within the system was limited by the network of mutual obligations. We have seen a similar situation already in the context of Jewish law—a debtor whose land guaranteed his debt was not entirely free to sell the land, since if he defaulted the creditor could cancel the sale and seize the land. In the Irish system, similar restrictions appear in a variety of cases. A son was obliged to support his aged father, so a father could under some circumstances cancel a contract the son made that might reduce his ability to do so. For similar reasons, a dutiful son could dissolve his father's disadvantageous contracts. Husband and wife had mutual obligations which gave each the right to cancel some contracts by the other, with the details depending in part on the nature of their marriage. If it was a marriage on joint property, meaning that husband and wife had contributed comparable amounts of the property that supported the couple, either partner could dissolve the other's contracts, with the exception of a contract that was clearly beneficial and so posed no risk to the other partner. If it was a marriage on husband's property, the husband could cancel his wife's contracts, his chief wife could cancel his disadvantageous contracts, a lower-status wife only his contracts relating to food, clothing, cattle and sheep. If it was a marriage on wife's property, the legal situation reversed.

The mutual obligations within the *derbfine* imposed a similar set of constraints. A contract that could threaten the kin group's property, such as adoption into the kindred or gifts of land, could be annulled by the kin group.[418] A contract that did not directly threaten the property but might impose obligations upon the kin could be objected to, after which the kin would not be liable for payments due to the principal's default.[419] Absent such objection, the

kin were to some degree functioning as involuntary *ráth* sureties; a similar situation could exist between lord and client. Similarly, kin and lord could under some circumstances function as unappointed *naidm* sureties.

If one party ended up with an unfulfilled obligation to another there was a formal procedure, distraint, by which he could be forced to fulfill it. The claimant entered the defendant's property with suitable witnesses to announce his claim. The defendant then had a fixed length of time in which to respond by fulfilling the obligation or agreeing to arbitration. If he did not, there was a second entry and, after a further space of time, a third. At that point the claimant was entitled to seize the defendant's cattle and move them to a safe location. If the claim was not satisfied and arbitration not agreed to the cattle would forfeit one by one over time.[420]

There was a different procedure if the defendant was a *nemed*: fasting, which seems to have been a sort of ritualized hunger strike. Details are not clear, but apparently the plaintiff fasted outside of the *nemed's* house, possibly from sundown to sunrise, which would cover the main evening meal. While the fast continued the *nemed* was not entitled to eat until he had satisfied the claim by giving a pledge or appointing a *ráth* surety; if he ate without doing so, he owed double damages. In that case, at some point after the fast the claimant was entitled to distrain property to satisfy his claim.

Offenses, Damage Payments and Feud

The Irish system for dealing with offenses such as robbery, assault or killing was, like the Icelandic system, based on feud and damage payments. In both, offenses were expected to be open rather than concealed.[421] In Iceland secret killing was regarded as shameful and eliminated potential legal defenses, in Ireland it doubled the damage payment owed.

Just as in Somalia, there was a pre-existing coalition responsible for both pursuing feud on behalf of a wronged member and assisting with the payment of damages owed by a member—in the Irish case the kin group. The Icelandic wergeld, like the *diya* in Muslim and Somali law, was a fixed amount for the killing owed to the heirs of the victim. Under the Irish system the fine was a fixed sum for the life of the victim, the same amount for all freemen,[422] plus payments to his kin based in each case on the honor price of the kinsman and the closeness of the relationship. The payment went to both paternal and maternal kin and to foster kin as well, so not limited to the *derbfine*. Until and unless the payment was made, the victim's kin were entitled to hold the killer prisoner

awaiting payment, to kill him, or to sell him into slavery.[423]

Another feature that the Irish system shared with the Somali was the institution of sick-maintenance. Under Irish law, the party responsible for a wrongful injury was required to maintain the victim in the style to which his rank entitled him, including an appropriate retinue of attendants, to provide medical services and to provide him with an environment suitable for an invalid—no loud noises or children playing in the house. The obligation began nine days after the injury, until which time he was cared for by his kin, and continued until he was healed. According to at least one source, the practice was abandoned fairly early in favor of a monetary penalty. In addition, the person responsible for the injury owed a damage payment based on the severity of the injury and the honor price of the victim.

The Celts, in the course of their history, occupied many different places, but it is hard to believe that they got as far as the horn of Africa, so the similarities between Irish and Somali institutions are presumably examples of parallel legal evolution—or, just possibly, common descent from some legal system in the very distant past. For a third similarity, consider that a favorite sport of both cultures appears to have been cattle raiding—in the Somali case camels.

Curial Justice

The discussion so far has focused on the system of private law. It is clear from references in the text that kings had courts and that some cases went to such courts, although it is not clear what cases went there or to what degree the division of authority changed over time. It is possible that the king's court was only for cases to which the king was a party or that it was the court of an overking settling disputes between the kings subject to him or between their subjects. Alternatively, the references may reflect a change over time from private to curial mechanisms for law enforcement.

It appears from non-legal sources that by the time the law books were written there had been a substantial shift of authority from the local kings of the *túath* towards provincial kings, a shift largely ignored in the legal material. The private law material may be a holdover from an earlier period retained due to the conservative nature of legal scholarship, which often included in the text older verses on the law. Robin Stacey has suggested that the statements on court procedure might have represented an attempt to bring existing private law procedures under the authority of the jurist class, possibly associated with the increase in royal power.[424]

Court Procedure

There were professional judges and professional advocates, both of whom played a role in a trial. According to one detailed description of a court, the participants included provincial king, overkings, bishop, chief poet, sureties, hostages, witnesses, judges, litigants and advocates. This cannot be a description of all trials, since most would not have included a provincial king and overkings and even in a kingdom of three thousand people the king and all of the important people around him would not have been present for every trial. It may be an idealized version of the most elaborate court procedure the author could imagine. But it does suggest that there was a procedure involving a judge and a king, although it leaves it unclear what role the king had in determining the verdict.

Both judge and advocate were recognized professions; although each king was supposed to have a judge, there is no suggestion that every judge was connected to a king. It may be that some sorts of trials were held in a royal court with the king and the king's judge participating while others involved only the judge (or judges—for a major case there could be more than one), sureties, witnesses, and spectators.

The first step in a law case was for the plaintiff to publicly announce that an offense had been committed. Once the case commenced, it was up to the plaintiff's hired advocate to decide which of several possible legal procedures to pursue.

The next step was for plaintiff and defendant to each give either a pledge or a surety, depending on the path chosen, to guarantee that he would abide by the verdict. The judge was also required to give a pledge—five ounces of silver—in support of his judgment and owed a fine of eight ounces if he left a case undecided. A judge who acted unjustly, for instance by giving a verdict after hearing only one side of the case, lost his honor price and his position as judge; such a miscarriage of justice was also supposed to bring supernatural punishment down on the *túath* where it occurred.

Each party's advocate would then offer the argument for his side; presumably witnesses would also testify at that point. Each advocate would then get to rebut the other's arguments, after which judgment would be given and publicly announced.

As in Jewish and Islamic law, the legal procedure might include the swearing of oaths; under some circumstances someone accused of an offense could defend himself by swearing the charge away. Similarly, witnesses were expected to support their testimony by oath and a judge was required to swear to tell the truth.

In Irish law, the force of an oath was linked to the honor price of the person swearing it; a higher-status individual could overswear a lower-status. This appears to imply that an accusation sworn by an inferior against a superior could be cancelled by the superior overswearing it, that in the opposite case the superior's accusation would stand despite the inferior's oath to the contrary, and that a superior could rebut the testimony of an inferior in a case against a third party by overswearing it. If this reading is correct, it is not surprising that the literature contains warnings of the risk of lending money to, or in other ways contracting with, someone of higher status, especially a king.

It was possible for the oath of one party in a case to be supported by the oath of another person, up to the value of his honor price. It is not clear if the honor prices of the two oaths added, making it possible for two people of lower status to overswear one of higher, or whether the combined oath had the weight of the honor price of whichever of the two was of higher status. Someone who bore false witness in a case was supposed to lose his honor price; it is not clear how his guilt was to be determined.

Women's rights, in this context as in others, were severely limited. Their oath was acceptable only for matters to which they were the only likely witness.

Thus, for instance, one item in sick maintenance might be that the injured party had been separated from his wife during her fertile period, hence unable to permit her a chance to conceive; the wife's testimony would be accepted as to when her fertile period had been. This is similar to the restriction on women as witnesses in Islamic law but probably narrower.

If the judge in a case was unable to determine which party was in the right, perhaps because there were no witnesses or the oaths on either side were evenly balanced, the verdict could be produced by a random process or by an ordeal. If, for example, it was known that one of the animals in a herd had committed an offense but not which animal, one would be selected at random and his owner held liable for the damages. As in other early legal systems, someone accused of an offense could offer to prove his innocence by submitting to an ordeal, such as plunging his hand into boiling water. If the hand thereafter showed marks of scalding, the defendant was held to be guilty, if not, innocent.[425]

A dispute could also be settled by a formal duel, analogous to the Norse *holmgang*. The terms had to be agreed to by both parties and confirmed by sureties on both sides. As in the Norse case, the duel did not have to be to the death.[426]

One source describes five different procedures by which a case could be prosecuted, with different cases allocated, for reasons not entirely explained, to different procedures. It is not clear whether the description applied to all cases, some cases, or was a pattern the author was attempting to impose on a less precisely structured system.

Conclusion

As I hope this brief account makes clear, early Irish law was an elaborate and sophisticated system about which we have very imperfect information. Its chief interest to me is in the ways in which contracts were enforced and offenses dealt with in a decentralized and private system of justice. One of its puzzles is the relation between that system and the system of curial justice, administered under the authority of at least local kings.

13. Comanche, Kiowa and Cheyenne: The Plains Indians

Moderns often view primitive societies as having followed the same pattern of life for century after century. If they were capable of change surely they would have progressed, become more like us, ceased to be primitive. The Plains Indians provide a striking counterexample. Their immemorial lifestyle was a brand-new invention when Europeans first came into substantial contact with them.

The reason it was a new invention is that hunting buffalo from horseback requires horses. There were no horses in America[427] until the Spanish brought them and none available to North American Indians until enough time had passed for horses that had escaped the Spanish to multiply in the wild and spread north.

Faced with a sudden opportunity for progress, the chance to stop scratching in the earth as primitive agriculturalists and turn into noble savages hunting buffalo, living in tipis and proving their manhood by making war on each other, the Indian tribes living on or near the Great Plains seized the opportunity. The result was the development in the eighteenth century of a common material culture shared by tribes with quite different origins.[428] It depended on the horse but also made good use of the rifle, rifles having been initially provided by the English to tribes willing to fight tribes allied with the French and by the French to tribes willing to fight those allied with the English.

In this chapter I will discuss what is known about the legal systems of three of the tribes. My main sources are a chapter by E. Adamson Hoebel[429] covering all three, two books on the Cheyenne, one by Karl Llewellyn and Hoebel[430] and one by George Bird Grinnell, [431] and a book on the Comanche by Ernest Wallace and Hoebel.[432]

Comanche

"Once there were a bunch of Comanche out looking for trouble"[433]

I start with the Comanche; their government is the simplest of the three to describe, since they did not have one. A Comanche war chief was simply an entrepreneur, a warrior who announced his intent to go steal horses from the Mexicans, Americans, or some other tribe, and invited anyone interested to come along. Within the war party he had absolute rule, but anyone unhappy with the situation was free to leave.[434] A Comanche peace chief was simply an individual whom others were willing to follow. If he chose to go one direction and the rest of the band another, he was no longer a peace chief.

In addition to peace chiefs and war chiefs, there was also a council. As described by Wallace and Hoebel:

> In theory, at least, the council was supreme, but its decisions were often indefinite. Generally the majority made little effort to impose its will on the minority, for, as in most Indian tribes, it was thought that agreement should be unanimous. The "council" was composed of all the old men of the tribe who had shown exceptional ability as warriors, leaders, or guides. As in the selection of chiefs, there was no formal procedure for admission; one "just got that way" because of his achievement.[435]

The Comanche, in other words, were anarchists. Their social system included institutions for coordination at the level of the individual band but nothing we would recognize as a government over either the band or the entire tribe.[436]

One of the problems that concerns modern anarchists is how to defend an anarchist society against adjacent states, given the difficulty of raising and funding an army without a draft, taxation, feudal obligations, or something along similar lines.[437] The Comanche reversed the situation, raising the problem of defending adjacent states, and anyone else in the neighborhood, from them. They drove the Apache from the southern plains, raided the Mexicans for horses and slaves and, despite the disadvantage of lower technology and smaller population, blocked American expansion across Texas for decades, fairly earning the title of Spartans of the plains. Facing an overwhelmingly superior enemy they were eventually defeated, but only after making a very impressive fight of it.

Part of the reason, seen from an economist's perspective, is that they made warfare into a private rather than a public good. For most of their history, the incentive to fight was not the welfare of the tribe but of the individual warrior. Successful raids produced valuable loot. Heroic and successful fighting produced status.

One way of getting status was to steal horses from outsiders. Another was to face down another Comanche warrior. The opportunity to do so was provided by the common practice of wife stealing.

The strongest bond within the tribe was between brothers who, among other things, shared their wives and had the power to marry off their sisters.[438] From the standpoint of the brother, the ideal brother-in-law was a wealthy and successful warrior. The sister might prefer someone earlier in his career, younger and more handsome—and, given the opportunity, leave the husband chosen for her by her brothers to run away with one such. The incentive of the wife stealer was less possession of the wife than the opportunity to outface the husband.

Wife stealing was done openly, so guilt was not an issue. Compensation was. The husband was expected to confront the wife stealer and demand generous compensation, with the amount an increasing function of the wealth of the stealer and the prowess of the husband, a decreasing function of the prowess of the stealer. There being no government to enforce the (unwritten) law, the threat that backed the demand was the private use of force. Pay or I will kill you.

Carrying out that threat was neither desired nor likely, since if the husband killed the stealer (or vice versa) the victim's kin would take revenge by killing the killer.[439] The intended result of the threat was to set off the game that economists call bilateral monopoly, a bargaining game in which the parties have a common interest in the resolution of their dispute but a conflict over the terms, in this case over how much will be given in compensation to the wronged husband.

What if the stealer was clearly the more dangerous man of the two—not unlikely, since a prudent man in search of status would prefer not to steal from too able a husband? The husband had the option of calling in his brothers or other kin to support his threats. The stealer, having set off the conflict in order to prove his status, had no such option—asking for help would be to admit that he had bitten off more than he could chew, and besides, he was on what everyone saw as the wrong side of the law. So at that point the stealer backs down and agrees to pay substantial damages, going not to the husband but to his helpers.

What if the husband had no brothers? His option then was to find a champion, a brave, generous, well-thought-of warrior willing to take over the case and face down the stealer. This time the damage payment went to the husband. The champion's payment was the status gained by his willingness to risk himself in defense of the right and his success in forcing another warrior to back down. Much the same pattern appears in some of the Icelandic sagas, where a bully who relies too heavily on his and his friends' strength to let him violate the rights

of weaker men is brought down by someone still more formidable out to establish his own status.[440]

In addition to cases of wife stealing, there were also cases of adultery. The pattern there was the same, save that there might be a question of guilt. If the defendant denied it, the case ended unless there was proof of guilt available.

Cases of wife stealing and adultery seem to have been the nearest thing to legal disputes among the Comanche. So far as conflicts between husband and wife, most likely to occur when the husband suspected his wife of adultery, the husband had a free hand, up to killing his wife or torturing her to make her name her lover. One possible resolution was for the wife to swear by earth and sky that she was innocent, at which point the husband accepted the oath in the belief that if she was lying, earth and sky would eventually kill her. The same approach was used to settle some other disputes, such as disagreements as to which member of a war party had counted coup on an enemy or captured a particular horse, and similarly in some cases where a man accused of seduction denied it. As far as minor theft was concerned, the Comanche, like the other two tribes I will discuss, regarded such matters as beneath the notice of a warrior. As a Cheyenne would have put it, “if you had asked, I would have given it to you.”

That attitude, as well as other features of Plains Indian behavior, suggests one important feature of those societies—in their own terms, they were wealthy. Men frequently had more horses than they themselves had use for and so were free to use the surplus to prove their generosity by giving some away. In an uncertain environment, they were from time to time at risk of starving to death during the winter. But the most important form of portable, indeed self-portable on four legs, wealth was plentiful.[441]

What about murder? As already mentioned, a first killing required a second, of the killer by the kin of his victim. At that point the matter ended. The second killing was justified by the first and so required no further vengeance.[442] For these purposes, killing a favorite horse, thought of as having a soul, counted as murder and so justified the killing of the responsible human in revenge.

An exception to the rule of a life for a life occurred in the context of sorcery. Every Comanche male was expected at some point to go on a vision quest and end up with some sort of magical power, typically restricted by a taboo whose violation could cost his life. For the most part such power was used for the good of the tribe and the individual, but there were “mean medicine men,” individuals with a greater than usual share of magical power and an inclination to misuse it, sometimes lethally.

The first recourse if someone was believed to be dying from sorcery was to

get a good medicine man to cure him. If that failed, the next step was to confront the sorcerer believed responsible and try to get him to stop what he was doing. If that failed, however, there was no obligation to kill the sorcerer, possibly because doing so was seen as too dangerous, possibly because in that case, unlike an ordinary murder followed by revenge, there might be a serious risk of blaming the wrong man.

> "The sorcerer who maintained his innocence, when threatened with force, in each recorded case immediately forestalled further legal steps by throwing the whole affair over to supernatural judgment. He swore his innocence with a conditional curse. If he was guilty he was killed by power of the Sun and the Earth. If he survived, his innocence was accepted as proved." (Wallace and Hoebel 1952, 239)

What if it was believed that a particular bad medicine man was responsible for multiple deaths? At that point, the Comanche made use of the nearest thing their society had to criminal law. The rest of the tribe met together, concluded that the guilty individual must die, and either killed him or tricked him into violating his own taboo and so dying.

The Kiowa

The Kiowa, while in some ways similar to the Comanche, had something a little closer to a government and much closer to a well-defined class/rank system. The latter consisted of four classes. The Onde were the high-status warriors, sufficiently high that they had no need to further demonstrate their courage or prowess; they are estimated to have been at most ten percent of the men. The Ondegupta were the would-be Onde, the pushy up-and-coming warriors trying to establish their claim to the top category. Not surprisingly, the Ondegupta were the chief source of conflict within the tribe as they, like their Comanche equivalent, tried to gain status. Below them were the common men and below those the Dapom, the dregs of society, functioning as hangers-on of the more important Kiowa and tolerated petty thieves.

Kiowa bands had recognized headmen, almost all of Onde rank, who in practice made important decisions for the band. Kiowa war chiefs, like Comanche war chiefs, were the leaders of war parties.

In addition to these, there were ten keepers of medicine bundles, tribal fetishes with magical power, and one keeper of the Sun Dance fetish, as such the nominal grand chief of the tribe, all of whom played an important role in settling disputes. An Ondegupta who claimed to have been wronged by another made a great show of threatening a violent response, while letting himself be restrained by the bystanders from actually doing anything until one of the ten medicine bundle bearers showed up with his pipe, asking him to accept a peaceful settlement with suitable compensation. Usually the offer was accepted. If not, a second medicine bundle bearer would appear and, if necessary, a third and a fourth. It was believed that refusal of the fourth meant death by supernatural agency.

Both men were trying to demonstrate their courage and determination, with the risk that the bluff might became reality. If someone was killed, the killer might be killed in retaliation by his victim’s kin or they might accept compensation, the equivalent to the Icelandic wergeld or the payments that atoned for killing under Islamic law or among the Somali. The man who had killed was believed to become unlucky as a result, as a murderer was in ancient Athens, but his presence did not, as with the Cheyenne, pollute the tribe.

In addition to the keepers of the medicine bundles, the Kiowa had military fraternities, roughly similar to those of the Cheyenne.

The Cheyenne

Of the three tribes, perhaps of all the Plains Indians, the Cheyenne came closest to having a government—part of the year. The entire tribe, possibly as many as four thousand people, gathered together in a single camp in summer when food was plentiful. During the winter the tribe separated into much smaller bands and dispersed in search of game.

The summer encampment was the site of the Council of Forty-four, the government, or perhaps nascent government, of the tribe. It was a self-perpetuating body; how the original members were chosen is not known. Every tenth year the Council was renewed. Each existing member chose a successor, usually from his own band. A chief could not succeed himself but could be kept in the Council if another chief was willing to name him as his successor.

There were four priest chiefs among the forty-four, each associated with a supernatural power, and in addition to the forty-four there was one keeper of the sweet-medicine, the most important of the tribal fetishes. When the council was renewed, each priest chief chose his successor.[443] If a priest chief died, his successor was chosen by the others. The remaining forty chiefs, according to Grinnell, consisted of four from each of the ten bands into which the tribe was divided. It is unclear how authority was divided between the four priest chiefs and the forty ordinary chiefs, possibly because there was no clearly defined rule.[444]

In addition to the Council there were also soldier societies, six of them, military fraternities existing initially as social groups but over time taking on some governmental responsibilities. One of the societies, the dog soldiers, constituted its own band and so existed as a single unit through the entire year. Each of the others had members dispersed among the bands, together only during the summer encampment. Each of the soldier societies had two chiefs, functioning as war chiefs, and two “servants,” lower-level chiefs responsible for a particularly dangerous part of the defense against attackers. A war party could however, as in the other two tribes, be formed and led by any brave who could get others to follow him.

The council was responsible for making decisions about war or peace with other tribes, deciding cases of homicide or whether to permit the readmission of an exiled killer, and deciding the movements of the tribe in search of game. It seems to have been a consensus process. One chief might decide that the tribe should move in some direction. He would take council with several others, they

would eventually call together all of the council chiefs, confer, and have the conclusion announced to the tribe. In some contexts, such as deciding on a peace treaty with another tribe, the process would involve a good deal of back and forth between the Council and one or more of the soldier societies. The Council had the right to make the decision. But in practice it had to be made in consultation with others, most obviously those who would actually implement it.

A further responsibility of the Council was to control the buffalo hunt, a mass effort by the entire tribe conducted under the authority of one of the soldier societies selected for the purpose. The basic rule was that nobody was to attack a buffalo until the word was given, at which point the line of hunters would charge the herd, with the ends of the line wrapping around to entirely enclose it.

The rule was sometimes violated, perhaps typically by young warriors out to prove that they could get away with it. The following account is from one of the informants quoted by Hoebel and Llewellyn:

> All the hunters went out in a line with the Shield Soldiers in front to hold them back. Just as they were coming up over a long ridge downwind from where the scouts had reported the herd they saw two men down in the valley riding in among the buffalo. A Shield Soldier chief gave the signal to his men. They paid no attention to the buffalo, but charged in a long line on the two violators of the rules. Little Old Man shouted out for everyone to whip them: "Those who fail or hesitate shall get a good beating themselves."
>
> The first men to reach the spot shot and killed the horses from under the hunters. As each soldier reached the miscreants he slashed them with his riding whip. Then some seized the guns of the two and smashed them.
>
> When the punishment was done, the father of these two boys rode up. It was Two Forks, a member of the Dakota tribe, who had been living with the Cheyenne for some time. He looked at his sons before talking. "Now you have done wrong. You failed to obey the law of this tribe. You went out alone and you did not give the other people a chance. This is what has happened to you."
>
> Then the Shield Soldier chiefs took up the talk. "Now you know what we do when anyone disobeys our orders," they declared. "Now you know we mean what we say." The boys did not say anything.
>
> After that the chiefs relented. This was not alone because of the fact that the culprits were Dakotas. They called their men to gather around. "Look how these two boys are here in our midst. Now they have no horses and no weapons. What do you men want to do about it?"
>
> One of the soldiers spoke up. "Well, I have some extra horses. I will give one of them to them." Then another soldier did the same thing.
>
> Bear Standing On a Ridge was the third to speak out. "Well," he announced, "we broke those guns they had. I have two guns. I will give them one."
>
> All the others said, "*Ipewa*, good."[445]

The account has several interesting features, consistent with other such accounts. To begin with, the punishment of offenders consisted of whipping them and destroying their property. On the face of it, the latter seems a wasteful form of punishment. Why not replace the destruction by a fine, seizing the property and using it for the good of the tribe or perhaps the soldier society that,

in this case, was enforcing the rules?

One possible answer is that making punishment profitable invites excessive or unwarranted punishment,[446] the same problem that Athenian law attempted to solve by combining a profitable punishment with a penalty for unsuccessful prosecution, to be described in chapter 16. It might be a particularly serious risk in a system as unstructured as the Cheyenne. Hunting too early violated a well understood rule but deciding what the consequences were was up to the people who detected the offense and punished the offender. Customs that permit the enforcers to shoot horses but not to confiscate them make punishment unprofitable and so reduce the risk that it will be excessive.

The second interesting, and to us odd, feature of the story is the replacement of the killed horses and one of the destroyed guns by the enforcers. By not trying to evade capture, offer arguments in their defense, or resist the destruction of their property, the two boys were implicitly conceding the authority of the tribal rule they had violated. Once they had done that they were, in effect, readmitted to respectability—and since young men obviously couldn't be left on the prairie, just before the hunt started, without horses or guns, horses and a gun were generously donated by members of the same group that had imposed the punishment. It is unclear to what degree the rules controlling the buffalo hunt were designed to kill buffalo as effectively as possible, to what degree to establish the authority of tribal rules.

In this case the Shield Soldiers were acting to enforce the rule against premature hunting, having been appointed to that task by the Council of Forty-four, although the details of the enforcement were of their own invention. In addition to monitoring the actual hunt, the members of the selected soldier societies could also investigate charges of premature hunting by insisting on searching the tipi of the accused. If fresh buffalo meat was found, a likely punishment (as for some other offenses) was to destroy the tipi.

In other cases described by the informants, members of the soldier societies acted to enforce other rules, in some cases engaging in *de facto* legislation, solving a particular problem and proclaiming a general rule to cover such situations in the future. Thus, for example:

> "While Wolf Lies Down was away, a friend took one of his horses to ride to war. This man had brought his bow and arrow and left them in the lodge of the horse's owner. When Wolf Lies Down returned, he knew by this token security who had his horse, so he said nothing.
>
> A year passed without the horse's return, and then Wolf Lies Down invited the Elk Soldier chiefs to his lodge, because he was in their society. [*He asks what he should do. The chiefs agree to send someone to bring back the borrower or word from him. Eventually the messenger returns with the borrower, leading two horses. He confirms that he borrowed the horse, but was gone longer than he planned to be, and offers to both return the horse he borrowed and give Wolf Lies*

Down two other horses and his bow and arrow.]

Then up spoke Wolf Lies Down. "I am glad to hear my friend say these things. Now I feel better. I shall take one of those horses, but I am giving him that one he borrowed to keep. From now on we shall be bosom friends."

The chiefs declared ….

"Now we shall make a new rule. There shall be no more borrowing of horses without asking. If any man takes another's goods without asking, we will go over and get them back for him. More than that, if the taker tries to keep them, we will give him a whipping."[447]

When the tribe broke up into separate bands, neither the Council nor the full soldier societies (except for the Dog Soldiers, who were their own band) was available to deal with matters. Council chiefs functioned as peace chiefs in their individual bands, leaders with imprecisely defined powers. To some degree members of the soldier societies acted to enforce group decisions, for instance by preventing a minority of the band who disagreed with a decision on which way to go from openly splitting off. At all times, the Council chiefs were expected to be exemplars of moderation and good behavior, even when wronged, and paragons of generosity—if someone asked to borrow something, the proper chief's response was to give it to him. A Cheyenne who did not think he could live up to the standard expected of a council chief might decline the office on that account. As Sun Road put it:

"When a dog is running after a bitch in heat—if my wife is chased by another man, I might weaken and open my mouth. Then it would be well if another had the medicine and not I."

In a warrior society where it is common for semi-official enforcers to punish those they regard as rules violators by whipping them or shooting their horses, there is an obvious risk that someone will go too far and either enforcer or enforcee end up dead. The Cheyenne had a simple and elegant solution to that problem. Beating up another Cheyenne was between you and him. Killing another Cheyenne meant exile from the tribe.

The reason, as they saw it, was not punishment but hygiene. Killing a fellow Cheyenne polluted the medicine arrows that were one of the tribal fetishes; blood would mysteriously appear on their feathers. It also polluted the killer; he smelled of death and the pollution was contagious. Until the arrows had been ceremonially renewed and the killer exiled, no luck could be expected in hunting or warfare.

Exile was not lethal; there were other friendly tribes on the plains. Exile was nominally for either five or ten years, sometimes in practice less.[448] At some point during the term of exile the exiled man could petition to be readmitted to the tribe, possibly bringing with him a horse loaded with tobacco to demonstrate

his repentance. If the kin of his victim were willing he might be readmitted subject to conditions that they imposed. But for the rest of his life, nobody would share his pipe or eat from his bowl. The smell of death might be weakened enough by time to permit his presence in the tribe but the pollution was still contagious.

While exile was the usual result of a killing, there were exceptions. The clearest case is a woman who killed her father in the process of defending herself from being raped by him. The arrows had to be renewed but she was not exiled. A number of other cases are mentioned where the killer was not or may not have been exiled but the arrows had to be renewed.[449]

Llewellyn and Hoebel see the combination of temporary exile and permanent pollution as successfully replacing feud, evidence of the superiority of the Cheyenne institutions to those of other primitive societies. But from Grinnell's account it appears to have been at most a partial replacement.

> If a man killed a tribe fellow, he was often obliged to flee, at least for a time, for he was likely to be killed by some near relative of the dead man. If he saved himself by flight, the council considered the case, and the chief called in the relatives of the dead man and from them learned how much it would take to satisfy them for their loss. The relatives of the slayer were then called together and the penalty stated to them. When they had paid over this fine to the dead man's relatives, the slayer might return to the camp. Whether the matter was thus settled or not, the man who had done the killing was ostracized by his fellows, temporarily expelled from the camp, and lost all standing in the tribe, which he never recovered. He was obliged for a time to camp away from the main tribe, and often he went away from their camp and spent a year or more with some other tribe.[450]

That looks like a combination of the conventional feud pattern—threatened retaliation prevented by compensation—with what Llewellyn and Hoebel regarded as the new and improved system. By their account, in contrast, compensation was offered, if at all, at the point when an exile petitioned for readmission and went to the tribe in general, in at least one case with the kin of the victim refusing a share. The kin's permission seems to have been required for the killer to be readmitted to the tribe, but not purchased.[451]

A Note on Sources

One problem, in this chapter and others, is figuring out to what extent my sources can be relied on. It is made more difficult by the fact that three of them are authored or coauthored by the same person, Hoebel, and so can be expected to share whatever biases he brought to his study of the Plains Indians. I have tried to deal with that problem in part by supplementing those books with earlier and more nearly first-hand reports, in part by trying to allow for biases revealed by internal evidence in the sources.

Consider the contrast between two books on the Cheyenne, Grinnell 1923 and Llewellyn and Hoebel 1941. Grinnell visited the Cheyenne first in 1890, a little more than ten years after they went on reservation, and regularly thereafter, both the north and south bands, at least until 1923, when his book was published. Llewellyn and Hoebel's book is based on two summers of investigation, mainly interviewing members of the northern band on reservation, in 1935 and 1936, as well as secondary sources, including Grinnell. They focus on the legal and political institutions, which occupy only one chapter of twenty-two pages in Grinnell.

Both books are partisan. But while Llewellyn and Hoebel are mainly arguing the virtues of Cheyenne legal institutions and the way in which they were employed, Grinnell's is a broader partisanship. He is describing people he knew well, some of them close friends, and he wants his readers to end up sharing his high opinion of them. Hence when I find an element of their system that a modern reader will strongly disapprove of, the very rare practice of "putting a woman on the prairie," gang rape as a punishment, described only in the later book,[452] I suspect that its omission by Grinnell was deliberate.

But where the two sources disagree on details of the legal and political system I am inclined to trust Grinnell. Llewellyn and Hoebel are working from accounts of the traditional Cheyenne system collected almost sixty years after the Cheyenne surrendered to the U.S., Grinnell from a point much closer to the traditional system.

Dorsey, a third and less informative source, based his account on interviews with a single Cheyenne informant conducted about 1901.

Similar issues arise in the case of the Comanche. Their traditional system was ended by treaty in 1868, after which they were restricted to a reservation representing a tiny fraction of the area previously under their control. The interviews on which Wallace and Hoebel relied were conducted from 1933 to 1945, by which time a Comanche who had been a young adult at the time of the

surrender would have been well over eighty.

In addition to interviews conducted by themselves and contemporary scholars, they made use of surviving written material from much earlier, but there remains a problem. The Comanche that Wallace and Hoebel interacted with were the survivors of a defeated nation whose culture had largely been destroyed, natural objects of sympathy. The Comanche whose institutions I am trying to understand were an arrogant and powerful people who, for a hundred and fifty years, successfully waged war against Spanish, Mexicans, Texans, Americans, and other Indian tribes. While the authors can and do report the facts of the earlier period, their reporting is colored by their observation of the later state of the tribe.

As in the case of Grinnell and the Cheyenne, the clearest evidence is what they do not say. It is reasonably clear from the earlier sources that the Comanche routinely killed most adult male captives, often torturing them to death, frequently mutilating their corpses. Adult female captives were subject to gang rape, followed by slavery, followed by forced marriage in a society where wives had very limited rights.[453] That picture comes through in only a muted form in Wallace and Hoebel's account—the sole index reference to "rape" points at the sentence "Rape, except upon captives, occurred infrequently and was not part of the general pattern." Their references to torture imply that it was uncommon.[454]

Of course, there may also be biases in the earlier sources. Lee's account includes a description of impressive ruins showed to him by his captors that, while probably based on real Pueblo ruins, does not fit them closely.[455]

In addition to wanting to make a good story of his ordeal, Lee also had two other objectives—to persuade his readers that the U.S. army should invade Comanche territory to discourage Comanche attacks and that the government should have a policy of ransoming captives back from the Comanche. Both would tend to bias his account in the opposite direction from the bias I think I see in Wallace and Hoebel. But his picture of the treatment of captives is supported by Neighbors (1853, 132), who writes "Men are never taken prisoners by them in battle, but killed and scalped in all cases. The women are sometimes made prisoners, in which case their chastity is uniformly not respected."

14. Feud Law

> As we shall see, what usually happens in our early medieval sources is that, when one social group, usually a family or kindred but occasionally an institution such as a monastery, is wronged, it makes a great display of its anger, of the fact that it has been wronged and of the fact that it has the right to extract vengeance upon the wrongdoers. Pressure is thereby brought upon the original attackers to make reparation, either informally or through the local officers of the law, or sometimes through the mediation of the church. Where compensation is not paid, the aggrieved party sometimes carries out a retaliatory attack. If the correct procedures have been followed, a successful vengeance killing is held to be quite legal, and terminates the dispute. There is little conception that the recipients of the retaliatory attack have any right to feel aggrieved, or that they would be justified in responding violently to it.
>
> (Halsall 1999, 10)

Most moderns take it for granted that law is, must be, enforced by the state. Criminal offenders are detected and arrested by police, prosecuted by government prosecutors, tried in government courts and punished by the government. Eighteenth-century England had a modified version of that system, with criminals, like tortfeasors in a modern system, detected and prosecuted privately but tried and punished by the state.

We have now seen a number of societies in which law enforcement was private and decentralized.[456] That pattern, although strange to us, is historically common.[457] It seems likely that in many, perhaps most, societies it was the original legal system on top of which later systems were constructed. I call it feud law.[458] Its logic is simple. If you wrong me, I threaten to harm you unless you compensate me.

In order to work, it must solve four different problems.

The Requirements of Feud Law

1. My threat to harm you must be more believable if you have wronged me than if you have not.

2. There must be ways of making it likely that I will carry out my threat despite the risks.

3. There must be ways of enforcing the rights not only of the strong but of the weak.

4. There must be ways of terminating feud, preventing the pattern of continued back and forth violence that the word suggests to the modern ear.

All of these problems must be solved for feud to provide an adequate mechanism to enforce law. All have been solved in real-world feud systems.

1. Right Makes Might

If my threat is equally effective whether or not you have actually wronged me, it works as well for extortion as for law enforcement. A feud system requires some mechanism that makes the threat more believable when you have wronged me than when you have not.

Saga-period Iceland shows one way of solving this problem. If I believe you have wronged me, I take you to court. The court gives a verdict—you owe me fifty ounces of silver. You pay or you do not pay. If you do not pay you are outlawed, making it legal for me to kill you, illegal for anyone to feed you, shelter you, defend you. Friends who might want to defend you know that any clash will lead to further legal suits in which they will be on the losing side. If they refuse to pay damages, the kin of anyone they injure will be pulled into the coalition against them. The court system is the mechanism through which right, as defined by the existing law code, makes might. The Romanichal achieve the same objective in a less formal way. Instead of a law code there is a system of community norms. If you have wronged me as judged by those norms and fail to compensate me, my friends will back me in the resulting clash, your friends will not back you.

The legal system of Somaliland is somewhere between the two. Law is customary—unlike the Icelandic case, there is no legislature. The courts that settle disputes are ad hoc, formed for the dispute. But they have enough legitimacy in the eyes of neighbors and potential allies of both sides to give their verdict weight.

When I first read about Romani law I interpreted the Romanichal's legal

system as a feud system, the Vlach Rom's as a system of communal control operating through the *kris*. A more detailed account[459] of the Vlach Rom in America, however, made it clear that they too had a feud system, with feuds fought out in large part by manipulating the *gaje* authorities to impose costs on opponents. The *kris* of the Vlach Rom is no more a government than the court of the Somali. Both are, like the Icelandic court, mechanisms for settling disputes in a feud system by involving members of the society not themselves party to the feud, using ad hoc judges rather than professionals.[460]

The details vary from one system to another but the basic logic is the same.

2. Commitment

When I threaten to harm you, you respond that if I do you will retaliate, making the exchange a loss for both of us. For the system to work, I need some way of committing myself, making it in my interest to carry out my threat despite the risk, in your interest to back down and compensate me.

One solution predates our species—territorial behavior.[461] One member of a territorial species, typically birds or fishes, somehow marks the territory he is claiming. Doing so turns a metaphorical switch in his brain, commits him to fight more and more desperately against a trespasser the farther into his territory the trespasser comes. Unless the aggressor is much stronger than the defender, a fight to the death is a loss for both. So once the commitment is clear, it is in the interest of the trespasser to retreat.

The corresponding mechanism in humans is vengefulness. When someone has wronged you, you very much want to get back at him, even at some risk to yourself. Considered *ex post*, after the fact, it looks like an irrational passion, one that can quite easily get you killed. Considered *ex ante*, it may well be a rational commitment strategy, hardwired into us by evolution. That you will revenge yourself against anyone who wrongs you, even at considerable cost to yourself, is a reason not to wrong you.[462]

Human societies provide other commitment strategies as well, most obviously reputation and status. Your failure to carry through on your threat, to revenge yourself on one who has wronged you and refused to pay compensation, marks you as a wimp. Being known to be a wimp lowers your status. It also marks you as a safe target for future wrongs.

Failing to avenge wrongs to yourself costs status. Forcing the person responsible for a wrong to pay compensation gains status, even if the wrong was to someone else. That explains the volunteer enforcer, someone who faces down

an aggressor on behalf of a victim too weak to do it himself, a pattern we observe in the Icelandic sagas and in accounts of conflicts among the Comanche Indians.

What if the wrong you suffer leaves you dead, unable to either threaten or execute vengeance? To deter killing, you need a commitment strategy that lasts past death. Real-world feud systems provide it.

Under Icelandic law, killing me gives my kin a claim against you, the right to collect money damages and, if not acceptably compensated in an out-of-court settlement, have you outlawed. The kin have a double incentive to enforce that claim. It may let them collect a considerable amount of money. It also gives anyone who might want to kill one of them a reason not to. The same mechanism, a claim for damages inherited by the living, exists in other feud systems such as the Somali.

3. Protecting the Weak

A fight to the death between two birds may be a loss for both but a fight to the death between an elderly man with no allies and an aggressor backed by half a dozen friends is likely to be a loss for only one. In order for feud to do an adequate job of protecting rights, it needs some mechanism that works for weak as well as for strong.

The Icelanders solved that problem by making claims for damages transferable. The elderly man who knows that if he tries to prosecute his claim himself he is likely to be beaten up on his way to the court transfers the claim to a friend or neighbor who can enforce it. If enforcing it is not too hard, they split the cash. And however the compensation is divided, at least the aggressor has paid for his crime.

The Somali had a different system. The individual is a member of a *dia*-paying group, a coalition formed in advance. If he is wronged, the other members of the group are entitled to part of the damages. Just as with the Icelandic kin group, that gives them a double incentive, cash and reputation, to make sure they are paid.

4. Terminating Feud

The simplest way of ending a feud is for one side to compensate the other for the damage done, ideally at the first step. One reason not to do so is the belief by the initial aggressor that he can get away with refusing, that the other will back down. Another is the belief that he does not owe anything, that he is in the right. If he is in the right and pays anyway that will mark him as a wimp, an easy target

for extortion. Better to respond to force with force and hope the other party will back down instead.

The Icelandic solution was arbitration. Find someone prominent, respected, powerful. Have both parties agree to accept his settlement of the dispute. Paying what he says you owe does not mark you as a wimp. Refusing to do so not only makes you look bad and makes settlement more difficult in any future dispute, it gets you a new and powerful enemy. A similar approach was used by at least some other feud societies, including the Romani.

> "When a problem arises, initially, attempts are made to resolve the problem on the spot in order to avoid convening the court. This is usually done when the parties engaged in a dispute approach some respected person (or several respected members of the community) for assistance, who then make their pronouncement on the spot."[463]

The Somali system also offers a different solution. When the amount of killing reaches an unacceptable level, raise the price—have the clans whose members have been feuding agree to increase *dia*, the damage payment for killing.

The First Legal System

No modern state uses a feud system to settle conflicts among its citizens, although some groups within modern states, such as the Romanichal or Kaale, continue to do so. But a number of existing legal systems show evidence of having been built on top of pre-existing feud systems.

The clearest example is Anglo-American common law. It evolved out of Anglo-Saxon law. Anglo-Saxon law, at least prior to its final century, was essentially Icelandic law plus a king. The king claimed that some offenses were violations of the king's peace, hence that offenders owed damages to both him and the victim. Expand that approach enough and eventually the exception swallows the rule, converting all crimes into offenses against the crown alone.

For another example, consider Jewish law. The rules for killing, described in Chapter 4, put the job of executing a killer whose crime is ruled capital on the Avenger of Blood, the heir of the victim. They also give him the right to kill a killer whose crime is ruled not capital if he can intercept him on the way back to his city of refuge. The rule of *Avid Inish Dina Lenafshei* (a man may take the law into his own hands) in Jewish law is further evidence.[464] Similarly, Islamic law assigns the job of prosecuting a killer to the victim's kin, gives them the right to retaliation if the killing was capital and of collecting *diya*, wergeld, from a non-capital killer or a capital killer against whom they choose not to retaliate.

Roman law, on which European civil law is ultimately based, is a less clear case. Its earliest known form, the Law of the Twelve Tables, has survived only in fragments deduced from other documents. It has features that suggest a pre-existing feud system, such as references to the circumstances under which the victim of a crime is entitled to kill the criminal. Later Roman law preserved extensive elements of private action, obligating the plaintiff to bring the defendant to court, if necessary by force, and giving a successful plaintiff in some contexts the right to kill the defendant or sell him into slavery. Theft in early Roman law was treated as a tort, only later also as a crime.[465]

Chinese law permits a husband who catches his wife in adultery to kill wife and/or lover and similarly for someone enraged by the murder of parent or grandparent or someone who finds a stranger entering his house at night without lawful cause, but in each case only if the killing immediately follows the discovery.[466] I have not been able to find good evidence, however, that it started as a feud system.

Under Hittite law, recorded from the second millenium B.C.:

"Whoever commits murder. whatever the heir of the murdered man says (will be done): if he says: 'Let him die,' he shall die; if he says 'Let him make compensation,' he shall make compensation. The king shall have no role in the decision."[467]

Feud in the Modern World

Modern formal legal systems are based on enforcement by the state but much informal enforcement follows the logic of feud law. Private norms of behavior are enforced by private action, at least some of which involves the threat of retaliation—true hostile gossip and sometimes more. Robert Ellickson, in his description of the system of norms of neighborly behavior in modern-day Shasta County, California,[468] gives an example. If a neighbor who repeatedly lets his cattle stray into another's field and damage his crops fails to apologize and help undo the damage, the victim may respond by driving the cattle off his property and some distance down the road in the direction away from their owner's farm.

Much of the crime in a modern society can be interpreted as private enforcement. A retaliatory killing in the course of a conflict among urban gangs is one example, a husband who discovers another man in bed with his wife and shoots him another. Donald Black has argued that "most intentional homicide in modern life is a response to conduct that the killer regards as deviant."[469]

Hatfields and McCoys, The Feud that Mostly Wasn't

According to a popular tale, the Hatfields and McCoys, two families of Appalachian hillbillies living on opposite sides of the Tug Fork, the border between Kentucky (McCoys) and West Virginia (Hatfields), started killing each other before the end of the Civil War and continued to do so through a long series of revenge killings, each inspiring the next, for some decades thereafter.

The real history is shorter and less dramatic. Asa McCoy volunteered for the Union Army, was invalided out, returned to the Tug valley and was killed, a murder often claimed to have been the first in the feud. There is, however, no evidence that his death had anything to do with a family feud and his killer was never discovered. Practically everyone in the Tug Valley other than Asa, both Hatfields and McCoys, was pro-Confederate, providing an obvious motive for his killing.

The first definite conflict between Hatfields and McCoys occurred 13 years later, when Old Ranel, the patriarch of the McCoy clan, suspected that Floyd Hatfield had stolen one of his hogs. Instead of getting down his rifle and telling his boys to fetch theirs, however, Ranel took his suspicions to the nearest Justice of the Peace. Floyd Hatfield was tried and acquitted. A year and a half later, two of Ranel's nephews got into a fight with Bill Staton, a relative of both families who had been a witness for Floyd Hatfield's side in the trial, and killed him. They were arrested, tried, and acquitted on grounds of self-defense—on the Hatfield side of the river by a Hatfield judge. No revenge killings followed.

The first violence fitting the pattern of a proper family feud occurred in 1882. In the course of an election-day fight, Ellison Hatfield was badly wounded—shot and stabbed—by three of the McCoys. The three were arrested and on their way to the Pikeville, Kentucky jail when their party was intercepted by a larger group led by Anse Hatfield and the prisoners seized. The captors, uncertain whether Ellison's wounds were mortal, waited until he died and then, on the Kentucky side of the river, killed the three McCoys.

That should, of course, have brought forth return violence from the McCoys. What actually happened was that they took the matter to a Kentucky court, which issued warrants for twenty-one of those involved in the killing but did nothing else. Five years passed with no further violence.

At which point a new governor of Kentucky was elected who happened to be a friend of Perry Cline, a lawyer, friend and distant relative of Ranel McCoy who had lost out to Anse Hatfield in a lawsuit over land some years before. Cline persuaded the governor to announce rewards for Anse Hatfield and his fellow

killers and begin extradition proceedings. While the governor of West Virginia was still considering the request for extradition, a Kentucky posse crossed the state border into West Virginia and captured Selkirk McCoy, despite his name considered a Hatfield supporter.

That set off the second instance of retaliatory killing. A group of Hatfield supporters attacked Ranel McCoy's home, burned it, and killed two of his adult children. That was the point at which the conflict began to draw national attention, with newspapers describing it in dramatic and wildly exaggerated terms. Shortly thereafter further raids into West Virginia killed Vance Hatfield, Anse Hatfield's uncle, and captured seven more Hatfield supporters while another voluntarily surrendered. The West Virginia court responded by issuing warrants for the arrest of the twenty members of the posse responsible for killing Vance Hatfield. Continued efforts by Kentucky bounty hunters, most of whom had no connection with the McCoys, led to a battle between a Kentucky posse and a West Virginia posse and the murder by the leader of the former of one member of the latter. At which point the conflict was over, at least for the two families.

Not, however, for the lawyers. The governor of West Virginia demanded the return of citizens of his state kidnapped to Kentucky to be tried in a Kentucky court. The case eventually reached the Supreme Court, which held that although the kidnapping was illegal there was no recourse; once the nine were in Kentucky, the Kentucky court could try them.

Two things are worth noting about the story. The first is that only six killings were directly due to conflict between the families—five revenge killings of McCoys, one the killing of Ellison Hatfield that inspired the first revenge.[470] One Hatfield and one member of the West Virginia posse were killed by Kentucky posses and one Hatfield condemned to hang by a Kentucky court.

The other is that, so far as we can tell, the feud would have ended with a total of only four killings—for five years had ended—had not the governor of Kentucky chosen to revive it.

15. England in the Eighteenth Century[471]

The criminal justice system of England in the eighteenth century presents a curious spectacle to an observer more familiar with modern institutions. The two most striking anomalies are the institutions for prosecuting offenders and the range of punishments. Prosecution of almost all serious criminal offenses was private, usually by the victim.[472] Intermediate punishments for serious offenses were strikingly absent. It is only a modest exaggeration to say that, in the early years of the century, English courts imposed only two sentences on convicted felons. Either they turned them loose or they sentenced them to hang by the neck until dead.

Parts I and II of this chapter describe the institutions for prosecution and the forms of punishment. In part III I offer possible explanations for several features of the legal system, arguing that, contrary to the view of many commenters then and now, they may have made considerable sense.

Part I: The Private Prosecution of Crime

England in the eighteenth century had no public officials corresponding to either police or district attorneys. Constables were unpaid[473] and played only a minor role in law enforcement. A victim of crime who wanted a constable to undertake any substantial effort in order to apprehend the perpetrator was expected to pay the expenses of doing so. Attempts to create public prosecutors failed in 1855 and again in 1871. When the office of Director of Public Prosecution was finally established in 1879, its responsibilities were very much less than those of an American district attorney now or then. In eighteenth-century England a system of professional police and prosecutors, government paid and appointed, was viewed as potentially tyrannical—worse still, French.[474]

Any Englishman could prosecute any crime; in practice, the prosecutor was usually the victim. It was up to him to file charges with a local magistrate, present evidence to the grand jury and, if the grand jury found a true bill, provide evidence for the trial.

Their system for prosecuting crimes was similar to our (and their) system for prosecuting torts. Under both, the victim initiates and controls the process by which the offender is brought to justice. One difference is that if the tort plaintiff prevails, the tortfeasor is required to pay him damages. If the victim of a crime won his case, the criminal was hanged or pardoned. The damage payment in civil law provides the victim with an incentive to sue. What incentives to prosecute were there in eighteenth-century criminal law?

Modern historians were not the first to consider this question. A central concern of eighteenth-century legal writers was the difficulty of inducing people to prosecute. One solution was to establish substantial rewards for the conviction of criminals charged with particularly serious crimes. In 1692, Parliament offered a reward of £40 for the apprehension and conviction of highway robbers. In later decades, the range of felonies to which the reward applied gradually expanded.[475] In 1720, a royal proclamation added an additional £100 reward for the prosecution and conviction of street robbers in and near London. The combined reward of £140 corresponded to about three years' income for a journeyman, much more for a laborer. The royal reward remained in force, with one brief intermission, until 1745.

Rewards increased the incentive for victims to prosecute. The combined effect of rewards and a free pardon for a criminal whose testimony resulted in the conviction of two others provided an incentive for a member of a criminal gang

to betray his associates. Rewards also encouraged thieftakers, private investigators who supported themselves by public rewards for convicting thieves, private rewards offered by victims, and rewards for the recovery of stolen property. Jonathan Wild, self-appointed Thieftaker General, supported himself for a decade by a combination of revenues from thieftaking, rewards for the recovery of stolen property, and income from the large-scale employment of thieves. He was convicted and hanged in 1725 but lived on in fame as the central figure of a book by Defoe and, in the persona of Mr. Peachum, of Gay's *Beggar's Opera*.

Rewards provided an incentive for prosecution but led to new difficulties. In some cases it was alleged that the accused had been framed for an offense that had never occurred. Other cases were said to be the result of entrapment; the perpetrators were persuaded to commit the crimes by confederates whose real purpose was to betray them for the reward.[476] The most famous of the resulting scandals involved the McDaniel gang who, when one of their plots miscarried and they were themselves tried, turned out to have been responsible over a period of about six years for the transportation of two men and the hanging of six and to have received a total of £1,200 in state rewards.

> Thief-takers constantly attended the Old Bailey proceedings to become familiar with the persons who regularly appeared in the dock, from whom they chose people to give false information about. There was a common saying that anyone discharged from the Old Bailey was bound to reappear after a Session or two. Such persons were befriended by the thief-taker's accomplice, and led into further crime (or indeed the accomplice would commit the robbery himself), for which they would be subsequently sworn against. After the robbery, the confederate and his companion would meet in some pub in Black Boy Alley or Chick Lane, where the thief-taker with some further assistants would arrive and apprehend both of them. When they were carried before a Justice, the thief-taker would get his secret confederate admitted as an evidence and the poor dupe would be convicted; the reward would be shared between the thief-taker and the confederate. Subsequently the confederate would become a thief-taker in his turn, using another confederate to ensnare another innocent dupe.[477]

Casanova, visiting London from 1763 to 1764, observed window signs advertising the availability of false witness.[478] Jurors, knowing that witnesses expected to share in the reward from conviction, discounted their testimony accordingly.

John Townsend, one of the more famous of the Bow Street Runners, appearing before a parliamentary committee in 1816, argued that payments to officers ought not to depend on conviction since if they did the officer would have an incentive to convict a defendant whether or not he was guilty:

> "I have, with every attention that man could bestow, watched the conduct of various persons who have given evidence against their fellow-creatures for life or death, not only at the Old

> Bailey, but on the circuits, and I have always been perfectly convinced that [rewards not depending on conviction] would be the best mode that possibly could be adopted to pay officers, particularly because they are dangerous creatures; they have it frequently in their power (no question about it) to turn that scale, when the beam is level, on the other side; I mean against the poor wretched man at the bar: why? This thing called nature says profit is in the scale; and, melancholy to relate, but I cannot help being perfectly satisfied, that frequently that has been the means of convicting many and many a man."[479]

Perhaps because of such problems, the system of rewards was reduced in the mid-eighteenth century. It was supplemented in 1752 by a provision permitting the court to reimburse prosecutors, especially poor prosecutors, for the expenses of prosecution.[480] While such reimbursement reduced the disincentive to prosecute, it did not eliminate it. Even if the defendant was convicted, expenses were not always reimbursed or reimbursed in full. Not until 1778 did it become possible for a prosecutor to be reimbursed for an unsuccessful prosecution.

Dissatisfaction with the perceived problems of private prosecution and concern with what was perceived as a high and rising crime rate eventually led to the introduction of paid police forces, first in London in 1829 and later elsewhere in England.[481] The police took over from the private prosecutors much of the cost of locating and convicting criminals. The result, by the end of the nineteenth century, was a system where most prosecution was nominally private but where the private prosecutor was usually a police officer.

It is easy enough now, it was easy enough then, to see why a system of private prosecution could not work. The puzzle is that it did. Whether it worked better or worse than alternative institutions would have is not clear. But we know that, during the eighteenth century, quite a lot of English criminals were charged, prosecuted, and convicted. While property may not have been as secure as its owners wished, it was sufficiently secure to permit a flourishing economy and an impressive amount of economic growth. At the end of the century it was the French state, with its modern system of police and prosecutors, that went down in the chaos of the French Revolution, while England went on to the glories of empire and industrial revolution.

Part II: Punishment at the Extremes

> It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offense: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy or hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.
>
> (Blackstone 1884, Book 4 Chapter 1)

Offenses fell into three categories according to their possible punishment: minor offenses (mostly misdemeanors[482]), clergyable felonies, and non-clergyable felonies. Minor offenses such as petty larceny, theft of goods worth less than a shilling, typically received punishments designed largely to shame the offender such as public whipping or exposure in the stocks. Those accused of such offenses were subject to summary judgment by a magistrate rather than receiving a jury trial.[483]

In addition to offenses that might be expected to be prosecuted by the victim there were what we would classify as victimless crimes, in particular vagrancy, prostitution, and begging. Constables or members of the night watch were supposed to arrest those guilty of such offenses, bring them to a magistrate, and receive a small reward for doing so. The usual penalty was a brief period of confinement at hard labor.

Benefit of Clergy

Benefit of clergy originated as a legal rule permitting clerics charged with capital offenses to have their cases transferred to a church court, which did not impose capital punishment. “Cleric” came to be defined as anyone who could read, usually tested by having him read a specific verse from the Bible, known for that reason as the “neck verse”—memorizing it could save a defendant’s neck.

By the eighteenth century, the rule had changed in ways that made it entirely secular.[484] Statutes in 1623 and 1691 extended the privilege for some offenses to women, with no requirement of literacy. After 1706 men were no longer required to demonstrate literacy.

Under a Tudor statute, a defendant who pled his clergy could be imprisoned for up to a year, but that appears to have been done only rarely.[485] Defendants not actually clergymen were entitled to plead clergy only once; branding on the thumb may have originated as a device to identify those who had pled clergy once and so could not do so again. But this restriction does not seem to have been enforced very often. In theory, being convicted of a felony was supposed to result in forfeiture of property and land, with land being restored to a felon who pled clergy and was branded,[486] but that also does not seem to have been enforced. Presumably the brand had some stigmatizing effect. That, plus the costs borne by the defendant prior to his conviction,[487] seems to have been at some periods the only penalty actually imposed on most of those convicted of a clergyable offense.[488] That ceased to be true when the transportation act of 1718 made it possible to sentence some defendants who pled clergy (but not peers, actual clerics, or those whose crime was manslaughter) to transportation to America for seven years of indentured servitude.

Clergyable offenses were offenses for which, absent benefit of clergy, the punishment was death. Manslaughter, for example, was a clergyable felony. Its definition included many offenses that we would define as murder. A killing in a tavern brawl, even if done with a deadly weapon, was manslaughter as long as there was no evidence of premeditation or previous enmity. The killer was allowed to plead his clergy, branded on the thumb, and released.[489]

Transportation

Large-scale use of transportation as a criminal punishment began about 1663. It was imposed both on defendants convicted of capital non-clergyable felonies and pardoned on condition of transportation and on some defendants convicted of clergyable felonies. Until the literacy requirement was abolished a judge who wished to transport such a felon could choose to test it strictly and find that the defendant was not literate and thus not entitled to benefit of clergy or, if the defendant was already branded for a previous offense, the judge could enforce the rule forbidding non-clerics to plead clergy more than once.

Transportation was by private merchants. A merchant who wished to transport a felon was required to pay the sheriff “a price per head that included jail fees, the fees of the clerk of the appropriate court, fees for drawing up the pardon, and so on.”[490] After transporting the felon to the New World, the merchant could sell him into indentured servitude for a term depending on his offense. This was a profitable transaction if the felon was young and healthy or had useful skills, but

many felons did not bring enough return to pay the merchant's cost. The result was that felons who had been sentenced to transportation but whom nobody was willing to transport accumulated in jails intended as temporary holding places.

Another problem was with the colonies to which the felons were sent; in the 1670's both Virginia and Maryland passed laws prohibiting transportation. John Beattie, a leading historian of the period, concludes that “transportation to the mainland colonies was being seriously curtailed by the 1670's.”[491] While some transportation continued, it seems to have become an uncommon punishment by the end of the seventeenth century.

The second period of transportation began in 1718. This time the government made no attempt to charge merchants for the privilege of transporting convicted felons, instead offering a subsidy of £3 per transportee. On those terms transportation was profitable. The system was continued until the American Revolution removed most of the places to which transportees were being sent from the authority of the crown.[492]

After 1776, a variety of temporary measures were used to deal with prisoners who would otherwise have been transported. Some, confined in hulks moored in the Thames, were used as convict labor for work on improving the river. Others were held in jails. None of these expedients proved satisfactory and they were eventually replaced by transportation to Australia. At about the same time, there were attempts to expand and regularize the use of long-term imprisonment. While initially frustrated by the unwillingness of local governments to build the necessary facilities, such attempts were ultimately successful.

The Range of Punishments

Along with the broadening of the class of defendants permitted benefit of clergy came a narrowing of the range of clergyable offenses. Under the Tudors, a variety of serious offenses[493] were made non-clergyable. Starting in the late seventeenth century, many more were added.[494] The result was a legal system in which the only punishment for some capital offenses was a branded thumb while for many others the only punishment a judge could impose was hanging.

While hanging was, for much of the century, the only punishment that a judge could impose for serious non-clergyable felonies, that did not mean that everyone charged with such a felony, or even everyone convicted, was actually hanged. Some charges were dismissed by the grand jury’s failure to indict.[495] A substantial fraction of defendants were acquitted. Of those convicted, many were convicted of a lesser offense. A jury might find a defendant guilty of an offense

that was punishable by whipping or the pillory either to keep the offender from pleading his clergy and being released or to prevent him from being convicted of a capital offense and hanged. After 1717, they might find him guilty of a clergyable rather than a non-clergyable felony in order to convert the punishment from hanging to transportation.

In some cases the verdict was clearly an act of “pious perjury” by the jury. The fiction was clear when a jury found a defendant guilty of stealing from a house goods of value 39 shillings although the goods included more than that in cash; 40 shillings was the value that would make the theft non-clergyable.[496] In other cases the jury failed to include in its verdict features of the crime, such as the fact that the theft was from a house at night or involved breaking and entering, that would have made it non-clergyable. The combined effect of acquittals and conviction for a lesser (non-capital) offense was that, in the sample examined by Beattie,[497] fewer than 40% of those charged with capital property felonies and fewer than 25% of those charged with murder were actually convicted of those offenses.

Conviction did not necessarily result in hanging. It was quite common for a defendant to be convicted and then pardoned. In some cases the reason may have been that the judge disagreed with the jury's verdict and recommended a pardon in order to avoid the execution of an innocent person. In many other cases, the pardon was the result of petitions by the convicted defendant's relatives, friends, employer, and anyone else willing to petition the crown on his behalf.

Some pardons resulted in the convict going free. Others were a device for substituting a lesser but still serious punishment. The convicted criminal was pardoned conditional on his agreeing to be transported or to enlist in the army or navy. Multiplying the fraction of those indicted for capital offenses who were convicted of them by the fraction of those convicted who were hanged, in Beattie’s sample the fraction of defendants charged with a capital felony who were actually hanged was less than 16%.

The overall picture of punishment for serious offenses was fairly simple. For clergyable felonies, the convicted offender was either branded on the thumb and sent home or, especially after 1718, transported. For non-clergyable capital offenses, of which there were a great many, the convicted offender was either pardoned, pardoned and transported, pardoned on condition of enlistment, or hanged. Jails were used to confine defendants awaiting trial or convicts awaiting punishment.[498] Occasionally something went wrong with the system and convicted prisoners started to accumulate in the jail system. Toward the end of the century there were proposals to expand the use of confinement as a

punishment and some efforts begun in that direction.

Part III: Three Puzzles

While contemporaries, then as now, worried about rising crime rates, there seems to be little evidence that crime rates were actually rising. Beattie's figures, based on homicide indictments per capita, suggest that rural homicide rates fell more than fourfold and urban about ninefold between 1660 and 1800. Combining that information with data for the nineteenth century,[499] it seems likely that much, perhaps most, of the drop in the crime rate between 1660 and 1900 occurred prior to the introduction of paid police.[500]

Such conclusions must be qualified by the fact that the seventeenth- and eighteenth-century data reflect homicide indictments, not homicides. If the fraction of homicides resulting in indictments felt sharply from 1660 to 1800, that could explain the data without any decrease in the murder rate. But there seems to be no evidence for a decline on that scale. Beattie concludes that while some of the decline in the indictment rate may reflect a change in what events were prosecuted as homicide, at least some is due to a real drop in the murder rate.[501]

To understand how and why the system worked as it did, there are at least three puzzles to be solved. The first is why private individuals chose to bear the cost of prosecution even when there was no prospect of a reward. The second is why the legal system used the limited range of punishments it did, with very little use of imprisonment. The third is why the legal system imposed high punishments with low probability.[502] If execution was the correct punishment for anyone who stole goods worth forty shillings or more from a house, why were only a small minority of those caught committing that crime hanged? If it was too high, why did the legal system not set a lower punishment and consistently inflict it?

The Incentive to Prosecute

Two features of the system may help solve the first puzzle: deterrence as a private good and compounding, out-of-court settlements.

Deterrence as a Private Good

Consider the situation from the viewpoint of a potential victim of crime. He would like potential thieves to believe that if caught stealing from him they would be prosecuted to the full extent of the law. But if he actually caught a thief, he would be strongly tempted not to file charges. Carrying the case through

as a private prosecutor might cost many times the value of the goods stolen.[503] The prosecutor not only had to pay legal fees, he also had to pay transportation and lodging expenses for his witnesses to attend court, often at a distance of a day's travel or more from their homes. A successful prosecutor might be reimbursed for expenses by the court but such reimbursement was unlikely to cover all expenses.[504] If the criminal had to be located and apprehended before he was prosecuted there would be additional costs, possibly including the cost of advertising and paying a reward. Potential victims wished potential criminals to be deterred. But in order to achieve that result, it had to be in the interest of actual victims to prosecute actual criminals.

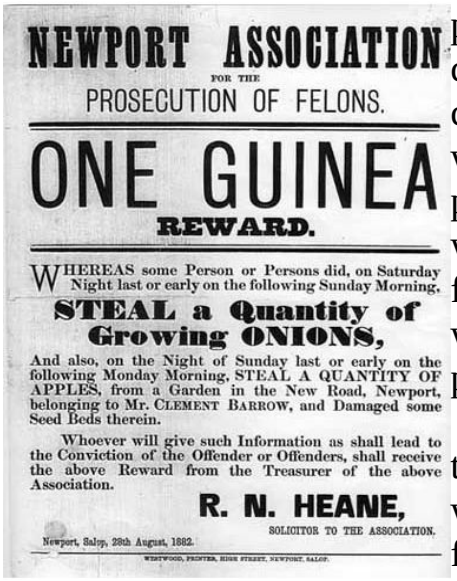
One solution was reputation. A merchant who expected to be a frequent target of theft might prosecute one thief to assure others of his resolve. But most potential victims would be lucky to catch one thief in a lifetime. How could they commit themselves in advance so that potential thieves would know they would be prosecuted?

The solution was to join an association for the prosecution of felons. Most such associations consisted of between twenty and a hundred members, all living in the same general area.[505] Each contributed a fixed payment to a common pool, money that could be used to pay the cost of prosecuting a crime committed against any member. The list of members was published in the local newspaper.

Thousands of prosecution associations were established in the eighteenth and early nineteenth centuries.[506] I interpret their main function not as insurance but commitment. By joining such an association, a potential victim committed himself to prosecute. The money had already been paid out. That was why the list of members was published in the local newspaper—for the felons to read.[507]

Not everyone joined such an association. While it is impossible to make any very exact estimates, members and their households were surely a minority, quite possibly a small minority, of the population. There were at least two different reasons not to join, corresponding to two different groups of non-members. The first consisted of potential victims for whom deterrence was already a private good. Wealthy individuals, firms that were either large or particularly subject to theft, were repeat players with an adequate reputational incentive to follow through on their commitment to prosecute. The second consisted of those for whom private deterrence was not worth its price: potential victims whose expected costs of crime were low enough to make the value of deterrence less than its cost.[508]

Private deterrence cannot be the full explanation for why offenses were



NEWPORT ASSOCIATION
FOR THE
PROSECUTION OF FELONS.

ONE GUINEA
REWARD.

WHEREAS some Person or Persons did, on Saturday Night last or early on the following Sunday Morning,

STEAL a Quantity of Growing ONIONS,

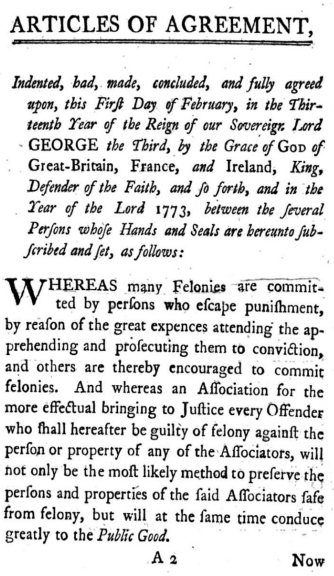
And also, on the Night of Sunday last or early on the following Monday Morning, STEAL A QUANTITY OF APPLES, from a Garden in the New Road, Newport, belonging to Mr. CLEMENT BARROW, and Damaged some Seed Beds therein.

Whoever will give such Information as shall lead to the Conviction of the Offender or Offenders, shall receive the above Reward from the Treasurer of the above Association.

R. N. HEANE,
SOLICITOR TO THE ASSOCIATION.

Newport, Salop, 28th August, 1882.

WESTWOOD, PRINTER, HIGH STREET, NEWPORT, SALOP.



ARTICLES OF AGREEMENT,

Indented, had, made, concluded, and fully agreed upon, this Firſt Day of February, in the Thirteenth Year of the Reign of our Sovereign Lord GEORGE *the Third, by the Grace of* GOD *of* Great-Britain, France, *and* Ireland, *King, Defender of the Faith, and ſo forth, and in the Year of the Lord* 1773, *between the ſeveral Perſons whoſe Hands and Seals are hereunto ſubſcribed and ſet, as follows:*

WHEREAS many Felonies are committed by perſons who eſcape puniſhment, by reaſon of the great expences attending the apprehending and proſecuting them to conviction, and others are thereby encouraged to commit felonies. And whereas an Aſſociation for the more effectual bringing to Juſtice every Offender who ſhall hereafter be guilty of felony againſt the perſon or property of any of the Aſſociators, will not only be the moſt likely method to preſerve the perſons and properties of the ſaid Aſſociators ſafe from felony, but will at the ſame time conduce greatly to the *Public Good.*

A 2 Now

prosecuted, since surviving court records reveal many cases where the prosecutor was neither associated with a prosecution association, wealthy, nor representing a firm. What, in such cases, was the incentive to prosecute?

One answer popular at the time was that prosecutors were motivated by a desire for vengeance. Another possible answer is that prosecution was sometimes a necessary step towards recovering stolen property.[509] Another is that prosecutors began prosecutions in the hope of being paid not to complete them.

In Defense of Compounding Felonies

One way of resolving a civil suit is by an out-of-court settlement. The equivalent in a system of privately prosecuted criminal law is for the prosecutor to compound the offense, agree in exchange for compensation not to press charges. Compounding a misdemeanor was legal in eighteenth-century England. Magistrates seem to have felt that part of their job was to encourage private settlements between the offender and the injured party, thus keeping disputes out of the courts.

> "It is not uncommon, when a person is convicted of a misdemeanor, which principally and more immediately affects some individual, as a battery … for the court to permit the defendant to *speak with the prosecutor*, before any judgement is pronounced; and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice … prosecutions for assaults are by these means too frequently commenced rather for private lucre than for the great ends of public justice."[510]

Compounding a felony was illegal once charges had been filed but appears to have been common. A potential prosecutor could agree not to file charges in exchange for compensation, even an apology. Once he had filed his charges he was subject to a fine if he failed to carry the case through to trial.[511] He could, however, show up and offer a deliberately weak prosecution or fail to show up and hope to be let off the fine. One of the criticisms of the system of private prosecution, especially during the nineteenth-century attempts to establish a

system of public prosecutors, was that many cases were dropped because of agreements between the prosecutor and the defendant.[512]

What both modern and contemporary commentators seem to have missed is that, however corrupt such arrangements might be from a legal standpoint, they helped solve a fundamental problem of private prosecution. The possibility of compounding provided an incentive to prosecute. It converted a criminal prosecution into something more like a civil suit, where a victim sues in the hope of collecting money damages. And while compounding might save the criminal from the noose he did not get off scot-free, since he ended up paying the prosecutor what was in effect a damage payment. The appendix offers evidence that the same mechanism provided part of the incentive for private prosecution in the form of appeals of felony five centuries earlier.

Viewed from this standpoint, cases that went to trial represent failures, not successes, of the system. As a rule, the loss to the criminal of being hanged or transported was considerably greater than the resulting gain to the prosecutor. Between the two values there was a bargaining range. Sometimes bargaining would break down, perhaps because of differing opinions concerning the probability of conviction or the assets available to the defendant, perhaps due to mutual stubbornness in trying to get the most favorable possible outcome. But under normal circumstances, if my conjecture about how the system worked is correct, some payment in cash or kind, offered by the defendant himself or others on his behalf, would be agreed on.[513] That payment would punish the defendant, reward the prosecutor, and compensate the victim if, as was usually the case, the victim was the prosecutor.

We do not know how common such arrangements were. One study of eighteenth-century cases found that “28 of the 227 prosecutors bound by recognizances to appear at the Essex quarter sessions failed to bring an indictment, but only two had their recognizances estreated.”[514] The fact that the penalty for a prosecutor who failed to indict was rarely enforced is consistent with the view that compounding a felony was a practical option for a prosecutor. The small percentage of cases dropped, on the other hand, is evidence against. It does not, however, include either those prosecutors who were bought off before filing charges or those who brought an indictment, perhaps in order to avoid the risk of legal penalties for not doing so, but deliberately lost the case, perhaps by making it clear to the jury that they now considered themselves satisfied or, if the jury convicted, persuaded the judge that the defendant deserved a pardon.

One reason a case might go to trial was a breakdown in bargaining. Another was that the prosecutor's objective was deterrence rather than compensation.

Execution or transportation would impose a larger cost on most criminals than the largest payment they could make. A prosecutor seeking deterrence would have to balance that benefit against whatever the criminal was willing and able to pay.

One advantage of such institutions, compared to either civil law or criminal fines, was their superior flexibility. The fine was determined not by the court's estimate of what the defendant owed or could pay but by bargaining between the parties most immediately concerned. Defendants might be less eager to appear judgment-proof if the consequence of that status was being hanged. Of course, a criminal system could also offer the defendant the choice between hanging and paying a fine. As we will see in Part VI below, such a transaction may have been implicit in the pardoning system, although the payment took a non-pecuniary form. But the court might be less competent at finding the right fine—the highest that the criminal (and, possibly, his friends and family) were prepared to pay—than a private prosecutor pursuing his private interest.

Controlling undesirable acts by treating them as crimes under a system of private prosecution has another advantage over the alternative approach of treating them as torts. For many offenses, the victim is also the best witness. In a civil system, where legal success produces a damage payment from tortfeasor to victim, the victim has an incentive to perjure himself, a problem familiar enough in modern tort law. A jury, recognizing that incentive, may be skeptical of evidence offered by the plaintiff on his own account or by witnesses provided by the plaintiff.

A victim who hopes to be paid to drop charges before the trial has an incentive to threaten to perjure himself in order to secure a conviction. But unless he has some way of committing himself to carry out such a threat, it will not be believable.[515] Paradoxically, the result may be to make prosecution more profitable than it would be under a civil system. If the case goes to trial the prosecutor gets nothing, so his reservation price, the lowest price at which settlement makes him better off than trial, is lower than under a civil system. But the defendant's reservation price will be higher under the criminal system, since the greater credibility of prosecution testimony under such a system makes conviction more likely. And such a system, by reducing the victim's incentive to commit perjury, may do a better job of distinguishing guilty from innocent.

Concerns with profitable perjury and its potential effect on the willingness of juries to believe witnesses are not entirely theoretical, nor are they based only on modern experience with plaintiffs who abandon their wheelchairs immediately after being awarded large damage payments for permanently disabling injuries.

The problem was discussed in the eighteenth century in the context of rewards for the conviction of criminals guilty of certain crimes. As mentioned earlier, it was widely believed both that such rewards led to entrapment and attempts to frame innocent parties and that such concerns were reflected in jury skepticism. Those were among the reasons for the partial abandonment, in the middle of the century, of the system of public rewards.[516]

The conjecture I have offered is relevant not only to why crimes were prosecuted but also to another issue raised in modern discussions of eighteenth-century English law: its relation to the system of class and authority. Some authors view the law as a class-neutral instrument employed by rich and poor alike to protect themselves against the small criminal minority.[517] Others argue that it was primarily a device by which the rich protected themselves from the poor or by which the ruling class established and maintained its legitimacy.[518]

One argument for the latter view is that those with more resources were better able to prosecute crimes committed against themselves. That is surely true, although writers on the other side of the argument have offered evidence that many private prosecutors were ordinary members of the working class. But what both sides have missed is the tendency of the system to discriminate in favor of poor criminals and against rich ones.

The tactic of starting a prosecution in order to be paid to drop it is familiar in the literature on malicious prosecution.[519] One implication is that the incentive to prosecute criminals is greater the greater their ability to pay to have charges dropped. A victim who catches an obviously penniless thief is probably best off giving him a beating and turning him loose, at most insisting on a public apology. A victim who catches a well-dressed thief has more to gain by prosecuting. The eventual out-of-court settlement leaves the thief better off than if he had been tried and convicted but worse off than if the victim had not bothered to prosecute because it was not worth the cost. Hence private prosecution added to the system an incentive for selective prosecution of those who could pay to avoid the risk of trial.[520]

One issue that a system of private prosecution must deal with is the allocation of property rights to prosecute particular offenses. This is not a problem if the only incentive is deterrence—I am happy to have you bear the cost of prosecuting, and thus deterring, offenders who injure me. But it may be a problem if the incentive for prosecution is the opportunity to be paid to drop charges or if one possible prosecutor is an accessory of the criminal who wishes to control the prosecution in order to make sure that it fails. Conspiracies

between poachers and informers were alleged to have occurred in the enforcement of the game laws.

> "If a friend laid an information before the keepers could, it prevented their prosecuting, for the informer had rights in the fine. Five pounds sterling went from the poacher to the JP, then to the friend (as informer) and back again to the poacher over a pint in the alehouse." [521]

Rewards avoided this problem since their allocation was determined by the judge, divided among those he believed to have had some hand in securing the conviction.

In order to either obtain an out-of-court settlement or protect a confederate, a prosecutor who drops charges must be able to prevent another prosecutor from taking up the case. A victim who was himself the chief witness or who could control other essential witnesses was in a position to do so. Other potential prosecutors were not. The only way they could provide the offender reasonable security against prosecution was to carry the process far enough forward to make the charges *res judicata* and thus invoke the double jeopardy protection.[522] That might be risky since, once a trial started, it was controlled by the judge, not the prosecutor.

If two people did wish to prosecute the same offense, what would happen? One possibility is that the conflict would be resolved by the magistrate. The usual first step of prosecution, filing charges with the magistrate, required his approval, although a prosecutor had the option of instead proceeding directly to the grand jury. Another possibility is that the rule "first in time, first in right" would have applied to such cases, as it seems to have applied to the related case of informers entitled to collect a share of the penalty prescribed under penal statutes.[523]

Punishment and Punishment Cost

We come next to the puzzle of why the legal system used execution, transportation, and for minor offenses humiliation by whipping or exposure in the stocks but not, with a few exceptions, imprisonment.

In considering the choice among alternative punishments, a useful concept is punishment inefficiency: the ratio of punishment cost to amount of punishment.[524] A costlessly collected fine or damage payment has an inefficiency of 0; what one person loses another gets, so no net cost. Execution has an inefficiency of about 1; the criminal loses his life and nobody gets one.[525] Imprisonment as practiced in modern societies has an inefficiency considerably greater than 1. The criminal loses his liberty, nobody gets it, and the state must

pay for the prison.

One explanation for the pattern of criminal punishments in eighteenth-century England is that imprisonment of convicted criminals was little used because it was too expensive. That fits the similar pattern in the Chinese legal system.[526] The later shift to extensive use of imprisonment can be interpreted as in part a consequence of economic growth. A punishment too costly for a poor country might be appropriate for a rich one.

This conjecture suggests several questions. The first is whether imprisonment in the eighteenth century was necessarily more inefficient than execution; a penal system that was willing to hang sheep-stealers had no moral qualms about setting them to hard labor instead. If the output that could be extracted from prisoners was more than the cost of guarding and maintaining them, then imprisonment, although still less efficient than a fine, would be more efficient than execution.

Apparently it was not. One piece of evidence is the attempt to use prison labor for improvements on the Thames when transportation was interrupted by the American Revolution. The conclusion of modern historians[527] is that the value of the work done was much less than the cost of maintaining the prisoners.

A more interesting attempt occurred on the other side of the channel. French criminals sentenced to the galleys became part of an elaborate system of state-run slavery.[528] Until 1748 they were sent to the arsenal at Marseilles, where the galley fleet was based. Those in sufficiently good condition were assigned to galleys as rowers. The rest were used in the arsenal to produce goods for government use under the direction of private employers. The private employers paid a small wage to the galley slaves, presumably for incentive purposes, and received a subsidy from the state. According to Andrews, the system provided the state with goods at below market prices.[529]

During the winter months the galleys were kept at dock. Their oarsmen were rented out, with guards, to employers in Marseilles. Other prisoners ran small businesses in shacks on the dockside, paying off the officers of their galley with a share of the profits.

In 1748, the galleys were abolished; the galley slaves were shifted elsewhere, many to Brest, the chief base of the Atlantic fleet. At Brest, an elaborate prison was constructed for the galley slaves, implementing the latest ideas in eighteenth-century penology. Each slave worked eight days outside of the prison and eight days in. The outside work was mostly heavy labor on behalf of the fleet, but prisoners with useful skills were allowed to use them. The eight days in prison were devoted to a mix of prison maintenance and production of goods and

services. The latter were sold to the public in the prison courtyard, which functioned as a sort of bazaar, with sellers of goods and providers of services chained in place.

The interesting question for our purposes is whether this elaborate system of slave labor showed a profit or at least covered its costs. Nobody seems to have worked out the relevant accounts, but there is indirect evidence. While the French state exploited the labor of its galley slaves, it made little attempt to exploit the labor of the much larger number of prisoners not sentenced to the galleys. If the galley slave system had been a clear success, it is hard to believe that the eighteenth-century French state, perennially short of cash, would not have applied a similar approach to the rest of its prison population or at least as much of it as was in suitable physical condition.

A second piece of evidence comes from the role played by galley slavery in the history of imprisonment.[530] At about the end of the 15th century, Mediterranean states with galley fleets began using condemned prisoners as oarsmen.[531] In some cases, states without galley fleets commuted capital sentences in order to provide rowers for the fleets of their Mediterranean allies. The result was a substantial shift away from capital punishment in favor of galley slavery.

That sequence of events suggests that rowing a galley was a job sufficiently well suited to slave labor to more than pay its cost, converting imprisonment from a punishment less efficient than execution to one more efficient than execution. There are at least two reasons why that might have been the case. One is that galley labor is relatively easy to supervise. Since the oarsmen are all rowing together under the observation of a free officer, any slacking will be immediately obvious and can be immediately punished.[532] The other is that it is difficult for a chained prisoner to escape from a galley at sea.

I conclude that galley slaves, at a time when galleys were still militarily useful, probably produced services worth more than the cost of guarding and maintaining the slaves but that in other employments France, like England, found that prison labor cost more than it was worth.

If imprisonment had a positive cost, the next question to ask is how it compared with what the British government was willing to pay for other punishments. We can get some evidence on that from the history of transportation. One reason the seventeenth-century experiment with transportation failed was that the government was unwilling to pay for it. The second experiment, begun in 1718, succeeded in part due to a subsidy of three pounds per convict. That suggests that the amount the government was willing to

pay for transportation reached three pounds per transportee in about 1718.[533]

Three pounds per transportee was a one-time cost in exchange for which the transportee was removed from England for at least 7, in many cases at least 14, years.[534] I have no figures for the cost of prisons in England save the very high figure for confinement of prisoners in hulks during the American Revolution. But the cost per prisoner at one of the contemporary French prisons was the equivalent of about four pounds sterling (75-79 *livres tournois*) a year.[535] That suggests that imprisonment cost substantially more than the English state was willing to pay.

One exception was imprisonment for debt, but it was an odd sort of imprisonment. Debtors, unlike felons, were unlikely to run away. The King's Bench prison in London allowed its occupants to move pretty freely in and out, with a considerable minority living outside the walls in the neighborhood of the prison. The cost to the government was close to zero, since prisoners were responsible for paying their own expenses.[536]

One further element in the pattern of punishment in England in the eighteenth century is implied by the conclusions of Part III above. Punishments for serious crime were not limited to execution and transportation. There was also the possibility of a payment, in cash or kind, worked out between criminal and prosecutor. The punishments provided by law were default outcomes providing the background against which such bargaining occurred. A fine is an efficient punishment, since what one party loses another gains. The legal punishments of transportation and hanging were less efficient than fines but still more efficient, and less costly to the state, than imprisonment.

And there were also payments of a different sort …

Pardons

A further oddity in the pattern of punishments in eighteenth-century England was the extensive use of pardons. In Beattie's study of Surrey between 1660 and 1800, he found that only about 40% of those convicted of capital felonies were actually executed. For many of the rest, especially after 1718, a pardon was conditional on transportation. But for some the pardons were unconditional. Having been charged, jailed, tried, convicted, and jailed again while waiting execution, they were released. "Go home and don't do it again."

Pardons could be used to correct what the judge regarded as an erroneous verdict but guilt was not usually the issue. The pardon was based on character evidence about the defendant, offered either during the trial or in later petitions.

In some cases petitions came from people who knew the defendant and could provide information on how likely he was, if pardoned, to reform. In others petitioner's qualification was not his personal knowledge of the defendant but his influence over the officials who decided which defendants were to receive royal pardons.[537]

In addition to correcting erroneous verdicts, there are at least three different functions that the system of pardons may have served. The most obvious is avoiding unnecessary punishment costs. If the experience of being jailed, tried, convicted, and almost hanged is sufficient to discourage this particular defendant from any future crimes, then execution serves no incapacitative function. If the defendant is unlikely to reform in England but has better prospects in the harsher environment of the New World, transportation may be a better punishment than execution. And if most potential criminals who are similar to this defendant can be deterred by something less than a certainty of being executed if convicted, then by pardoning some of them, with or without transportation, the state reduces punishment cost substantially at only a small price in deterrence.[538] Similar arguments can be used to justify judicial discretion in sentencing in a modern court system.

A second function is taking account of negative externalities imposed by execution. Hanging almost always imposes a large cost on the person most directly affected—that is one of the reasons for hanging people. It may also impose substantial costs on others: friends, relatives, employers, and taxpayers potentially responsible for supporting the convicted criminal's dependents. Those costs serve little deterrent function. If many such people are willing to testify in favor of the criminal at trial or petition for a pardon, that is evidence that such costs are substantial and so a reason for avoiding them by pardoning the convict.

There is at least one more function that the system of pardons could have served. Imagine that you are an ordinary Englishman who wishes to save the life of a friend convicted of a capital felony—say sheep stealing. You go to some high-status person you know, perhaps the local squire, and ask him to intervene on your friend's behalf. If he does so, it will be as part of an exchange of favors. Low-status people sometimes have opportunities to benefit high-status people and you have implicitly committed yourself to do so, whether by being suitably deferential to the squire in public or by supporting the parliamentary candidate he recommends.

The local squire has more influence with the authorities than you do but not enough to save a convict from the gallows. He accordingly writes to a politically influential local peer, requesting him to intervene in behalf of one of the squire's

people, a worthy young man led astray by bad companions. Here again, the exchange is not of information but of services. One of the things that makes local peers politically influential is the support of local squires.

The legal system, by considering and acting on such petitions, is implicitly offering the convicted felon a choice between a fine and execution. The fine is paid not by the felon but by his friends and takes the form not of money but of favors. It is paid, possibly through intermediaries, to people who can influence the granting of pardons. To the extent that those paying the fine are in a position to prevent their friends from committing felonies, such a system gives them an incentive to do so. It then functions as a collective punishment similar to those observed in some primitive legal systems, where fines are paid in part by the offender, in part by other members of his kinship group.[539]

Pardons procured in this way substitute an efficient punishment—a fine—for a less efficient punishment—execution. In doing so, they provide resources to the state and those who control it. Officials who give out pardons are selling them for non-pecuniary payments. Thus the legal system, in addition to providing a mechanism to reduce crime, also increases the ability of the state to maintain its authority. Considered from the standpoint of public relations, it is an elegant way of doing so. Nobody is threatened save the guilty convict. The squire is not oppressing his tenants but doing them a favor at their request. The knowledge that such favors may occasionally be needed gives everyone in the village an incentive to be polite to the squire.[540]

In Search of a Pardon: A True Story[541]

James Boswell, best known for his biography of Samuel Johnson, was a Scottish attorney who practiced at length in the Scottish courts and more briefly in the English. He maintained a journal through much of his life, most of which survives. It contains, among many other things, a first-hand account of his attempt to obtain a pardon for a convicted client.[542]

John Reid, found in possession of stolen sheep and charged with stealing them, was Boswell's first client. Several months after he was acquitted the Lord Justice-Clerk, head of the Scottish Supreme Court for criminal matters, delivering a judgment in another case, mentioned the Reid case as one where an obviously guilty man had been gotten off by a clever lawyer.

Eight years later Reid was again found in possession of stolen sheep, again tried for stealing them. Boswell again defended him, this time unsuccessfully. Reid was sentenced to hang. Boswell petitioned the King for a pardon to convert the sentence from execution to transportation—arguably an appropriate sentence

if Reid, as he claimed, had received the stolen sheep but not himself stolen them.

In seeking support from people who might be able to influence the king's decision, Boswell offered arguments, but not very persuasive ones. With some, such as the Earl of Pembroke, an old friend of Boswell's and a Lord of the Bedchamber to George III, he asked for support as a favor. Colonel Webster, a friend of Boswell and fellow believer in Reid's innocence, knew Lord Cornwallis, another intimate of the King, so Boswell got Webster to write Cornwallis. In a letter to Lord Richford, Secretary of State for the Southern Department and an important figure at court, Boswell appealed to their common concern over the French suppression of the Corsican rebellion[543]—which, of course, had nothing to do with John Reid's guilt or innocence. His planned letter to the Lord Advocate—he ended up speaking to him instead, unsuccessfully—included the phrase "I would ask a transportation pardon from him as a favour which I should consider as a serious obligation for life," a clear offer of a quid pro quo. Reid's father-in-law had been a tenant of the Earl of Errol, so Boswell wrote the Earl asking his help. The response: "I should be very willing to show any favour in my power to a client of yours, but … ."[544] The petition to the king included the argument that Reid received the sheep but did not steal them, but appealed mostly to the idea that an act of mercy would favorably impress the king's Scottish subjects.

> "The prerogative of dispensing mercy is the brightest jewel in the British crown, and several late instances of it in this part of the United Kingdom have endeared Your Majesty to your more northern subjects. Your petitioner flatters himself that he also shall have cause to bless the goodness of the King and shall not be singled out as a miserable exception to Your Majesty's beneficent lenity."[545]

Despite Boswell's effort, Reid was hanged. The reason, by Pembroke's account, was the opposition of the Lord Justice-Clerk. Pembroke and Cornwallis spoke for Reid but could not overcome the strong opposition of the judge. In a later letter, Pembroke wrote: "Lord Rochford would have urged for mercy had he been able to do it, but he and the King too indeed think the judge must resign if, after his report, any mitigation of the sentence should take place."[546]

The Market for Mercy

We are left with one final puzzle: Why did the legal system set a high level of punishment and impose it on only a minority of offenders, probably even of convicted offenders?[547]

One answer is suggested by part of my explanation of pardoning—a market for mercy. The analysis applies beyond the issue of pardons. The probability of

favorable outcomes for a defendant depended in large part on his ability to get people to speak in his favor—his employer, his neighbors, his landlord, his victim/prosecutor. The victim had the option of not prosecuting, of accepting instead an apology. He had the option, in the course of the trial, of recommending mercy to judge and jury. So did others who might speak as character witnesses for the defendant. That gave anyone who might someday be accused of a crime an incentive to be on good terms with those he interacted with; their good opinion of him might literally save his life.[548]

So one possible interpretation of the system is that it was designed to give potential defendants an incentive to maintain good relations with those they associated with, especially the status superiors whose word was likely to carry the most weight with judge and jury, and thus to reinforce the existing social structure.

Eighteenth-Century Behavioral Economics

There is at least one other possible explanation. From the standpoint of a modern economist, what matters for deterrence is expected punishment, roughly speaking the probability that a crime will result in punishment multiplied by the size of the punishment. That does not seem to be what contemporary commenters on the legal system had in mind. What mattered was that punishment be striking enough to impress itself on the minds of potential offenders and imposed often enough to keep potential offenders aware of it.

It was sufficient to hang an offender from time to time, preferably a particularly wicked offender. Once enough were hanged to make a suitable public impression, those less deserving of punishment could be let off with transportation or even a free pardon. Hanging ten men might have no more effect on expected punishment than transporting fifty or flogging five hundred, but it made a much more memorable spectacle.[549] Hanging too many might even weaken the effect by reducing the emotional impact of any single execution.

That approach does not fit the conventional economic analysis of law but does make some sense in terms of behavioral economics.[550] One conclusion from research in that field is that individuals do a poor job of evaluating low probabilities and overweight striking outcomes, fear airplane crashes more than auto crashes even though the expected mortality per mile is much higher for the latter. One possible explanation of the pattern of punishment in eighteenth-century England is that the men responsible for constructing that system had a good intuitive feel for the imperfect rationality of those it was designed to control.

Change Over the Century

The legal system as it existed at the end of the seventeenth century had a number of problems obvious to contemporaries as well as to us. The legal history of the eighteenth century is in part a story of attempts to deal with those problems, with varying degrees of success.

The first was the lack of intermediate punishments for anything approaching serious crime. Minor crimes, which did not require a jury trial, could be dealt with by a whipping, exposure in the pillory or a week in the workhouse. For anything more serious, it was hanging or nothing. The obvious solution was long-term imprisonment at hard labor, seen as both an intermediate punishment and a way of reforming criminals by teaching them to work. But imprisonment required prisons and, until the end of the century, neither the central nor the local governments were prepared to bear the cost of creating them on a sufficient scale.

A second problem was giving victims an adequate incentive to prosecute. One alternative, from the victim's standpoint, was to buy back his property via a middleman with suitable contacts. Doing so was made illegal but remained a common practice. Rewards created an incentive for prosecution but also additional problems, as already discussed.

A different approach was to shift the responsibility to prosecute away from the victim, to move to something like a modern system of police and public prosecution. One part of law enforcement, dealing with victimless crimes such as vagrancy or prostitution, was already in large part publicly enforced. The enforcers, constables and, in London, members of the night watch, were ordinary householders drafted by their local government into a year's unpaid service and given a small reward for each offender they brought in. Early in the century there was also a substantial effort by the Societies for the Reformation of Manners, private organizations attempting to clean up London and a number of other cities by gathering incriminating information on offenders, especially bawdy houses and prostitutes, and reporting it to the magistrates for summary judgement.[551] Eighteenth-century reformers saw minor crime, often by juveniles, as the gateway drug that led to more serious crime, believed that drinking, prostitution, and gambling produced young men driven to robbery because they had wasted their time and money.

The magistrates responsible for dealing with offenders, both minor offenders and accused felons, were unpaid members of the local elite who volunteered their time for a prestigious role in the legal system. Over time that approach

tended to break down, with fewer people willing to fill the required roles.

For constables and watchmen the solution was to hire substitutes, creating a group of semi-professionals. By the end of the century, at least in the City of London, that had developed into a system of constables and watchmen paid out of local taxes.[552] The problem for the system of magistrates was that the fewer who volunteered, the more onerous the task became for those left to do the work. One result was the development of "trading justices," magistrates who treated the office as a source of income, at least in part via corruption. And even honest magistrates, being unpaid volunteers, had no commitment to be available to the public at regular times and places. By the end of the century, those problems were being dealt with in London by the creation of stipendiary magistrates, paid and organized by the central government, committed to regular hours, provided with a small staff of constables also paid, a system modeled in part on the system that the Fieldings had developed earlier with the assistance of a modest subsidy from the central government.

After the breakdown of transportation to North America, the authorities faced a difficult problem in dealing with increases in the crime rate. To deter more crimes it was necessary to arrest, prosecute, and convict more criminals. Unless they were willing to hang them all—and they were not—convicting more criminals meant more convicted criminals accumulating in a system that had no adequate place to put them. The eventual solution was twofold: more prisons and Australia.

Conclusions

I have attempted to show that the institutions used in eighteenth-century England to discourage serious crime may have been well adapted both to that purpose and others. The preference for execution and transportation reflected the greater cost of imprisonment and was relaxed as the society became richer. The system of private enforcement worked both because deterrence could be produced as a private good and because compounding provided an incentive to prosecutors and a punishment for criminals. The system of severe punishments threatened but often not imposed provided an incentive to maintain systems of deference and good reputation, perhaps also a way of scaring potential criminals out of becoming actual criminals. We do not know enough to say whether the institutions chosen were the best possible. But they functioned better than one might expect from the arguments offered against them both then and now.

Appendix: A Thousand Years of Back and Forth

Anglo-Saxon law in the seventh century was a privately prosecuted legal system along lines similar to the legal system of saga-period Iceland discussed in Chapter 10. The victim or, in the case of a killing, his kinsman sued the offender and, if successful, collected damages. Starting in the late tenth century, that system was replaced by one of publicly prosecuted criminal law in which damages went to the crown. By the thirteenth century it had again become in large part privately prosecuted, this time in the form of the appeal of felony, a private criminal prosecution. By the end of that century the appeal of felony was mostly gone. But by the eighteenth century criminal prosecution was again almost entirely private, usually by the victim, this time in the form of an indictment of felony, a nominally public prosecution. The best explanation I have found for the middle part of that history is by Daniel Klerman, a legal historian who has written extensively about thirteenth-century legal institutions.[553]

At the beginning of the thirteenth century there were two different forms of criminal prosecution, presentment by the jury and appeal by a private party.[554] If the private prosecutor withdrew the prosecution or never showed up, the judges could either acquit the defendant or turn the case over to the jury for trial. If they were expected to choose the former alternative, the prosecutor could bargain with the defendant for an out-of-court settlement, offering to drop the prosecution in exchange for compensation. The more likely the latter alternative, the less willing a defendant would be to settle, hence the weaker the incentive to initiate prosecution.

Early in the century judges almost always set non-prosecuted defendants free, possibly because they realized that doing so made settlement more likely and so provided an incentive for private prosecution. By the end of the century judges almost never set non-prosecuted defendants free, possibly because the introduction of a new legal form, trespass, the ancestor of modern tort law, provided a substitute for an appeal, with tort damages as an incentive. By the end of the century the rate of appeal was down to about a fifth of its level at the beginning of the century. From the fourteenth century on, most criminal prosecution was by indictment, typically by the presenting jury, the ancestor of the modern grand jury.

Through the end of the thirteenth century, jury trial depended on a largely self-informing jury, a group of neighbors assumed to already know the facts of the

cases brought before them or able to learn the facts for themselves. That shifted during the fourteenth and fifteenth centuries to something more like the modern system, where trial juries relied on evidence that the parties presented in court.[555] That in turn led to a shift back to private prosecution of nominally public criminal cases, there being no adequate body of public officials to do the job, although coroners and, later, Justices of the Peace, played some role in the process.

That brings us back to the system discussed in this chapter, private prosecution motivated in part, like the appeal of felony five hundred years earlier, by the potential for out-of-court settlement.

Klerman offers data to support the link between the potential for out-of-court settlement and private prosecution. The figure below, from Klerman 2001, graphs over the course of the thirteenth century the number of appeals of felony and the percentage of unprosecuted defendants who were acquitted rather than tried. The fit is not perfect[556] but the relation is reasonably clear. The less willing judges were to acquit a defendant when the private prosecutor either withdrew charges or failed to show up, the less willing defendants were to pay prosecutors not to prosecute, hence the fewer private prosecutions.

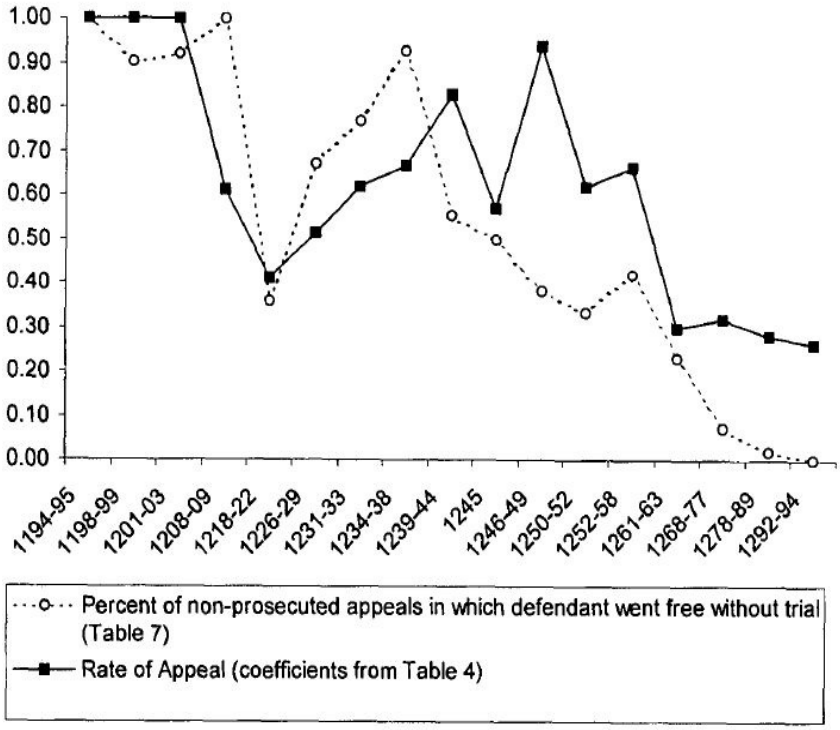


Figure 2. Respect for Settlement and Rate of Appeal, 1194–1294

16. Athenian Law: The Work of a Mad Economist

The city state of Athens in the fourth and fifth centuries BC, from the time of Pericles to the time of Demosthenes, is famous for two reasons: as a source of a great deal of literature that still survives and as the first prominent example of democracy. To most moderns, democracy implies a system where government officials are chosen by majority vote or appointed by politicians so chosen. The Athenians had a rather different approach. Laws were made by majority vote of the Assembly (*Ekklesia*), which consisted of all adult male citizens who chose to show up. But the officials—magistrates—were selected by lot, each to serve for a term of one year; the only officials to whom this did not apply were the generals. The result was a government of amateurs and a legal and political system designed to accommodate it. It was a legal system containing a number of clever ideas by clever people, some of which probably worked and some of which probably did not.

The Athenian Population

The population was divided into three large groups: citizens, metics, and slaves. You were a citizen if you were the acknowledged child of married citizen parents,[557] duly registered as such, although it was possible, under exceptional circumstances, for a non-citizen to be granted citizenship. Being a citizen gave you a bundle of political and economic rights, including the right to marry an Athenian citizen and, if male, the right to vote in the assembly, serve as a magistrate, volunteer for jury duty, serve as a paid arbitrator in your sixtieth year and own property in Attica.

The metics were resident aliens, sometimes resident for several generations. They could not be selected as magistrates or vote in the assembly, could prosecute some but not all sorts of law cases. Their economic rights were more limited than those of a citizen; they could not, save by special dispensation, own land in Attica. A metic had to have a citizen sponsor who was to some degree responsible for him. A metic might be given citizenship or some of the rights of citizenship as a reward for some particularly valuable service.

Debt slavery was abolished as part of the reforms of Solon about two hundred years before the start of the period being discussed, so most slaves were either prisoners taken in war or the descendants of such. They may well have made up a majority of the population.[558] A slave's owner could sue to collect damages for an injury to his slave and could be sued for damages done by his slave. He was not free to kill his slave but was free to beat him. The child of slave parents was a slave; it is not clear what the status was of the child of a slave and a free man or woman. While many slaves were household servants, farm laborers, or workers in the silver mines from which Athens got much of its wealth, some were independent workers who paid a share of their earnings or a fixed annual sum to their owners.[559]

If a master chose to free a slave, the slave could either return to his home city or become a metic, provided that his previous master was willing to be his sponsor; he could not have any other sponsor. It seems likely that, as in many other societies, a slave could buy his freedom, either with borrowed money or in exchange for a commitment to pay his previous owner from his earnings as a freedman. Other than being freed, a slave had one legal means of leaving his master; he could claim asylum in the Theseion[560] and ask for someone else to buy him.

Laws and Courts

By the fifth century the assembly had spun off the job of trying cases and functioned primarily as a legislature. Cases were tried by juries in one of several courts, depending on under what law charges had been brought. The procedure was overseen by the magistrate associated with that category of offense. He received the charges that started the process and presided over the trial but the verdict was up to the jury.

Each year, 6000 jurors were selected by lot from those who volunteered; the only qualification was being a male citizen and at least 30 years old. The size of the jury for a case varied over time and according to the nature of the case but seems usually to have been 200 to 500. Jurors were paid ½ drachma for each day they served, about half the wage of a rower, so jury service provided a sort of low-end welfare. If we accept an estimate of 30,000 for the total number of adult male citizens, at any one time about a fifth of them were on the jury panel. Even allowing for the fact that a juror might not serve every day, that suggests that trials absorbed the attention of a substantial fraction of the citizen population.

Juries gave their verdict by majority vote. The sums at stake in litigation could be substantial and jurors were likely to be poor, which raised an obvious risk of bribery. To prevent that, the Athenians contrived elaborate procedures designed to make sure that no juror would know what case he would be assigned to until the last minute.

No full text of the laws has survived, merely pieces quoted in the orations written by professional speechwriters to be memorized by prosecutor or defendant and fragments of laws recorded in surviving inscriptions. We cannot be sure that even what we do have is accurate; an orator might deliberately misrepresent the law in order to make it more favorable to his case. It appears, however, that each law included, explicitly or implicitly, a description of the court in which cases arising from it was to be tried and the procedure for initiating a case; the magistrate responsible for the case would be the magistrate associated with that category of offense. Most cases were to be initiated by the plaintiff summoning the defendant to an initial hearing before the relevant magistrate, a few by bringing the defendant to the magistrate to be arrested. Unlike the Chinese statutes, the laws often did not specify the penalty, leaving that to the jury.

Once the case was initiated, it was up to the plaintiff to collect evidence and the magistrate to run the trial. The parties were not allowed a legal representative to present their case, as in a modern trial; each had to speak for himself, although

it was permitted for a party to yield some of his time to a friend to speak for him on an unpaid basis. There were no limits to what sorts of arguments could be introduced; it was claimed that a defendant would sometimes bring his children to stand by him in the hope of inspiring pity in the jurors. Litigants could employ speechwriters to write speeches for them which the litigant would then memorize and deliver.[561] A considerable number of these speeches were preserved for their literary value, which is why we know as much as we do about the legal system.

Witnesses gave their testimony in writing in advance; during the trial, their only contribution was to confirm that it was indeed theirs. Witnesses could not be cross-examined but the parties could, if they wished, question each other.

The evidence of slaves was admissible only if given under torture and only if the owner permitted it.[562] The reason may have been the belief that a slave could not otherwise be trusted to tell the truth, at least in testimony against his master. There are surviving orations arguing that slave testimony under torture was entirely reliable, never having proved false, others arguing that it was entirely unreliable, since the slave would say whatever the torturer demanded. One speechwriter wrote one of each—for different clients. Torturing free men was not permitted by the law.

A witness could be asked to testify to a certain fact or event but was allowed to swear an oath that he did not have knowledge of it. Although a slave owner could not be required to permit his slave to give evidence, his refusal to do so could be introduced as evidence against him.

Public and Private Cases

Most law cases were either public or private. A public case corresponded roughly to our criminal cases; it was supposed to be for an offense that injured not merely a single person but the whole community.[563] At one time such cases may have been prosecuted by magistrates but by our period that was possible only for minor charges. The ordinary procedure was for the case to be privately prosecuted by any male citizen who chose to do so. The prosecutor would, for many but not all sorts of cases, receive a substantial fraction of any resulting fine, sometimes as much as half, as his reward. If the case was based on the claim that the defendant was holding property that properly belonged to the state, a successful prosecution would result in half of the property forfeiting to the state, half to the prosecutor.

Such a system raises the risk of suits against innocent defendants believed to be rich, unpopular, or both. One solution was a provision of the law under which, in many public cases, a prosecutor who failed to get at least a fifth of the jurors to vote for conviction was himself both fined and barred from any future suits of the same kind. The fine was 1000 drachmas, roughly two years' wages for an ordinary craftsman. It was also possible to charge a prosecutor with the crime of sycophancy, abusive prosecution, although such charges were limited to at most three citizens and three metics each year.[564]

In some cases, prosecutor and convicted defendant each got to propose a penalty; the jury voted on which to accept. Possible penalties included fines, execution, exile, forfeiture, disfranchisement of descendants, loss of some privileges of citizenship, and, for a metic or other alien, enslavement.

The equivalent of our tort suit was a private case, a case based on the claim that the plaintiff or someone the plaintiff was representing, such as a woman or child for whom he was responsible, had been injured by the defendant. Some categories of private cases were required first to go to arbitration, the arbitrator being selected from a group of citizens in their sixtieth year. If both parties accepted the arbitrator's verdict, the case was over. Either could instead appeal, in which case there would be a jury trial. No new evidence could be introduced; only the evidence that had been presented to the arbitrator was admissible. It was also possible for parties to bring their case to a mutually agreed upon private arbitrator whose verdict would be binding.

Murder cases were under a special part of the law believed to predate the reforms of Solon. Prosecution was normally by kin of the victim in analogy to a

private case, but there may have been exceptions for someone not related who had a close relationship to the victim. For intentional murder, the penalty was execution with forfeiture of property, for unintentional killing, exile without forfeiture. A defendant who expected to lose had the option, after his first speech of the trial, of going into exile instead of proceeding with his defense.

When looking at any legal system, one question, one that we will return to in a later chapter, is what incentive those who enforce the law have to do so. If there is no benefit to the prosecutor from prosecuting offenses, it is unlikely to happen. If there is too much benefit, defendants may be prosecuted even if they have done nothing wrong. In the Athenian case, the obvious incentive was a share of the fine or forfeited property in a public case, a damage payment in a private case. An additional incentive might be to injure a political enemy.

The victim of theft was entitled to get back both his stolen property and a sum equal to twice its value. We worry about police planting drugs on a suspect in the process of search; the Athenians worried about a private party planting his own property on someone in order to accuse him of stealing it. They had a simple solution. The accuser was allowed to search the house where he suspected his stolen property was hidden. But he had to do it naked.[565]

Miasma

Athenians, like gypsies and Cheyenne Indians, believed that certain acts resulted in pollution; their equivalent of marimé was miasma. It was contagious and it brought bad luck.[566] One consequence was that a murder trial had to be held in the open for fear that in an enclosed space the miasma would spread from the defendant to others present. Another was that someone charged with murder was not permitted to be present in temples or courts. In one case we know of, a defendant charged with murder claimed that the only reason for the charge was to keep him from showing up in another court to prosecute a different case.[567]

In another case the belief in miasma may have been used to get around an amnesty. The defendant, it was charged, had committed murder during the brief period when Athens, having been defeated by Sparta, was under the rule of an oligarchy. The killer could not be prosecuted for murder because the restoration of democracy had been accompanied by a blanket amnesty for crimes committed under the Thirty. Instead, according to at least one source, [568] he was charged with entering temples and courts even though, being a murderer, he was polluted and so not permitted in such places.

Miasma shows up in at least one other oddity of the law: An object responsible for killing an Athenian had to be ceremonially exiled, removed beyond the boundaries of Attica. That reminds one of the deodand in early English law, an object which, having been responsible for someone's death, forfeited to God via the Crown to be sold, with the money applied to some pious use. It also resembles civil forfeiture in modern law. Trying a rock for murder seems odd but we are in a poor position to make fun of the practice, given that our legal system produces civil forfeiture cases such as "*The State of California vs 88 Ford Truck*."

Marriage and Inheritance

As a result of a law introduced by Pericles, in order for someone to be an Athenian citizen both parents had to be citizens.[569] Marriage was monogamous, although the husband was also permitted to have a concubine, a recognized position with less status than that of wife; the concubine could be a slave or a free non-citizen, such as a metic. A free woman, wife, concubine, or unmarried, had to have a lord, a *kyrios*,[570] a man who was responsible for supporting her. He was also responsible for representing her at law since a citizen woman could not sue on her own behalf. Before marriage a woman's *kyrios* was her father,[571] after marriage her husband. If her husband died and she returned to her own family her *kyrios* was again her father. If she remained in what had been her husband's household it would be the head of that household, usually her own son or a different son of her husband.

For a woman to be first betrothed and then married required the consent not of the woman but of her *kyrios*, usually her father. Divorce was permitted at the initiative of either side, with the woman's dowry going back to the man who had provided it, again usually her father. A dying man could assign wife and dowry to another or specify in his will to whom they were to go.

When a man died his property was divided among his sons, who were then obligated to support his widow and provide dowries for his daughters. While he had some control over the details of the division, he could not disinherit any of them save by denying his legitimacy. The only way in which he could bequeath property to someone other than his sons was by adoption, in which case the adopted son forfeited any claim he might have to inherit from his actual parents. If a man died with a daughter but no male descendants she would be required to marry the nearest male relative, outside of the narrow limits of the incest rules, who would have her. If already married, she was required to divorce her husband. One motive for these rules may have been to keep the household in existence in order that there would be someone to take care of the family tombs and do the required ceremonies on behalf of dead ancestors.

Legitimacy was a serious issue, since it affected not only inheritance but citizenship as well. Citizens took precautions to guard their wives, permitting them only very limited opportunities to go out of the household. If a man caught another in adultery with his wife he was required to divorce the wife, entitled to either kill the seducer or hold him for ransom. Seduction was treated as a more serious crime than rape, the latter being punished with a fine, initially 100

drachma, later set by the jury. Seen from the standpoint of the husband, that made sense; seduction implied the loss not only of confidence that his wife's children were his but also of his future trust in her.

Liturgies: The Production of Public Goods

The Athenians had a straightforward solution to the problem of producing public goods such as the maintenance of a warship or the organizing of a public festival. If you were one of the richest Athenians, every two years you were obliged to produce a public good. The relevant magistrate would tell you which one.

“As you know, we are sending a team to the Olympics this year. Congratulations, you are the sponsor.”

Or

“Look at that lovely trireme down at the dock. Guess who gets to be captain and paymaster this year.”

Such an obligation was called a liturgy. There were two ways to get out of it. One was to show that you were already doing another liturgy this year or had done one last year. The other was to prove that there was another Athenian, richer than you, who had not done one last year and was not doing one this year.

How, in a world without accountants, income tax, public records of what people owned and what it was worth, do I prove that you are richer than I am? The answer is not an accountant’s answer but an economist’s—feel free to spend a few minutes trying to figure it out before you turn the page.

I offer to exchange everything I own for everything you own. If you refuse, you have admitted that you are richer than I am; you get to do the liturgy that was to be imposed on me.

17. Enforcing Rules

There are many different ways of enforcing rules. If someone breaks your arm you call a cop. If he breaks your window you call a lawyer. Criminal law and tort law are different mechanisms for doing the same work. Someone does something bad to someone, the legal system is called in, something bad happens to him; that is a reason not to do bad things to people. In one case the offender is found and prosecuted by police and public prosecutors, in the other by the victim and his agents, but the logic is in both cases the same. Sometimes either or both approaches can be used; O.J. Simpson was first acquitted of the crime of killing his wife and then convicted of the tort of killing his wife.

Tort and criminal law are familiar parts of the legal systems we live under, but we have now looked at a number of less familiar approaches to law enforcement.

Different Ways of Doing It

Since we are looking at a wide variety of societies, I will try in this chapter to list all the enforcement mechanisms I know of and consider the problems with each. As a first cut at classification it is useful to think of the task to be done as having three parts, corresponding, in modern criminal law, to the jobs done by:

1. police and public prosecutors—finding the offender and the evidence of his guilt
2. judge and jury—deciding guilt
3. police and prisons—enforcing the punishment.

Criminal Law

In criminal law, all three jobs are done by professionals employed by a government to do them. Ideally, everyone involved in the project, from prison guards and police officers up to the politicians responsible for selecting and controlling everyone else, will act in the general interest of the population they serve, doing their best to convict the guilty and acquit the innocent while minimizing the net costs of the process.

That is a desirable outcome but a hard one to achieve. Politicians and police, like the rest of us, are more interested in serving their own objectives than those of other people. If the real criminal cannot be found, there may be much to be said for finding someone else who can be convicted; what the voters don't know won't hurt them. If campaign contributions are needed, organized groups of government employees such as cops and prison guards are one place to get them, which gives the politician an incentive to follow the policies that those interest groups support. In California, the prison guard union routinely, and often successfully, lobbies against policies that would reduce the number of prisoners and thus the demand for their services.

Some costs of enforcing criminal law are paid by the law enforcement agency that incurs them, giving it an incentive to hold them down. Other costs are imposed on other people without compensation and so may safely be ignored, provided that those people have insufficient political influence to make their complaints matter. Criminal law in imperial China provides multiple examples. Torturing a witness or an innocent defendant imposes a cost on him but not on those who impose the torture, so there is little reason for them to take account of that cost in deciding when to employ torture and when to refrain from doing so.

The same logic applies in modern systems. Holding a suspect in jail imposes a

cost on him. Shutting down a restaurant where a crime has occurred until all relevant evidence has been collected imposes a cost on the owner and his employees and customers. Seizing computers containing all the copies of important information—the only draft of a book or a doctoral thesis, say (real cases[572])—and holding them until the authorities are certain that they no longer contain anything of interest to them imposes costs, possibly very large costs, on the owner but costs the police nothing. If the police smash down my door, shoot my dog, scare my children half to death and only then discover that they have come to the wrong address, they have no obligation to compensate me for the damage they have done, hence little reason to take extra care to avoid such costly (to me, not them) errors.

Not only do they have the option of ignoring costs they impose on others, they have the option of deliberately imposing such costs as a way of punishing people who do things they disapprove of, even if they are not illegal. On a trip a few years back my checked suitcase contained semi-liquid sourdough starter for a class I was going to teach on medieval cooking, safely stowed in a closed container inside another closed container. The suitcase emerged from baggage claim with both containers open and the sourdough scattered over the other contents of the suitcase. My guess is that that was how the TSA inspectors expressed their resentment at having to go to the trouble of checking out containers with unknown semi-liquid stuff in them.[573] Forty-some years earlier I missed an airplane flight and got a first-hand view of a Louisiana jail as a result of being an accessory, in the New Orleans airport, to the crime of asking a policeman for his badge number.

A related problem is selective enforcement. In one recent case, the mayor of a city wanted to redevelop part of it by bulldozing the houses and transferring all of the property to a developer of his choice. Unable to satisfy the state's requirements for seizing the houses under eminent domain he instead arranged for code-enforcement citations to be issued to landlords in the area, often for trivial infractions such as tall grass or weeds in their yards. One landlord owning four properties received fines accumulating at the rate of three thousand dollars a day. Landlords were told that if they sold to the Mayor's chosen developer the developer would take care of the fines. The developer purchased the properties for a price well below their market value and was told by the mayor that once they bulldozed the properties the fines would go away.[574]

Even in cases that do not involve any deliberate malfeasance, it is far from clear how to make a legal system take account of one of the most serious costs it imposes on other people, the cost to defendants who end up punished for crimes

they did not commit. For a discussion of that problem, see the next chapter.

A different sort of incentive problem was pointed out in the article by George Stigler and Gary Becker that I discussed in Chapter 10.[575] When a cop gets a criminal convicted the cost to the latter is likely to be greater than the benefit to the former, making possible an exchange in their mutual benefit—the criminal bribes the cop to burn the evidence. Preventing that requires additional layers of enforcement. The solution they suggested was to compensate the enforcer with the fine paid by the convicted offender. Becker and Stigler had, without realizing it, reinvented tort law, although not in precisely the current form.

Which brings us to our next topic.

Tort Law

Tort law is criminal law with the police and public prosecutor replaced by the victim and his agents. It is their job to figure out who committed the tort, gather evidence and convince the court. The police and public prosecutors are professionals who do it because that is the job they are hired to do. The tort victim does it in order to collect damages; what the tortfeasor pays as penalty the successful victim receives as reward. The victim may have the additional incentive of private deterrence, establishing the reputation of being a bad person to commit torts against.

Tort law privatizes part of the job of enforcing legal rules. Doing so solves some, but not all, of the problems raised by criminal law. A tort plaintiff can impose costs on the defendant without compensation, such as the cost of paying for a lawyer to defend against the suit or of responding to a discovery demand, but, not being protected by sovereign immunity, he is less able to do so than a police department. The lawyer representing the plaintiff might, like the corrupt policeman, sell out to the other side, but there is someone directly involved in the case with an interest in making sure that doesn't happen—the plaintiff. Many of the arguments that suggest that a competitive private market does a better job of producing goods and services than a government monopoly apply here, where the service being produced is that of detecting and proving violations of legal rules. Most people do not think of government enforcement of criminal law as a form of socialism but, economically speaking, that is what it is—government ownership and control of a means of production. Familiar arguments for the inefficiency of socialism apply.

Tort law has its own incentive problems. The damage payment awarded by a court is both the penalty to the convicted tortfeasor for committing the tort and the reward to the plaintiff and his lawyer for convicting him of it. There is no

reason to expect the same payment to give both the right incentive to avoid committing the tort and the right incentive to prosecute it.[576] Nor is there a reason to expect the amount awarded in our tort system, enough to "make the victim whole," to be optimal for either.

Consider a tort that is difficult to detect and prove, with the result that half the tortfeasors escape unpunished. The damage done is (say) ten thousand dollars, so that is what convicted tortfeasors pay, making the average penalty five thousand—half the time ten, half the time zero. If the cost to me of precautions to avoid committing it is seven thousand dollars, I am on average better off not bothering to take them. What saves me seven thousand dollars costs you ten, making us, on net, worse off by three thousand dollars. A tort that should be deterred isn't.[577]

Next consider the incentives of the victim. If spending six thousand dollars on a lawsuit buys him only a fifty percent chance of collecting a ten-thousand-dollar damage payment, suing me makes him poorer, not richer, so he doesn't. And if he is not going to sue me, the penalty I pay for committing the tort is not five thousand dollars but zero.

One solution might be a probability multiplier for damage awards. If damage done is ten thousand but the probability of successful suit is only fifty percent, set the award at twenty thousand. Now the average punishment is equal to the damage done, giving potential tortfeasors an incentive to prevent any tort whose prevention costs less than the damage it does. Some scholars, including Landes and Posner, have suggested that punitive damages, damage awards greater than damage done, serve just that purpose.[578]

While this might be an attractive solution in some cases, it too has problems. For one thing, the damage award is limited to what the tortfeasor can pay. In the case of a serious offense with only a low probability of successful prosecution what the tortfeasor can pay may be less, perhaps much less, than the damage done scaled up to allow for the low probability of conviction.

A second problem is that a probability multiplier may make it profitable to create synthetic torts. Late at night as your car comes around the bend I shove mine into the road and hastily stand back. When the dust has cleared and you have gotten free of the wreckage—I considerately staged my fake accident on a slow road so that you would survive to be sued—I commence a legal action, claiming five times the value of my car on the grounds that it was only by great good luck that you did not succeed in escaping after smashing my car and that four friends of mine just happened to be lurking in the underbrush to witness the accident and testify against you. In order to frame you I had to create a real accident that really destroyed my car, so it was made profitable only by the

existence of a probability multiplier.

So far I have assumed that the tort victim only sues in order to collect damages, hence will not sue if damages come to less than the cost of suit. Under the corresponding assumption for criminal law, privately prosecuted criminal law without rewards, as existed for some crimes in England through parts of the eighteenth century, could not have worked, since there was no damage payment to compensate for even modest costs of prosecution.

Part of the explanation of why crimes were prosecuted under that system is that plaintiff and defendant together could convert a criminal punishment, such as hanging, into a tort punishment by a covert out-of-court settlement. Part is that potential victims could publicly precommit to prosecute by joining a prosecution association, making deterrence a private good that they were willing to pay for.

Another assumption I have been making is that the tort victim has sufficient resources to prosecute if he chooses to. That may not always be the case. If we shift our story from twenty-first century America to tenth-century Iceland, the man whose son or brother has been killed may be old and feeble, with no remaining relatives willing to help him press his suit against an offender prepared to beat him up when he tries to go through the legal procedures required for a law suit.

The Icelandic solution was to make tort claims transferable. I may not have the resources to press my claim but one of my neighbors does. Successfully prosecuting my claim will result in his collecting a hundred ounces of silver as wergeld, tort damages for the killing. I transfer the claim to him, he prosecutes it successfully, keeps whatever share of the profits we have agreed to and gives me the rest.

Privately Prosecuted Criminal Law: Athens and England

Privately prosecuted criminal law was intermediate between our criminal system and our tort system. Prosecution was by a private party, not necessarily the victim; in both the English and Athenian systems, any adult citizen (in Athens any adult male citizen) could prosecute any crime. In Athens one incentive was a share of the fine that the criminal defendant paid if convicted. Prosecution could also be motivated by personal hostility or political rivalry.[579] In England during the eighteenth century, incentives included rewards, private deterrence, the recovery of stolen property and the possibility of extorting an out-of-court settlement.

The most obvious advantage of privately prosecuted criminal law over

publicly prosecuted criminal law is the reduction in state power. Public prosecution makes it possible for enforcers to ignore both criminal offenses they approve of and costs they impose on innocent third parties. Neither is possible in a system where prosecution is private. That may have been one reason why England failed to develop a system of publicly enforced criminal law until well into the nineteenth century. The most obvious disadvantage of private prosecution is that it sometimes does not pay any private individual, including the victim, to prosecute a crime, a problem raised by eighteenth-century critics of the system. The Athenian version solved that problem by giving the successful prosecutor a share of the fine, an automatic reward scaled to the amount of the fine and thus the seriousness of the offense. The equivalent in the English system, for some crimes at some times, was a reward for successful prosecution.

That suggests the possibility of replacing criminal law entirely with tort law, the Icelandic system combined with state enforcement of verdicts. One argument against doing so is that criminal law is needed to deal with offenses that affect the society in general rather than a specified victim. But that does not describe most crimes in modern legal systems; mugging me or stealing from me is as much an offense against me as denting my car, even if the legal system treats it as an offense against the state I live in. Another argument is that tort law cannot deal with offenses where the cost of catching and convicting the offender is more than the offender can pay in damages. I have discussed those and other problems with the proposal and suggested ways in which it might be possible to modify tort law to deal with them at length elsewhere.[580]

Feud Law

All three of these approaches to law enforcement—tort, publicly prosecuted criminal and privately prosecuted criminal—are broadly similar. Someone violates a rule, someone—police officer, tort victim, or private prosecutor—convinces a court that a rule has been violated and shows by whom, the court delivers a verdict and the state enforces it.

For a very different approach to achieving the same objective consider a primitive feud system such as that of the Romanichal. Jerry violates a rule, harming Larry. Larry threatens Jerry with violence if he does not compensate Larry for the harm. The victim is simultaneously policeman, prosecutor, judge, jury, and executioner.

That sounds more likely to produce bloodshed than law enforcement, but Larry's ability to use force against Jerry is limited by the existence of Cary, Gary,

Harry, … potential allies of both parties. If they believe that Larry's demand is unreasonable and Jerry justified in refusing it, they will be unwilling to support Larry and likely to support Jerry, making the attempt by Larry to carry out his threat hazardous in the extreme. Thus a feud system can successfully enforce a set of rules understood and accepted by the participants. Enforcement depends on the threat of violence, but that is equally true of our form of law enforcement. Violence by one private party against another is constrained by the symmetry of the situation. Unlike the state, the initiator of a feud does not have access to enormously greater resources than the defendant.

The mechanism depends on interested third parties knowing enough about the conflict to judge who is acting reasonably or unreasonably. In a small society everyone knows everyone else. A larger one requires a mechanism such as the Icelandic or Somali court procedures to lower the cost of figuring out who is the bad guy. The same issue arises with a more conventional legal system. In order to know whether the police are arresting people because they have broken the law, because they have resisted police extortion or because they supported the wrong candidate or are of the wrong race, interested third parties require similar information.

Information does not solve the problem unless there is an incentive to act on it. Someone who tries to extort money from innocent people by accusing them of violating his rights might do the same thing to me, which gives me an incentive to avoid dealing with him, possibly to support his victim in resisting his demands. In a system of state law enforcement in a democracy it is similarly in my interest to vote out politicians who appoint law enforcers who behaved badly to someone else and might behave badly to me, but unless the polity is small my vote has little effect on the outcome so the incentive to get information and act on it is weak. For evidence of how weak the incentive to get information about how the system works is, consider the large difference between the popular perception of criminal conviction in the U.S.—by a jury trial—and the reality of a system in which almost all convictions come through plea bargains with no jury and no trial.[581]

In saga-period Iceland as in a modern legal system there was an explicit body of laws and a system of courts to judge whether it had been violated and with what legal consequences. But the final step of enforcing the verdict was done privately by the victim and his allies. He had the option of demanding compensation from the offender with the threat of either a lawsuit or violence. If the defendant refused to settle, lost his case and failed to pay the resulting fine, the plaintiff could have him outlawed and be free to hunt him down and kill him.

What are some of the problems with that system?

One is that it requires commitment mechanisms. The benefit of having it known that if I am injured I will revenge myself whatever the cost may be very great, since by deterring acts against me it reduces the risk both of being injured and of having to bear the costs of revenge. But after I have suffered a serious injury from a formidable opponent, the cost of revenging myself may be more than the benefit is worth—better a live wimp than a dead hero. The solution, as in the parallel case with private prosecution of criminal law, is to find some way of committing myself in advance. In eighteenth-century England it was done by prepayment to a prosecution association. In a less developed society it depended on some combination of social norms and internal incentives.

Seen from this standpoint, the human trait of vengefulness is not an irrational passion but a hardwired commitment strategy. It is irrational after the fact, when I have to do my best to hunt down the killer of my kinsman at considerable risk to myself, but rational *ex ante*, when the knowledge that I will hunt down anyone who kills my kin is one reason my kin do not get killed.

Part of the modern hostility to feud is based on the belief that its violence is unbounded in both time and magnitude, that a minor conflict could be expected to generate a continued cycle of revenge killings as in the legend of the Hatfield/McCoy feud. In an earlier chapter I sketched the real history. The feud consisted of one exchange in which three members of one family killed a member of the other and were themselves killed in revenge and a second, five years later, in which a renewal of the conflict set off by the intervention of the governor of Kentucky resulted in five more deaths, three of them by Kentucky law enforcement. The rest of the famous feud exists in movies and newspaper stories but not in the work of careful historians. That illustrates my rule of thumb for reading history: View with suspicion any anecdote that makes a good enough story to have survived on its literary merits.

Moderns are less familiar with the much more extensive record from societies such as saga-period Iceland. A careless reading of the sagas makes it sound like a violent society. A more careful examination suggests that most feuds terminated either at the first round, when the offender agreed to pay the penalty set by court or arbitrator, or at the second, after the victim of the first clash had reversed roles for the second. Only a few continued beyond that for multiple exchanges—and so, with the boring parts removed, provided the material for sagas.

If I honestly believe that the compensation you are offering me is absurdly low while you regard it as generous, we may have a hard time finding a settlement that does not leave at least one of us feeling as though he has

abandoned his own commitment strategy, making him fair game for any future aggressor. So a well-functioning feud system may require enough commonality among the participants to make it possible for the two sides to agree on terms, whether negotiated between them or arranged by a third party arbitrator. An alternative may be a mechanism whose authority is commonly recognized, such as the Icelandic court system. Even if I believe that what the court awarded me was unreasonably little I can still accept it without signaling my unwillingness to defend my rights against future aggressors, since they will have no reason to expect the court in cases spawned by future clashes to err in their favor.

Reputational Enforcement

All the forms of law enforcement so far described depend on force or the threat of force. For a very different mechanism, imagine that you have bought a jacket from a department store that guarantees to refund your money if you are not satisfied with what you bought. You discover that the jacket you bought is the wrong size and your wife points out that purple is not really your color. If the store refuses to give you a refund, you are unlikely to sue them—the amount at stake is not enough to make it worth the time and trouble. Nonetheless, stores in that situation are likely to take the jacket back—because they want the reputation, with you and with others, of living up to their promises.

A more elaborate example of the same approach is provided by the New York diamond industry as described in a classic article by Lisa Bernstein.[582] At one point, somewhat before the time she studied it, the industry had been mostly in the hands of Orthodox Jews, forbidden by their religious beliefs from suing each other. They settled disputes instead by a system of trusted arbitrators—rabbis—and reputational sanctions. If one party to a dispute refused to accept the arbitrator's verdict the information would be rapidly spread through the community, making others in the industry unwilling to deal with him. The system survived after membership in the industry became more diverse, with organizations such as the New York Diamond Dealer's Club providing both trusted arbitration and information spreading.

Reputational enforcement works well for parties engaged in repeat voluntary transactions; once you have obtained a reputation for failing to do what you have promised, people become reluctant to deal with you. Anticipating that, you fulfill your obligations. It does not work for a one-time transaction, a con man who intends to cheat his victim out of a fortune and then retire. Nor does it work for involuntary transactions; a mugger does not require the consent of his victims. And even in the case of repeat voluntary transactions, there is a risk of end game

betrayal, the trader who, having built up a reputation for trustworthiness by twenty years of honest dealing, spends the final year before his planned but unannounced retirement borrowing money he has no intention of paying back and taking payment for orders he does not plan to fill.

Even someone who is only an occasional participant in a particular market routinely engages in other transactions, social, economic, political. If I sell you a car that stops running two days later, there is a reputational penalty even if I never plan to sell another car; the fact that I cheated you over a car will be seen as evidence that I am likely to cheat other people in other ways. One way of making sense of our moral judgments is that we put two different acts into the same moral category precisely because we believe that the willingness to do one correlates positively with the willingness to do the other.[583] Once enough people have heard your story and looked over your car, I find landlords unwilling to rent me a room, employers reluctant to hire me, fathers refusing to allow me to date their daughters. In a society where people know each other well enough for reputational enforcement to work well, a mugger, even if he has never been convicted, even if his society has no courts to convict him in, may find that his loss of reputation costs him in the parts of his life that do not consist of mugging people.

The argument can be expanded beyond the loss of trading opportunities. Humans are social animals; most of us want to be liked, admired, seen as high status. Being viewed as someone who cannot be trusted costs on all those dimensions. That may be a reason to be trustworthy even for someone planning no repeat transactions that depend on trust.

Human beings reveal their feelings, values, thoughts in facial expressions, voice tones, gestures. That makes it difficult, although not always impossible, to maintain the reputation of being an honest, trustworthy, generous person while awaiting a good opportunity to swindle someone. Able con men exist, but they are rare. Reputational enforcement may be harder in the case of firms, which have no faces to show their emotions and can discard a bad reputation by filing a new set of incorporation papers under a new name. One solution is for the firm to post a reputational bond—an expensive advertising campaign whose benefits will be lost if the firm vanishes, a marble-faced bank building with limited resale value.[584]

There is a further problem with reputational enforcement that becomes more serious the larger the society. When you cheat me by failing to fulfill your side of a contract and I complain, you respond by explaining to any who ask that you only pulled out of the contract because I had failed to fulfill my side of the

bargain. An interested third party with no easy way to tell which of us is lying may conclude that it would be prudent not to trust either. Anticipating that response I conclude that public complaint will only make a bad situation worse—better to take my losses and keep my mouth shut. This is a problem for a system where deterrence is produced not by people hired to produce it but as a side effect of individuals acting for their own protection.[585]

So one requirement for reputational enforcement to work is that the information cost to interested third parties of figuring out who was at fault is low enough to make it worth their while to do so. One way of fulfilling this condition is a small society where everyone knows everyone else and has a pretty good idea of whose account can or cannot be trusted. Another is the use of arbitration, ideally prearranged arbitration. If you and I have publicly agreed in advance that any dispute over our gemstone dealings will be settled by the New York Diamond Dealers' Association, all a third party has to learn is their verdict, which takes much less effort than investigating the details of the controversy himself.[586]

A third approach is demonstrated by the dealings of Chinese merchants in Taiwan in an environment largely dependent on reputational enforcement, as described in Chapter 1. Structure your contracts in ways that make it as easy as possible for third parties to tell who was at fault. If my goods are being stored in your warehouse and I complain that you have let them be damaged or that some of them are missing it will be hard for a third party to judge the dispute, so follow the simple rule that ownership goes with physical possession. Make a buyer responsible for inspecting goods before he accepts them and forbid him, save in the most extreme cases, from demanding compensation if he later discovers that their quality is less than he was led to expect—the rule of *caveat emptor*. It is easier to demonstrate whether or not I delivered the goods to him than what happened to them afterwards or what condition they were delivered in.

Reputational enforcement is more effective for some than for others. So design contracts to put the temptation to default on those who can best be trusted not to yield to it. If you can be trusted and I cannot, I pay in advance; you could take my money and fail to deliver what it bought, but won't. Those are the terms on which I routinely buy things from Amazon.com.

Ostracism

Next consider the same sort of enforcement, this time used as an explicit punishment.[587] A community finds one of its members guilty of violating its

rules and pronounces a sentence of ostracism—Romani *marimé* or Amish *meidung*. Other members refuse to associate with the convicted defendant. If ostracism imposes large costs on its target the threat provides a reason not to violate the rules of the community.

The reason not to associate with the convicted defendant is not, as in the previous case, to keep from being cheated but to enforce the rules of the community. That creates a problem. An individual who goes along with the ostracism bears the cost of giving up any mutually profitable dealings he might otherwise have with the defendant. He shares the benefit of enforcing the rules with all members of the community, making ostracism what economists describe as a public good, a good whose producer cannot control who gets it.[588] That makes it less likely that an individual's share of the benefit will be larger than his cost, which may make it hard to get individuals to go along with the ruling.

One solution is the rule: *You shall not associate with anyone who has violated a communal rule—including this one*.[589]

Start at a time when everyone accepts and follows all of the communal rules. Bill violates one of them and is sentenced to ostracism. A second member of the community, John, has to decide whether to help enforce the sentence by refusing to deal with Bill. There is now an additional reason to do so—continuing to associate with Bill will itself be a rules violation and will subject John in turn to ostracism. That cost makes it in John’s interest to refuse to deal with Bill. The members of the community (no longer including Bill) are in what is described in game theory as a Nash equilibrium; each is following the best strategy for himself (refusing to associate with rules violators), given how the others are acting (refusing to associate with rules violators, including violators of the rule that you don’t associate with rules violators). Rewind our film to before Bill violated our rule and the whole community is in a Nash equilibrium: Given how everyone else is acting, it is in everyone’s interest, Bill included, not to violate the rules.

So far I have been assuming a formal mechanism for imposing ostracism. Informal norm enforcement is a more familiar version of the same logic. There is no legal rule that forbids me from teaching classes stripped to the waist, but doing so would be imprudent. Many of my colleagues would conclude that I was not the sort of person they wished to associate with, in part because, if they continued associating with me, their colleagues might reach a similar conclusion about them.

In addition to the public good problem, there are at least two other problems with ostracism as a way of enforcing rules. The first is that someone has to

decide whom to ostracize, which requires a decision-making procedure whose results practically everyone accepts. If there is no such procedure, an attempt at ostracism may divide the community between those who accept the verdict and go along and those who do neither. The second is that the people participating in the ostracism have to include a large enough proportion of those the target would like to interact with so that their refusal to interact imposes a serious cost on him.

In a large society this is hard to arrange, since only a small proportion of its members need defect to provide the target with an adequate number of trading partners. In a small community embedded in a larger society, the Romani (and Amish and Mormon and …) case, it works only if the barriers to a member of the community interacting outside it are sufficiently high. That condition can be met, but at a considerable cost, and it may cease to be met, arguably has, for the Vlach Rom in America, due to changes that make either the embedded community or the surrounding society less intolerant of the other. If the barriers are low the threat of ostracism is only a mild deterrent, limiting the community's ability to enforce its rules on its members.

That suggests that ostracism will be most effective for a small community either entirely isolated, set in a very unfriendly larger society, or itself very unfriendly towards the larger society. Outside of one of those situations it can be used to enforce rules, but only rules that nobody has strong reasons to violate.

The Community Responsibility System

The community responsibility system described in Chapter 8 demonstrates yet another approach to law enforcement. A society is divided into multiple groups —in that case prison gangs—with known membership. It is in the interest of each group to enforce the rules on its own members, in part to avoid costly conflicts with other groups, in part to maintain a group reputation that makes it possible for members to interact with members of other groups in peaceful and mutually profitable ways.

Prison gangs are not the only example. The American Vlach Rom described by Sutherland are divided into *vitsa*, groups of relatives. An individual can identify with the *vitsa* of either his father or his mother and a wife may identify with the *vitsa* of her husband. But most people, most of the time, can be identified as members of one *vitsa* or another.

Each *vitsa* has a reputation in the eyes of the members of other *vitsa.* That reputation affects how eager members of other *vitsa* are to buy daughters from them or sell daughters to them and at what price. It affects the willingness of those outside that *vitsa* to accept its leader as the *Rom Baro,* the big man, the

dominant figure in a *kumpania*. In these and other ways, reputation matters.

One result of an individual Romani violating the rules of *romania* is that he becomes *marimé*, polluted, and so ostracized. Another is that his *vitsa* loses status:

> Behavior that is shameful (*lashav*) or worse still, *marimé*, creates a reputation for an individual and his family (since the family is considered responsible for the behavior of its members) which ultimately must be borne by the *vitsa* and possibly the *kumpania* as a whole.[590]

That is a reason for each *vitsa* to use social pressure to keep its members from violating the rules and to punish them if they do.

The Somali dia-paying groups provide another example. If one member of such a group commits an offense against an outsider the others will be obliged to either share in the damage payment or help in the resulting feud. That is a reason for them to control their members—for instance by forbidding one too inclined to kill from carrying a rifle. The *'akila* of Islamic law and the *derbfine* of Irish law are similar institution with similar functions.

The community responsibility system is, as these examples suggest, an old institution. So is academic recognition of its function. Consider Adam Smith's response to David Hume's argument in favor of an established religion.

Hume argued that if each religious sect had to support itself on the contributions of its members, ministers would have an incentive to stir up religious passions, leading to conflict.[591]

> "And in the end, the civil magistrate will find that … the most decent and advantageous composition which he can make with the spiritual guides, is to bribe their indolence by assigning stated salaries to their profession, and rendering it superfluous for them to be farther active than merely to prevent their flock from straying in quest of new pastures."

Which explains why Hume, widely believed to be an atheist, was in favor of an established church.

Smith's reply was that multiple competing sects served a useful function, since it was in the interest of each to maintain its reputation by controlling the behavior of its members.

> All his brother sectaries are, for the credit of the sect, interested to observe his conduct, and if he gives occasion to any scandal, if he deviates very much from those austere morals which they almost always require of one another, to punish him by what is always a very severe punishment, even where no civil effects attend it, expulsion or excommunication from the sect.[592]

Very nearly the same system David Skarbek found operating in California prisons more than two hundred years after Smith described it.

In the systems described by Skarbek and Smith different enforcement mechanisms are possible, including violent force (prison gangs) and ostracism

(small religious sects). However the rules are enforced, the group needs some decision mechanism, a religious leader or a gang's shot caller. What is special about the system is the group's incentive—to maintain the reputation of group members by controlling their behavior. The advantage over an ordinary reputational system is that even if an individual member is not a repeat player the group he is a member of probably is, hence has an incentive to be concerned with its reputation with those its members deal with.

Divine Enforcement: *In Foro Interno*

Divine enforcement provides not only an independent mechanism for rules enforcement but also a way of facilitating other mechanisms. The point of swearing to tell the truth, the whole truth and nothing but the truth, so help me God, is that the oath makes it more likely that you will actually do it, for fear of divine punishment or out of belief in your obligation to act as God wishes. The reason to allow the defendant in a suit under Jewish law to swear and be quit, defeating the suit (Chapter 4), or the plaintiff, in a case where the evidence is stronger, to swear and take, is that plaintiff and defendant, as believing Jews, will be reluctant to swear falsely. Both the criminal and civil mechanisms for rules enforcement depend on a court being able to judge guilt or innocence. Doing that is easier with the equivalent of a lie detector. The practice of requiring oaths by believers reluctant to swear falsely provides one.

Divine intervention can also substitute completely for a court trial. If God supports the right, trial by combat or ordeal vindicates the innocent and convicts the guilty. Even if divine intervention is only mythical, the belief in it gives an advantage to the party who knows he is innocent over the party who knows he is guilty.[593]

Consider an Orthodox Jew who keeps kosher even when he is sure nobody is watching or a Muslim convert who suppresses his remembered taste for pork. That can be seen as rule enforcement by the threat of divine sanctions, a bolt of lightning or an extra decade in Purgatory. Or it can be seen as obedience not from fear of punishment but because obedience is what one ought to do. There is a continuum of variants, with at the one end the believer in divine punishment, at the other C. S. Lewis's atheist brought up to believe that gentlemen do not cheat at cards.[594]

For another example of the same pattern, consider the mechanism by which the Cheyenne Indians capped the level of physical violence within the tribe.[595] Fighting, even quite violent fighting, was allowable. But a Cheyenne who killed

another member of the tribe, for whatever reason, was banished from the tribe, at least for several years—because he now smelled of death and the smell, and its consequences in ill fortune, were contagious. Similarly for *marimé* among the Romani.

There are three different reasons for an individual to obey religious rules, and it may not always be clear which is responsible:

Because he believes they are right.

Because he believes violation will result in supernatural punishment.

Because he believes violation will result in social sanctions.

There is a simple test to distinguish the first two reasons from the third: Does he obey the rule when he is certain nobody is looking?

Consider the case of the Romani. So far I have taken it for granted that they obey the *marimé* rules because they believe that pollution results in illness and bad luck as well as ostracism. If so, the rules are self-enforcing.

It is not clear that it is entirely true:

> A wife is responsible for the purity of her husband, and she cannot allow him to become polluted by stepping over his clothes or mixing them with women's clothes when washing them. One wife said defiantly, 'I'll step over his clothes any time at home, but I could never do it in front of my father-in-law', emphasizing the difference between public and private behavior.[596]

That suggests that in that system, and possibly others, enforcement is in part supernatural, in part social.

The pure form of divine enforcement depends on everyone believing in the divinity and his willingness to enforce. That belief may be shaken if violators of the rules are seen to escape unpunished. One way to avoid that is to start with beliefs sufficiently strong to make detected violations rare. Another is to incorporate in the belief system forms of divine punishment that are unobservable from the outside, such as post-mortem punishment in Islamic law, or difficult to observe, such as bad luck. Practically everyone is unlucky in something.[597]

Even if divine enforcement is not a complete substitute for more To use oaths as a lie detector it is not necessary that everyone be a believer, only that there is some test to identify unbelievers. Religious practices that are costly and not enforced, hence engaged in only by believers, provide one such test. One function of kosher rules and similar restrictions may be to identify believers whose oaths are to be trusted.[598]

The extreme version of that is a situation where being a member of the group is so costly that nobody would choose to join unless he truly believed in the religion. Arguably that describes those who participated in the Mormon church

in its early years, when the faithful were fleeing most of the rest of mankind to set up their refuge in what would become Utah. Also the core of believers who accepted expulsion from Mecca in order to join Mohammed in Medina.

That suggests that religions such as Islam or the Church of Latter Day Saints, at least in their early stages, have a significant advantage over less controversial rivals; they know who can be trusted because nobody who can't be will join. Arguably an analogous situation exists for political movements. Being in power has advantages but also an important disadvantage. Since identifying with the party in power pays, there is no easy way of distinguishing dedicated believers who can be trusted from the political equivalent of rice Christians, Chinese who converted because the missionaries had rice.

Conclusion

I have now sketched all of the approaches to enforcing legal rules that we have observed in the legal systems discussed here. All have problems, but not the same problems. That suggests that what system works best depends at least in part on the society whose rules it is to enforce. That is one reason that this book is an attempt to understand different legal systems, not to decide which one is best.

18. The Problem of Error

If nobody benefits by enforcing a legal rule, the rule will not be enforced. If someone benefits too much by convicting someone else of violating a legal rule, we may spend more on law enforcement than the resulting improvement is worth. Getting the incentive correct involves balancing the benefits of enforcing the law against the costs. We could get almost perfect enforcement of speed limits if every road had a cop car every few miles, but it would take a lot of cops and cars.

A second cost of convicting more who are guilty is convicting more who are not. If we increase convictions by reducing the amount of evidence required to convict, we will acquit fewer guilty defendants but convict more innocent ones. If we increase convictions by increasing the reward to cops who arrest speeders, we have increased the incentive for cops to arrest drivers whom they falsely claim were speeding and for localities to contrive speed traps designed not to reduce accidents but to increase revenues. It is a problem almost as old as automobiles.

> While we waited outside, the fat man on the grey horse rode up and entered into loud talk with his brother magistrates. He said to one of them—for I took the trouble to note it down—'It falls away from my lodge-gates, dead straight, three-quarters of a mile. I'd defy any one to resist it. We rooked seventy pounds out of 'em last month. No car can resist the temptation. You ought to have one your side the county, Mike. They simply can't resist it.' (Kipling 1918, 191)

A different example of the same problem was described in Chapter 15. In England in the mid eighteenth century, both Parliament and the Crown established rewards for convicting criminals of offenses for which it was feared that private prosecution was inadequate.[599] The result was a series of scandals in which someone was either entrapped into committing an offense or framed for an offense he did not commit. Eventually rewards for conviction were replaced by partial compensation for the expenses of a successful prosecution—not enough to make prosecution profitable, merely less costly.[600]

Preventing False Verdicts

The direct approach is to use legal rules that make it hard to convict innocent defendants. The rules of evidence and the requirement of proof beyond a reasonable doubt in Anglo-American criminal law are supposed to achieve that. It is not clear how well they succeed in a legal system where the overwhelming majority of convictions are not by trial but by plea bargaining.[601] We have no good measure of what fraction of those convicted of crimes are innocent but attempts at indirect measures for serious offenses suggest that it is at least three to five percent, perhaps more.[602] Given the logic of plea bargaining, the rates for less serious offenses might be considerably higher.

Even if we knew how to design rules that did a better job of separating innocent from guilty, it is unclear that it is in the interest of those who create the rules to do so. When someone is convicted of a crime he did not commit it is not the judge or the legislator who pays the penalty. And even with well-designed legal rules it may often be possible to find, out of the universe of all potential suspects, someone easier to convict than the actual offender. Hence, even with well-designed rules, increasing the incentive to convict can be expected to increase the number of false convictions.

The problem is the same whether the incentive is a reward for catching a criminal, avoiding the punishment for failing to catch a criminal,[603] tort damages, career advancement for a police officer who gets his man or favorable publicity for a politically ambitious prosecutor. In modern American law the issue of too much incentive to convict shows up as concerns with civil forfeiture,[604] class actions and punitive damages. In feud law, the corresponding problem is extortion disguised as rights enforcement.

Blackstone famously wrote “Better that ten guilty persons escape than that one innocent suffer.” Benjamin Franklin made it a hundred to one.[605] Neither offered any basis for their number.

If only we had a legal system that would never convict an innocent defendant…

The Origin of the Law of Torture: A Cautionary Tale

People in the past worried about convicting the innocent too. In the early Middle Ages, they had a solution—let God judge. A defendant could be subjected to an ordeal such as plunging his hand into boiling water, carrying a

red-hot iron bar, being dumped bound into water. Various passages in the Bible were interpreted to imply that God would reveal guilt (hand injured or body floated) or innocence (not injured, sank, pulled out). Since God was omniscient, a correct verdict was guaranteed.

The use of ordeals was eventually abandoned on theological grounds; in 1215, the Fourth Lateran Council rejected the religious legitimacy of judicial ordeals and banned priests from participating in them. Over the next few decades most European countries abandoned their use.[606]

That left medieval judicial systems looking for another way of being certain a defendant was guilty before convicting him. The solution was a high standard of proof, evidence "clear as the noonday sun." Conviction required either two unimpeachable eyewitnesses to the crime or a voluntary confession. Circumstantial evidence, however strong, was insufficient.

> In the history of Western culture no legal system has ever made a more valiant effort to perfect its safeguards and thereby to exclude completely the possibility of mistaken conviction.[607] But the Europeans learned in due course the inevitable lesson. They had set the level of safeguard too high. They had constructed a system of proof that could as a practical matter be effective only in cases involving overt crime or repentant criminals. Because society cannot long tolerate a legal system that lacks the capacity to convict unrepentant persons who commit clandestine crimes, something had to be done … (Langbein 1978, 4-5)

The solution was the law of torture. Once the court had half-proof, one eyewitness or the equivalent in circumstantial evidence, the defendant could be tortured. A confession under torture was not voluntary, but that problem could be dealt with. Stop the torture and the next day ask the defendant if he is willing to confess. Since he is now not being tortured, the confession is voluntary. If he doesn't confess, torture him again.

John Langbein, my source for this account, offers a parallel story in modern law. Two hundred years ago, jury trials were short:

> In the Old Bailey in the 1730s we know that the court routinely processed between twelve and twenty jury trials for felony in a single day. A single jury would be impaneled and would hear evidence in numerous unrelated cases before retiring to formulate verdicts in all. Lawyers were not employed in the conduct of ordinary criminal trials, either for the prosecution or the defense. The trial judge called the witnesses (whom the local justice of the peace had bound over to appear), and the proceeding transpired as a relatively unstructured "altercation" between the witnesses and the accused. In the 1790s, when the Americans were constitutionalizing English jury trial, it was still rapid and efficient. "The trial of Hardy for high treason in 1794 was the first that ever lasted more than one day, and the court seriously considered whether it had any power to adjourn… ."

Over the years since, trials have become longer and much more complicated, at least in part in an attempt to reduce the risk of convicting the wrong person.

Patricia Hearst's 1976 trial for bank robbery lasted forty days. That was unusually long, but the average felony jury trial in Los Angeles in 1968 took 7.2 days, more than a hundred times the length of the average felony trial in the Old Bailey in the 1730's. If every felony trial in the U.S. took that long, felony trials alone would require the full-time efforts of more judges than currently exist, state and federal combined, and close to a million jurors, court attendants, and the like.[608] Not impossible, but very expensive.

The American legal system found a cheaper alternative. Like its medieval predecessor, it substituted confession for trial. The medieval confession was motivated by the threat of torture. The modern version, a plea bargain, is motivated by the threat of a more severe sentence if the defendant insists on a trial and is convicted. Like the medieval version, it preserves the form—every felony defendant has the right to a jury trial, a lawyer, and all the paraphernalia of the modern law of criminal defense—while abandoning the substance. Conviction after a lengthy and careful jury trial is, arguably, evidence of guilt beyond a reasonable doubt. The willingness to accept a sentence of a year, possibly a year already served while awaiting trial, instead of the risk of ten years if convicted is not.

Similar problems have arisen in other legal systems. Under Jewish law as described by Maimonides, conviction for a capital offense required two witnesses to testify that, immediately before the offender committed the crime, both of them warned him that it was subject to capital punishment and he committed it anyway. And the witnesses must have seen the crime committed:

> "Even if the witnesses saw him (the assailant) chasing the other, gave him warning, and then lost sight of him, or they followed him into a ruin and found the victim writhing (in death agony), while the sword dripping with blood was in the hands of the slayer, the court does not condemn the accused to death, since the witnesses did not see him at the time of the slaying."

That was the theory. The practice:

> "Every court … if it sees that crime is rampant among the people … can impose the death penalty, monetary fines, or other punishments, even if there is no absolute proof."[609]

Under Islamic law, conviction for a *Hadd* offense, one based in theory directly on the Koran, required two eye witnesses to the same act, both competent adult Muslim males of good reputation. In the case of *Zina*, unlawful intercourse, it required four witnesses to the same act of intercourse, not a condition likely to be met. *Hadd* crimes could, however, be prosecuted as *Ta'zir* offenses, with weaker standards of proof and, according to some but not all schools of law, weaker punishments. If even that was too difficult, there were the *shurta* and *mazalim* courts set up by the ruler and not bound by the rules of Koranic

jurisprudence.

Standards of Proof

In setting the standard of proof, a legal system is balancing the benefit of convicting more guilty defendants against the cost of convicting more innocent defendants. Conviction of the innocent may be less important or deterrence more important for some offenses than for others. That would be a reason to use different standards of proof for different offenses.

In Anglo-American common law, the standard of proof for a civil case is a preponderance of the evidence, commonly interpreted as a probability of guilt above fifty percent. The standard in a criminal case is proof beyond a reasonable doubt. Why the difference? It cannot be just a matter of higher standards when more is at stake, since the criminal standard applies to minor crimes as well as major, the civil standard to suits claiming tens of millions of dollars in damages as well as suits for small amounts.

One possible answer is that a mistake in the civil case means that someone pays money that someone else gets. That may be unjust, but the cost of the penalty nets to zero. In the criminal case, nobody gets the life or the liberty that the innocent defendant loses. So convicting the innocent is more costly in the criminal case, which is a reason for a higher standard of proof.

The argument can be generalized both to standards of proof in other legal systems and to other ways of holding down punishment costs. In Islamic law, giving the victim or his heir the choice between retaliation and *diya*, blood money, makes it possible to substitute an efficient punishment for an inefficient one. So did out-of-court settlements in English criminal law, legal and encouraged for misdemeanors, illegal but, I have argued, common for felonies.

A legal system could compensate for a higher standard of proof with more severe punishment of those convicted, thus maintaining the same level of deterrence. One cost of that approach is that it may require a shift from an efficient punishment, a fine, to less efficient alternatives such as imprisonment, corporal punishment, or execution, there being a limit to how large a fine a defendant can pay.

Technologies for Revealing Truth

One way of avoiding the conviction of innocents is to require a high standard of proof. Another is to change the rules in ways designed to do a better job of judging guilt. That might mean longer trials, greater expenditure by the court and the parties on proving or disproving charges. It also might mean changes in how

cases are tried. What changes improve performance, what changes worsen it, may depend on details of the legal system and the society.

Consider jury selection. Early medieval England used an informed jury, jurors local to the defendant and so likely to already know much of the information relevant to his guilt or innocence. That advantage was balanced by the risk that they might be biased for or against a defendant they knew. The modern U.S. system takes the opposite approach, doing its best to exclude from the jury anyone with any connection to the defendant and relying on the trial process to inform an initially uninformed jury. Which approach is better depends in part on which is more likely to be biased, the neighbors or the trial apparatus, in part on how rich the society is. A poor society may be better off relying on the information the jurors already have instead of throwing that information away and paying someone to replace it.

Another issue is the choice between an inquisitorial system, in which the court apparatus discovers and presents evidence to judge or jury, and an adversarial system, where the prosecution offers evidence for guilt, the defense for innocence. A disadvantage of the latter is that someone looking for evidence on one side may ignore any he turns up on the other. An advantage is that, with a partisan on each side, there is less risk that partisanship on the part of the investigator will produce a biased selection of evidence.

There is another and less obvious advantage to the adversarial system. The payoff to looking for something is higher the more likely you are to find it. An innocent defendant can expect that the facts will, on average, support his innocence, and so has more incentive to pay the costs of an extended search for evidence than a guilty defendant. Thus the self-interested behavior of the defendant reveals his private information of guilt or innocence in a form, evidence of innocence produced, that feeds into the trial process. The inquisitorial system has no such mechanism, since the search for evidence is being done by court officials with no access to the defendant's private information of guilt or innocence.

An argument on the other side is that, under the adversarial system, how much is spent looking for evidence of innocence depends in part on how rich the defendant is. The inquisitorial system can choose to spend the same amount investigating the innocence of rich and poor.[610]

Another way that the accuracy of trial outcomes might be improved is by reducing restrictions on how evidence can be obtained. A modern example is surveillance. Tapping phones, setting up video cameras on poles in public places and recording their output, requiring phone companies to keep records of who

called whom when and make them available to law enforcement, monitoring activities on the internet, searching homes and computers, are all technologies that can be used to gather evidence to help identify the guilty. Such technologies also have costs: They reduce privacy and provide opportunities for blackmail by law enforcement agents, agencies or the politicians they serve. Those are reasons to restrict such activities.

One approach to doing so in modern U.S. law is the exclusionary rule: Evidence obtained by an illegal search cannot be used at trial. That reduces but does not eliminate the incentive to conduct an illegal search; the information produced might be used without its origin being revealed. According to news stories published in 2013, evidence produced by surveillance justified for national security was being funneled to law enforcement agencies acting against domestic crime. The recipients were instructed that, once they had the data, they should reconstruct it by normal investigatory techniques and, at trial, conceal its origin.[611]

I have already mentioned an older investigatory technology still not entirely abandoned: torture. One argument against it is that a defendant who is tortured and acquitted has been punished by torture, perhaps permanently injured, for a crime he did not commit. Another, noted at least as far back as Periclean Athens, is that under torture even an innocent defendant may confess.

The law of the Visigoths,[612] the earliest Germanic law code to have survived, offered a solution to the second problem. Torture of a defendant was only permitted if there were facts of the crime that an innocent defendant would not know. A confession was only accepted if it included such facts. The same approach is sometimes used in modern law in deciding whether a confession should be believed.

Both the ancient and the modern rule have the same weakness. The interrogator knows the relevant facts. If he wishes to convict the defendant, all he has to do is leak the facts to him when nobody else is around and then use torture to compel him to include them in his confession.

Suppose there were a substitute without those problems, a truth drug that produced reliable information with no harm to the defendant. The arguments against torture would then not apply. Should we use it?

A possible response is that we want to do a good job of enforcing the law, but not too good. So far I have taken it for granted that the laws being enforced are ones that should be enforced. That may not always be the case. A reliable way of convicting all criminals is also a way of enforcing tyrannical laws. Limits to law enforcement technologies may be justified as limits on the power of whoever is

making and enforcing the laws.

Changing Incentives

Another approach to the problem of protecting the innocent from conviction is to make it in the interest of prosecutors to avoid prosecuting innocent defendants. An example is provided by Athenian law. Their equivalent of criminal cases could, like criminal cases in eighteenth-century England, be privately prosecuted by any adult male (in the English case also female) citizen. Conviction usually led to a large fine, a share of which went to the successful prosecutor. To reduce the risk that a prosecutor might deliberately target an innocent defendant, Athenian law provided that a prosecutor who failed to get at least 20% of the jury to vote for conviction was himself fined and barred from any future prosecution of that sort of case. That gave potential prosecutors an incentive to avoid prosecuting defendants who had a substantial chance of proving their innocence. In the *Guta Lag*, a thirteenth-century Swedish law code, a woman found guilty of killing her child owed a three mark fine. If she was found innocent, her accusers owed her three marks.[613]

The Athenian approach could be applied to a modern legal system by penalizing a tort plaintiff or public prosecutor who failed to get more than some minimum number of jurors to vote for conviction. Alternatively, one might impose a penalty on prosecutors responsible for convictions later shown to be mistaken, as in the case of DNA reversals.

The problem with the first version is that it gives prosecutors who suspect the defendant may be innocent an incentive to conceal as much as possible of the evidence from the jury. The problem with the second is that it gives a prosecutor who suspects that he may have convicted an innocent defendant an incentive to prevent the error from being discovered.

That is not a purely theoretical issue. There is no legal penalty in modern U.S. law for a prosecutor who turns out to have convicted an innocent defendant but there are costs to his reputation. Reading accounts of attempts by innocence projects to use DNA testing to check the results of old cases, one is struck by how reluctant many of the authorities controlling access to the evidence were to make it available.[614]

For a different approach to protecting the innocent, consider prosecution motivated by private deterrence. Arresting the first feeble-minded beggar found near the site of a crime and railroading him to the gallows works just as well as hunting down the actual perpetrator from the standpoint of a private prosecutor motivated by a reward or a police officer angling for promotion—and it may be

a lot less work. But if potential felons know whether the person convicted is the one who committed the crime, as the real criminal certainly does, private deterrence depends on convicting the right person. It is thus one mechanism for prosecution, perhaps the only one, that comes with a built-in incentive to convict the right person.

Enforcers are not the only people whose incentives matter. Criminals and witnesses matter too. In many legal systems punishment is reduced for an offender who turns himself in or increased for an offender who takes actions, such as concealing the body of his victim, that make it harder to discover the crime and assign blame.[615] That too is a mechanism for making it easier to selectively convict the guilty. In many legal systems, perjured testimony is itself criminal, making it less likely that innocent defendants will be convicted or guilty acquitted. In several, including Jewish law and the legal system of Periclean Athens, false testimony that led to the execution of an innocent defendant was a capital offense.

Legal Systems and the Incentives They Provide

So far we have been looking at the problem of the incentive to enforce and the associated problem of the conviction of innocent defendants from a perspective that cuts across legal systems. How does the logic apply to differing mechanisms of enforcement?

Feud

Someone deciding whether to demand compensation for injury has two incentives do so, the compensation and deterrence. He has one incentive not to—the violence that may result, including both the immediate clash if he tries to carry out his threat and subsequent conflicts if the other party retaliates. The clearer it is that he is in the right and the other in the wrong, as judged by potential allies of both, the more likely the other is to give in to his demand and the lower the expected costs of conflict. How likely a pure feud system is to punish the right people thus depends on how accurately others in the community can judge guilt, which explains why such systems typically include some mechanism for third-party arbitration. The verdict of a trusted arbitrator or court provides interested third parties with information on who is at fault without requiring them to investigate the claims of the parties themselves.

The same considerations come in on the benefit side of the calculation. Starting a feud only provides deterrence against future wrongs if those who might commit them believe that you really have been wronged, hence take your response as evidence that it would be prudent for them not to wrong you. The less clear the evidence for your position is, the less benefit you get from demanding compensation or, if it is not forthcoming, carrying out the threatened violence. If your neighbors consider your action entirely unjustified they may conclude not that it is risky to wrong you but that it is risky to have anything to do with you, perhaps even that you are a public danger who should be dealt with.

Reputational Enforcement

Tort law, criminal law and feud deter offenses by imposing penalties on offenders; the offender is punished due to actions by someone trying to punish him. Reputational enforcement also imposes costs on an offender, but those costs are an indirect effect of individuals choosing to protect themselves by not dealing with parties they believe cannot be trusted.

If their judgment is correct, their action benefits them; if they are wrong, they

are giving up opportunities for potentially beneficial transactions. That gives them an incentive to distinguish innocent from guilty and, unlike prosecutors who will be rewarded for a conviction, no incentive to convict the innocent. But while there is no benefit to convicting the innocent there is in most cases only a small cost to doing so, since there are usually other department stores and other diamond merchants to deal with. Hence the third parties whose acts provide reputational enforcement have only a weak incentive to avoid convicting the innocent.

How serious this problem is depends on how easily third parties can determine who is at fault in a dispute. If doing so is hard and the benefit small they may instead assign some probability of guilt to the offender, some to the complaining victim, and avoid dealing with both—in which case, as pointed out in the previous chapter, complaining becomes a losing strategy and reputational enforcement breaks down. That is again an argument for mechanisms, such as arbitration, that provide third parties with information without requiring them to independently judge the merits of a controversy.

Ostracism

Punishing rules violators by ostracism has one attractive feature in common with reputational enforcement: The punishment is costly for the ones who impose it as well as the one it is imposed on, giving the former some incentive to get it right. On the other hand, it is easy to imagine circumstances where one member of a community can benefit by expelling another, perhaps a rival in love or communal politics. If the former is influential or very persuasive and the latter unpopular, there is an incentive for, and risk of, false conviction.

Divine Enforcement

If potential offenders believe in a supernatural power that punishes those who violate divine law, they have an incentive not to do so. Religion provides the perfect mechanism for punishing the guilty and only the guilty, provided that the religion is true and the divinity omniscient. It works reasonably well even if the religion is not true, provided that potential offenders believe in it. A traditional Romani has an incentive to avoid pollution even if he is sure nobody is watching, although less than when supernatural sanctions are reinforced by social sanctions, and similarly, *mutatis mutandis*, for a believing Jew or Muslim.

There are problems with this approach if implemented without the assistance of an actual divinity. Religious law must be interpreted by someone. If the interpretation is by the individual believer, he may commit actions he ought not

to if he can persuade himself that what he wants to do is not sinful—and every man is a biased judge in his own case. If interpretation is by others, they may use the threat of divine punishment to serve mundane objectives.

Peter Leeson, in an article on medieval ordeals,[616] describes an ingenious mechanism to leverage religious belief in the service of human enforcement. The legal system was structured in a way that gave accused defendants the opportunity to undergo an ordeal or avoid one. Since defendants believed that God would reveal guilt or innocence, guilty defendants were reluctant to undergo ordeals. The priests, realizing that most of those who chose ordeals were innocent, rigged the ordeals to acquit most defendants. In support of that interpretation, Leeson offers evidence of an implausibly large number of accused criminals who succeeded in picking up purportedly red-hot iron or plunging their hands into boiling water without injury. He also points to a collection of cases where the ordeal of submersion was given only to men—because, he argued, women were more likely to float and so be convicted.

Correcting Mistakes

A final issue is what can be done to correct mistakes when and if they are discovered. The answer depends in part on the form of punishment. If it is a fine or a damage payment the money can, at least in principle, be returned. If it is a continuing punishment, such as imprisonment or ostracism, the convicted innocent can at least be relieved from the remainder of his sentence. When it is discovered that someone who was punished was innocent he can be compensated with money, provided he is still alive, and some modern legal systems attempt to do so.[617] If a defendant is discovered to be innocent only after he has been executed, on the other hand, there is not much that can be done to compensate him.

Another possibility, if a verdict is shown to have been mistaken, is to punish those responsible for the error. If the false conviction is due to misdeeds by the legal apparatus, a prosecutor who withheld exculpatory evidence or a police officer who gave false testimony, it seems just to punish those responsible. The problem with this approach, as mentioned earlier, is that establishing the innocence of someone who has been convicted of a crime he did not commit is likely to require the cooperation of the legal system that convicted him, which is less likely to be available the greater the risk to members of that legal system.

19. Making Law

The legal systems we have looked at demonstrate some of the ways in which rules come into existence and change over time. This chapter is on the implications of each. As we will see, there is no simple one to one relation between legal systems and ways of creating law. The current U.S. system is arguably created and changed in at least three different ways, Jewish and Muslim law in four.

Divine Inspiration

At least two of the legal systems we have looked at are viewed by believers as based on divine commands—Jewish law on the Torah, written and oral, Muslim law on the Koran and *hadith*. This raises a number of problems.

One is the risk of legal inconsistency growing out of inconsistent versions of the authoritative text. In the case of the Koran, an official text was established under Abd al-Malik (65/685—86/705[618]) and all variant versions destroyed. A similar process may have occurred with the written Torah at an earlier date.[619] The problem remained with the oral Torah, instructions believed to have been given by God to Moses on Mount Sinai and passed down from him in a chain of oral transmission. The risk that different scholars would hold different views on its content was dealt with by the doctrine, based on the written Torah, that in case of uncertainty one should go with the opinion of the majority, interpreted as the majority of the Great Sanhedrin.

The Great Sanhedrin gave its last binding decision in 358 A.D. Its role was eventually taken over by the Geonim, the heads of the two Babylonian academies, which were at the time the leading bodies of Jewish scholarship. They received queries on legal and religious questions and sent back responsa, answers accepted as authoritative. Their authority weakened in the tenth century and ended, with the Geonim themselves, in the eleventh. Thereafter there was no single authority accepted throughout the Jewish world, although the views of a leading scholar might be accepted across many communities. Within any single community the communal authorities determined the law, if possible with the aid of one or more religious scholars. Since most disputes were intracommunal, uniformity within a community was usually sufficient.

A second problem is the risk that someone will claim legal authority by persuading others that he has his own pipeline to God. The story of the oven of Akhnai, discussed in chapter 4, can be read as a rejection of all such claims. Rabbi Eliezer provides the strongest possible proof of divine support, a string of miracles followed by a voice from heaven. The sages remain unconvinced, holding that the law is determined by the view of the majority. Taken literally, the story is puzzling; one might expect that the sages, after hearing God's opinion on the question, would change their votes. But it makes sense as a forceful rejection of the claims of purported miracle workers. God has transferred responsibility for determining the law to the human authorities.

The solution for Sunni law was the doctrine that Mohammed was the final

prophet, hence there could be no further Koranic revelation. There were occasional attempts by later figures to claim prophethood, including at least one case of claimed authority for a new Koran,[620] but they were rejected by the bulk of the Islamic community. Shia Muslims believed that their imams were, like Mohammed, divinely inspired, their practice like his evidence of God's will. That source of law ended for the Twelver Shia, the largest group, in the tenth century when the final Imam went into occlusion to reappear only in the final days.[621]

While the creation of an authoritative text of the Koran eliminated one source of disagreement, a second remained. Islamic law was also based on the Sunna of Mohammed, the practice of the Prophet as recorded in *hadith*, traditions. Different scholars could, did, and do disagree as to which were genuine, which doubtful. Eventually several authoritative collections were created, collections of *hadith* widely believed to be well supported, reducing but not eliminating that source of disagreement.

Interpretation

God never answers all the questions that matter. Divinely inspired law, like legislated law, requires interpretation; there is no sharp boundary between interpretation that fills gaps or clarifies ambiguity in religious law and interpretation that makes new law. In the Jewish case, interpretation occurred first by vote of the Greater Sanhedrin, later as decisions and treatises by scholars whose authority was based on their reputation. The opportunity for further interpretation was kept open by the doctrine of *hilkheta ke-vatra'ei*, "the law is in accordance with the views of the later authorities."[622] Eventually the *Bet Yosef* and *Shulhan Arukh* of Joseph Caro, along with associated commentary, came to be accepted across most of the diaspora.

Islamic scholars differed on the rules for interpreting Koran and Hadith, hence on their legal conclusions. The process, for Sunni Muslims, was conducted through the orthodox schools of law, eventually reduced to four. Different Muslims might choose to accept the interpretation of different schools, although often one school was dominant in a region. Within a school there might be disagreement on some points among different authorities, leading to rules within each school for choosing among the interpretations based on the relative status of different scholars. All four schools accepted the doctrine of consensus, according to which an interpretation which was at some time accepted by all legal scholars is thereafter considered certain, on the basis of hadiths reporting Mohammed as having said, in one or another form, that his people would never be agreed on an error.

Both Jewish and Islamic law, in their original forms, permitted a husband to divorce his wife but did not permit a wife to divorce her husband. Jewish law eventually changed to give the wife the *de facto*, although not *de jure*, possibility of divorce: If she could persuade the court that she had adequate cause, the court could compel the husband to divorce her. Islamic law permits a husband to delegate the power to divorce him to his wife as part of the marriage contract or a later agreement. It is also possible for a wife to request a divorce in exchange for compensation. Details vary across the schools.

Legislation

The mechanism for producing law most familiar to moderns is legislation. In Imperial China the authority was the Emperor, in Athens the assembly, in Jewish law communal authorities. Amish legislation, change in the content of the *Ordnung* of a congregation, is proposed by the bishop but requires the congregation's unanimous acceptance.

The oddest case of those we have looked at may be the Cheyenne. In at least one case, rules adding to customary law by declaration of a single soldier society following its resolution of a dispute were seen as binding in the future on all Cheyenne. A somewhat similar pattern among the Romani, specifically the Vlach Rom in America, was the holding of a *diwano* or *kris* to agree on a modification of *Romania*.[623]

While legislation can be used to resolve ambiguities in the law, that did not always suffice, not even in Chinese law, designed as a complete mapping from offense to punishment. Someone has to decide how to deal with cases that do not exactly fit the rules. The boundary between resolving ambiguity and creating law is rarely a sharp one, as illustrated by the expansion, in U.S. constitutional law, of congressional authority to regulate interstate commerce into something close to a blank check to regulate all economic activity.

Precedent

Another approach to creating law is binding precedent. A court's decision is binding on future courts below its level, determining law not only for the case being interpreted but for future cases.

Precedent has several advantages over legislation. Since it grows out of the resolution of a large number of cases, it generates a more detailed set of legal rules than is likely to be produced by either a ruler or a legislature. Because it originates with real cases, it maps more closely to real issues than rules created in the abstract. And because the rules it creates change as new cases are resolved, with courts able to overrule their own past precedents and higher courts free to overrule the precedents of lower, it creates a legal system that adjusts to changing circumstances.

Binding precedent has disadvantages as well. Since it is developed simultaneously by multiple judges, it may produce inconsistent rulings. Until and unless the inconsistency is resolved by a higher court, litigants find that the outcome of litigation depends on the choice of what court to litigate in. In systems where it is in the self-interest of judges to have cases come to them, the result is to bias legal rules in favor of whichever party controls the choice of forum. Daniel Klerman has argued that English common law had a pro-plaintiff slant until the nineteenth century because judges received fees for each case and it was the plaintiff who decided which of several alternative courts the case went to. Statutes in 1799 and 1825 eliminated fees as a source of judicial income. The result, according to Klerman, was to shift common-law rules in a pro-defendant direction.[624]

Something that some will see as a bug and some as a feature is the slow response to change of a system of precedent. Judges reach a high level late in their careers and remain there until forced to retire by old age or death. Old judges may base their decisions on the views and values of their youth. Legislators, even aging legislators, are under pressure to support positions popular with the current electorate.

Customary Law and Non-Authoritative Precedent

For a different approach, consider Somali law as described by Van Notten or pre-Islamic Bedouin law as described by Schacht. Judges are arbitrators, their verdicts opinions about the law not decisions creating it. That multiple arbitrators see the customary law as implying a particular resolution to some legal issue is evidence that it does imply that resolution, especially if the verdicts of those arbitrators were viewed as just and if those who produced them continue to be chosen as arbitrators. Past decisions influence future decisions as evidence but not as binding precedent.

For a modern example of the same logic, consider *Annie Lee Turner et al. v. Big Lake Oil Company et al.* The Supreme Court of Texas had to determine what compensation, if any, Big Lake Oil Company owed Annie Lee Turner and her neighbors for damage done to their property by the escape of polluted water from Big Lake's storage pools. A key issue was whether Big Lake was liable only if it was negligent.

The Texas judges looked first not to the statute law of Texas but to a case decided in another country almost a century earlier: *Rylands v. Fletcher*, decided by a committee of the British House of Lords in 1868. They spent a considerable part of their written opinion explaining why they reached a different result.

The law lords who decided *Rylands v. Fletcher* were both a court deciding the outcome of a particular case and a body of experts interpreting the common law of England. In that second role the conclusion they reached was relevant to, although not determinative of, the deliberations of a Texas court deciding a similar case based on the same underlying system of law. An English judge has authority over an American case in precisely the same sense in which an English scholar has authority over a dispute in his field carried on by American scholars; he is an expert whose opinion is relevant to deciding a disputed question of fact. Seen from this point of view, the common law functions as a system of binding precedent within a single national legal system and a system of informative precedent more broadly.

For another mixed system, consider Amish law. The final decision that determines the content of a congregation's *ordnung* is legislation, proposed by the bishop and accepted by the unanimous consent of the congregation. But the process that changes the *ordnung* looks more like the process by which customary law is changed. Someone does something arguably in violation of the *ordnung* as currently interpreted. If others object, the congregation will probably find that what he did is forbidden. He may have to publicly confess to a misdeed.

But if few or none object and others imitate him, the view of what is permitted may change and the changed view be incorporated in the next revision of the *Ordnung*.

Works such as the *Mishnah Torah* of Maimonides claimed not to create law but to discover and describe it. Halakhic authorities were offering their interpretation of an existing body of law that claimed divine origin. Their opinions were not binding as precedent—that would be inconsistent with both the rule that the law was according to the opinion of the later authorities and the actual practice of legal scholars. One of the criticisms of Maimonides' work was that, because to each legal question he gave only one answer, he failed to provide a judge with the opinions and arguments of past scholars needed to reach his own conclusion.

We know where legislated law comes from, where judge-made law in a system of binding precedent comes from, where law based on divine revelation comes from. It is less clear who creates customary law or how. As Justice Stewart said of obscenity, you know it when you see it.

Consider a form of customary law with which we are all familiar. While getting dressed before going to class yesterday I went in search of a clean pair of pants, the previous pair having just gone into the washing machine. Hanging in my closet was a worn pair of blue jeans. I gave no serious thought to wearing them, although they would probably have been more comfortable, perhaps also warmer, than the slacks I ended up with.

The reason is that doing so would have violated customary norms of behavior for professors teaching courses. Norms are a form of customary law. Nobody legislated those rules, nobody legislates their changes, yet they exist. The mechanism of change is much the same as among the Amish. A particularly brave and self-assured professor chooses to push the boundaries, to appear before his class in shorts and flip flops—I have a real example in mind. If students and colleagues look at him oddly, if he notes that at the next faculty meeting his opinions carry less weight than in the past, if his wife mentions that a colleague's wife asked her if her husband was going through some sort of stage, he may abandon his norm-violating behavior. If nobody seems particularly shocked, if colleagues react, if at all, with friendly amusement, he continues it. After a while—a week, a month, perhaps a year—another professor shows up in shorts, possibly after discovering at the last minute that all his pants either are in the wash or should be. The norm changes.

Social norms are a form of customary law with which all of us have first-hand experience. They may be the original source of all customary law. Individuals behave in a certain way, constrained by the expectations of others. When a

dispute arises, an arbitrator rules on the basis of what behavior is or is not accepted in that society. Norms, enforced for the most part by social pressure, evolve into customary law enforceable by violence or the threat of violence.

Mix and Match

As some of these examples show, real systems often mix multiple approaches to making law. The *ordnung* of an Amish congregation can be seen as legislation by unanimous assent, but the process by which it changes looks more like customary law. The Anglo-American legal system consists of both legislation and common law, the latter a system of precedent, but with decisions largely based on judges' perception of customary law. Somali law was mostly customary but in part Islamic law, seen as based on divine revelation. Islamic law was based on revelation, but revelation interpreted by *mujtahids*, religious scholars, and supplemented by legislation such as the Ottoman *kanun*.

Flexibility: Solution and Problem

All of the systems I have described are to some degree flexible, whether by legislation or interpretation. That provides a potential solution to two problems —mistakes discovered in the original law code and changes in circumstances relevant to what the legal rules should be. But flexibility also raises additional problems. One is that it makes law less predictable. The more flexible the legal system, the less certain someone making decisions today can be as to what legal rules will apply to him tomorrow. Another is that those who expect to gain or lose by a change have an incentive to spend resources supporting or opposing it. In the modern U.S. system, those expenditures take the form of lobbying for and against legislation, litigating in the hope of establishing a favorable precedent, and efforts to influence the appointment of judges, especially Supreme Court justices. In Islamic law, where legal rules were in part based on *hadith*, "in nothing do we see learned men more prone to untruth than the fabrication of traditions."[625]

Making Good Law

I have so far ignored the most important question of all: To what extent can we expect one or another of these mechanisms to produce good law, law that promotes the welfare of those to whom it applies?[626]

If divinely inspired law is the work of a benevolent deity, the result should be good law, but I have my doubts. Similarly if legislated law is created by a wise and benevolent ruler, but I know of no reason to expect that either. Believers in democracy might argue that legislated law will be designed in the interest of the voters since otherwise the legislators will be voted out of power, but I find that claim equally unconvincing. Distinguishing good law from bad is not easy. Individual voters, knowing that their vote has little effect on political outcomes, devote little effort to gathering the information needed to vote wisely. Politicians rarely help out by labeling themselves as bad guys or their bills as bad law. The result, as I have argued elsewhere, is a system that frequently produces bad law, a theoretical conclusion for which I find a great deal of empirical support.

Consider the case of trade restrictions.[627] Economists have known for about two hundred years that a country that imposes tariffs on imports will under most circumstances make its inhabitants worse off by doing so. For that entire period, most countries, including most democracies, have imposed tariffs. While there are theoretical arguments that under certain special circumstances the general result does not hold, the tariffs actually imposed do not fit the pattern those arguments imply; protection is typically provided not to infant industries but to senile ones.

What about judge-made law? Richard Posner has argued that common law tends to be economically efficient, supporting that argument with extensive economic analysis of the efficiency of common-law rules.[628] In my view, neither the evidence nor the theoretical arguments offered by him and others is sufficient to establish the truth of his claim; interested readers will find the question discussed at length in my *Law's Order*.[629]

Which leaves us with customary law.

Consider a norm which, if adopted by a group of individuals for interactions among its members, makes them better off—say a norm of honest dealing. Once one group has adopted it and others have observed the results, we would expect them to either join that group or imitate it. Thus desirable norms could spread through a society. Once established, they could become the basis out of which customary law develops.

There is an important limitation to this argument. In *Order Without Law*, Robert Ellickson described how nineteenth-century whalers developed an efficient set of norms with regard to issues such as what happened when one ship harpooned a whale and another eventually killed it, norms that efficiently changed as the whalers shifted from hunting one species of whale to another.

The reason they shifted from one species to another was that one species after another was being hunted to near-extinction. That suggests that they would have been better off if they had also had a norm that restricted the number of whales killed to a number that would not seriously reduce the population. No such norm existed.

A norm of restricted whaling benefits all whalers if they all follow it, but the benefit from my restraint goes to other whalers whether or not they act similarly. The right rule for all is to restrict. The right rule for any individual is to free ride on the restrictions of others. The problem is strictly analogous to the familiar case of the prisoner's dilemma, more generally market failure,[630] situations where individual rationality does not lead to group rationality.

It follows that customary law based on social norms ought to do a good job of generating the sort of rules that benefit the members of a group whose members adopt them but not the sort of rules which make us all better off if we all follow them.[631]

Competition in Law

After I have signed a contract with you, I would prefer law that favors me in any resulting dispute. But before we have signed the contract, we have a common interest in law that maximizes our combined benefit, increases the size of the pie to be divided between us. That suggests that a legal system in which individuals get to choose in advance the judge, arbitrator, or court that will interpret their contract will tend to produce good law, at least for the contracting parties. That was to some degree the case in the traditional Islamic system, where parties could choose to set up their contract with a court following the school of law whose view of contract law they preferred. It is to some extent the case for modern U.S. corporate law, which is in part a definition of the terms of a contract among the stockholders of a corporation, since the original creators of a corporation can choose what state to charter it in. And it is true of the non-state law created by mechanisms for binding arbitration.

The same principle applies on a smaller scale as well. A contract is itself a miniature legal system, a set of rules agreed on by the contracting parties for controlling their interaction. It is in the interest of the contracting parties to

choose rules that maximize their total gain from the interaction.

The articles of the pirate ships described in Chapter 7 provide another example of good law—good for the pirates if not their victims—generated by the same mechanism.

20. Guarding the Guardians

Quis custodiet ipsos custodes?[632]

Powers used to enforce rules may also be used for other purposes—extortion, intimidation of political opponents, facilitating ordinary crimes such as robbery. Who is to enforce the rules upon the enforcers?

The simplest solution is to have no enforcers with special rights or powers. Consider a system of social norms. What prevents me from teaching my classes in jeans is not the fear of being arrested but the expectation that doing so would lower my reputation, social and professional, would change to my disadvantage the behavior of people with whom I interact. Norms are enforced against me by everyone I interact with, by me against everyone I interact with. That describes not only the social norms I face but the norms of neighborly behavior in Shasta County, California, as described by Robert Ellickson in *Order Without Law*, enforced by both legal and mildly illegal acts against norm-violating neighbors.

A feud system such as traditional Somali law or the legal system of saga-period Iceland also lacks specialized enforcers. The rules are enforced by the threat of the private use of force by anyone against anyone. Some individuals are more formidable or have more allies than others but nobody has any special rights or legal status associated with the job of enforcing rules. Someone who uses his strengths to try to abuse the system risks bringing into existence a stronger coalition to block him.[633]

For a third example, consider England in the eighteenth century. Since any Englishman could prosecute a criminal case, the fact that an offense was approved of by the authorities was no guarantee that it would not be prosecuted. The point was demonstrated when a demonstration in favor of imprisoned radical John Wilkes ended with troops firing into the crowd and killing several people. The Wilkites responded by charging several of the soldiers, the magistrate who had ordered the troops to fire and the other magistrates present with murder.

The king had the power to pardon a convicted felon but doing so in too obviously partisan a way might provoke public outrage. In one notorious case two convicted murderers were pardoned, apparently because their sister's aristocratic lovers applied political pressure on their behalf ("the mercy of a chaste and pious prince extended cheerfully to a wilful murderer, because that murderer is the brother of a common prostitute").[634] The Wilkites responded by raising money to fund an appeal of murder, a private criminal case. An appeal was a complex, expensive and difficult proceeding that had gone almost entirely

out of use. It had, however, one large advantage:

> "If the appellee be found guilty, he shall suffer the same judgement as if he had been convicted by indictment: but with this remarkable difference; that on indictment, which is at the suit of the King, the King may pardon and remit the execution; on an appeal, which is the suit of a private subject, to make an atonement for a private wrong, the King can no more pardon it, than he can remit the damages recovered in an action of battery." (Blackstone 1884, Bk 4 Ch 23)

The appeal failed, as did the earlier criminal prosecutions of the soldiers and magistrates, but like them demonstrated the possibility of using privately prosecuted criminal law against malefactors supported by the government.[635]

A different approach is to have a second layer of enforcers charged with the duty of enforcing the rules on the first layer. In the modern U.S. that may mean a civilian review board to examine charges against police officers. In Islamic law the *nazar fil-mazalim*, "investigation of complaints," was a prerogative of the caliphs by which they "or, by delegation, ministers or special officials and later the sultans, heard complaints concerning miscarriage or denial of justice or other unlawful acts of the *kadis*, difficulties in securing the execution of judgements, wrongs committed by government officials or by powerful individuals …, and similar matters. Very soon formal courts of complaints were set up."[636] In imperial China, the censorate "had as its primary general purpose the investigating and impeaching of governmental wrongdoing or corruption wherever uncovered."[637] While this approach may limit the ability of ordinary enforcers to abuse their powers, it raises the risk of abuse by the layer of enforcement above them.

A variant is to use one category of specialized enforcers against another, as when the FBI or state police investigate corruption by local police. A more decentralized version uses tort law to punish abuse of the powers of enforcers of criminal law. Modern law texts describe what police must do in order that the evidence they procure will be admissible. Nineteenth-century textbooks described what police had to do in order not to be sued.[638] That approach is not entirely dead. In a number of prominent cases in recent decades, such as the shooting of Black Panthers Fred Hampton and Mark Clark in Chicago in 1969 and the Steve Jackson case in Texas in 1990,[639] victims of law enforcement abuse sued and collected.

A famous eighteenth-century example of the use of tort law to restrain enforcers of criminal law was *Hinkle v. Money*, one of the earliest punitive damage cases in English law. Issue 45 of *The North Britain*, an anonymous anti-government publication, contained an article attacking in strong terms a royal

speech.[640] The government responded by sending out Kings' Messengers, the eighteenth-century equivalent of Secret Service agents, with a general warrant authorizing them to arrest any person and seize any papers that they believed were connected with the publication. They arrested forty-nine people. One of them, a journeyman printer, sued, on the grounds that holding him prisoner for six hours while searching his papers on the authority of a warrant that did not name him was illegal. He won the case and collected three hundred pounds from the Secretary of State.

The award was against the Secretary of State but it was paid on his behalf by his government. The awards in the Black Panther and Steve Jackson cases were paid by the governments that the law enforcers found liable worked for. While that pattern holds, tort law provides an incentive to prosecute in the form of a possible damage payment and an incentive for governments to try to control law enforcers, but it does not provide a direct incentive for the enforcers themselves not to misuse their powers.

A further problem with the use of tort law or privately prosecuted criminal law to prosecute misdeeds by enforcers is that the government that employs the enforcers has, and may use, veto power. When it was discovered that AT&T had been providing information to the National Security Agency, arguably in violation of its obligations to its customers, customers sued. Congress responded by altering the law to immunize phone companies from such suits. If the Wilkites had succeeded in convicting a magistrate of murder for instructing troops to fire on a crowd the King could, and very likely would, have pardoned him.

That problem does not exist with a feud system. In Egilsaga, one of my favorite of the Icelandic sagas, Kveldulf's son Thorolf, a retainer of King Harald, is attacked and killed by the king, worried by Thorolf's increasing wealth and power. Skallagrim, Kveldulf's other son, asks the King for wergeld for killing Thorolf and is turned down. Kveldulf and Skallagrim depart for Iceland, then being settled. On the way they stop long enough to intercept and attack a ship carrying two of the king's nephews, a ship that the King had earlier seized from Thorolf. They kill the nephews and most of the crew and send one survivor back to Harald to tell him who was responsible. That sets off a three-generation-long feud between a family of Icelandic farmers and the royal family of Norway.

> East of Kveldulf's Island was a world his foeman ruled;
> West of it a land where men were free.
> Death's the price of living and the Norns are never fooled;

He saw the stolen ship go by and followed it to sea.
He would never look on Iceland but he led proud Harald know
That even kings pay wergeld, though they will not have it so,
He made them brace and bend their backs and row, row, row.[641]

One final approach to controlling enforcers is suggested by David Brin.[642] He predicts that improvements in surveillance technology will produce a society where everything that happens in any public place will be recorded and findable, putting enormous potential power into the hands of law enforcement. He argues that the best way to control that power is for transparency to run in both directions, the ability of the police to watch the citizens balanced by the ability of the citizens to watch the police.

Brin's solution depends on the officials controlling surveillance giving the public access to the resulting data. It also depends on the surveillance covering things the authorities may not want covered; one can easily imagine police, before beating up a suspect, making sure that the room's video camera was turned off. But recent high-profile cases where law enforcement agents got into serious trouble as a result of bystanders video recording their misdeeds suggest that something along the lines Brin suggested may be occurring. The technology is new but the underlying theory is not. One very ancient approach to controlling the misdeeds of government actors is for the ruler to hold open court at which any of his subjects may approach him to complain of the acts of his officials.[643]

Both the old and the new versions suffer from the same limitation. The police can watch us, we can watch the police. The police can arrest, jail or execute us; we cannot do the same to them.[644] Brin's approach depends on the willingness of rulers to punish misdeeds by enforcers. So did the older version.

H.L. Mencken, in a satirical discussion of the problem of controlling misdeeds by government officials,[645] describes two solutions. The German solution was a special court for trying errant officials. It worked because "a Prussian official was trained in ferocity from infancy, and regarded every man arraigned before him, whether a fellow official or not, guilty *ipso facto*; in fact, any thought of a prisoner's possible innocence was abhorrent to him as a reflection upon the *Polizei*, and by inference, upon the Throne, the whole monarchical idea, and God."

That approach would never work in America, since "even if they had no other sentiment in common, which would be rarely, judge and prisoner would often be fellow Democrats or fellow Republicans, and hence jointly interested in protecting their party against scandal and its members against the loss of their jobs." Mencken therefore proposes an alternative better suited to American

conditions: “… any [American citizen], having looked into the acts of a jobholder and found him delinquent, may punish him instantly and on the spot, and in any manner that seems appropriate and convenient—and that, in case this punishment involves physical damage to the jobholder, the ensuing inquiry by a grand jury or coroner shall confine itself strictly to the question of whether the jobholder deserved what he got.”

Think of it as a modified version of the tort law approach—privately initiated actions to control public enforcers. Or perhaps a modern form of feud law.

Democracy as the Solution—but Only for Pirates

I have so far ignored what many modern people think of as the most important constraint on enforcers—democracy. If the chief of police is corrupt and the mayor refuses to fire him, vote the mayor out. That was, after all, the mechanism that eighteenth-century pirates used to deal with a corrupt or incompetent quartermaster.

For a pirate ship with a crew of a hundred or so, it may have worked. The scale of the polity was small enough so that the individual voter had adequate first-hand information on how good or bad a job the quartermaster was doing. And it was reinforced by a second mechanism—reputation. If the quartermaster pocketed more than his share of the loot and managed to fool or bribe enough of the pirate voters to keep his position, the next time the ship docked at a pirate port it might lose half its crew and have a hard time recruiting replacements.

It works much less well for a city of three million or a country of three hundred million. The average citizen of Chicago or the United States sees directly only a tiny fraction of what the employees of his government, including those enforcing the laws, are doing. In order to decide whether they are doing a competent and honest job he needs to devote a considerable amount of time and energy to gathering information, listening to and evaluating arguments by supporters and critics.

That is a cost, and people are generally willing to bear costs only if they expect benefits from doing so. In a population of three million, the chance that my vote for mayor will change the outcome is tiny, probably less than one in ten thousand. In a population of three hundred million choosing a president, tinier still. That is not much return for an investment of many hours of time and effort. Better to spend my time instead researching what model of car or refrigerator to buy, since in that case my vote is decisive.

It follows that voters in large polities will be rationally ignorant of the information they would need in order to control government actors. As a test of the theory, I have occasionally tried the experiment of asking a room full of college students if they know the name of their congressional representative. Generally about half say that they do. It is hard to keep track of what someone is doing if you do not know his name.

The rational thing for an ordinary voter to do, unless he is a fan of politics as a spectator sport, is to decide which candidate it is in his interest to support, not which will do a better job if elected. That may mean supporting the candidate whom most of the people he interacts with support. It may mean supporting the

candidate who produces sound bites that make his supporters feel good. It may even mean supporting the best-looking candidate.[646]

21. Ideas We Can Use

I did not write this book in the hope of finding the ideal legal system. I doubt there is one. My purpose is to understand some of the different ways in which different societies have dealt with the problems that a legal system is designed to deal with. One benefit of doing so is discovering ideas that might be worth stealing.

Marketable Torts

In modern tort law, it is up to the victim to identify and prosecute the tortfeasor. In the Icelandic system it was also up to him, once he got a verdict from the court, to enforce it. That could be a problem for a victim with insufficient resources, defined mostly in terms of the ability to use force, himself or with the aid of allies, to prosecute the case and enforce the verdict. The solution described in Chapter 10 was to make claims marketable, permitting the victim to transfer his claim to someone better able to pursue it. He might or might not end up with a share of the damage payment—but then, crime victims usually collect nothing under our system. At least the offender would pay, giving potential offenders a reason not to violate the rights of even weak victims.

Consider the application of the same approach to modern tort law, where the victim needs resources to win his case even if not to enforce the verdict. A careless driver damages your car and perhaps you. You cannot afford a lawyer. You may be able to get a law firm to take the case on a contingency basis, in exchange for a share of whatever damages it collects. But you find it hard to judge which law firm will do the best job, collect the most. Even if you can afford a lawyer, you still do not know which one will do the best job for you. If tort claims were fully marketable you could simply auction the claim off to the highest bidder.

That is not the only advantage of marketable tort claims. Consider a tort that does a small amount of damage to each of a large number of people. The current mechanism for dealing with such is a class action. An enterprising attorney persuades a few of the victims to appoint him to act for them, a judge to authorize him to pursue the case on behalf of all the other victims as well.

While the attorney has an incentive to try to win the case and collect damages, he also has an incentive to direct as much as possible of the payment to himself rather than to his supposed clients. Ideally the judge keeps him honest. If not, the attorney agrees with the defendant on a multi-million-dollar settlement consisting of a million dollars in real money to him, ten million for the tort victims in the form of an offer of discounts on future purchases.

Suppose tort claims were marketable. A firm such as an insurance company that routinely deals with a large number of customers offers a discount to anyone willing to sign over to it all tort claims he might have in the next year for less than a hundred dollars. An enterprising lawyer concludes that ten million people have gotten mildly sick due to something wrong with a brand of canned beans, giving each a legitimate claim for ten dollars in damages.

The lawyer goes to the insurance company and offers to buy all of their claims for injury from canned beans. He makes the same offer to other firms that have similarly purchased their customers' small claims. When he is done, he owns three million claims for ten dollars each. He goes to the bean company and offers to settle for eighty cents on the dollar, twenty-four million dollars. If they turn him down he sues—not on behalf of the victims, who have sold their claims to him via middlemen, but for himself. There is no need for an attorney to pretend to represent millions of people who have never heard of him, no need for a judge to monitor the settlement to make sure it is fair to the victims. The victims have been paid in advance.

Iceland had marketable claims in the tenth century. America does not have them yet. Our legal system is more than a thousand years behind the cutting edge of legal technology.[647]

Feud

I do not expect the U.S. to convert to a legal system that is decentralized and privately enforced any time soon, although I did sketch what something along those lines might look like in my first book forty-some years ago.[648] But an understanding of the logic of feud law can help us make sense of legal conflicts in the modern world.

High-Tech Feud

Consider patent litigation among high-tech companies. Imagine that Apple is considering suing Samsung for a patent violation of which Samsung is not actually guilty—the equivalent, in the modern context, of a Romanichal gypsy or medieval Icelander demanding compensation for a wrong that did not occur. There are at least two reasons why Apple might do so. One is the chance that the court will mistakenly decide in Apple's favor, patent law being a complicated subject. The other is that the litigation imposes significant costs on a rival. The public perception that Samsung might have to withdraw products from the market or modify them will cost Samsung sales, some of which will go to Apple.

One argument against suing is the risk that Samsung might retaliate. Even if neither company has actually violated the patents of the other, the countersuit may still be profitable for the same reasons as the initial suit. And even if the countersuit is not profitable as a gamble on court error or a way of reducing Apple's sales in favor of Samsung's, being committed to such a countersuit is one way of deterring the initial suit, just as being committed to vengeance against anyone who kills your kin is one way of keeping your kin from getting killed. The implicit feud system in modern patent litigation provides a mechanism for deterring meritless suits that might otherwise be profitable just as explicit feud systems deter other forms of otherwise profitable wrongs.

What about suits that are not meritless—what if Samsung actually has infringed Apple's patents? The threat of countersuit is still a cost to Apple of suing. If courts reached their verdicts at random the situation would be the same as in the meritless case and the feud system would equally deter suits in both cases.

But courts do not reach their decisions at random, not even in patent law. If Samsung is guilty that raises, one hopes substantially, the chance that Apple will win, increasing the benefit to Apple of suing. If Apple has not infringed Samsung's patents, that reduces the benefit to Samsung of countersuing. The

mechanism through which right makes might in the world of high tech, as in Iceland a thousand years ago, is the court system.

As long as the plaintiff is more likely to prevail when he is in the right than when he is in the wrong, suing someone for infringing your patents produces a larger benefit to the plaintiff and a larger cost to the defendant when the defendant actually has infringed the plaintiff's patents than when he has not. Provided that the cost imposed by the threat of countersuit is greater than the benefit of a meritless suit but less than the benefit of a legitimate suit, the result is to deter the former but not the latter.

The clearest anecdotal evidence that what I have described is how the system actually works is the practice of high-tech companies accumulating large inventories of patents, many of which they are unlikely to use. It is the modern equivalent of the medieval Icelander accumulating weapons and allies in case he ever needs them to prosecute his side of a feud. As in that case—and the higher-stakes version played by great powers under the name of Mutual Assured Destruction—if the strategy works the weapons need never be used.

There remains, however, one hole in the system.

The Invulnerable Plaintiff

Samsung and Apple both produce cell phones, making both vulnerable to threats of retaliation. A firm that produces nothing is not. A non-practicing entity, referred to by critics as a patent troll, owns a collection of patents, practices none of them, sues practicing entities for alleged infringement but faces no risk of an infringement countersuit. It is invulnerable to retaliation, like an Icelander with armor so good that no sword can cut it.

The non-practicing entity, like Apple, has the possibility of profiting by court error, winning a case it should have lost and collecting damages. And although imposing costs on Samsung provides no direct benefit to the non-practicing entity, it does give Samsung an incentive to settle instead of letting the case go to trial.

In the case of Samsung, there is an obvious reason not to settle—paying off one plaintiff with a weak case will encourage others.[649] That incentive is weaker in the case of a much smaller firm, unlikely to be the target of multiple extortion attempts and at risk of being destroyed by a single law suit. Hence we get what critics of non-practicing entities allege to be their usual tactic, suing small firms in order to be paid to drop the suit.

It follows that even if the feud system is adequate as a way of controlling patent suits among producing companies it is impotent to control bogus patent

suits by non-practicing entities. Which suggests that we may need something else. For one possible solution, …

The Athenian Rule: A Modest Proposal for Revising Tort Law

Under the American rule, each party to a tort suit pays its own legal expenses. Under the English rule, the losing party to a tort suit owes the prevailing party compensation for its legal costs.[650] That provides a deterrent to a suit sufficiently meritless so that the plaintiff is virtually certain to lose. But a plaintiff who has some significant chance of winning, through court error or legal uncertainty, still has an effective threat. If the defendant wins he breaks even, if he loses he pays not only damages but the legal costs of both sides. That may be a good reason for the defendant to agree to settle for some fraction of what the plaintiff claims he owes, even if he is reasonably sure he is in the right. Defendants who are repeat players, such as a firm the size of Apple or Samsung, may be able to commit to never settling. The problem is more serious for defendants who do not expect to be repeat players and so are not in a position to commit themselves.

The fundamental problem, not limited to suits over intellectual property, is that a plaintiff who sues an innocent defendant in a system with legal error imposes a cost on him in addition to his legal costs—the risk of losing the case and being found liable for damages. We cannot compensate the defendant for that risk when he loses because if he loses we do not know he is innocent. But tort law treats a defendant who is found guilty by the preponderance of the evidence as if he were guilty with certainty, so it seems natural to treat a defendant who is found innocent by the preponderance of the evidence as if he were innocent with certainty, making the plaintiff guilty of suing an innocent defendant. We can use damages owed by the losing plaintiff to the prevailing defendant as a proxy for damages for the cost imposed by a plaintiff who sues an innocent defendant and wins. The logic is analogous to the case for punishing unsuccessful criminal attempts. Shooting at someone and missing does no harm. Punishing someone who shoots and misses serves as a proxy punishment for imposing a risk of death, collected, like damages under the tort rule I am proposing, when the risk does not eventuate.[651]

These arguments suggest that the losing tort plaintiff should be liable to the defendant for damages, possibly based on the amount the plaintiff claimed and thus the size of the risk imposed, possibly also on some measure of how badly the plaintiff lost and thus how strong the evidence is that he was innocent. Making damages depend on how badly the plaintiff lost would correspond to the rule for private prosecution of most categories of criminal offenses in Periclean

Athens; a prosecutor who failed to get at least 20% of a large jury to vote for conviction was himself fined. Making the damages depend on the amount claimed would correspond to the rule in Athens for at least some of their equivalent of our tort cases; the losing plaintiff owed the defendant one sixth of the amount the plaintiff had claimed that the defendant owed him. It is not known whether that penalty depended on getting less than 20% of the jury to vote for conviction, like the equivalent in criminal cases.

By properly setting the damages owed by the losing plaintiff and those owed by the losing defendant, it should be possible for the legal system to deter would-be plaintiffs from suing defendants they believe to be innocent while providing potential tortfeasors with the desired level of deterrence.

I have sketched the idea of the Athenian rule, damages owed to a prevailing tort defendant to compensate him for the risk of being wrongfully found liable, in the context of the patent troll problem, but the argument is a general one. Suing an innocent defendant in a legal system that sometimes finds innocent defendants guilty imposes costs beyond the cost of the litigation, costs for which the plaintiff should be liable. The rule is particularly important in the patent troll case only because that is a situation where deliberately suing innocent defendants and then proposing settlement is argued to be a serious problem. There may well be others.

Another Idea From Athens

The Athenian solution to the problem of determining who were the richest Athenians in order to decide who was obliged to produce a public good might be relevant to analogous problems in a modern society. One version that has been proposed is the self-assessed property tax. Every property owner must state a value for his property and is taxed on that value. If someone offers to buy it at that price he is obliged to accept.

The property owner would like to set the value of his property as low as possible in order to hold down the tax, but high enough so that he will not be forced to sell it unwillingly. Aiming for a little above the market price may not be sufficient, since he might be underestimating the market price. And even if he gets the market price right, there is the opportunity for extortion, a buyer who recognizes the high value of the property to the present owner, offers to buy the house, and demands a payment to drop the offer. So the price we would expect a prudent owner to set would be somewhere in the range between what he believes it is worth on the market and the lowest price he would be happy to sell it for.

The advantage of the self-assessed property tax is that it gives us a mechanism for setting the value to be taxed that does not depend on the existence of honest and competent assessors. One argument against that may occur to some is that it is unjust to tax subjective value rather than market value, to make me pay for the special emotional value to me of the house in which my children grew up, the fruit trees I planted. Another is that insecurity of my ownership of my home is too great a price to pay for the advantage of an automatically assessed value.

In my experience, it is the latter issue that makes many people regard the proposal as not merely undesirable but outrageous. One possible modification would be to have property valued for purposes of taxation in the conventional way but allow a property owner to revise the taxable value of his property if he wishes by declaring his willingness to sell at a lower price.

The usual argument for eminent domain, the legal rule that allows a government to force a property owner to sell at a price set by the government buyer, is that it is necessary to prevent the owner of a piece of property that blocks a project such as a new highway from taking advantage of the situation to charge an unreasonably high price. With a self-assessed property tax the property already has a price set by the owner, eliminating the problem and thus eliminating the argument for giving governments the power to force an owner to sell at a price set by the buyer.

A modern version of the Athenian approach is routinely used in horse racing

to construct a competitive race. Entering a horse in a claiming race constitutes an offer to sell the horse at the stated price, say $20,000. Varying the price provides a simple way of creating races at a range of levels. The owner of a fast horse could get an easy win by entering him in an easy race, but only at the cost of losing the horse. An even simpler and more familiar example of the same approach is the rule for dividing something evenly: You cut, I choose.

Are there other contexts where the approach could be used and isn't? None occur to me, but perhaps one of my readers can suggest some.

Chinese Lessons on Contracts

Chinese contract practice provides evidence on how to manage contracts with minimal help from contract law. That is relevant even in places with much more detailed contract law than ancient China, since under most circumstances what both parties want is not to win a law case but to avoid one.

People constructing contracts probably don't need help from Imperial China to find solutions to the problem of how to structure a contract to make it in both parties' interest to keep it.[652] But the issue is also relevant to people constructing contract law, since legal rules may make some private solutions more difficult. *Caveat emptor*, "let the buyer beware," the rule according to which a buyer takes goods as he finds them unless the seller explicitly warrants their qualities, may be useful in some contexts as a way of avoiding litigation. It also may be ruled out by some forms of modern contract law. More generally, the observation that parties may find it in their interest to structure contracts in ways designed to keep them out of court provides an argument for the doctrine of freedom of contract, under which contract terms are enforceable even if the court enforcing them considers them unwise.

Plea Bargaining and the Law of Torture

John Langbein argued that the modern practice of plea bargaining, like the medieval law of torture, came into existence as a way around problems raised by an unworkably high standard of proof. His conclusion was that the U.S. should shift to something like the modern German system of trial, retaining juries for serious offenses but eliminating the adversarial system. Whether or not that is the right answer, his article points out the risk that, if additional protections for defendants make trials longer and more expensive, the result may be not fewer convictions of innocents but more.

Plea Bargaining, Overcharging, and Athenian Law

Part of the problem with the modern system of plea bargaining is that a prosecutor can stack charges. Consider a defendant arguably guilty of an assault punished by a year in prison. The prosecutor charges him not only with that but attempted murder as well. Facing only an assault charge of which he believes himself innocent, the defendant might choose to go to trial with a reasonable hope of being acquitted. Charged with murder as well, facing a significant chance of a year in prison and a much smaller but non-zero chance of twenty years, he agrees to plead guilty to the lesser charge. Is there a way of changing the incentives of prosecutor and defendant to discourage that approach?

In Athens, a private prosecutor who failed to get 20% of the jury to vote for conviction could be fined. In modern legal systems the prosecutor is not a private citizen but an official acting for a government, which makes that approach less likely. But there might be others. One could, for instance, provide that if, in three different cases over a year, there was at least one charge on which fewer than four jurors voted for conviction, the prosecutor will be removed—a three strikes rule. That gives a prosecutor a reason not to file charges that he cannot support at trial.

If he files such charges anyway the rule provides no protection to the defendant, hence no reason for him not to give in to the threat; if he gives in the charges never get tried. Consider instead, or in addition, a rule providing that a defendant who is acquitted on any one charge must receive the lowest legal penalty on any charges he is convicted of. That reduces the power of the prosecutor's threat, giving him an incentive to charge the defendant only with offenses the prosecutor thinks he can convict him of and bargain from that.

I doubt that either variant could get adopted in a U.S. jurisdiction at present, but there are other places and will be other times.

To Catch Up With Eighteenth-Century England

From time to time someone commits a crime that his government approves of. Examples in my lifetime include murder (of Black Panthers Fred Hampton and Mark Clark by Chicago police in 1969) and perjury (by Director of National Intelligence James Clapper testifying to Congress in 2013). Criminal prosecution in our legal system is by the government, so crimes the government approves of are unlikely to be prosecuted, and neither of those was. But the Black Panther shooting produced a civil case that eventually settled for 1.85 million dollars, paid by Chicago, Cook County and the federal government.

A civil suit is one way of dealing with a crime that the government chooses not to prosecute, but not all crimes produce grounds for such a suit. In eighteenth-century England, the solution was much simpler: Any Englishman could prosecute any crime.

Suppose we wanted to change our system to deal with the problem of the government refusing to prosecute crimes it approves of. We could do so by changing our law to permit a private citizen to institute a criminal prosecution against a defendant whom the state failed to prosecute. That sounds like a radical proposal, but a version of it already exists in modern American law. Some statutes provide the option of a private attorney general, prosecution by a private citizen. As in English law in the late eighteenth century, the successful prosecutor can, at the option of the judge, be awarded attorney fees to cover his costs. I am proposing a modest expansion of the existing rule—to cover all crimes.

One question remains—is the result a good one? Seen from one side, it is a precaution against governments murdering people they don't like. Seen from the other, it reduces the ability of the legal system to ignore illegal acts that are not worth punishing.

In the U.S. at present, it is illegal for college students who are under twenty-one to buy, possess, or consume alcoholic drinks or for others to provide alcoholic drinks to them.[653] Would it be a good thing for a student with a grudge against his ex-girlfriend or her new boyfriend to be able to have one or both arrested, charged with (depending on the state and circumstances) a misdemeanor or felony and, if convicted, jailed for several months, conceivably several years?

Here again, evidence from past legal systems is relevant. Under the English game laws, some wild animals were considered property of the Crown and hunting them restricted to the king or those he had authorized. The result, by the

early 19th century, was that the right to hunt such animals did not always belong to the owner of the land on which they were hunted. The restriction was widely ignored, providing opportunities for the threat to prosecute to be used to extort money from landowners guilty of the crime of hunting the king's deer on their own land.[654]

A possible compromise might be to permit private prosecution only against government employees. Think of it as an updated version of Mencken's proposal.

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Notes

[←1]
A few of the student papers are webbed.

[←2]

The excavation in 1975 of the tomb of a minor Qin official in Shuihudi produced written texts that included accounts of legal rules and procedures for investigating crimes. They were inconsistent with the claims of extreme severity, suggesting that the conventional account of Qin legalism may have been, at least in part, propaganda by its successors.

[←3]

Also referred to as the Ch’ing or Manchu dynasty.

[←4]

An English translation of the statutes but not sub-statutes of the Qing code, published in 1810 by George Staunton, is webbed. There are also two French translations, one by Philastre and one, more complete, by Boulais.

[←5]

Information on earlier codes can be found in sources such as Van Gulik 2007, a translation with commentary of a thirteenth century collection of cases, Johnson 1979, a translation of part of the Tang code, and Jiang 2005, a translation of all statutes (but not substatutes) of the Ming code.

[←6]

Head and Wang 2005, 146.

[←7]

The much earlier and possibly fictional cases in van Gulik 2007 are largely accounts of how clever magistrates successfully deduced what had really happened.

[←8]

Allee, working from records of a local court in 19th c. Taiwan, reports that an extended term of imprisonment, while nowhere provided for in the law code, was in practice quite often employed as a punishment. (1994, 236-247). According to Alabaster (1899, 72), writing near the end of the final dynasty:

> *Imprisonment* did not, in the ordinary sense, exist as a punishment until a comparatively recent period .. . It has gradually been introduced either as a mode of commutation, or as an initial punishment.
>
> Of a fine pure and simple, where a fixed sum of money is laid down in the Code as the penalty due the commission of an offence, there is apparently no instance. Chinese legislators would be shocked at the idea that a breach of the peace should be visited by a fine of forty shillings, or that no other penalty should attach to offenses of greater heinousness. (Alabaster 1899, 77).

[←9]

The cangue was a device fastened around the convict's neck, sometimes taking the form of a flat square large enough to prevent his hands from reaching his mouth and so prevent him from feeding himself. It might carry a description of his crime, might be heavy enough to seriously impede movement. (Photo from Wikipedia. The photographer, John Thomson, died in 1921.)

[←10]

In some cases specified as to a malarial province or to serve as a military slave, in some cases apparently with no substantial restriction other than location.

[←11]

One possible explanation is that the decrease in number of blows resulted from an increase in the size of the sticks used and was necessary “so that offenders might not die under the beatings.” (Bodde and Morris 1967, 80-81).

[←12]

This system was introduced during the Ming dynasty (Meijer 1984, 2, 13), about 1459 according to Bodde and Morris (1967, 135). That explains why the distinction between punishments before and after the assizes does not appear in the Great Ming Code (Jiang 2005), created early in the Ming period, but does appear in the Qing code (Staunton 1810).

[←13]

Bodde and Morris 1967, 140. They attribute the account to Alabaster (1899, 28-29), suggest that an alternative account from another source is more likely, but still conclude that “it is striking to see the long progression of highly rationalistic procedures in capital cases culminating in a ceremony resting upon magic and the charismatic insight of the emperor.”

[←14]

Meijer 1984.

[←15]

A similar pattern occurred in early Roman law, where cosmic balance was maintained by a nominally capital punishment for violations of religious law, with execution later converted to banishment.

[←16]

The same issue arises with the so-called bloody code of eighteenth century England. All serious crimes were nominally capital but it seems likely that only a minority of those convicted of capital crimes were actually executed. See Chapter 15 for details.

[←17]

Chapter 5 of Huang 1982 describes the life of Hai Jui, a Ming dynasty official who eventually became the Censor-in-Chief in Nanking. Hai believed firmly that the legal system should be used to enforce the balance of power in China's social hierarchy:

> I suggest that in returning verdicts to those cases it is better to rule against the younger brother rather than the older brother, against the nephew rather than the uncle, against the rich rather than the poor, and against the stubbornly cunning rather than against the clumsily honest. If the case involves a property dispute, it is better to rule against a member of the gentry rather than the commoner so as to provide relief to the weaker side. But if the case has to do with courtesy and status, it is better to rule against the commoner rather than against the gentry: the purpose is to maintain our order and system.

[←18]

Bodde and Morris 1967, 39. There were exceptions:

“Those officers of government, who hold remote and important stations and commands, shall not be bound by the above regulations on the arrival of the intelligence of the death of their parents, as the line of conduct they are to pursue on such occasions will always be determined by express orders from the Emperor.” (Staunton 1810, 189)

[←19]

This possibility is suggested by the case of Chang Chü-cheng, Grand Secretary to the Ming emperor Wan-li in the 16th century, whose control over the Emperor and the bureaucracy was put at risk by the death of his father. Chang succeeded in evading his mourning obligation but by doing so badly weakened his position with the class of scholar officials. (Huang 1982, 21-25).

[←20]

Bodde and Morris 1967, 276-8.

[←21]

Bodde and Morris 1967, 277.

[←22]

There is some evidence that under the Legalist Qin regime, penalties depended on subjective factors such as intent. (Sanft 2008).

[←23]

Strict liability torts might be justified by the need to compensate victims, the Chinese rules as needed to compensate heaven: “Crimes produce discord; once a crime is committed, harmony is restored only by suitable punishment.” “Punishment is enacted not to teach that crime does not pay, it is levied to placate heaven.” One problem for all legal systems is that costs may arise that are due to nobody’s fault but must still be borne by someone.

[←24]

> “From the impracticability of providing for every possible contingency, there may be cases to which no laws or statutes are precisely applicable; such cases may then be determined, by an accurate comparison with others which are already provided for, and which approach most nearly to those under investigation, in order to ascertain afterwards to what extent an aggravation or mitigation of the punishment would be equitable.” (Staunton 1810, 43).

[←25]

"Whoever is guilty of improper conduct, and such as is contrary to the spirit of the laws, though not a breach of any specific article, shall be punished, at the least, with 40 blows; and when the impropriety is of a serious nature, with 80 blows." (Staunton 1810, 419).

"In all cases of doing what ought not to be done, the offenders shall be punished by 40 strokes of the light stick. … If the circumstances are serious, the penalty shall be 80 strokes of beating with the heavy stick." (Article 410 of the Ming code, Jiang 2005, 221).

[←26]

Along somewhat similar lines in Anglo-American common law, “By an equitable construction, a case not within the letter of the statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. … In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the lawmaker present, and that you have asked him this question, did you intend to comprehend this case?” Quoted in Hart and Sacks 1994, 82, from Bacon’s Abridgment (Statutes I, 5).

[←27]

Multiple examples appear in Alabaster 1899, such as the case of Kao Ch’i-kang on page 280.

[←28]

Watt 1972, 20.

[←29]

> “The judge in criminal matters has nominally no latitude. He has to determine what the facts are, and what article of the Code those facts agree with. The Code, then, constitutes of itself an impregnable barrier to any expansion of authority … .” (Alabaster 1899, LXIII).

[←30]

There were also indirect paths through the system including, at some times, the possibility of purchasing rank instead of winning it in the examinations. For a much more detailed account see Watt 1972.

[←31]

One exception was the ability to write formal administrative statements and dispatches.

[←32]

Watt (1972) describes the situation in the final dynasty in detail, but it seems clear that supervision of magistrates from the center went back much earlier. The Qing statutes translated by Staunton provide punishments not only for deliberate official misconduct but for unintended errors as well, as do the Ming statutes translated by Jiang Yonglin.

[←33]

> In the early Qing period there were about half a million licentiates, another 350,000 people who had bought the right to sit for the provincial exams and so presumably had studied to pass them, for a total of almost a million people who had gotten that far through the system. I have not seen any figures on what fraction of those who took the first exam passed it, but this suggests that at least a million people, perhaps several million, had put substantial time and effort into studying the Confucian classics. (Watt 1972, 24).

[←34]

Readers interested in the puzzle of American education can find a short introduction, with useful links, webbed, a longer presentation in Caplan 2018.

[←35]

Data from the earlier Yuan dynasty suggest that executions normally ran at the rate of only about a hundred a year. (Ch'en 1979, 44-45).

[←36]

“The procedure for all but the most serious cases was lifted out of the ordinary course, and an area was opened in which only the top officials of the province and the central government enjoyed wider powers of discretion through classification and could legally advise the Emperor how to reduce punishment on a routine basis. Ostensibly the face of the law was saved in this way, and the principles on which the system was built were not infringed.” (Meijer 1984, 15).

“But it must ever be borne in mind that few of these sentences are actually executed, for in nearly every case a capital sentence must, before it is carried out, be submitted to the Board at Peking for revision.” (Alabaster 1899, LXVI).

[←37]

According to Bodde and Morris, the pay for a workman in government employ was a little less than one ounce a day.

[←38]

The Manchus were nomads who invaded China and established the Manchu (Qing) dynasty. Descendants of the invaders were organized into eight regiments, “banners,” membership in which was hereditary. There were also eight banners of Mongols and eight of Chinese, descendants of ones who had supported the Manchu conquests.

[←39]

A system of seniority provides a simple way of ranking individuals. A familiar example in our society is seniority in job status, with the less senior employees laid off first. A historical example is provided by the British navy, where a captain's seniority dated from his receiving the rank. If two or more ships commanded by captains were working together, command over the squadron went to the senior captain.

[←40]

The details of the description here are based on Qing practice, although the pattern seems to date all the way back to the Han dynasty.

[←41]

> “In all cases of assaulting and striking, which occur between relations of the same name, but not within the degrees for which mourning is enjoined, a distinction shall be made between the junior and the senior; and the blow struck by a junior shall accordingly be punished one degree more, and that struck by a senior one degree less severely, than an equal offence would have been in ordinary cases between equals:” (Staunton 1810, 343).

[←42]

“A son accusing his father or mother; a grandson his paternal grandfather or grandmother, a principal or inferior wife, her husband, or her husband's father or mother, paternal grandfather or grandmother, shall, in each case, be punished with 100 blows and three years banishment, even if the accusation prove true: the individuals so accused by their relations, if they voluntarily surrender and plead guilty, shall in each case also, be entitled to pardon.

“In any of the above instances, if the charge should prove either in part or wholly false, the accuser shall suffer death by being strangled.” (Staunton 1810, 371-2).

Essentially the same rule appears in Ming law (Jiang 2005, 198).

There were, however, some exceptions, such as for “those who justly accuse their relations of treason, rebellion, concealment of criminals, and the suppression or compromise of any of the greater offences against the state.” (Staunton 1810, 372)

The rule did not apply in the opposite direction. “A parent falsely accusing his child ; a paternal or maternal grandfather or grandmother their grandchild, or grandson's principal or inferior wife; a husband his inferior wife, or a master his slave or hired servant, shall not, in any case, be punishable.” (Staunton 1810, 373).

[←43]

Windrow 2006, 277-278.

[←44]

> The Duke of She said to Master Kong: “In my native place, there is a man nicknamed Straight Body. When his father stole a sheep, he bore witness against him.”
>
> Master Kong said: “In my native place, straight people are different from this man: Father conceals for son and son conceals for father. Straightness lies therein.”
> (Confucius 1997 13:18, 136).

[←45]

The officials were assisted by clerks and runners but the number of such that the government was prepared to authorize and pay for was strictly limited.

[←46]

There were also trade guilds.

[←47]

This was a nominal punishment, converted to an actual punishment of 40 blows.

[←48]

Chu 1961, 39. In these passages and elsewhere I use the transliteration from the sources I quote. In the current (pinyin) system, “Hsu Kung-chu” would be “Xu Gongzhu,” “tsu” would be “zu,” with similar changes for other names and words.

[←49]

Chu 1961, 24.

[←50]

For a similar attitude in a modern society, consider the 2010 case of Tyler Clementi, who committed suicide after his roommate Dharun Ravi and another student used a webcam on the roommate's computer to view a same sex encounter between Clementi and another man. While there was no clear evidence that the spying was the cause of Clementi's suicide, the incident resulted in an extended public outcry, public statements by President Obama and other administration figures, legislation at both the state and federal levels and online proposals to charge the two students with manslaughter. Ravi was indicted on a range of charges and sentenced to 30 days in jail, 3 years probation, 300 hours of community service, a $10,000 fine, and counseling on cyberbullying and alternate lifestyles.

[←51]

According to Staunton's translation of the statutes:

> When several persons are parties to one offense, the original contriver of it shall be held to be the principal, and as such suffer the punishment required by the laws, in its full extent: the rest who followed, and also contributed to the perpetration thereof, shall suffer the punishment next in degree, under the denomination of accessaries. — When the parties to an offense are members of one family, the senior and chief member of that family shall alone be punishable; but if he be upwards of eighty years of age, or totally disabled by his infirmities, the punishment shall fall upon the next in succession.
>
> *When, however, the offence is a direct injury to the person or property of any individual, the several individuals shall, as in all ordinary cases, be punished as principals or accessories in the manner previously stated.* (Staunton 1810, 32-33).

For the Ming equivalent, see Jiang 2005, 40.

Examples where the punishment is reduced because the offender was acting under the authority of superior are given in Alabaster 1899, 33 and 37-8.

Bodde and Morris (1967, 385-388) describe a case where two members of a family drown a third under orders from a senior member and are sentenced to decapitation after the assizes. That would come under the exception that I have italicized.

[←52]

The attitude is suggested by a passage from an 11th century case included in a 13th c. collection:

> "Shen K'uo says in his Pi-t'an: 'The people in Kiangsi love law suits. They have a book called Teng-szu-hsien that consists entirely of models of documents used in litigation. It starts with teaching how to discredit people by written documents. If one can not trap them with those, one should try to get the better of them by deceit and slander. And should this method fail also, one should cause them to commit an offence and then intimidate them." (Van Gulik 2007, 150).

Bodde and Morris (1967, 526-7) describes two cases in which providing or offering to provide legal advice was severely punished despite the activities not fitting the terms of the statute ("habitual litigation tricksters who conspire with government clerks, trick ignorant country folk, or practice intimidation or fraud"). Bernhardt and Huang (1994) argue that the "litigation tricksters" provided valuable legal services to the peasants but that the magistrates viewed them as the source of their case overload and claimed that many of the cases they were responsible for were bogus.

[←53]

"In most instances, the judgments were pronounced on the spot at the court session before the prostrated litigants." (Bernhardt and Huang 1994, 154). For vivid fictional pictures of the interaction, see the Judge Dee books, crime fiction by Van Gulik set in ancient China.

Here again, there is a parallel with Roman law: "Litigation should be avoided like the plague," Cicero advised, even when the law was on your side. (du Plessis 1015, 63).

[←54]

Van Gulik 2007, 57-8.

Allee however reports, on the basis of cases from Taiwan in the 19th century, that “Men readily and women occasionally turned to the courts for redress when they felt there was no other recourse or when other options seemed less likely to bear fruit.” (Allee 1994, 147).

According to Bernhardt and Huang, litigation over minor conflicts was common despite attempts by district magistrates to discourage it, sometimes resulting in a large backlog of cases. “It was a common presumption throughout Fujian society that the disputes of litigants would not automatically be accepted for resolution at the official courts.” (1994, 94), “Judges generally preferred that civil cases be resolved out of court. This might entail refusal to accept a petition for technical reasons … . Sometimes a petition was refused because it was unsuitable for the particular dispute in question to be aired in public.” (1994, 139).

[←55]

Fairbanks 1971, 24.

[←56]

> “Any person who addresses and presents an information and complaint to an officer of government, containing direct criminal charges against a particular individual, without having inserted therein his (the informant's) proper name and family name, shall, although the charges should prove true, be punished with death, by being strangled at the usual period. Whenever any such anonymous information or complaint is discovered, it shall be immediately burned or otherwise destroyed; and if the person who accidentally finds such a document, instead of so doing, presents it to a magistrate or some other officer of government, he shall be punished with 80 blows. Any officer of government who, nevertheless, takes upon himself to act upon any such anonymous information and complaint, shall be punishable with 100 blows; …” (Staunton 1810, 360).
>
> Essentially the same rule appears in the Ming code. (Jiang 2005, 193).

[←57]

Bodde and Morris 1967, 189.

[←58]

Allee 1994, 5.

Staunton made much the same point two hundred years earlier:

> indeed there are no traces of any such distinction, as that of civil and criminal, in the jurisprudence of the Chinese; but it is probable, that as those causes which might be denominated civil, are, from the ordinary tenure of property and other circumstances, of comparatively small importance in China, they are not necessarily referred to the decision of the higher courts, and therefore, generally speaking, decided by the officers of the districts in which such disputes originate." (Staunton 1810, 360n).

[←59]

In the Ming code, Article 168 paragraph 4 (Jiang 2005, 105-6).

[←60]

The accusation had to be made in proper form. According to Allee, “In circumstances where litigation was undesirable or a better alternative such as outside mediation existed, this opinion was noted and the petition rejected. Mrs. Zhou’s first petition … was not accepted for this reason. To accept her lawsuit against her husband’s brothers would be “injurious to tranquility.” The court felt that lineage relatives not directly involved should mediate.” (Allee 1994, 160).

[←61]

See Huang (1996, 106) for examples of substatutes enforcing civil law buried in nominally criminal statutes.

[←62]

Huang 1996, 13.

[←63]

> “Despite the official ideology of absolute power for the ruler and his administration, which has led us to the impression of arbitrariness, in practice the Qing legal system routinely protected the legitimate claims of common litigants to property, contracts, inheritance, and old-age support.” (Huang 1996, 235).

[←64]

> “The major publication in the area of customary law was *Taiwan Shiho* [the Private Law of Taiwan] (1910), a six-volume work which reprinted and analyzed documents pertaining to land law, family law, personal property and commercial law … with seven volumes of reference materials … .” (Brockman 1980, 130n1).

[←65]

"Of the 346 statutes in the Code, only eight dealt at all with what is usually called commercial law." (Brockman 1980, 85). "The provisions of the Code relating to Mercantile Law are singularly few in number and narrow in range, and the published cases on the point are not very numerous. (Alabaster 1899, 541). On the other hand, Allee points out that "The Qing Code, for example, made no mention at all of contracts. … If we shift our focus away from legislation sanctioned by the central government, the law might be found less aloof from commerce. Compendia of provincial government regulations are one source of law that bear further examination in this regard. Those for Fujian include samples or models for various types of contracts as well as numerous provisions regulating commercial transactions." (Allee 1994, 313n9).

Fujian is the province which included Taiwan, which suggests that Brockman may have underestimated the degree to which the legal system supported contractual practice. But none of the cases that Allee discusses, including one that involved the division of familial property and hinged on written contracts, show the court ruling in terms of any detailed commercial regulations. The court tried to shift the dispute to arbitration by the extended family and, failing that, to find a peaceful solution to the conflict, even if it involved elements, such as a small payment to someone without a good legal claim to it, not justified by the law. (Allee 1994 Chapter 6).

[←66]

Benson 1998.

[←67]

Bernhardt and Huang 1994, 59-60.

[←68]

There were a few exceptions—most notably for a dye shop that would have cloth in it to be dyed.

[←69]

Interested readers can find a more detailed account in Brockman 1980.

[←70]

In this chapter I use the label “Romani” rather than “Gypsy.” One reason is that it is the label preferred by at least some Romani activists, who view “Gypsy” as pejorative. Another is that “Gypsy” has acquired a secondary meaning, a style of life rather than an ethnicity, a sense that does not include all Romani and does include some who are not Romani, such as the Highland Travelers.

[←71]

Weyrauch 2001, 28.

[←72]

. Ian Hancock (2010, Chapter 5) has offered an ingenious, if somewhat speculative, linguistic detective story, deducing the history prior to the arrival in western Europe from the Romani vocabulary. He argues that the group that originally left India were not farmers and had some military connection, since words of military relevance are derived from Indian languages while words relevant to farming are borrowed from other languages, presumably picked up en route. He dates their departure from India no earlier than the 11^{th} century, when the Indian languages lost their neuter gender, since the Romany dialects have no neuter and assign gender to words that earlier were neuter in the same pattern as the Indian languages. Mendizbata et. al. (2012), however, argue on the basic of genetic evidence for a departure from India about 500 A.D.

[←73]

Possibly the origin of “Egyptian” and hence “Gypsy” as labels for the Rom, although other explanations have also been offered. “Lesser Egypt” may have been a region in the Peloponnesus called Modon, ruled by Venice, where there was a Romani community. Alternatively, it could have been a reference to Asia Minor.

[←74]

Marushiakova and Popov (2007, 76) describes Romani in Moldavia in the eighteenth century as having a considerable degree of legal autonomy.

[←75]

Another valuable source is Ronald Lee, a Canadian Romani author and activist. The picture he gives of the Canadian Romani is broadly consistent with Sutherland's of the California Romani.

[←76]

According to accounts by observers, Rom rarely cheat or steal from fellow Rom. See sources cited in Leeson (2013, 284).

[← 77]

Sutherland (1975, 200), reporting on the view high-status Vlach Rom held of a low-status group.

"Staley and Janet [a local welfare official] worked together to get the community to stop shoplifting. They had found a place where they wanted to stay, and Staley and the other two leaders, John Davis and George Lee, made sure no one broke the law. Anyone who did had to leave town." (Sutherland 2017, 6).

For a similar approach by modern Shia Muslims:

"Q197: Is it permissible for a Muslim to steal from the unbelievers in their country [Europe] or to deceive them in taking their properties by employing means that are known to them (the unbelievers)?"

A: "It is not permissible to steal from their private and public properties, and likewise to damage or destroy them (properties), if this tarnishes the reputation of Islam and Muslims in general." (al-Seestani 2014). The response continues with additional restrictions.

[←78]

Marushiakova and Popov 2007, 82.

[←79]

For details see Weyrauch 2001, 3-7, Hancock 2010, 105-113.

[←80]

Sutherland 1975, 268. The description is of Vlach Rom in America.

[←81]

> “In general, the most accepted and common way to solve any problem arising between two families is for the families to leave the *kumpania* until they can come back in peace.” (Sutherland 1975, 50).

[←82]

For descriptions see Sutherland 1975, 134-137, 292-297 and Lee 1997. The former source describes a pattern with a judge or judges, a jury, and observers. As Lee describes it, there is a single chief judge agreed on by the parties, he selects assistant judges; all adult men can participate but the final decision is by the chief judge advised by the assistant judges. For a discussion of Romani societies in Eastern and Central Europe with and without the *kris*, see Marushiakova and Popov 2007.

[←83]

Sutherland 1975, 98.

[←84]

Sutherland 1975, 150.

[←85]

Sutherland 1975, 203.

[←86]

Marriage by elopement occasionally occurs among the Vlach Rom but is strongly disapproved of. Sutherland 1975, 230-234.

[←87]

This account is based on Chapter 3 of Weyrauch 2001, written by Thomas Acton, Susan Caffrey, and Gary Mundy. For the Icelandic feud system, see Chapter 10.

[←88]

This account is based on research done by Marti Gronforss, mostly from 1976-8, and reported in Chapter 7 of Weyrauch 2001.

[←89]

> “If the father-in-law breaks it up there is not much the kids can do about it unless in a few cases in the past the kids did elope, run away with one another, and got lost as long as a year from both parents from both sides and made a go of their marriage.”
>
> “They may have to disappear for a period of time until things cool down and they have had a baby. When the first baby is born, the *Xanamik* [parents and grandparents of the couple] make a greater effort to accept the marriage.” (Sutherland 2017, 14, 61. The first quote is by Romani John Marks, the second by Sutherland).

[←90]

Marushiakova and Popov (2007, 72), discussing their observation of groups in Central and Eastern Europe.

[←91]

Marushiakova and Popov 2007, 75-77. See also Fraser (1995, 50-51) for institutions elsewhere in which a feudal lord was entitled to revenues from the local Romani.

[←92]

> “Consider, for example, the royal decree of the Moldavian prince Michael Sutsu, dated 25 March 1793: ‘… every kind of quarrel among them [the Gypsies, the slaves of the prince] and its judgement so as giving and carrying out the sentence is in the power of their leaders, who are to find justice according to their own old customs [sic], and the governors and other dignitaries are not to interfere unless there is a death case’ (Potra 1939: 327—31).” (Marushiakova and Popov 2007, 76).

[←93]

Leeson 2013, 285-286.

[←94]

Sutherland 1975, 266.

[←95]

Orwell 1944, 122.

[←96]

For a much more extensive discussion of this issue in the context of problems faced by governments trying to control their populations, see Scott 1998.

[←97]

For a more detailed description of the ways in which Romani communities restrict information about themselves and control over them by the states within which they live, see Weyrauch 2001, 52-3. For a different example of a community enforcing its rules in violation of state law, sometimes by lethal force, see the account of how the Khap Panchayet, communal authorities, enforce restrictive marital rules among the Jat in Haryana in modern India in Chaudhry 2014.

[←98]

The Holocaust Encyclopedia contains a detailed account of the Romani holocaust..

[←99]

Sutherland 1975, 21.

[←100]

Sutherland 1975, 26.

[←101]

Sutherland 2017, 31.

[←102]

This chapter was inspired by a paper on the subject by Kelly Baxter, written for my seminar.

[←103]

The figures are for the Old Order Amish, from Wikipedia.

[←104]

The European Amish groups had mostly vanished, largely by merging with local Mennonite groups, by 1900; the last group with some distinctively Amish practices (foot washing and the use of hook and eye fasteners instead of buttons) merged with a Mennonite congregation in 1937. At present, Amish congregations exist only in the U.S. and Canada. (Hostetler 1980, 68).

[←105]

Amish houses are often designed to make it possible to seat a large number of people. (Egenes, 63). “They meet in a farmhouse, the basement of a newer home, or a shed or barn” (Kraybill 1993, 10).

[←106]

"Low" because the Amish regard humility as an important virtue.

One of the issues over which the Schwartzentruber Amish split off was their view that a congregation should not accept someone who was banned by the congregation in which he was baptized until he had first returned to his original congregation and made an appropriate confession. (Kraybill and Olshan 1994, 55).

[←107]

The Lancaster County settlement, the oldest of the large Amish settlements, consists of only one affiliation of Old Order Amish, although there are also congregations of two splitoff groups, Beachy Amish and New Amish. The exact definition of which groups do or do not count as Amish is arbitrary; for the purposes of this chapter I am not including groups that permit things forbidden by most Amish groups. The Beachy Amish, for example, permit ownership of automobiles and for my purposes are classified with the Mennonites and other related-but-not-quite-Amish groups. Chapter 13 of Hostetler 1980 provides a detailed description of the history of splits in one area over a period of about a century, resulting in twelve different Amish and/or Mennonite groups.

[←108]

Nolt and Meyers 2007, 7.

[←109]

In the Lancaster settlement, it is common for one Bishop to preside over two congregations (Kraybill 1989). Elsewhere, that appears to happen only during the transition period for a new congregation that has not yet selected a Bishop or a congregation that has lost its bishop and not yet chosen a replacement.

[←110]

Hostetler 1980, 112. Kraybill 1989, 110.

[←111]

Hostetler 1980, 111-113.

[←112]

> “Amish choices are thus based on a practical, worldly assessment resembling social engineering more than asceticism. They do not limit the use of automobiles, electricity, telephones, and tractors to seek suffering and redemption through hardship. Rather, decisions about accepting modern conveniences are based on the anticipated effect that a new product might have on the community.” Robert L. Kidder in Kraybill 1993, 217.

[←113]

Kraybill 1989, 92.

[←114]

A year for a death in the immediate family, six months for a grandparent, three months for an uncle or aunt, six weeks for the death of a cousin. Compare the similar terms but more severe mourning requirements under Imperial Chinese law.

[←115]

In some Amish groups, the minister can make the decision without first putting it to the congregation, but that is very much the minority practice. (Nolt and Meyers 2007, 69).

[←116]

Kraybill 1989, 112-113.

[←117]

"If conflict arises between Amish members, the community tries to cooperate in finding a peaceful settlement. If the church community takes a position, any member resisting it risks being excommunicated and shunned." Robert L. Kidder in Kraybill 1993, 215. Along similar lines, Yoder refers to the Prozess, or congregational court, handling a bankruptcy in Kraybill 1993, 38.

[←118]

Kraybill (1989, 137-140) provides a fairly detailed picture of *rumspringa* in the Lancaster County settlement.

[←119]

In particular the Swartzentruber Amish.

[←120]

Based mostly on personal communication with Thomas J. Meyers, who describes the situation in northern Indiana, where there are more than 130 congregations in a common affiliation with nearly identical *ordnungen*, as one where the congregation is, in effect, a territorial sovereign. The same situation seems to exist in the Lancaster County settlement. But Meyers describes a different community, containing 5 distinct affiliations not in fellowship with each other, with in some cases overlapping church districts. And there may be significant variations of *Ordnung* among districts in the same affiliation. (Nolt and Meyers 2007, 53).

[←121]

According to Kraybill (1989), 274n26.

[←122]

“Families began to move to other settlements or regroup on the basis of a stricter or milder discipline.” Hostetler (1980, 64), describing events in the late eighteenth century.

[←123]

Kraybill 1989, 83-85.

[←124]

The usual Amish term for non-Amish.

[←125]

Kraybill 1989, 219.

[←126]

"Of all Amish young men who were drafted during World War II, only 4 percent went into military service." (Hostetler 1980, 293).

[←127]

Kraybill 1993, 69.

[←128]

Old Order Amish Steering Committee 1972:1.

[←129]

· Formed in 1966-7 to persuade the Selective Service to approve appeals by Amish conscientious objectors who wanted farm work instead of the hospital work to which they were assigned. It went on to argue on behalf of the Amish with various departments of the federal and state governments over a variety of issues. For details, see Olshan 1990.

[←130]

"In some instances, local board decisions were reversed on the same day they were made by quick intervention from national authorities responding to calls from Amish leaders. One leader described several episodes where "a quick call on a public phone to my friend General Hershey," the Selective Service director, produced same-day results. Robert L. Kidder in Kraybill 1993, 224-5.

[←131]

Kraybill 1989, 131

[←132]

Kraybill 1989, 120-129. Similar compromises were worked out in some other states.

[←133]

Kraybill offers a list of areas where modernity capitulated to the Amish rather than the Amish capitulating to it: Alternatives for conscientious objectors, exemption from high school attendance, waiver of school building requirements, waiver of minimum wage requirements for teachers, Social Security exemption for self-employed, workmen's compensation exemption for self-employed, unemployment insurance exemption for self-employed, waiver of hard hat regulation, alteration of zoning regulations (by townships), horse travel on public roads, avoidance of Sunday milk pickup. (Kraybill 1989, 245).

Some of these were concessions at the federal level, some state or local; the last item in the list was a concession by private companies.

[←134]

Kraybill and Olshan 1994, Chapter 9 (by Kraybill and Nolt).

[←135]

"When asked about the ability of the church to hold its members, one person said: "That's easy to answer, it's the *Meidung*. If it weren't for shunning, many of our people would leave for a more progressive church where they could have electricity and cars." (Kraybill 1989, 117).

[←136]

"Amish life is fused by informal ties anchored in family networks, common traditions, uniform symbols, and a shared mistrust of the outside world." (Kraybill 1989, 93).

[←137]

Hostetler, who has written extensively on the Amish, grew up Amish but chose not to join the church as an adult.

[←138]

I asked one author with whom I was corresponding whether this view reflected the fact that the authors were sociologists, with political biases that made them suspicious of modern America. His response was that the actual reason was that they were all Anabaptists and so shared, in a somewhat weaker form, the Amish view of worldly corruption.

[←139]

Responsa were replies by legal experts, initially the *geonim*, the heads of the Babylonian academies, to questions sent to them. Elon quotes an estimate that several hundred thousand survive.

[←140]

One exception may be the Khazar kingdom, where the royalty and nobility are said to have converted to Judaism sometime between 740 and 920 A.D.

[←141]

From the enactments of Valladolid (1432). Elon 1994, 2:803.

“As we have seen, the Spanish Jewish center enjoyed wide criminal jurisdiction—even including the power to inflict capital punishment—over a long period; and for a limited time such jurisdiction existed also in Poland … .” (Elon ibid, 697). See also Kaufman 1896.

This resembles a feature of Chinese law. Reporting one’s father’s crimes to the Imperial authorities resulted in the son being punished—by the Imperial authorities. My interpretation, in both cases, is that the higher level authority was willing to give up some of its direct power in order to maintain the power of the lower level authority, the Chinese extended family or Jewish community.

[←142]

I am using “legal authorities” for what Elon refers to as “halakhic authorities,” individuals considered to be expert in Jewish law. The term is not limited to those with an official position, although many, perhaps most, halakhic authorities were judges, members of the Great Sanhedrin, high priests, or rabbis. As will become clear, a good deal of Jewish law, especially after the destruction of the Temple and the Kingdom of Israel, came out of a reputational system rather than a system of formal authority.

[←143]

Maimonides (1949b Book XIV, Treatise 3, chapter 3, 143-150) discusses the issue of the rebellious elder, a legal authority who insists on judging cases according to his view of the law after it had been rejected by the majority. He argues that almost any mistaken ruling could lead an innocent person to violate Jewish law, for instance by marrying a woman who had been betrothed with money awarded in a mistaken judgement, making the money, hence the betrothal, hence the marriage, hence intercourse with the supposed but not actual wife, illegitimate. He concludes that practically any refusal to accept the view of the majority could be treated as a capital offense. Different authorities disagreed as to whether the court was obliged to execute the rebellious elder or had the option of not doing so.

[←144]

Account by Harold Feld (personal communication) based on the *Talmud*, Rosh Hashannah Chapter 2:8-9.

[←145]

The story is discussed in Elon 1994,1:261-3, 3:1068-9.

[← 146]

Precisely what the implication of this part of the story is intended to be is unclear, at least to this reader. A more detailed account and discussion.

[←147]

This appears in both the Babylonian Talmud and the Jerusalem Talmud. It may occur to those suspicious of history written by the winners—the Talmuds were produced after the triumph of Hillel over Shammai—to wonder how it is that a divine voice in support of Eliezer is rejected with “It is not in Heaven” but a divine voice in favor of Hillel settles the matter. The Tosafists explained the contradiction on the basis that a divine voice could not change the law, since that was determined by the majority, but could confirm an interpretation of it. That does not explain why the majority did not change its vote, and so the law, in response to divine advice.

Elon defends the final outcome on the grounds that it produced uniformity in what the law was but preserved multiple opinions of what it should be, thus allowing future improvements. (Elon 1994, 3:1067).

[←148]

Jewish examples would include Shabbatai Tzvi in the 17th century, who claimed to be the Jewish Messiah, and the Ba'al Shem Tove, founder of the Chassidic movement in the eighteenth century. A similar Islamic figure, viewed by some as a saint, by others as a charlatan, was Hallaj (Husayn ibn Mansur 858 - 922 AD). For a sympathetic view, see Schroeder 1955, 522-554. For an account of him as a fraud, see Margoliouth 1922, 91-93.

For a thirteenth-century Muslim comment on the issue:

> When we see someone in this Community who claims to be able to guide others to Allah, but is remiss in but one rule of the Sacred Law—even if he manifests miracles that stagger the mind—asserting that his shortcoming is a special dispensation for him, we do not even turn to look at him, for such a person is not a sheikh, nor is he speaking the truth, for no one is entrusted with the secrets of Allah Most High save one in whom the ordinances of the Sacred Law are preserved. (Muhyiddin ibn al-Arabi, *Jami'karamat al-awliya'*, quoted in Al-Nawawi 2009, 164.)

Maimonides:

> "if a man will arise, whether from among the Gentiles or among the Jews, and make a sign or wonder and say that God sent him to add or delete a commandment or to give any of the commandments an interpretation that we have not heard from Moses…, he is a false prophet." Quoted in Elon 1994, 264 from *Mishnah Torah*, Tesodei ha-Torah 9:1.
>
> "The *sifra* comments as follows on the last verse in the Book of Leviticus (namely, "These are the commandments that the Lord gave Moses for the Israelite people on Mt. Sinai"): 'These are the commandments'—a prophet is no longer authorized to introduce anything new." (Elon 1994, 1:243).

[←149]

A partial translation of the Shulchan Arach.

[←150]

Elon 1994, 3:1317-19.

[←151]

> "Within a few years, *Bet Yosef*, together with the *Shulhan Arukh*, became the authoritative and binding code of the *Halakhah* throughout the eastern diaspora except for Yemen, where the Jewish community generally followed the law as set forth by Maimonides." (Elon 1994, 3:1373)

[←152]

Elon 1994, 3:1282-3.

[←153]

William Gelley, personal communication.

[←154]

Bal tigra (“you shall not take away”), the prohibition against taking away, *Bal tosif* (“you shall not add”) the prohibition against adding to the commandments (*mizvot*) set forth in the *Torah*. Both in Deut. 4:2, 13:1.

[←155]

The Sadducees rejected the idea of the oral Torah, holding that law was derived only from the written text. They lost out to the Pharisees, disappearing by about 70 A.D. Their position was later revived by the Karaites.

[←156]

Maimonides 1949b, Treatise 3, chapter 7, 157-161.

[←157]

"There never has been a boy declared to be a disobedient and rebellious son, and there never will be. Why then was the law written? So that you may study it and receive a reward… ." (Babylonian Talmud: Sanhedrin 71A).

[←158]

Deuteronomy 17:8-11. “You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left.” Here “they” are taken to be the sages, the halakhic authorities.

One response to a similar argument used to justify communal legislation in the 14th century was to distinguish between the power to interpret ambiguity in *Torah* and the power to set aside a rule of the *Torah*. It was a good point, given that *Torah* explicitly forbade the latter activity, but raised about fifteen hundred years too late.

[←159]

Hora'at sha'ah (“a directive for the hour”) a temporary legislative measure permitting conduct forbidden by the Torah when such legislation is a necessary precaution to restore people to the observance of the faith. Some legislation originally adopted or justified as a temporary measure has become an established part of Jewish law.

[←160]

Le-migdar milta (“to safeguard the matter”) the principle that authorizes the halakhic authorities, as a protective measure, to adopt enactments in the field of criminal law that prescribe action the Torah prohibits.

[←161]

Shev ve-al ta'aseh ("sit and do not do") a category of legislation directing that an affirmative precept, obligatory according to Biblical law, not be performed.

[←162]

Elon 1994, 2:511-513, 561.

[←163]

See Maimonides 1951, Chapters VI and VII. A description of some of the ways of evading the restriction and attempts to limit them.

[←164]

For example, “It is a time to act for the Lord, for they have violated your Torah.” (Psalms 119:126) was interpreted as authorizing the violation of Torah when it was necessary to act for the lord.

The best defense of such interpretation I have seen, from inside the belief system, was provided by an online correspondent: “The Perfect One Who made the Law also made the loopholes.”

[←165]

Much of this parallels later developments in Islamic law. There too a legal code nominally built on an unchangeable text, the Koran and *Hadith*, was the product of extensive interpretation supplemented by rules created by secular authorities.

[←166]

Elon 1994, 1057-1072, in particular 1060.

[←167]

Mishnah. Baba Qamma 3:1. Neusner 1988, 506.

[←168]

Babylonian Talmud, Tractate Bava Kamma 27a-b. Neusner 1992, 114.

[←169]

Hefker Beit Din Hefker.

[←170]

Elon offers a third basis, the argument that the community had inherited the authority of the no-longer-existing king of Israel, but Gelley argues that the source he gives was referring to Noahide law, law that applied to all descendants of Noah, not Jewish law. (Personal communication from William Gelley).

[←171]

Elon 1994, 2:714.

[←172]

Elon 1994, 2:707-8.

[←173]

Elon 1994, 2:737-9.

[←174]

Maimonides (1949b, treatise 5, chapter 3, 214) argues that all of these were within the power of the king of Israel.

[←175]

Instead of giving a ring, the marriage could be effected by sexual intercourse, an option that was generally disfavored—and raised a problem for the approach adopted by some communal authorities and described below. For their approach to dealing with it, and the *issur*/*mammon* issue more generally, see Elon 1994, 2:851-2.

Marriage under Jewish law involved two steps. The first, usually translated “betrothal” or “espousal,” was a binding agreement effected by a writ, money, or intercourse, after which the couple were considered married and separation required a *get*, a bill of divorce. The wife was expected to remain in her father’s house and not have intercourse with her husband until the marriage, which occurred when she entered the bridal chamber of his house and had intercourse with him. For details see Maimonides 1972 Treatise 1.

[←176]

Elon 1994, 2:676-7, 712, 846-8, 859, 878.

[←177]

I am oversimplifying a little. A compelled divorce, like a contract under duress, was not legitimate and so did not take effect. But that was held not to apply to legal compulsion.

[←178]

Signs of puberty were defined as two public hairs, although there were alternative forms of evidence. A girl became a *naara*, maiden, no longer a child but not yet with full legal rights of adulthood, at twelve years and a day (and signs of puberty). Six months later she became an adult (*bogeret).* Her father no longer had the right to betroth her or accept an offer of marriage on her behalf.

[←179]

Casanova 1970, 3: 271.

[←180]

For the same issue in medieval England:

> Whereas rape appeals were brought only by the aggrieved woman herself, ravishment actions were brought by husbands, fathers, and lords. Ravishment was the tort of abducting and/or raping a woman, and such claims became common around the turn of the fourteenth century. Such suits sometimes arose out of a woman's marriage contrary to the will of her father or her desertion of her husband in order to abscond with a lover. In such situations, vesting the right to bring ravishment actions in fathers and husbands gave men additional power over women. In contrast, the requirement that the female victim bring a rape appeal made it nearly impossible for an appeal to be used to thwart her choice of husband or lover. (Klerman 2002, 313*)*.

[←181]

I am ignoring the distinction between a biblical and a rabbinic oath and between a situation where the defendant loses his case by being unwilling to swear and one in which he is punished for refusing to swear but does not lose the case.

[←182]

> “He who is suspect with regard to an oath may not be subjected to an oath … . … Also, he who is incompetent as a witness by reason of a transgression he has committed, whether the incompetence be pentateuchal, as in the case of usurers, those who eat meat of animals not slaughtered in accordance with the rules of the ritual, or robbers, or whether the incompetence be Rabbinical, as in the case of dice players or pigeon flyers, is deemed suspect with regard to an oath and may not be subjected thereto.” (Maimonides, 1949a, Treatise 4, Chapter II, 196).

[←183]

They may also be reluctant to swear on the grounds doing so is a frivolous invocation of God's name.

[←184]

My description simplifies and merges elements of two versions of the fraud, one initially reported on the Volokh Conspiracy blog, the other the subject of a lawsuit against the perpetrators.

[←185]

Maimonides 1972, Treatise I Chapter IX part 6, 53.

[←186]

Maimonides 1972, Treatise III Chapter VIII part 10 pp. 322-323.

[←187]

In each of these cases, Maimonides provides a detailed discussion covering a wide range of variant situations; I am reporting only on the simplest version of the relevant rules.

[←188]

Unless it was a sheep, taken and butchered, for which he owes four times the value, or an ox, for which he owes five times—in both cases due to text in the Torah. A minor or a slave who steals owes only the value of what he stole and a minor who steals something and loses it owes nothing. Both the minor and the slave, however, are subject to corporal punishment.

[←189]

One explanation might be that the probability of apprehending the thief is lower, hence the punishment must be higher to deter. Alternatively, the fact that something was taken openly might imply that the taker believed he had a claim to it, making the case a dispute over ownership rather than a deliberate robbery.

[←190]

A tort can be intentional, but we usually treat a deliberate attack that wounds as a crime. Maimonides includes it in the same book as an injury due to a straying ox or the injury done by a man who is blown off a roof by the wind and wounds someone or damages something as a result.

[←191]

The treatise contains an extensive discussion of the rights of the (in Maimonides time and for the previous millennium nonexistent) king of Israel. Maimonides writes: "…so that this compendium would include all the laws of the Torah of Moses, our teacher, whether or not they have practical relevance in this time of exile." (Maimonides 1971, Introduction, 1b).

"Maimonides aspired to restore the scope of the *Halakhah* to its ancient glory—as in the Mishnah—and included in his code (the *Mishnah Torah*) the entire *corpus juris* of Jewish law. His work, however, remains an isolated effort; both before and after him, codification has been limited to the portions of the law that have practical relevance." (Elon 1994, 3:1095).

Some passages explicitly anticipate the revival of the kingdom of Israel. (Maimonides 1949b treatise 5 chapter 11, 238-40).

[←192]

Maimonides 1954, 199-200.

[←193]

I am oversimplifying; there were three different sorts of unintentional killers and the rule I describe applied to only one of them.

[←194]

Another example: “Because once the death sentence has been passed on him, he is accounted as dead, and one who slays him is not liable.” (Maimonides 1949b treatise 4 chapter 7, 160). That looks like outlawry in the Icelandic system.

[←195]

For details see Maimonides 1949b, 230-238.

[←196]

"Some, in particular younger Muslim scholars, tend to use '*Shari'a*' as a name for the divine will as only God knows it; an abstract divine law only perceived by Him. … what the jurists have on the basis of this Revelation formulated though their reason is only 'law' as science, *fiqh.*" (Vikør 2005, 2). This is how I use the terms in this chapter, since that seems to me the best way of making sense of them. As Vikør makes clear, not all Muslim scholars agree.

[←197]

For example, charging interest (*riba*) is forbidden but scholars have disagreed as to whether it is punishable by law or only by God in the afterlife.

[←198]

Schacht (1986 Chapter 10, 69-75) argues for the closing of the gates, but his position was challenged by Wael Hallaq in Hallaq 1984 and his view, that complete closure never happened, seems now to be generally accepted. By Hallaq's account, it was generally agreed by sometime in the fourth/tenth century that no more schools of law would be founded, there being no more *mujtahids* of the ability of the eponymous founders, but there remained many *mujtahids* capable of doing *ijtihad* within the four existing schools. Sometime in the late fifth/eleventh early sixth/twelfth century it began to be debated whether *mujtahids* could become extinct and *ijtihad* thus impossible, and in later centuries some scholars argued that it had happened while others denied it.

> After the fourth/tenth century, legal doctrine had reached an exquisite level of detail and sophistication, and one would be at pains to find a case entirely without precedent. Yet, the jurists needed legal theory after this time no less than they had before. Just as many elements of it were employed to construct early law, it was summoned in later periods to adjudicate between the many legal opinions that it had itself produced over time. (Hallaq 2009, 76).

[←199]

Al-Nawawi 2009 is a modern translation of a thirteenth century summary of the law with notes aimed at modern Muslim readers. Chapter 8, in the process of explaining why deducing the law from Koran and Hadith is a hard problem that requires scholarly expertise, provides examples of how the source material can be interpreted and misinterpreted.

[←200]

> "The fundamental role of the jurisconsult [*mufti*] in constructing and replenishing the body of substantive and procedural law is underscored by the fact that the legal theorists were insistent throughout the centuries upon equating the mujtahid with the jurisconsult, not with the judge. True, unlike the magistrate's decision, the jurisoncult's legal opinion was not binding, but his opinion, by virtue of its having emanated from a highly qualified authority became part of, and indeed defined, the law. It was the common perception in the legal profession that the judge's decision is particular (*juz'i*) and that its import does not transcend the interests of the parties to the dispute, whereas the jurisconsults' *fatwā* is universal (*kulli*), and applies to *all* similar cases that may arise in the future." (Hallaq 1997, 154).

[←201]

> “The first government appointment of a mufti appears to have been that made in Damascus with the creation of Dar al-‘Adl, House of Justice, in the latter part of the seventh /thirteenth century, or the first part of the eighth /fourteenth century.” (Makdisi 1981, 199).
>
> “As the state grows stronger it begins to appoint *muftis* to particular courts. … We know that the Mamluks, who in many ways were intermediaries between the medieval and the Ottoman periods, did appoint *muftis* at some of the major mosques, while the rest of the country still had ‘self-appointed’ muftis.” (Vikør 2005, 145).

[←202]

Hallaq 1997, 145.

[←203]

Schacht 1986 Chapters 4-11. The argument was earlier made by Ignatz Goldziher.

[←204]

Thus Wael Hallaq criticizes Schacht while arguing for a position that appears, at least to this non-expert observer, to differ from his only in detail:

> However, mounting recent research, concerned with the historical origins of individual Prophetic reports, suggests that Goldziher, Schacht and Juynboll have been excessively skeptical and that a number of reports can be dated earlier than previously thought, even as early as the Prophet. These findings, coupled with other important studies critical of Schacht's thesis, go to show that while a great bulk of Prophetic reports may have originated many decades after the Hijra, there exists a body of material that can be dated to the Prophet's time. (Hallaq 1997, 2-3).

For context, al-Bukhari, one of the authorities for authenticated hadith, lists 7275 of them, purportedly culled from 600,000 candidates. Another authority, Muslim, included 9200, culled from 300,000.

In a later work, Hallaq writes:

> The dramatic increase in Prophetic authority at the turn of the second/eighth century involved projecting on Muhammad post-Prophetic *sunan* as well. Legal practices and doctrines originating in various towns and cities in the conquered land, and largely based on the Companions' model, began to find a representational voice in Prophetic Sunna. The projection of the Companions' model back onto the Prophet was accomplished by a long and complex process of creating the narrative of *hadith.*" (Hallaq 2009, 45).

Which sounds close to Schacht's position.

[←205]

There were several other Sunni schools that eventually died out.

[←206]

For details see Donaldson 2000, 60-63.

[←207]

The situation with regard to the Shia schools of law is more complicated. Some Sunni legal scholars consider Shia heretics, and similarly in the other direction. There are also substantial divisions among the Shia.

[←208]

The Koran established three tolerated religions in addition to Islam: Judaism, Christianity and a third usually held to be the Sabeans, inhabitants of a Semitic kingdom in what is now Yemen, mentioned in both the Bible and the Koran. After the conquest of Persia, Zoroastrianism was generally held to be an additional tolerated religion.

[←209]

"The most normal situation is that if plaintiff and defendant belong to different *madhabs*, then they should use that of the defendant. However, a losing party may try to bring his case up at the court of a different *madhab*, if there is one in the town. But as this might lead to a conflict of competence between the courts of the schools, it would in most cases be difficult to get a judge from one school to accept a case that had already been decided by a colleague from another. …

Instead the losing party could go to a *mufti* and ask whether the verdict is correct. The *mufti* cannot then evaluate the evidence of the case … but he can give his view on the way the law was used, and declare this to be faulty. That would not lead to any automatic reversal or reopening of the case, but it would be a good argument for the party to approach another judge for this purpose. Such a new evaluation should only occur when the first judge has died [or been deposed] … but it may also occur that old cases are taken up again in new courts while the first judge is still in office." (Vikør 2005, 151).

"… the doctrine that proclaims judicial review and outright repeal of an existing legal decision to be valid when it can be proven that the decision stands in violation of the dictates of scripture and/or of consensus. … It seems that the only other ground for repealing an earlier decision is discovering that a mistake has occurred in determining the evidence on the basis of which the decision was reached." (Hallaq 1997, 156).

Both are being distinguished from a disagreement about *ijtihad*, the derivation of legal rules from the textual sources, which is not appealable.

[←210]

In theory, Islamic law, like the 18th c. English criminal law described in chapter 15, provides for no public prosecutor; every Muslim has the right to act as a private prosecutor and cases may be settled out of court without ever involving the *qadi*. But the *Siyasa Shari'a* courts made possible something more like ordinary criminal law, with cases initiated by state appointed authorities.

[←211]

The *waqfs* I discuss here were trust funds dedicated to religious purposes. There were also *waqfs* dedicated to purposes of secular welfare, such as the maintenance of public fountains, and others that were family foundations, money provided by one generation to be under the control and spent for the benefit of their descendants.

[←212]

Modern Saudi Arabia is to some degree an exception to this pattern, with independent legists. There is a dominant (Hanbali) school of law but some options for having controversies adjudicated under the rules of other schools.

[←213]

My account of Ottoman institutions is based mostly on Gerber 1994.

[←214]

I am offering no answer to the interesting question of what those causes were.

[←215]

. Schacht 1986, 176.

[←216]

According to Ibn Taymiyah, writing in the late 13th or early 14th century, up to his time *Zina*, unlawful intercourse, had never been proved by the required four witnesses.

[←217]

This restriction applies only to Muslims. Non-Muslims are permitted to make, transport, and consume wine.

[←218]

Schacht 1986, 176.

[←219]

> “There is a strong tendency to restrict the applicability of *hadd* punishments as much as possible, except the *hadd* for false accusation of unlawful intercourse, but this in turn serves to restrict the applicability of the *hadd* for unlawful intercourse itself. The most important means of restricting *hadd* punishments are narrow definitions. Important, too, is the part assigned to *shubha*, the ‘resemblance’ of the act which has been committed to another, lawful one, and therefore, subjectively speaking, the presumption of bona fides in the accused.” (Schacht 1986, 176).

[←220]

According to Vikør, “a highway robbery that did not lead to murder is treated as theft.” (Vikør 2005, 283)

[←221]

Schacht 1986, 177-8. In addition to making a killer subject to *diya* or retaliation, homicide also creates the obligation to free a believing slave or fast for two months. For a detailed account of the rules of *Jinayat*, see.

[←222]

Schacht 1986, 185. Vikør estimates that 1000 dirhem corresponded to five to ten years income at an average level, not far from my estimate for Icelandic wergeld in chapter 10 (Vikør 2005, 289). In modern Saudi Arabia, *diya* for a deliberate murder is over a hundred thousand dollars.

[←223]

Schact 1986, 186. A similar formula appears in Maimonides, although in that case it is the amount by which the victim's value would be reduced if he were being sold as a slave. (Maimonides 1954, Treatise IV Chapter 1).

[←224]

Also the Jewish rule, to judge by Maimonides' analysis of the problem of convicting a murderer who is suffering from a fatal disease.

[←225]

Non-Muslim witnesses are acceptable against a non-Muslim defendant but not against a Muslim defendant.

[←226]

I use the romanization “diya” in this chapter, “dia” in the Somali chapter, in each case following the usage of my sources.

[←227]

"The *'Akila* consists of those who, as members of the Muslim army, have their name inscribed in the list … and receive pay, provided the culprit belongs to them; alternatively, of the male members of his tribe (if their numbers are not sufficient, the nearest related tribes are included); alternatively, of the fellow workers in his craft or his confederates; … . This institution had its roots in the pre-Islamic customary law of the Bedouins, where the culprit could be ransomed from retaliation by his tribe, … . … the whole institution fell into disuse at an early date." (Schacht, 186) "… the principle is that no individual should be asked to pay more than four dirhem, so if a death has ensued, 2,500 paying colleagues have to be found. If this is not possible the state may intervene or the person who made the accidental killing will have to take on the loss after all." (Vikør 2005, 289).

According to my Saudi students, members of an *'Akila* share a common last name and, like members of the Irish kin groups discussed in a later chapter, descent from a common ancestor in the male line. Like the Somalis, the Saudis know their male line genealogy for many generations—ten in the case of one of my students to whom I put the question. The size of the clan is typically a few thousand males, similar to the size of a dia-paying group. A student paper on the *'Akila*.

[←228]

"For the more casuistical Shafi'i school, any act of apostasy was fatal, even from, say, Judaism to Christianity." (Forte 1999, 161). But that would clearly not apply to conversion to Islam.

[←229]

The *zakāt* consists primarily of a wealth tax of 2.5% on gold, silver, and commodities for trading, an income tax of 10% on crops grown in naturally watered land and of 5% on crops grown in irrigated land. (Al-Nawawi 2009 Chapter 4).

[←230]

Maimonides 1972 Treatise 1 Chapter XIV, 87.

[←231]

Al-Misri 1991 m5.2, 525.

[←232]

Maimonides IV Treatise 1 Chapter XIV, 89.

[←233]

Under Romani customary law (Chapter 2), if a wife refused intercourse with her husband the husband's kin are entitled to return her to her kin and demand a refund of the bride price paid for her. "… she wouldn't sleep with him as a wife, only as a sister. … So I got in touch with her father and said I wanted my money back." (Sutherland 1975, 293).

[←234]

Both, for instance, take it for granted that marriage and intercourse will sometimes occur prior to puberty, and discuss the legal implications.

[←235]

Maimonides 1972, 87.

[←236]

Al-Misri 1991, 538.

[←237]

Elon 1994, 946.

[←238]

Elon 1994, 883-5.

[←239]

Elon 1994, 1064.

[←240]

Schroeder 1995, 281-2.

[←241]

Khawam 1980, 153-154, not verbatim.

[←242]

There is some dispute as to the exact meaning of the words used, but this is the usual reading. Questioning the exact meaning of words is one tactic for working around such fixed points.

[←243]

The first ten amendments, commonly referred to as the bill of rights, were passed in 1789, two years after the Constitution was ratified.

[←244]

There has been dispute as to how much of the Bill of Rights is incorporated. *McDonald v. Chicago*, 561 U.S. 3025, 130 S.Ct. 3020 (2010) was the first case in which the Supreme Court held that the Second Amendment was incorporated via the 14th Amendment and so applied to state governments as well as to the federal government.

[←245]

In the case of Jewish law, the ban only applied to loans to fellow Jews.

[←246]

This is only a partial list of the required conditions given in Maimonides 1949b Treatise 3, Chapter 7.

[←247]

United States v. Miller, 307 U.S. 174 (1939).

[←248]

One exception was *United States v. Lopez*, which held that the interstate commerce clause was not a sufficient basis for a federal law that made it unlawful for any individual knowingly to possess a firearm at a place that he knew or had reasonable cause to believe was a school zone.

[←249]

Described in a news story.

[←250]

1 All the commandments that were given to Moshe at Sinai were given together with their interpretation, as it is written “and I will give thee the Tables of Stone, and the Law, and the Commandment” (Exodus 24,12). “Law” is the Written Law; and “Commandment” is its interpretation: We were commanded to fulfill the Law, according to the Commandment. And this Commandment is what is called the Oral Law.

2 The whole of the Law was written down by Moshe Our Teacher before he died, in his own hand. He gave a scroll of the Law to each tribe; and he put another scroll by the Ark for a witness, as it is written “take this book of the Law, and put it by the side of the Ark of the Covenant of the LORD your God, that it may be there for a witness against thee” (Deuteronomy 31,26).

3 But the Commandment, which is the interpretation of the Law—he did not write it down, but gave orders concerning it to the elders, to Yehoshua, and to all the rest of Israel, as it is written “all this word which I command you, that shall ye observe to do …” (Deuteronomy 13,1). For this reason, it is called the Oral Law.

(Maimonides 2011—the introduction to the *Mishnah Torah*)

[←251]

To answer this question, I wrote several articles and a book about pirates and their law (Leeson 2007b, 2009a, 2009b, 2009c, 2010a, 2010b). This chapter is based on that work.

[←252]

See Cordingly 2006.

[←253]

i.e. pounds.

[←254]

In Baer 2007.

[←255]

Anon 1723, 14.

[←256]

MSNBC 2005.

[←257]

MSNBC 2007.

[←258]

Varella 1999, 141.

[←259]

Irwin 1980.

[←260]

Trammell. 2009, 746-771.

[←261]

Skarbek 2014.

[←262]

Bunker 2000, 132, 145.

[←263]

Trammell 2009, 763-764.

[←264]

Trammell 2009, 755.

[←265]

Trammell 2009, 766.

[←266]

Bunker 2000, 56.

[←267]

Trammell 2009, 763.

[←268]

Some legal systems, such as the Somali, are non-governmental but not embedded, since there is no government above them with the power to enforce its rules.

[←269]

Some historical accounts, however, make it sound as though, early on, some tried to enlist outsiders in their internecine feuds (Weyrauch 2001, 142-145).

[←270]

Sutherland 1975 pp. 259-260. “When they must be in non-Roma places, Roma generally avoid touching as many impure surfaces as possible, but, of course, prolonged occupation of a non-Roma place such as a hospital or jail means certain impurity. In this case the person tries to lessen the risk by using disposable paper cups, plates, and towels—that is, things not used by non-Roma.” (Sutherland 2017, 72).

[←271]

For the modern version see Sutherland 2017, 51. For evidence that the view is not entirely unjustified, 86-94.

[←272]

Sutherland 1975, 99.

[←273]

The rules do not apply to children before the age of puberty, so this would be a problem mostly for older children.

[←274]

For details see Hancock 2010, 134-5. For the gradual breakdown of Vlach Rom institutions see Sutherland 2017.

[←275]

Hancock (2010, 128-129) estimates a million overall, about two-thirds of them Vlach Rom, stricter in maintaining social distance from others than other Romani groups, hence less willing to risk pollution or acculturation by sending their children to non-Romani schools. The major Vlach Rom dialects are mutually intelligible, unlike some other dialects of Romani, so the Vlach Rom would seem to be the group most able to imitate the Amish solution to the problem. The Romanichals, the next largest group, speak a language that is not mutually intelligible with the Vlach dialects, English with many loan words from Romani. The smaller Romani groups are to a considerable extent geographically concentrated, however, which should make establishing schools easier (Hancock 2010, 130-131).

[←276]

Hancock 2010, Chapter 9.

[←277]

The Swiss Amish speak a German dialect related to Schweizerdeutsch while the High German Amish speak Pennsylvania Dutch, a German dialect that developed in Pennsylvania out of multiple immigrant dialects.

[←278]

"Although very few in number, defecting young Amish in the "lowest" ranks tend to make abrupt changes like joining the army." (Hostetler 1980, 290). The context is a discussion of groups varying from low to high in a single community in Pennsylvania.

[←279]

"Young people run off together when they want to get married and these issues of purity and morality are never brought to a *kris*." Sutherland 2017, 103.

[←280]

Sutherland 2017, 99.

[←281]

Sutherland 2017, 45, quoting a communication from Ian Hancock.

[←282]

Sutherland 2017, 104.

[←283]

Sutherland 2017, 105.

[←284]

Sutherland 2017, 8.

Seven years before Sutherland's second book was published I put up a blog post arguing that the tolerance of North American societies was a threat to the maintenance of Romani culture.

[←285]

For a detailed account of supra-congregational structures in the Lancaster settlement, the oldest of the large settlements, see Kraybill 1989 pp. 86-90.

[←286]

> “It is the Committee's definite concern that one small group does not upset the general school system appreciated by many and approved by the United States Supreme Court.” (Old Order Amish Steering Committee 1980, 42).

[←287]

> "Some people may think that the Committee is trying to run the churches but this should not be so. *The Committee is only the voice of the churches combined"* (Old Order Amish Steering Committee 1972, 58; emphasis in original).

[←288]

For an extended discussion of the history of the Steering Committee and the tension between its structure, hierarchical and bureaucratic, and the decentralized Amish culture, see Olshan 1990.

[←289]

While there is no political structure above the *kumpania*, the *kris* can be and is used to resolve feuds that cross *kumpania* boundaries.

[←290]

Sutherland 1975, 12, 110-113.

[←291]

> “Earlier, during our fieldwork in the 1980s in Slovakia (among the Lovari and Bougešti), we witnessed attempts of such institutionalisation when the regional respected clan leaders tried to govern their communities by accepting the role of Roma representatives in front of the majority authorities… .” (Marushiakova and Popov 207, 86-87).

[←292]

Sijercic 1999, an interview with Ronald Lee, Director of Advocacy in the Roma Community and Advocacy Centre, Toronto.

[←293]

As this example suggests, the line between embedded and polylegal systems is a fuzzy one; diaspora Jewish communities with delegated legal authority could be classified either way.

[←294]

That meant was that while the princes were in allegiance to the king their land was not held from him, hence not under English law.

[←295]

> "… the racial divide between the Welsh and the English remained significant with regard to what procedure was to be used in certain personal actions, with regard to whether property was to be inherited and with regard to whether lands were freely alienable, … ." (Watkins 2007, 113).

[←296]

> “Areas under the jurisdiction of the Norman laws were often divided into Englishries, where the Norman customs obtained, and Welshries, where the population continued to live according to their native laws at least insofar as private law rights and duties, such as those relating to landholding, succession and family matters, were concerned.” (Watkins 2007, 81).

[←297]

Watkin 2007, 118-119, 121-2.

[←298]

This seems to have been the rule in some Muslim polities. In an analogous English context, the plaintiff decided what court a dispute went to. The income of the judges came from judging cases, giving them an incentive to be pro-plaintiff so as to attract suits. (Klerman 2007).

[←299]

The approach used in the hypothetical legal system described in Friedman 1972.

[←300]

In the notes to this chapter, Sturlungasaga I is McGrew 1970, the first volume of McGrew's translation of Sturlungasaga. Sturlungasaga II is McGrew 1974, the second volume. Gragas I is Dennis et. al. 2007, the first volume of the translation of *Gragas*, Gragas II is Dennis et. al. 2014, the second volume. Quotes from *Gragas* are labeled by section, such as K§24, and page in the translation. Sagas I-V is Hreinsson 1997, *The Complete Sagas of Icelanders*, volumes I-V.

[←301]

Becker & Stigler 1975.

[←302]

Landes & Posner 1975.

[←303]

That led to the interesting issue of why, in our legal system, some offenses are treated as torts, to be prosecuted by the victim, some as crimes, to be prosecuted by the state. Readers interested in my views of that question will find them in Chapter 18 of Friedman 2000.

[←304]

Friedman 1984.

[←305]

Friedman 1979.

[←306]

Some sagas are retellings of material from elsewhere, such as *Volsungasaga*, the Icelandic version of the German *Niebelungenlied*. Others are accounts of events in Norway such as *Heimskringla*, Snorri Sturluson's saga history of the Norwegian kings. Since they provide little information on Icelandic law I did not include them. That left about 2500 pages of *The Complete Sagas of Icelanders*, set mostly in Iceland, covering events from the settlement in 870 into the eleventh century, plus nearly a thousand pages of *Sturlungasaga*, the collection of sagas focused on the final period of breakdown in the thirteenth century and the events that led up to it.

[←307]

I believed that a killing only led to outlawry if the killer was unwilling to pay wergeld. That describes what usually happens in the sagas as a result of an out-of-court settlement but, according to *Gragas*, a successful prosecution resulted in outlawry even if the defendant was willing to pay. I further believed that an outlaw had a period in which he was free to leave Iceland before it was legal to kill him. That again was not a correct description of the legal rule for full outlawry as described in *Gragas*. Once the confiscation court had been held on an outlaw's property he was fair game and it was illegal to assist him to leave the Island. But it does describe the terms often agreed to in settlements as well as the terms of lesser outlawry.

[←308]

Íslandinga saga was written by Sturla Þórðarson, an active participant in many of the events it describes. *Prestssaga Guðmundar góða* was written by Lambkár Þorgilsson, friend and secretary to Bishop Guðmund, its central figure.

[←309]

“For all the killings I have now told and also for major wounds men are not to settle without prior leave of the General Assembly. Lesser outlawry is the penalty if men settle in cases which ought not to be settled without prior leave.” (Gragas I K§98, 174).

One passage in *Gragas* can be read as implying that a settlement was approved if nobody with a seat on the Lögrétta, which is to say no goði or bishop, disapproved of it (Gragas I K§117, 212-13). But the passage goes on to describe procedures for providing temporary replacements for goðar absent from the Lögrétta, which implies that it is referring to events at the Althing. If any goði had the right to veto any settlement, one would expect some such incidents to appear in the sagas..

[←310]

Sigurðsson classified cases in a group of sagas according to how they were resolved and found that only about ten percent were settled in court (Sigurðsson 160-161). He cites a calculation by Andreas Heusler covering all cases in the sagas of the Icelanders with a similar result (Sigurðsson 1999, 154).

[←311]

Gragas I K§86, 145, 148, 149; K§99, 174-5; K§105, 181. According to another rule, someone charged with an offense who attends an assembly can escape punishment by showing that he was charged not because he was guilty but in order to keep him out of the assembly (Gragas I *K§99, 175).* That parallels an Athenian case mentioned in Chapter 16.

[←312]

Sturlungasaga II 161-2 *The Saga of Guðmund Dýri*. Ingimund, who has killed Helgi, is then himself killed. The settlement of the case sets off Ingimund's death and the fine on Eyjólf for harboring a murderer against the murder of Helgi. Since Ingimund has not been tried, this appears to support the rule in *Gragas*. On the other hand, the fact that damages are owed for killing Ingimund appears inconsistent with the *Gragas* account of forfeit immunity. In *People of Laxardal* (Sagas V, 14), Thorolf has killed Hall and asks his kinswoman Vigdis for protection. She replies that "anyone who offers you protection does so at the risk of his own life and property, because such powerful men will be on your trail." The implication is that sheltering a killer who has not yet been tried can get one into trouble, but it is unclear whether that is a matter of law or only power.

[←313]

Sagas I 279 *The Saga of Bjorn, Champion of the Hitardal People*, III 85 *Njal's Saga*, III 246 *The Saga of Finnbogi the Mighty*.

[←314]

Sagas III 78-9 Njal's Saga.

[←315]

Sagas IV 281-2 *The saga of the People of Reykjadal and of Killer-Skuta,* V 130 *Bolli Bollason's tale*

[←316]

Examples are Sagas II 429 *Viglund's saga*, III 68 *Njal's saga*, III 86 *Njal's saga*, III 286 *The Saga of the People of Floi*.

Pre-Islamic Arab history provides a parallel example. The war between the tribes of 'Abs and Dhubyân was ended when two chieftains of Dhubyân agreed to pay blood money in camels for the difference between the number killed by their side and by their opponents. The story is recorded in the 10th c. A.D. *Book of Songs* of Abu 'l-Faraj al Isbahānī.

[←317]

According to Gragas II K§156, 70, “If a man lies with a slave-woman, he is under penalty for three marks for that, …”

[←318]

The father was a prominent landowner. The couple lived together openly, unable to marry because their relationship was within the very broad reach of the incest prohibition.

[←319]

Sturlungasagas I 189-194. The chieftain is Þorvald.

[←320]

"The principal in a case [of intercourse] is first the woman's husband if he is born a lawful heir. Then her father. Then a son born a lawful heir, sixteen winters old or older. …" (Gragas II K§156, 70). So possibly the father could have prosecuted but chose not to, his daughter having become a mistress with his consent.

[←321]

Pregnancy leading to legal charges is mentioned in *Njal's saga* (Sagas III, 76), *People of Laxardal* (V, 81), Sturlungasaga I, 64**,** Sturlungasaga I, 238. Pregnancy apparently not leading to legal charges in *Cairn Dweller* (Sagas II, 443) and *People of Fljotsdal* (IV, 395). Affairs not leading to legal charges are mentioned in *Sworn Brothers* (Sagas II, 354), *The Saga of the Icelanders* (Sturlungasaga, 120). There is one case where a man volunteers to pay damages to the husband of the woman he has been sleeping with (*The Saga of Guðmund Dýri*, Sturlungasaga II, 168-9**)** and one case where a man is said to owe compensation for kisses (*Kormak*, Sagas I, 219). There is also one case where a man is flirting with a woman and writes her love verses. Her father takes him to court but the proceedings are violently interrupted (*People of Vatnsdal*, Sagas IV, 50).

[←322]

> “The so-called book-prose theory of saga studies looked upon the Icelandic family sagas basically as fiction, which made historians of early Iceland heavily dependent on the law code, Grágás, for everything that could not be based on archaeological evidence. Over the last two decades, scholars however, have begun using of the family sagas historically again, by supporting their conclusions drawn from them with anthropological studies about remote parts of the earth.” (Karlsson 2001).

[←323]

Snorri Sturluson comments in the introduction to *Heimskringla* that the most reliable sources of historical information are skaldic poems written at the time, in part because the verse form makes random change less likely.

[←324]

Byock 1995.

[←325]

Byock 2001, 144-145.

[←326]

Sigurdsson 1999.

[←327]

Gragas I K§117, 213.

[←328]

"It is doubtful that *Gragas* represents an official collection of laws. It should rather be considered either a private collection of laws adopted by the Law Council and written down by individuals, or a 'rights' book' containing notes on legal provisions that may not necessarily have been adopted by law. There is no indication that *Gragas* was ever consulted as an authority at the general assembly." (Karlsson 2001).

Gragas includes an elaborate formula for payments by various kin of an offender to corresponding kin of the victim. It does not appear in the sagas, does appear in roughly contemporary Welsh law: "The compensation payable, indeed the wrong of unlawful killing, was termed *galanas*. It was payable by the family of the slayer to that of the slain, and there were elaborate rules relating to the distribution of the liability and benefit among the two groups respectively. … The remaining two-thirds of the *galanas* had to be paid by the remoter relatives of the killer, extending back as far as the great-grandparents and collaterally as far as fifth cousins; in all, nine degrees of relationship." (Watkin 2007, 66-67).

[←329]

Sagas, 5:350, *Hrumund the Lame*.

[←330]

Gragas I K§28, 53. It is possible that bringing an army to the Althing did not count as bringing men to court, since the court was only part of what is happening at the Althing. It was, however, the part that the army was being brought for.

[←331]

Some estimates put it at about 10%.

[←332]

Barthi Guthmundsson argues that the settlers were in large part Danes who had colonized in Norway and thus brought Danish institutions with them to Iceland (Guthmundsson 1967).

[←333]

The twelve goðar in the North Quarter appointed only nine judges to the quarter courts. My description of the system is that accepted by most scholars. Jón Viðar Sigurðsson argues that it is a back projection from later accounts, that the actual system in the early period was considerably less tidy.

[←334]

The Icelandic judges correspond more nearly to the jurymen of our system, since it was up to them to determine guilt or innocence. There was no equivalent of our judge, although experts in the law could be consulted by the court.

[←335]

Conybeare 1877, 48.

[←336]

While this is the generally accepted view, some have argued that the judges for a quarter court were appointed by only the goðar from that quarter. (Johnson 1930, 64, Bryce 1901, 274).

[←337]

While there was nothing strictly equivalent to our system of appeals, claims that a case had been handled illegally in one court could be resolved in a higher court. In a famous case in Njal's Saga the defendant tricks the prosecution into prosecuting him in the wrong court by secretly changing his goðorð and hence his quarter in order to be able to sue the prosecutors in the fifth court.

[←338]

"It is only lawful for a man to have an assembly attachment in a different Quarter from the one he lives in if the chieftain in question is permitted at Lögberg to accept someone from outside the Quarter as a man of his assembly third." (Gragas I K§83, 141). This rule appears inconsistent with the trick in Njal's Saga where Glosi transfers his *goðorð* to his brother and becomes the thingman of a *goði* in a different quarter, changing what court he should be sued in (Sagas III, 179), but it is possible that the rule was established later, perhaps in response to such a trick. A man could declare what goði he was the thingman of at the Althing or the *Vorþing*.

[←339]

"Men shall pay assembly attendance dues at the rate they agree on with the chieftain in each assembly third." (Gragas I K§23, 44).

[←340]

He was immune from killing until he left, provided that he remained within a limited area assigned to him.

[←341]

“Þorkel Flosason, declared outlaw the previous summer, paid a visit to Þorvarð and, placing his head on the table before him, awaited his decision. Þorvarð granted him his pardon and told him to go in peace wherever he wished.” (Sturlungasaga II, 100).

[←342]

"It is prescribed that if a man murders a man, the penalty is outlawry. And it is murder if a man hides it or conceals the corpse or does not admit it."(Gragas I K§87, 154). A similar obligation appears in the rules for the feud system of northern Albania. (Fox 1989, 164.)

[←343]

Full outlawry was the penalty for stealing food, irrespective of its value (Gragas II K§228, 179). It was also the penalty for stealing anything else worth more than half an ounce-unit if any attempt was made to conceal the theft (Gragas II K§227, 162).

[←344]

In *Njal's saga*, Halgerd sends a thrall to steal food from a neighbor's storehouse. When her husband, Gunnar, discovers it, he slaps her and offers to compensate the neighbor. In one passage in *Egilsaga*, Egil and his companions escape from their captors with a considerable amount of stolen treasure. Egil, being an honorable man, insists on going back by himself to tell the owners who has taken their treasure—and then kill them. In Welsh law, concealment of a killing doubled the damage payment owed (Watkin 2007, 66).

[←345]

Byock 2001, 137-8.

[←346]

For examples, see Sagas III *Njal Saga*, 25, 27, 76.

[←347]

As happens in *Hrafnkel Saga*. The same pattern appears in the Comanche system, as mentioned in Chapter 13.

[←348]

Sagas III, 177, *Njal's Saga*. In an earlier passage in the same saga, 84, Gunnar responds to his brother Kolskegg's suggestion that they pursue their defeated attackers: "Our purses will be empty enough by the time the ones already lying dead have been compensated for."

[←349]

Sturlungasaga II, 184.

[←350]

Since concealing the crime was considered shameful and if unsuccessful imposed additional legal consequences.

[←351]

The division of payments was defined in advance by contract among members of a coalition in the Somali system described in Chapter 11, by law among members of an ‘*Akila* in the Islamic system described in Chapter 5. The Icelandic system was informal, but there are cases in the sagas where a large fine imposed on a leader in an out-of-court settlement is paid largely by voluntary donations by his followers. *Gragas* refers in several places to obligatory life-ring payments from kin of the offender to the corresponding kin of the victim but I have found no examples of such in the sagas.

[←352]

Each thing-tax paying farmer owed one percent of his wealth each year as tithe. A quarter went to the *Hreppur* for maintenance of the poor. A quarter went to the bishop. A quarter went to the person who controlled the church for its maintenance, a quarter to the priest—who might be the owner, a member of his household, or one of his servants. Thus as much as half of the tithe could end up going to the landowner who had provided the land for the church.

[←353]

Byock 2001, 328-9.

[←354]

Gizur jarl. According to some accounts, Snorri Sturluson was also given the title.

[←355]

There are examples of torture in *Hrafnkel saga*. In one of the Sturlung sagas Sturla tricks Órækja into his power and is said to have blinded and gelded him. But later in the saga he appears to still be able to see, a fact never explained. Possibly the person actually responsible for his mutilation only pretended to do it. One incident involves the rape or intended rape of a man's wife and daughter (Sturlungasaga II, 34, *The Saga of Thorgils and Haflithi*), another the carrying off of a woman with the intention of marrying her. She is returned when it becomes clear she cannot be persuaded to agree (Sturlungasaga I, 207-8).

[←356]

The only cases I have come across where a woman is deliberately killed involve the execution of witches. There are several incidents in the sagas where a woman attacks a man, in one case trying to stab him with the sword of her brother who he has helped to kill, in another striking a man across the face with the purse of silver with which he has bribed her husband to betray a kinsman of hers (Sagas V, 17, *The Saga of the People of Laxardal*). In both of those, no action is taken in retaliation.

[←357]

Sveinsson 1953 at 72 gives an estimate of three hundred and fifty killed in battle or executed during a fifty-two-year period (1208-12601). The population of Iceland was about seventy thousand, giving an annual rate of 9.6/100,000.

[←358]

Hoffman 1964, 213.

[←359]

Gjerset 1924, 206.

[←360]

Magnusson and Palsson 1960, 41. Also Johannesson 1933, 37.

[←361]

Gragas I K§78, 129-130.

[←362]

Hoffman 1964, 215-16.

[←363]

Private communication.

[←364]

Gragas I K§116, 209.

[←365]

Sagas III, 45, *Njal saga*.

[←366]

One of my sources interprets the ounce by which compensations are measured as probably meaning “an ounce of unrefined silver ... worth four legal ounces” (Magnusson and Palsson 1960, 63). Another interprets it as the legal ounce (Williams 1937, 31).

[←367]

See previous note.

[←368]

In comparing this figure with current sentencing levels for murder or manslaughter, one must remember that killing, in Icelandic law, was distinguished from murder by the fact that the killer turned himself in. Thus even if the average sentence served by the convicted killer in our society were as high as 12 1/2 years, the corresponding expected punishment would be higher in the Icelandic case.

[←369]

Magnusson and Palsson 1960, 63.

[←370]

A brief period of peace in the south was created by an alliance of Islamic courts (the ICU, “Islamic Courts Union”) backed by local clan militias. In late 2006 that period was ended when Ethiopian troops, acting with U.S. and U.N. support in alliance with the U.N., created a “Transitional Federal Government,” invaded Somalia and eventually took Mogadishu. Lewis 2008, 87-91. For Lewis’ view of the situation in Somalia in recent years, see Lewis 2004. Leeson 2007a offers evidence that Somalia was, on the whole, better off as a result of the collapse of the Barre government, that after a brief period of widespread violence the situation in much of the country became reasonably peaceful.

[←371]

Not including Puntland in the north-eastern corner, whose government considers itself a province of the nation of Somalia but acts in large part independently.

[←372]

> “the ‘governments’ in Puntland and Somaliland do not have a monopoly on the law or its legitimate enforcement. Although some public laws and courts exist, in both regions, the legal system functions primarily on the basis of private, customary law and mechanisms of enforcement.” (Leeson 2007a, 700).

[←373]

I am using the first nine chapters and Appendix A; the rest of the book evaluates the strengths and weaknesses of the traditional legal system and proposes ways in which it might be improved and applied.

[←374]

About the Sab, Southern Somali agriculturalists, Lewis writes (1961, 13): “Their conquest political structure if not that of a tribal state is certainly more formalized and more hierarchical than the political system of the northern nomads. … Sab tribes—for here there are territorially defined jural and political communities—do not appear to base their political relations upon kinship but upon what Maine called local contiguity.”

[←375]

Lewis (1961, 133).

[←376]

A partial exception exists for women; a man’s wife is in some respects classified by her husband’s genealogy, in some respects by her own.

[←377]

> “The more distant units are genealogically, the greater the likelihood of extended strife between the larger units of which they are segments. Thus strife between a segment of the Dulbahante and a segment of the Habar Tol Ja'lo is more likely to lead to fighting between the Dulbahante as a unit opposed to the Habar Tol Ja'lo as a unit, than is strife between one group of Faaraḥ Garaad and one segment of Maḥamuud Garaad to a general war between these two segments of the Dulbahante. ... The smaller a unit the greater is its cohesion, and the larger a unit the more likely is it to split into hostile groups following the lines of genealogical cleavage.” (Lewis 1961, 152).

[←378]

Lewis 1961, 2.

[←379]

"In principle, within the clan *dia*-paying groups oppose *dia*-paying groups, primary lineage-groups primary lineage groups, and within the clan-family clans oppose clans. But the simple model of agnatic segmentation with equipoised units at every level is distorted by the recognition of irregular growth and by the importance given to the uneven distribution of man-power and fighting potential. These inequalities are counteracted partly by uterine ties which act as a built-in compensating mechanism, and partly by alliances (*gaashaanbuur*) outside kinship." (Lewis 1961, 159).

Evans-Pritchard describes a similar pattern among the Nuer. "A characteristic of any political group is hence its invariable tendency towards fission and the opposition of its segments, and another characteristic is its tendency towards fusion with other groups of its own order in opposition to political segments larger than itself." (Evans-Pritchard 1940, 137).

[←380]

Similar to the ‘Akila in Islamic *Jinayat* law (Chapter 5), itself presumably derived from pre-Islamic Bedouin practice.

[←381]

Under British administration the contracts were in writing with copies filed with the British officials; an example is shown at the end of this chapter. Lewis suggests that prior to that they were normally oral but may sometimes have been in writing and deposited with the custodian of the shrine of a prominent saint. (Lewis 1961, 176).

[←382]

Under Islamic law the ‘akila pays part of what a member owes for an injury, provided the amount is more than a third of the payment that would be owed for a killing.

[←383]

Lewis 1961, 156. The Somali used the same term to describe the British Commonwealth or the western alliance against the Soviets (Lewis 1961, 189).

[←384]

> “It is at least refreshing to confront the various hypothetical theories of social contract with a contract case where this institution is systematically employed, within a kinship ambience, in the formation and definition of political units, to an extent which, so far as I know, is unparalleled elsewhere.” (Lewis 1961, xiv).

[←385]

This description is from Van Notten. Schacht (1986, 7-8), describing pre-Islamic Bedouin law, writes: “If protracted negotiation between the parties led to no result, recourse was normally had to an arbitrator (*ḥakam*) … …. the parties were free to appoint … any person on whom they agreed, …. The decision of the *ḥakam*, which was final, was not an enforceable judgement (the execution had indeed to be guaranteed by the security), but rather a statement of right on a disputed point. It therefore became easily an authoritative statement of what the customary law was, or ought to be; the function of the arbitrator merged into that of a lawmaker, … .

[←386]

For an analogous pattern for settling feud in a different society: “Judges in Gypsy courts in the region are appointed on an ad-hoc basis for each new court session;” (Marushiakova and Popov 2007, 80).

[←387]

Judges are held to have a special duty to be law-abiding, hence subject to heavier fines than ordinary people if they are not.

[←388]

Judges are normally elders of the parties' *jilibs*. Presumably the point of the passage is that a judge whose decisions are generally disapproved of loses his position as elder. Von Notten mentions that an individual unhappy with the elder of his *jilib* may leave his extended family and start a new one, possibly joining up with other dissatisfied individuals from other *jilibs*, or can try to convince the other members of his family to replace their elder.

[←389]

Adhering to the Shafi'ite school. But inheritance practice represents a mix of Islamic and traditional law; camels, for instance, are inherited only by males.

[←390]

In the case of the Samaron clan, into which Von Notten married, the last titular head died in 1954 and had not been replaced as of 2002, when Von Notten died.

[←391]

According to Van Notten decisions are by consensus, with the result that meetings can last for months. Lewis describes decision making, not merely for a clan but for groups at all levels, as done in a meeting open to all adult males with decision by majority vote.

[←392]

In parts of Van Notten's account he seems to be describing a system where each *dia*-paying group (his *Jilib*) has a single elder (*oday*).

[←393]

Judging by Lewis’s description, disputes within a clan are normally settled peacefully. Interclan disputes may or may not be.

[←394]

A similar pattern of norms for Norse society is implied by a passage in *Egilsaga* where Kveldulf, Egil's grandfather, says that if King Harald, who was in the process of unifying Norway, invaded Fjordane Kveldulf might be considered obligated to help defend it, but he has no obligation to help the king of Fjordane attack Harald.

[←395]

Von Notten is not entirely clear about the membership of *juffo* (his term for what Lewis calls the jiffo-paying group) and *jilib* (*dia*-paying group). At one point the former is defined as all the descendants in the paternal line of a common great-grandfather and the latter as a group of *juffo*'s whose members are related. At another point, the *jilib* is defined as "all the living descendants of a given paternal great-grandfather or further removed ancestor." The *fine* in ancient Irish law, discussed in Chapter 12, is made up of all the descendants in the paternal line of a common great-grandfather. It sounds from Lewis's description as though the juffo (his jiffo-paying group or "tertiary section") is defined by paternal kinship, the jilib (*dia*-paying group or "secondary section") by contract among the member juffos, usually but not always ones that have a common paternal ancestor. Describing the logic of kinship alliances, he writes: "The tertiary sections support each other against the secondary, the secondary against the primary, and all combine in the solidarity of the tribe when this is threatened or attacked from outside." (Lewis 1955, 108).

[←396]

See, for instance, the contract in the appendix to this chapter.

[←397]

Among the Nuer, who are divided into multiple tribes, blood money is owed for homicide within the tribe but not outside it and similarly for damage payments for lesser torts. (Evans-Pritchard 1940, 121-122).

[←398]

The Somali follow the Shafi'i school; some differences between their rules and those listed in Chapter 5 may correspond to differences among schools of Sunni law.

[←399]

Lewis 1961, 177-178.

[←400]

"This is known as *jaa' ifo* (as distinct from *jiffo*) and is any non-fatal but fairly serious wound for which compensation is of the order of thirty-three-and-a-third camels, but may be more." (Lewis 1961, 177n1).

[←401]

"When two men attack another of the same group this is known as *hiill* or *tuuto* and insult compensation is regularly payable. This is a common provision in dia paying treaties." (Lewis 1961, 177n2).

[←402]

"This refers to the Somali practice of widow inheritance (*dumaal*) where the children belong to the new husband and not to the deceased brother or close agnate. A reduced bride-wealth is normally paid." (Lewis 1961, 177n3).

[←403]

Shares in proportion to the number of males in each lineage.

[←404]

For a discussion of evidence for the alternative views, see Kelly 2009, 232-237.

[←405]

Since the contents of the texts have survived only as passages quoted in much later manuscripts, the dating is based mostly on linguistic evidence.

[←406]

"The Irish as well as the Hindu jurists were 'backward-looking'—men with a profound respect for antiquity. The more ancient a custom, the more venerable it became in their eyes, and the fact that it had long been obsolete in practice was quite irrelevant; far from being jettisoned, it was religiously reserved, often side by side with the later rule which had superseded it." Binchy 1970, 1. "Thus in the 'canonical' tracts which received their definitive shape during the seventh and eighth centuries, side by side with contemporary rules drafted in classical Old Irish we find passages which are more archaic alike in language and in content, and which doubtless go back to the oral teaching of the pre-Christian law schools." (Binchy 1972, 365).

[←407]

As D. A. Binchy, one of the leading 20th century scholars of early Irish law put it in the context of one such institution: “I suggest, then, that the Irish law of suretyship may well reflect the various stages in the development of this institution throughout the Indoeuropean world.” (Binchy 1972, 372).

[←408]

Like the Icelandic sagas, these are partly historical accounts mostly in prose. The Mythological, Ulster and Fenian cycles are set considerably earlier than the Icelandic sagas, the Historical cycle, which covers a very long span of time, overlaps them.

[←409]

"We can then regard the 'High-Kingship' as a claim asserted quite early by Uí Néill propagandists, like Adamnán, but never realized in practice by any monarch of that race, nor even (as Professor Byrne rightly insists) by the 'usurper' Biran Bóruma or any of those provincial kings who during the eleventh and twelfth centuries fought for what was by then at least a national monarchy *im Werden*." (Binchy 1976, 19).

[←410]

A similar pattern appears in a surviving Swedish law code from the thirteenth century: “No one may sell land unless pressing need arises. Then he is to inform those kin most closely related and the parishioners and the family members, and they are to test the need. But whoever gives money for land without this test, has forfeited his money and is to pay a fine of twelve marks to the authorities and another twelve to the close-related kin, who are invalidating the agreement.” (Peel 2009, 41).

[←411]

Ranging from marriage where the wife was betrothed by her kin through marriage forbidden by her kin.

[←412]

Not true, however, of a lower category of fuidir, the dóerḟuidir or “base fuidir.”

[←413]

"A contract without sureties is normally unenforceable. However, the texts provide a considerable number of exceptions to this general rule." (Kelly 2009, 162-3). Guarantors in Bedouin law function like sureties in Irish law (Bailey 2009, 40). Sutherland (1986, 136, 295-6) describes the use of sureties by the Romani.

[←414]

"The three functions of a *naidm* are defined as 'holding in mind [the debt] for which he is invoked as surety, so that nothing be added to or subtracted from it, swearing to it without reservation, and enforcing it without negligence'" (Binchy 1972, 361).

[←415]

Thurneyson thought that a *giall* was a standing hostage surety for all controversies, originally for his *túath* in controversies between *túaths* and perhaps later also for his kindred, while an *aitire* was a hostage surety appointed for a single transaction. (Stacey 1994, 83).

[←416]

Stacey argues that the *Giall* may have been almost exclusively for inter-*túath* disputes and could have been an important person such as the tanist, the king's heir, and that the exact role of *aitire* is unclear. If he stood surety for private contracts, it may have been as a standing surety not one appointed for the particular transaction, perhaps to deal with things such as tort suits for woundings. (Stacey 1994, 82-111).

[←417]

I discuss the use of hostages for contract enforcement in Friedman 2005.

[←418]

It is unclear how decisions for the kin group were made, possibly by an individual selected in some way to represent the other members.

[←419]

Stacey 1994, 67.

[←420]

This is a simplified account—details of distraint varied with circumstances and there were different mechanisms used to distrain a professional, such as symbolically restraining him from practicing his profession until the obligation was fulfilled. See Kelley 2009, 177-182.

[←421]

True also of the feud system of northern Albania as described in Fox 1989, 164.

[←422]

This went to the kin, except that a third of it might go to someone outside the kin whose assistance had been necessary in collecting the claim, such as a lord intervening on behalf of a client unable to enforce his claim on his own.

[←423]

Gragas describes a similar system of payments by kin of an offender to corresponding kin of the victim but I have been unable to find any reference to it in the Icelandic sagas and it may not have been part of the actual law in practice.

[←424]

Stacey 1994, chapter 5.

[←425]

See Leeson 2012a.

[←426]

For a discussion of holmgang, see Radford 1989.

[←427]

Horses went extinct along with a number of other New World megafauna something like 10,000 years ago, possibly due to overhunting by humans.

[←428]

My account is somewhat simplified. The Spanish explorer Francisco Vásquez de Coronado described the Apache he observed in 1541 as having some of the characteristics of the later plains tribes, including tipis, although they had not yet acquired horses.

[←429]

Hoebel 1954.

[←430]

Llewellyn and Hoebel, 1941.

[←431]

Grinnell 1923.

[←432]

Wallace and Hoebel 1952. I also looked at two much earlier accounts of the Comanche, Lee 1859 and Neighbors 1853.

[←433]

The usual start of an account by a Comanche informant, according to Hoebel

[←434]

Commanche also used the term “war chief” for the individual within each band recognized as the “leading war chief.” (Wallace and Hoebel 1952, 216).

[←435]

Wallace and Hoebel 1952, 213.

[←436]

"No Individual action is considered as a crime, but every man acts for himself according to his own judgment, unless some superior power, for instance, that of a popular chief, should exercise authority over him." (Neighbors 1853, 131).

"The man whose advice was most consistently followed was a peace chief for his group." As one Comanche informant put it, in response to the question of how peace chiefs were chosen, "No one made him such; he just got that way." (Wallace and Hoebel 1952, 211).

Lee, who was a captive for three years, describes a somewhat more organized system, writing (1859, 70) about his first owner: "He was the civil chief as distinguished from the war chief, and consequently the head of the tribe. This dignity carried with it the privilege of possessing four wives, a common Indian being allowed to have but one, subordinate officers two, and the war chief three.". But Neighbors writes that "Polygamy is practiced to a great extent, some chiefs having more than ten wives, … ." Presumably Lee was generalizing from his observations of one or more of the bands he was in. It is unclear if he ever learned the Comanche language; he may have communicated with his captors in Spanish, which some of them would probably have known.

[←437]

The problem is discussed in Friedman 2014, Chapters 34 and 56.

[←438]

According to Hoebel, but Neighbors writes, “The parents exercise full control in giving their daughters in marriage, …” (Neighbors 1853, 132).

[←439]

> “The ties of consanguinity are very strong, not only with regard to their blood relations, but extends itself to relations by marriage, &c., who are considered as, and generally called “brothers”—all offences committed against any member, are avenged by all, or any member connected with the family.” (Neighbors 1853, 131).

[←440]

Hrafnkel's Saga provides an example. "Many people were pleased, even though Hrafnkel had ended up being humiliated. They remembered that Hrafnkel had treated many people unfairly." (Hreinsson 1997, 5: 272).

[←441]

> “From the liberality with which they dispose of their effects on all occasions of the kind, it would induce the belief that they acquire property merely for the purpose of giving it to others.” (Neighbors 1853, 134).

[←442]

Wallace and Hoebel 1952, 233.

[←443]

According to Llewellyn and Hoebel (1941, 78), he would usually not choose his son as a successor. According to Grinnell (1923, 340), on the other hand, “Any one of the four principal chiefs of the tribe might, at the end of the ten-year period, choose his own successor, and so might name his own son to follow him at the end of his ten years of office. … . Thus in a sense the office of principal chief was hereditary.”

According to Llewellyn and Hoebel (1941, 75), the successor was selected from the retiring chiefs of the council. Yet they also write “But a soldier chief was never permitted to be a tribal chief at the same time. When a soldier chief was selected by the tribal Council to fill the place of a deceased head chief …”, which implies that someone not one of the forty could be selected to be one of the four head chiefs. According to Grinnell (1915, 341), “If, as often happened, a principal chief died or resigned and failed to nominate anyone to take his place, his successor might be chosen from among the forty-four head men, but was quite as likely to be selected from among the braves of the tribe who did not belong to this council.” He does not say whether a principal chief who chose his own successor was restricted to choosing among the existing chiefs.

Dorsey (1905, 14) writes: “After this, one of the four medicine-men, the old-time prophet, addresses the newly appointed forty chiefs. He says something like this: “Now, you who are here have been appointed as chiefs to look after the welfare of all men, women, and children, but in order to carry yourselves in an orderly manner, you, new chiefs, must select four men from among these old-time chiefs to be your counselors and leaders. These four ex-chiefs that you will appoint will be your advisers.” His “four medicine men” or “four ex-chiefs” are what my other sources call the four priest chiefs, “ex-chiefs” because they have been selected from the retiring forty. He is the earliest of the three sources.

[←444]

"The four principal chiefs of the tribe were equal in authority, and the others of the forty-four chiefs were really counselors, whose authority as chiefs extended no further than over their own immediate following. However, their positions as counselors commanded respect, and led the people to listen to the advice which they gave." (Grinnell 1923, 340). But also :The four head chiefs … possessed, in weighty matters, little more actual authority than other members of the council, … ." (Grinnell 1923, 337).

[←445]

Llewellyn and Hoebel 1941, 112-113.

[←446]

For a discussion of the same issue in a modern context, see Friedman 1999.

[←447]

Llewellyn and Hoebel 1941, 127-128.

[←448]

On one occasion a man was readmitted after two years, on one after three. (Llewellyn and Hoebel 1941, 12, 80-1). The willingness to readmit seems to have depended in part on how excusable the killing was seen to have been.

[←449]

Walking Coyote killed White Horse, who had stolen his wife, and does not seem to have been exiled as a result. He was later himself killed by Winnebago, who is not described as being exiled but next appears in the account eight years later, at which point he kills another man, this time in self defense. Exile is not mentioned, but when he is mentioned again he is living with another tribe. He ends up being killed by Rising Fire, who again is not described as suffering exile. Each killing seems to have been followed by a ceremony to renew the arrows, however.

[←450]

Grinnell 1923, 353-354.

[←451]

Llewellyn and Hoebel 1941, 166-8.

[←452]

Llewellyn and Hoebel 1941, 202-210.

[←453]

Captive children, on the other hand, seem to have been raised as Comanches and adopted into the tribe.

[←454]

"Although it was not their custom to torture unfortunate enemies, at times when the Comanches became unusually angered, they resorted to extreme forms of barbarism in seeking revenge." (Wallace and Hoebel 1952, 259). Compare that to Lee's account. He was part of a group whose members were killed or captured in a surprise attack by Comanches, without killing or injuring any of the attackers. Of the four captives, two were tortured to death in his presence, one was taken elsewhere, Lee suspected to be tortured to death, and Lee himself survived as a slave by taking advantage of his captors' awe at the noises made by an alarm watch he was carrying.

[←455]

Lee was captured at a location that he describes as about 350 miles northwest of Eagle Pass, which would put him at about the southeast corner of what is now New Mexico. Chaco Canyon in NW New Mexico contains an impressive collection of Pueblo ruins of which this might be a somewhat distorted description.

> "I saw, with infinite astonishment and surprise, the dilapidated ruins of a large town. In the midst of the falling walls of a great number of buildings, which, in some remote age, beyond doubt, had lined spacious streets, was what appeared to have been a church or cathedral. Its walls of cut stone, two feet thick, and in some places fifteen feet high, included a space measuring two hundred feet in length, and, perhaps, one hundred in width. The inner surface of the walls in many places was adorned with elaborate carved work, evidently the labor of a master hand, and at the eastern end was a massive stone platform which seemed to have been used as a stage or pulpit." (Lee 1859, 141).

[←456]

Describing it as private raises the question of how one distinguishes between a government and private institutions to enforce rights, commonly regarded as a governmental function. For my answer see Friedman 2014, Chapter 52.

[←457]

The feud systems we have looked at are saga-period Iceland, northern Somalia, Comanche Indians, and Romani—different versions for Vlach Rom, Romanichal, and Kaale. Others I am aware of include the Bedouin system described in a paper by one of my students, the Nuer described by Evans-Pritchard and the northern Albanian system described in Fox 1989.

[←458]

A feud system not a feudal system. The two words sound similar but are unrelated in both meaning and etymology. “Feudal” comes from medieval Latin “feodum,” meaning a fief or fee, from Frankish fehu (cattle, owndom, property, fee) possibly from proto-germanic “fehu” (cattle) from Indo-European **peḱu-*, *livestock*. “Feud” comes from “fede” (“enmity, hatred, hostility”) ultimately from proto indo-European root *peig- “evil minded, hostile.”

[←459]

Sutherland 1986.

[←460]

"The main aim is to bring together the opposing parties, and, through a compromise, to allow consensus to be reached. After the judges decide that a common position has been established to some extent, they hold consultations (they may also retire), formulate a decision in the case that is acceptable to everyone involved, and publicly declare it." Marushiakova and Popov 2007, 87, describing the *kris* in Eastern and Central Europe.

[←461]

See Alcock 2013. A webbed account.

[←462]

For commitment mechanisms used to define and enforce rights, considered not as legal or moral rules but as a pattern in human behavior, see Friedman 1994 and Friedman 2014, Chapter 52.

[←463]

Marushiakova, Elena and Popov 2007, 78, describing conflict settlement among the Romani.

[←464]

"A person may take the law into his own hands, if he possesses the strength to do so. Since he is acting lawfully, he does not have to bother to attend a court, even if there would be no loss if his case was delayed." (Maimonides, Sanhedrin 2:12).

"If a person sees his property in the hands of another, he can take it from him, and if the other party stands in his way, he can beat him until he relents…" (Shulchan Arukh, Choshen Mishpat 4).

[←465]

Friedman forthcoming.

[←466]

Staunton 1810, 327 (adultery), 372 (murder), 317 (intruder).

[←467]

Roth 1997, 215.

[←468]

Ellickson 1994.

[←469]

Black 1986. “Like the killings in traditional societies described by anthropologists, then, most intentional homicide in modern society may be classified as social control, specifically as self-help, even if it is handled by legal officials as crime.”

[←470]

According to Waller 1988. See also Rice 1978; sources vary in detail.

[←471]

An earlier version of this chapter was published as Friedman 1995.

[←472]

Some less serious crimes were prosecuted by constables or magistrates, a pattern that became increasingly common at the end of the century and thereafter. (Smith 2006). “The party aggrieved is generally the person bound over to prosecute; but, in the Police Offices, if no other person is ostensible for that object, we always bind over one of the Police officers, or a constable, to do it;” (Sir Nathaniel Conant, Chief Magistrate at Bow Street, in Report 1816, 5). Crimes actually committed against the government were prosecuted at government expense. Thus “Offences against the gold and silver coin were distinctive, in that finance and direction were provided for prosecutions by the Mint.” (Brewer and Styles 1980, 183).

[←473]

Starting in 1792, a few constables associated with magistrates' offices in London received a small salary while supporting themselves in part on reward money and, in some cases, a second profession: "One is a coal merchant, another a glazier, and another a green grocer." (Report 1816, 109).

[←474]

"I have had such an abhorrence of the very name of a public accuser, from its existence at the time of the French revolution, that I have taken no opportunity and have had no inclination to cogitate up such a matter …" (William Fielding, Magistrate and son of the more famous William Fielding, magistrate and novelist, Report 1816, 191). "As early as 1863, in reflecting on "the absence of a public prosecutor" in England, James Fitzjames Stephen proclaimed that the French system of prosecution, which relied upon "elaborate inquiry" by professional police and magistrates prior to trial, "would never be endured" by the English. Writing in 1983, Douglas Hay surmised that the attachment of English political elites to private prosecution "probably derived above all from their abhorrence of the alternative"-namely, "state prosecution." More recently, Allyson May has claimed that "[a]n historic, deep-rooted mistrust of an authoritarian state, and fear of abuses of state power … explains why criminal prosecutions [in England] remained in the hands of private individuals well into the nineteenth century."' (Smith 2006, 30-31). One possible explanation is that the English experience in the seventeenth century—two civil wars, a military coup (Pride's Purge), a military dictatorship, the Restoration and the Glorious Revolution—made many wary of powers that could be used by those in power against their opponents.

[←475]

"In the next decades further legislation extended such offers to burglary and housebreaking, coining, theft of certain livestock, and other offences." The statute was vague about exactly who got the rewards; the prosecutor often shared them with witnesses and informers. (Paley 1989, 316-322).

[←476]

In one case of entrapment, the prosecutors who had set up the offense stood to gain rewards that totaled £120 (Paley 1989, 302). For a vivid account of the misdeeds of the McDaniel Gang, including both framing and entrapping, see Jackson 1795, 91-99. See also Norton 2003, 18.

Contemporary writers seem to have taken it for granted that entrapment was a bad thing. They may not have considered that they might reduce crime by making criminals less willing to trust potential confederates.

[←477]

Norton 2003, 17.

[←478]

"The ease with which false witnesses can be found in London is really scandalous. One day I saw a notice put up in a window and bearing in capital letters the one word 'witness.' It meant that the person who lived in the apartment was a professional witness." (Casanova 1970, 9:341).

[←479]

Report 1816, 204.

According to a magistrate testifying before a parliamentary committee in 1816, “It is very common for an individual who has suffered any great injury to offer rewards of a very large amount; a banker will sometimes offer £500 for the apprehension of his clerk, who may have absconded with thousands.” (Report 1816, 204).

It was argued that juries were reluctant to trust the testimony of officers whose reward depended on persuading the jury to convict (Report 1816, 179 and elsewhere). In 1818 Bennet’s act replaced rewards on conviction with a more generous reimbursement of costs (Beattie 1986, 58-9).

[←480]

This did not entirely eliminate the problem. In the nineteenth century there were charges that police sometimes conspired with attorneys to convict defendants. The attorneys would be reimbursed by the court for their services and would then kick back some of the money to the police. Such a scheme depended on the court being willing to pay more in expenses than the real cost to the attorney of the services provided.

[←481]

The process was more gradual than a single date suggests. Beginning in the 1750's, "rotation offices" were established in London at which a magistrate could routinely be found. Over time, groups of constables formed associated with particular rotation offices, especially the Bow Street office occupied by first Henry Fielding and then his blind brother John. The constables were coordinated by the magistrates but supported themselves on rewards for successful prosecutions and for the return of stolen property. In 1785 there was an unsuccessful attempt to set up a police organization in London (Beattie 1986, 66). In 1792, rotation offices were provided with up to six salaried constables each, although they were expected to make much of their income on rewards. The change did not entirely eliminate the problems that had been associated with amateur thief takers. Paid constables, one of them a Bow Street Runner, were involved in an entrapment scandal in 1816 and several Bow Street runners seem to have accumulated substantial fortunes, presumably from some combination of rewards and payments for compounding (Radzinowics 1957, 2: 268, 333-337). Juries distrusted police testimony in the early nineteenth century for the same reason they had distrusted private prosecutors and their witnesses in the mid-eighteenth century, the suspicion that it was given in the hope of receiving a reward for conviction. (Radzinowicz 1957, 2:344-346.) Similar problems of entrapment and official perjury are not unknown today, even though police rewards take more indirect forms.

[←482]

Blackstone (Book IV, Chapter 7) classifies petty larceny as a non-capital felony rather than a misdemeanor, asserting that “FELONY, in the general acceptation of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands or goods.” But he also writes “THE idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offense felony, the law implies that it shall be punished with death, *viz*. by hanging, as well as with forfeiture: unless the offender prays the benefit of clergy; which all felons are entitled once to have unless the same is expressly taken away by statute.

[←483]

Sometimes these punishments became more than minor; a sufficiently unpopular convict might be attacked in the pillory, sometimes even killed (Beattie 1986, 466-468).

[←484]

In 1576 “the requirement that the clergied offender be turned over to the ordinary to undergo purgation was abolished. Henceforth, the successful pleading of clergy was to be followed by immediate discharge.” (Beattie, 142). The church courts still played a role in “wills and marriages and occasional cases of slander.” (Hay 1975a, 30).

[←485]

Beattie 1986, 492.

[←486]

Blackstone (Bk IV, Chapter 14): “the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels.” But “AND, we may observe, 1. That by his conviction be forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender. … That by the burning, or pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted.” (Bk IV, Ch. 28). Mathew Hale (1800, 388-9), whom Blackstone references, appears clear: “3. That by his conviction he forfeits all his goods that he hath at the time of the conviction, notwithstanding his burning in the hand. … 5. That presently upon his burning in the hand he ought to be restored to the possession of his lands …”.

[←487]

A defendant might spend as much as six months in jail waiting to be tried. The jails were both unpleasant and unhealthy; see Beattie 1986, 298-309. “Indeed 1750 saw the most memorable outbreak (of jail fever) of the century because it carried away not only dozens of prisoners but, following the April session at the Old Bailey, more than fifty people who had been in court, among them the Lord Mayor of London, two judges, an alderman, a lawyer, a number of court officials, and several members of the jury.” (Ibid 304)

[←488]

Beattie 1986, 88, 471.

[←489]

Starting in the 1760's, however, there was some use of imprisonment for manslaughter. Beattie 1986, 88.

[←490]

Beattie 1986, 479.

[←491]

Beattie 1986, 480.

[←492]

Beattie suggests that transportation had begun to go out of favor a few years before the revolution. His explanation is that it was no longer believed to provide either adequate punishment or adequate incapacitation. Trans-Atlantic voyages became substantially safer and less expensive during the fifty years after 1720. A transportee could escape from his indenture or (if he had money) avoid it by paying off the captain who transported him and return to England illegally.

[←493]

By the end of the sixteenth century, clergy had been removed from, among other offenses, petty treason (killing one's “lord, master or sovereign immediate”), murder, housebreaking (when there was someone in the house who was “put in fear”), highway robbery, horse stealing, theft from churches, pocket-picking and burglary. Most forms of larceny remained clergyable. (Beattie 1986, 144).

[←494]

Taking goods from a house when the owner was present and put in fear and breaking into houses, shops, and warehouses and stealing to the value of five shillings (1691), shoplifting to the value of five shillings and thefts to the same value from stables and warehouses (1699), theft from a house or outhouse to the value of forty shillings, even without breaking in and even if no one was present (1713), sheep stealing (1741), cattle theft (1742), theft from a bleaching ground of linen or cotton cloth worth ten shillings or more (1731, 1745), theft from a ship in a navigable river or from a wharf goods valued at forty shillings or more (1751), theft from the mails (1765). (Beattie 1986, 144-145).

[←495]

Beattie has computed, for the period 1660-1800, that 11.5 per cent of the bills submitted to the Surrey grand jury for capital property offenses and 14.9 percent of those for murder were dismissed. (Beattie 1986, 402).

[←496]

Examples cited by Beattie (1986, 424) include “theft of twenty-three guineas from a house ...; lace valued at more than a hundred pounds in the indictment ...; gold rings and jewelry ... valued by the owners at more than three hundred pounds ... .” All of these were “found by the jury to be thirty-nine shillings' worth.”

[←497]

The figures quoted here are based on the assize files of the Home Circuit and the quarter sessions rolls of Surrey and limited to those years from 1660 to 1800, a total of about a hundred, for which complete indictment evidence was available. The sample is described in detail by Beattie in his Appendix, Beattie 1986, 639-643.

[←498]

I am not considering here the use of workhouses and other forms of confinement for those not guilty of serious offenses, such as vagrants. Also, a judge who wanted to punish a minor offense with imprisonment could impose a fine the defendant could not pay, hold the defendant in jail for not paying the fine, and drop the fine after what the judge considered an adequate term of imprisonment.

[←499]

The rate of homicides known to police in England from 1906-1910 was 0.8 per 100,000 (Gurr 1981). Homicide indictment rates reported by Beattie fell from 8.1 per 100,000 (1660-1679) to 0.9 (1780-1802) in the urban parishes of Surrey, from 4.3 to 0.9 in the rural parishes of Surrey, and from 2.6 to 0.6 in (rural) Sussex.

[←500]

Koyama (2014, 281-282) offers evidence that rates of non-violent crime were increasing from 1807 to 1838, as reflected in the increase in committals. Committal data are not available earlier, but "local studies certainly suggest that property crimes were increasing in the late eighteenth century."

[←501]

Beattie 1986, 108-109. An interesting project, which so far as I know has not been done, would be to examine statistics for homicide indictments during the period just before and during the introduction of professional police in an attempt to determine whether there was a significant change in the ratio of indictments to homicides.

[←502]

The probability here is for individuals who had been apprehended and charged. We do not know what fraction of crimes resulted in the criminal being apprehended but there is evidence suggesting that it was low. Contemporary sources describe pick pocketing as common but “in 61 years, only 92 indictments for picking pockets laid before the Surrey magistrates.” (Beattie 1986, 180). Contemporary accounts describe some criminals as practicing for many years before being finally caught and tried.

[←503]

Philips (1989, 116) cites the case of Mr. James Bailey, a member of an association for the prosecution of felons, who succeeded in recovering his stolen horse and prosecuting the thief. His total outlay on the case came to £66.9s.7d. Philips, 115. A horse was “worth from £10 to £50.”

[←504]

Of the £66.9s.7d laid out by James Bailey, £38.8s.6d were repaid by the court.

[←505]

My description here is based on Philips 1989 and King 1989 and ignores considerable variation in the actual institutions. A few covered more than a local area. Some charged different amounts to members of different status. Additional information on prosecution association can be found in Koyama 2014.

[←506]

Philips 1989 offers estimates of the number of such associations ranging as high as 4000 associations around 1839, and thinks “at least 1000” a good working figure.

[←507]

An additional incentive was that the secretary of the association was likely to be an attorney with some expertise in catching and prosecuting criminals.

[←508]

A related reason for not joining would be the imperfect privatization of deterrence. The less prominent a potential victim was, the less likely it was that a potential thief would know enough about his commitments to be deterred by them. And private deterrence would be useless against crimes, such as most highway robberies, committed by criminals who did not know who their victims were.

[←509]

"She came again on Monday when she came and asked for her gown, and she would have it where she found it, but I would not unless she would prosecute the prisoner." (testimony of Francis Smith, pawnbroker). (Ryder Old Bailey Notes, 33: *R. v. Ann White).*

"On a conviction of larceny, in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII, c. 11." Blackstone Bk IV Chapter 27, 362.

[←510]

4 Blackstone, Chapter 27.

Beattie (1986, 457) argues that fines for minor offenses were largely token payments to show that the two parties had reached agreement. “A larger fine might well result when such agreement was not forthcoming, and its threat, along with the further threat that the nonpayment of a large fine could result in a period in jail, was clearly used by the courts as a way of persuading a recalcitrant prisoner to come to terms with the complainant.” Beattie (1986, 457-458) cites the Recorder of London in 1729, ... “In discussing an assault and battery, he said that it was `usual in these cases for the Defendant to make satisfaction to the Prosecutor for his wounds, and costs and charges—before the Court sets the fine ... which is usually greater if a Defendant won't make a Prosecutor easy as the Court directs.’ ... ‘...and then if he forbears to appear and prosecute [the defendant] will be discharged, and all charges of a Tryal saved, which would be a greate expence.’”

“In contrast, for most prosecutions for offenses against the person at Quarter Sessions, Quarter Sessions is a mere nominal presence. The decisive action—the settlement of the case—takes place out of the range of the justices’ hearing and usually outside the walls of their court. In this light, Quarter Sessions is merely an institution structured so as to encourage disputes to be settled extra-institutionally.” (Landau 1999, 533).

[←511]

"The compounding of penal actions, originally allowed, was made illegal by 18 Eliz. c. 5, made perpetual by 27 Eliz. c. 10." (Radzinowicz, 2:138n2). Also see Blackstone, Bk IV, chapter 10 parts 10 and 14.

[←512]

Kurland Waters 1959, 512.

[←513]

The following are a few examples I have come across:

“Ainsworth was caught stealing, begged Blundell repeatedly not to prosecute, and entered into negotiations to work on one of his master's houses in return for forgiveness.” (Hay et. al. 1975, 41).

“Mrs. Woodb. asked Ann Wh. to pay the money and she said she would provided there would be no more trouble afterwards.” (Ryder Old Bailey Notes, 34, *R. v. Ann White*). This was from the testimony of Francis Smith, pawnbroker. Mrs. Woodburn was the owner of the stolen gown; Ann White was the mother of the accused thief, also named Ann White. The money was being paid to Smith in order to redeem the gown, in order that it could be returned to its owner. The elder Ann White paid the money, but her daughter was nonetheless charged and convicted.

Jo. Watkins, father of prisoner. “The prosecutor has been with me, and wanted money to stop the proceedings, he having been at great expense. But I refused. ... He said, would I give nothing to save my child?” (Ryder Old Bailey Notes, 53). The girl, who was accused of having stolen and pawned a laced waistcoat, was acquitted, apparently because too young (11) to have sufficient discretion to be held guilty of a felony.

[←514]

King 1984, 27. Beattie (1986, 401) asserts that “the vast majority of those committed by magistrates to stand trial for felonies were charged and brought to court, ...” but does not provide actual numbers.

[←515]

This may or may not be true if the prosecutor's principle objective is deterrence. Using perjury to convict a defendant who potential offenders believe is innocent does not deter. Using perjury to convict a party who potential offenders believe is guilty does.

[←516]

The problem was also recognized by the law in the related context of informers who were entitled to a part of the fine paid by those they informed against. “When suing for a penalty, an informer was considered an incompetent witness unless made competent by statute.” (Radzinowicz 1957, 2:139).

[←517]

Langbein 1983.

[←518]

This argument is made repeatedly in *Hay et. al. 1975*, in particular in Hay 1975b. It is persuasively rebutted by John Langbein in Langbein 1983. For a re-rebuttal, see Linebaugh 1985. I offer a different version of the argument later in this chapter.

[←519]

See Hay 1989.

[←520]

The same phenomenon in modern civil law is described as searching for potential defendants with deep pockets.

[←521]

Hay 1975a, 198. Hay asserts that this was a common trick, citing *Anon* 1753, 26. I know of no similar example in the context of more serious offenses.

[←522]

A defendant could defend himself against prosecution by a plea of *autrefoits acquit* or *autrefoits convict*—having been either acquitted or convicted in one trial, he could not be tried again (4 Blackstone 1884, 335-336). It is not clear whether any similar defense existed for a defendant who had been charged but not tried due to the failure of the prosecutor to show up at the trial. The equivalent situation in a civil case resulted in a *non prosiquiter* being entered; the plaintiff owed costs to the defendant and a fine to the crown, but could reinstitute his suit after paying them (3 Blackstone 1884, 296).

[←523]

According to Blackstone 1884, 2 Comm. 437, where a statute provides a penalty payable to the informer, the first person who brings an action "obtains an inchoate imperfect degree of property by commencing his suit: but it is not consummated till judgement; for, if any collusion appears, he loses the priority he had gained." As I discuss in the appendix, Klerman found evidence in the 13th century context that the more likely it was that a prosecution dropped by the prosecutor would be transferred to the jury by the judge, the less private prosecution occurred.

[←524]

For more detailed discussions of punishment inefficiency and its relevance to the choice of punishment, see Friedman 1981 and Friedman 1993.

[←525]

The inefficiency is slightly greater than one if we include the cost of hiring the executioner. It might be less than one if the state obtained some direct benefit from execution, such as a corpse to be sold for dissection.

[←526]

> “Since the penalties of exile and penal servitude in the Yüan dynasty stressed the utilization of labor, the function of the jail during the Yüan was not to deprive an offender of freedom per se, but rather to put a suspect in custody before or during a formal trial or to detain a sentenced person before the final imposition of a sentence.” (Ch’en 1979, 73).

[←527]

“Duncan Campbell was paid about thirty-eight pounds a year for each prisoner on board his ships. The government got the benefit of their labor, but it came nowhere near that figure in value. Beattie 1986, 593, citing Johnson 1970, 9.

[←528]

My description of the galley slave system is based on Andrews 1994.

[←529]

Andrews 1994, 326. He does not offer either the evidence for that conclusion or data that could be used to compare the gains with the associated costs.

[←530]

Langbein 1976.

[←531]

Langbein asserts in a footnote that “the use of captives in the galleys had been known in antiquity, and may have been a more or less continuous process in the Eastern Mediterranean into the Renaissance,” and cites Masson 1938, 72 ff note 24 at 8-10. According to Casson (1971, 322-328) this is mistaken. In a careful and convincing discussion he argues that, in classical antiquity, neither slaves nor convicts were used to row warships save in rare emergencies.

The military use of slave rowed galleys may have been an innovation due to the increasing use of cannon in naval warfare. As long as the usual form of combat involved boarding and hand-to-hand combat, as seems to have been the case both for classical naval engagements and during the Viking period, a ship whose rowers could not be trusted with weapons was at a serious disadvantage.

[←532]

Similar considerations appear in the literature on plantation slavery in the new world; there too it has been argued that particular activities were well suited to slavery because they involved groups of workers working together at tasks that were easily standardized and supervised (the “gang system”) (Foley 1994, 21-45, 72-80).

[←533]

Beattie (1986, 504) suggests that the reason for the change in policy was that the financial situation of the English government had improved considerably by 1718.

[←534]

This ignores those transportees who returned illegally before their sentences were up. According to Beattie (1986,. 540-541), that became a significant problem during the second half of the century. Seven years was the usual sentence of transportation (and term of indenture) for clergyable felonies, fourteen for non-clergyable felons pardoned on condition of transportation. Presumably many of the transportees either died before completing their terms or chose to remain in the new world.

[←535]

Andrews 1994, 354-5.

[←536]

Innes 1980.

[←537]

For a detailed analysis of the arguments that judges offered for and against pardons and the source of character testimony in favor of pardons, see King 1984.

[←538]

For a more detailed discussion of price discrimination in punishment, see Friedman 1981.

[←539]

Posner 1981, 193-195. For one example, consider the dia-paying group in the Somali system.

[←540]

This point is made in Hay et. al. 1975b, 48-49.

[←541]

Wimsatt and Pottle 1959, 276-338.

[←542]

The Scottish legal system was based not on English common law but on the Dutch interpretation of Roman law—Boswell, his father and grandfather all studied law in Holland. Royal pardons, however, came from the English king, Scotland being part of the United Kingdom. Hence in trying to obtain one, Boswell was part of the same system as an English attorney acting on behalf of an English client.

[←543]

Boswell had visited Corsica during the revolt against Genoan rule, become a friend and admirer of General Paoli, leader of the revolt, and written a popular book in support of it. Rochford, as British ambassador in Paris, had tried unsuccessfully to prevent the agreement by which France took over the rule of Corsica from Genoa, leading to the suppression of the revolt.

[←544]

Wimsatt and Pottle 1959, 303-4.

[←545]

Ibid 290.

[←546]

Ibid 337.

[←547]

“It does not seem that at any time in the eighteenth century, in any part of the country, more than sixty per cent of those sentenced to death were actually executed, and over much of the century and in many places a figure of one-third is more typical.” (Tobias 1979, 140).

[←548]

The pardon was by the king but almost guaranteed by a request from the judge.

[←549]

Along a related line …

> “It has been well observed, that it is of great importance, that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.” (Blackstone, Book IV, Chapter 32).

[←550]

For a fascinating presentation of the approach, see Kahneman 2011.

[←551]

For details see Norton 2003. Conviction on the relevant charges did not require a jury trial.

[←552]

The process is described in detail in Beattie 2001, which limits its description almost entirely to London.

[←553]

For Klerman's full account of the history, see Klerman 2001, 5-8.

[←554]

> “In fact, until the turn of the fourteenth century, presentments were confined almost exclusively to homicide and theft, and nearly all accusations of rape, mayhem, wounding, false imprisonment, assault and battery were brought by way of appeal, as were large numbers of homicide and theft cases.” (Klerman 2001, 7).

[←555]

Klerman offers evidence for the self-informing jury in the early period and an explanation of the shift in Klerman 2003.

[←556]

For possible explanations of the divergences, see Klerman 2001, 41-42.

[←557]

At one time it was sufficient that one parent be a citizen.

[←558]

Freeman 1963 estimates that the free adult male population consisted of about 30,000 citizens and 15,000 metics; allowing for women and children would bring the total free population to something between a hundred and two hundred thousand. She guesses a slave population of 200,000-400,000. Gomme 1933 estimates for 431 B.C. a total population of about 315,00, of whom 40,000 were adult male citizens and 115,000 slaves.

[←559]

The same was true of slaves in the ante-bellum South; there was at least one who was a steamship captain.

[←560]

A temple on the Acropolis, later known as the Hephaisteion.

[←561]

Readers interested in seeing what the speeches look like will find sixteen of them in Freeman 1963.

[←562]

This was also the rule in Roman law.

[←563]

As in some of the other systems—Islamic law, for example—some offenses that we think of as crimes, such as murder, were treated as private cases.

[←564]

We do not know of any actual cases where sycophancy was charged, so it is possible that the charge existed only in rhetoric.

[←565]

Or possibly stripped to his underwear.

[←566]

"You know that, before now, many men whose hands are unclean, or who have any other sort of pollution, have gone on board ship, and by doing so have brought destruction on the innocent souls who sailed with them, or have brought them into grave danger." Helos, defending himself against a charge of having murdered Herodes, offers the fact that he and his shipmates did not have bad luck as evidence of his innocence (Freeman 1963, 81).

[←567]

The same issue appears in Icelandic law as reported in *Gragas I, K§99, 175*.

[←568]

MacDowell 1978, 121-2. Michael Gagarin suggests a different possibility for how the amnesty was evaded (personal communication).

[←569]

It is not clear whether marriage was ever prohibited between citizens and non-citizens, but it may have been in the fourth century.

[←570]

The same title was used for the head of a household. If a woman was married to a man who lived in his father's household, her *kyrios* would be her husband but the *kyrios* of the household she was part of would be her husband's father.

[←571]

Or brother or under some circumstances uncle if her father was no longer alive.

[←572]

Sterling 1993, 133-139.

[←573]

Details and evidence.

[←574]

Details from a non-profit public interest law firm involved in the case.

[←575]

4 Becker and Stigler 1974.

[←576]

For a solution to the problem of providing the optimal incentive to both offender and prosecutor, see Friedman 1984.

[←577]

I am not offering here anything approaching a full theory of optimal punishment or optimal enforcement; readers interested in the subject will find it in Chapter 15 of Friedman 2000. The simple rule "set average punishment equal to damage done so as to deter any offense that benefits the offender by less than it costs the victim" is sufficient for my purposes here although, as I demonstrate there, it is not strictly correct. A similar approach applied to how rules are enforced suggests avoiding enforcement actions that cost more than the value of the deterrence they provide.

[←578]

A discussion of punitive damages, including arguments against that interpretation and for and against others, can be found in Friedman 2000, Chapter 18.

[←579]

As when Aiskhines sued Ktesiphon for having proposed a decree conferring a gold crown on Demosthenes “in honor of his merit and virtue and because he continues saying and doing what is best for the people.” Part of Aiskhines' argument was that it was illegal to include a false statement in a decree and it was false to say that Demosthenes' speeches and policies were good for Athens. (MacDowell 1978).

[←580]

Friedman 2000, Chapter 18.

[←581]

"According to the U.S. Sentencing Commission, over 97% of convictions in the federal system arise from guilty pleas; state systems aren't far behind at about 95%." (Dervan, 2015).

[←582]

Bernstein 1992.

[←583]

This insight, obvious once stated but not so obvious before, I owe to James Donald.

[←584]

For a more extensive discussion of these issues, including their relevance for anonymous online transactions, see Friedman 2005.

[←585]

Friedman 2002 includes a simple model of reputational enforcement showing the link between cost to third parties and the amount of cheating.

[←586]

The mechanism works better if arbitrators are chosen in advance, since then third parties do not have to have independent information about the honesty or competence of the arbitrator. They need only know that a party agreed to abide by the arbitrator's verdict and then reneged on that agreement.

[←587]

One might interpret the Fair Courts of medieval Europe as using a mix of this and the previous approach. If a merchant refused to accept a verdict against him others would refuse to deal with him, in part for fear of being cheated themselves, in part in order to help enforce the rules of the trade fair.

[←588]

For a more extensive discussion of the public good problem and approaches to solving it, see Friedman 1996, 262-5.

[←589]

"Church members who refuse to ostracize the moral culprits are themselves expelled and shunned." Kraybill (1989, 117), describing Amish *meidung*.

[←590]

Sutherland 1975, 148.

[←591]

Hume 1762, 2:501-2.

[←592]

Smith 1976 Book V Chapter 1 Part 3 article III, 317.

[←593]

For a discussion of the use of divine sanctions in western Europe in the Middle Ages, see Leeson 2012b.

[←594]

> “I had sooner play *cards* against a man who was quite skeptical about ethics, but bred to believe that 'a gentleman does not cheat', than against an irreproachable *moral philosopher* who had been brought up among sharpers.” (Lewis 1947, 15).

[←595]

Llewellyn and Hoebel 1983.

[←596]

Sutherland 1975, 168. See also a similar comment on p. 266.

[←597]

> Peter Leeson, in an article on the use of cursing by medieval monks to protect their property, points out that one requirement for it to work is that the curse takes a form not readily falsified. If I curse you to drop dead tomorrow and you don’t, you and others will conclude that my curses don’t work. If I curse you to be unlucky, anything bad that happens to you can be interpreted as evidence that they do. (Leeson 2012b).

[←598]

Leeson makes the same argument for gypsies obeying *romania.* Leeson 2013.

[←599]

At one point the combined royal and parliamentary rewards for conviction of a serious crime in or near London came to £140, three years' income for a journeyman.

[←600]

Bennet's act, passed in 1818 in response to concerns with the perverse effect of rewards for conviction, including juries not trusting prosecutors and witnesses, replaced rewards with payment of costs as evaluated by the judge. (Beattie 1986, 58-59).

[←601]

According to the National Registry of Exonerations, maintained by the law schools of the University of Michigan and Northwestern University, 15% of those who were exonerated had pled guilty..

[←602]

Gross et. al. 2014 give 4.1% as a conservative estimate for the fraction of defendants sentenced to death who were innocent. Their conclusion is based on data on exonerations. A defendant may be exonerated on the grounds that the evidence on which he was convicted was not strong enough to satisfy the "beyond a reasonable doubt" requirement for criminal proof yet still be guilty, but the authors believed that the bias from counting all exonerations as implying innocence was more than outweighed by other biases in the opposite direction.

Roman et. al. 2012 made use of a cohort of 634 Virginia cases dating from 1973 to 1987 for which tissue evidence happened to have survived. Their results suggest that in about 16% of the cases the evidence, if analyzed, would have reduced the probability of conviction (my analysis of their results).

[←603]

“For failure to arrest a thief or a robber within a month, he was to be punished with seven or seventeen blows with a light stick, respectively; for two months, seventeen or 27 blows, respectively; and for three months, 27 or 37 blows, respectively. On the other hand, he was to be rewarded for arresting a thief or robber within the deadline.” Ch’en 1979 on the rules for “archers,” drafted police officers, under the Yuan dynasty.

“if the arresting constables do not capture forcible robbers within one month, they shall be punished by 20 strokes of beating with the light stick. For two months the penalty …” (Ming code article 418, Jiang 2005, 225).

“Whenever, by the authority of a tribunal of justice, consisting of regular officers of government, and of official clerks, an unjust sentence is wilfully and designedly pronounced and executed, … in every such case, the member of the court who stands first in point of responsibility, shall suffer punishment equal in degree with that which was, when it ought not to have been, or was not, when it ought to have been, inflicted.

Whenever the unjust sentence had not been pronounced wilfully, but through error, there shall be a reduction in each case, of three degrees in the punishment, if the injustice consisted in an aggravation; and of five degrees, if it consisted in a mitigation of the sentence.” (Staunton 1810, 466-468).

[←604]

Mast et. al. 2000, Benson et. al. 1995. See also. The problem may also appear in high profile cases where the prosecutor needs a conviction to further his political ambitions.

[←605]

Volokh 1997 provides a detailed history of various versions of the rule.

[←606]

For details see Leeson 2012 and Langbein 1978.

[←607]

Pace Langbein, the Jews made an even more extreme attempt, requiring not only two witnesses but two witnesses who had warned the offender in advance.

[←608]

In the U.S. in 2006, an estimated 1.2 million persons were convicted of a felony. If each of them had had a jury trial of 7.2 days the total would have been 8.6 million trial days. Assuming that courts function five days a week, 52 weeks a year, felony cases alone would have required the full time effort of 33,000 judges. Add in a few more for the trials of defendants who were acquitted. There are about 30,000 judges in the state judicial systems and another 1,700 in the federal system. For each judge the process would need twelve jurors and a still larger number of attorneys, witnesses, court officers, additional members of the jury pool and the like.

It is worth noting, however, that Periclean Athens employed as jurors a substantially larger fraction of its population.

[←609]

Quoted in Elon 1994 from Joseph Caro, Shulhan Arukh HM Ch. 2.

[←610]

John Lott (1987) has argued that the fact that richer defendants get lighter sentences due to having better lawyers is evidence in favor of the efficiency of the legal system, since equal sentences would correspond to a higher fine for offenders with a higher opportunity cost for their time. On the other hand, I have shown that under some circumstances it is efficient for wealthier offenders to pay higher fines. (Friedman 1981).

[←611]

13 “The document specifically directs agents to omit the SOD's involvement from investigative reports, affidavits, discussions with prosecutors and courtroom testimony. Agents are instructed to then use ‘normal investigative techniques to recreate the information provided by SOD.’” (From a Reuters story published on 7/5/13.

The SOD is the Special Operations Division of the DEA, the Drug Enforcement Agency, which was funneling information obtained from the NSA and other sources to law enforcement agents.

[←612]

Scott 1910.

[←613]

Peel 2009, 6.

[←614]

Scheck et. al. 2000.

[←615]

True of the Welsh legal system (Ireland 2015, 3-4, 14, 16), the Icelandic legal system, and the Somali legal system. In Jewish law theft, secret taking, was punished more severely than robbery, open taking.

[←616]

Leeson 2012a.

[←617]

In the U.S., 32 states, the federal government and the district of Columbia have compensation statutes of some sort. Similar rules exist in many, but not all, other countries.

[←618]

Dates given first as A.H., the Muslim calendar, and then A.D.

[←619]

The variant versions in the Dead Sea scrolls are evidence that the text of the Old Testament was fluid until about 100 A.D.

[←620]

The Berber Koran. (Von Grunebaum1997, 118. Hodgson1844, 40).

[←621]

Who the final Imam was and when is one of the issues on which different Shia sects differ. The Ismaili Sevener Shia sects recognized a continuing dynasty of divinely inspired Imams and, in the case of the Nizari, still do in the person of the Aga Khan. According to Twelver doctrine, the final Imam began his minor occultation in 874, continuing to interact with the faithful via deputies until 941, the beginning of his major occultation.

[←622]

“Jephthah in his generation has as much authority as Samuel in his generation.”

[←623]

Sutherland (1975, 131-2) describes a *diwano*, a discussion meeting less formal than a *kris*, where "the leaders of the West Coast *vitsi* assembled to decide new policies … . … it was decided that if a marriage fails, half the brideprice must be returned, … ."

"In another recent development, over two hundred Roma gathered for an advisory *kris* in Houston to discuss improving the rights of divorced women under the Romani legal system, to keep pace with developments in American law and to remove the incentive for Gypsy women to appeal to the American legal system for a stronger remedy." (Weyrauch 2001, 46).

[←624]

Klerman 2007, 1179-1226.

[←625]

Schroeder 1955, 242.

[←626]

In the context of the economic analysis of law, this is usually put in terms of economically efficient or wealth maximizing law. For the purposes of this book I prefer to be vaguer than that.

[←627]

For a more detailed analysis of these issues see Friedman 1990, Chapter 19.

[←628]

Posner 2014.

[←629]

Friedman 2000.

[←630]

Friedman 2014, Chapter 53.

[←631]

For a more detailed explanation of this point see Friedman 1992, my review of Ellickson's book.

[←632]

The original context of the phrase was not the political problem of controlling enforcers but the domestic problem of a husband trying to ensure the fidelity of his wife.

> the plan that my friends always advise me to adopt
> 'Bolt her in, constrain her!' But who can watch
> the watchmen? They keep quiet about the girl's
> secrets and get her as their payment; everyone hushes it up.
>
> (Juvenal, Satire VI, lines 346—8, O29-33, possibly interpolated)

For a later version of the problem, with solution, see "The English Padlock" by Mathew Prior.

[←633]

Arguably it was the gradual breakdown of that constraint that led to the final collapse of the system during the Sturlung period.

[←634]

Brewer 1980, 140. The quote is from Junius, the pseudonym of the author of a series of letters to the *Public Advertiser*.

[←635]

Gillam, the magistrate charged with murder for ordering the troops to fire, “was petrified that the London jury would find him guilty and, before he was acquitted, he fainted twice during the proceeding.” *Ibid*, 132.

[←636]

Schacht 1986, 51.

[←637]

Bodde and Morris, 121.

[←638]

Orfield 1947, 14-23, which also contains (in its footnotes) a listing of law-review articles on the topic. Also Hall 1936 and Foote 1955.

[←639]

The Steve Jackson case is described in Sterling 1993, 133-139.

[←640]

A despotic minister will always endeavour to dazzle the prince with high flown ideas of the prerogative and honour of the crown. I wish as much any man in the kingdom to see the honour of the crown maintained in a manner truly becoming Royalty. I lament to see it sunk even to prostitution.

An earlier issue, #5, had strongly hinted that Lord Bute, prime minister and favorite of the king (whose tutor he had been) was the lover of the King's widowed mother. The publication was part of the Wilkite movement mentioned earlier.

[←641]

A verse to the rowing song from *Silverlock*, Myers 2004.

[←642]

Brin 1998.

[←643]

> “Moslem Kings are expected, like the old Guebre Monarchs, to hold “Darbar” (i.e., give public audience) at least twice a day, morning and evening. Neglect of this practice caused the ruin of the Caliphate and of the Persian and Moghul Empires: The great lords were left uncontrolled and the lieges revolted to obtain justice.” (Burton 1885, 29n2).

[←644]

For a longer discussion of the problems produced by surveillance technology and the limits of transparency as a solution, see Chapter 5 of Friedman 2008.

[←645]

Mencken 1924.

[←646]

Dan Kahan of Yale Law School has done research along these lines in the context not of votes but of beliefs. He finds that when positions on some controversial issue have become a marker for group identification—consider gun control, abortion, global warming, or evolution—the more intellectually able someone is, the more likely he is to agree with his group, whether that means believing in evolution or not believing in it. He argues that this is rational behavior. What you believe has little effect on the world in general but a considerable effect on you, so it is in your private interest to agree with the people who matter to you. The smarter you are the better you will be at persuading yourself to do so. (Kahan et. al. 2016a, b, c).

[←647]

For a more detailed description of how such a system might work, see Friedman 2000, 99-100, 266, 282.

[←648]

Friedman 1973.

[←649]

A point made in verse, in a somewhat earlier context, by Rudyard Kipling..

[←650]

In the rule as it actually exists in English law, the compensation is for what the court believes the legal costs should have been, not for what the costs actually were. And under American law the prevailing party can sometimes get its costs paid if the court views the losing party's position as sufficiently meritless.

[←651]

This explanation of punishment for attempts is worked out in more detail in Friedman 1991, chapter 7.

[←652]

For a modern discussion of the question, see Chapter 3 of Jackson et. al. 2010.

[←653]

In Florida, possession is a misdemeanor punishable by up to sixty days imprisonment plus suspension of driving privileges. In Illinois, providing alcohol to someone under age is a misdemeanor with a penalty up to a $2,500 fine and a year in jail or a felony with a penalty of a year or more in jail and a fine of up to $25,000.

[←654]

Hay 1989.

[←655]

Two different people claim responsibility for the same translation, each with a webbed version.