**Legal Systems Very Different 2020**

3:00-5:00 Charney 101, 1/21 Guadalupe Hall, 150/151

* Outline of course:
  + Week 1
    - Introduction
    - Imperial Chinese Law
    - Romani Law
    - The Amish
  + Week 2
    - Jewish Law
    - Islamic Law
    - When God Is the Legislator
    - Embedded and Polylegal Systems
  + Week 3
    - Saga-Period Iceland
    - Somali Law
    - Early Irish Law
    - Feud Law
  + Week 4
    - England In the Eighteenth Century
    - Athenian Law: The Work of a Mad Economist
    - Enforcing Rules
  + Week 5
    - The Problem of Error
    - Making Law
    - Guarding the Guardians
    - Ideas We Can Use
* The idea of the course
  + All human societies face about the same problems
  + Solve them in an interesting variety of ways
  + They are all grownups
  + Learning more about the law
  + Getting ideas for our law
* The mechanics
  + Reading
    - My book draft
      * System chapters: Very different
      * Thread chapters
    - For each system chapter, additional reading if you want it
  + Papers if you want to do one
    - Possible topics
      * Mostly systems, but could be threads
      * Ideas from your background. Mormon Vietnam
* Think about threads
  + **God as Legislator:** 
    - When he gets it wrong.
    - Getting legal uniformity: Jewish vs Islamic
    - American constitutional law
  + **Embedded and Polylegal Systems**
    - Embedded
      * Amish. Romany. Social norms.
      * How do you enforce rulings in an embedded legal system?
      * Requirements for stability
    - Polylegal
      * How do you determine which rules apply to whom?
      * How do you handle cross cases?
  + **Enforcement Mechanisms: Civil, Criminal, And Lots More**
    - Criminal law: All offenses are offenses against the state
      * The state prosecutes
      * Settles
      * Collects fines
    - Civil law: Offenses are offenses against the victim
    - Do we need both?
      * Could a pure civil or pure criminal system work?
      * We will see examples of both
    - What other mixes are possible?
      * Privately prosecuted criminal law (18th c. England)
      * Hyper-civil, where enforcing verdicts also private (feud systems)
    - Norms and ostracism.
  + **Making Law**
  + **The Problem of Error—incentives to convict**
    - Too much—punitive damages, class action, etc.
    - How do you make it in the interest of actors not to convict the innocent?
    - Is there a better solution than adjusting
      * the strength of the incentive
      * The requirements for conviction
  + **Guarding the Guardians.** 
    - Police shootings
    - Surveillance — NSA. FISA.
* Think about relevance to our legal system—ideas we can steal, warnings of what not to do, parallels to our system.

**Chinese Law Class**

* Culture/Religion vs function as explanation
  + My tactic is to try to explain as function, that being common across systems
  + But I don’t always succeed.
  + The same question exists for other systems, including ours.
* The tort/crime puzzle
  + Why do we have two systems to do the same work?
    - How are offenses sorted?
    - How are rules sorted?
  + Could one manage with only one?
    - Iceland as pure tort
    - China as pure criminal?
* Pure criminal law?
  + Imagine …
  + I lend you money, you don’t pay it back, what do I do?
    - Threaten to turn you in for the crime of swindling?
    - Turn you in, then drop charges … but I can’t.
    - But the magistrate is a busy man.
  + So criminal in form, but tort in substance?
  + What about using the same mechanism to convert ordinary crime to tort?
    - Depends on one person controlling prosecution—sole witness?
    - Will come back to this with 18th c. English law
    - Where criminal prosecution was private.
* Punishment: Nominal vs real
  + Strangulation or decapitation after the assizes
    - Mostly meant a non-capital punishment, sorted by facts and chance
    - Also true of the English bloody code
    - Anything similar in our law?
  + Largely let off if …
    - Needed to stay at home (British pardons)
    - Redemption: Allowed to pay small sum instead of large punishment.
      * All animals are equal, but pigs are more equal?
      * Way of pardoning without saying so, selective enforcement.
      * In a system which claimed strict mapping of offense to punishment
        + The examples don’t fit what seems right to us
        + But perhaps to them. Killing two in one family. Not dismounting.
  + Possible reasons?
    - Religious: To maintain cosmic balance. Can the gods be fooled?
    - Frighten without wasting labor. Can the population be fooled?
    - Reducing vs increasing. Credit cards. Gratitude.
* Ruling a large population with a small bureaucracy
  + Indoctrinate, so that norms and moral pressure substitutes for law?
  + Make using law unpleasant, push controversy elsewhere
  + Subcontract to other structures, especially extended family
    - Legal rules reinforce authority structure
      * Seniority to give an automatic system of rank, hierarchy
      * British navy as equivalent
    - Illegal to betray your parent to the authorities
* Imperial examination system. 19th c., population similar to ours now.
  + The world’s first and most ambitious meritocracy
    - First level made you a licentiate, status legal and social. ¼% of population
    - Next level about 1/10,000 of population. Pass rate of 1%
    - Final level pass rate of 2-3%
  + What was tested was their equivalent of a liberal education
    - Confucian classics, history, contemporary subjects
    - Essay composition, verse composition, calligraphy
  + Typically took a decade or two of studying and taking exams
  + Why?
    - IQ+ test.
    - Indoctrinating the officials with Confucian virtues? Testing for.
    - Indoctrinating the licentiates and would-be licentiates.
  + Our equivalent: a college degree
    - Gateway to most good jobs, status
    - Much of what is taught is irrelevant to those jobs
      * Techy stuff—math, science—for most jobs
      * Non-techy stuff for techy jobs
      * But getting jobs depends on grades in the irrelevant parts
      * And getting into college on high school grades, including …
    - Possible theories
      * Filtering—**not functional**, but explains salary result.
      * Signaling
      * Human capital
        + Makes sense for techy classes for techy jobs, but …
        + For others, only if what you learn is somehow useful
        + Acculturation into elite culture?

Businessman pretends to know about relativity, evolution

An engineer about history? Or at least able to write.

* Contract without law
  + Argument might be wrong, but …
    - Still interesting—how to structure contracts not to require enforcement
    - And important for us, since litigation is expensive.
    - Structure so that no incentive to breach, or only on constrained party.
      * Hostage
      * Threat to report to authorities as a hostage
      * Will see something similar in Romani feud
  + Structure to minimize information costs to third parties
    - Explain logic of reputational enforcement
    - Arbitration one solution
    - Ethnic industries another

**Romani 1/17/17 Rm 139**

* Questions?
* Who are the Romani
  + Origin. What is known, what is conjectural
  + Mostly nomadic, but …
    - Most nomads herd cattle
    - Romani live off gaije society
      * By entirely legitimate activities—working, crafts
      * By semi-legitimate—fortune telling
      * By con games, theft, etc.
    - Linguistic point. Is it true of other languages?
* Many different groups
  + So provide a sort of controlled experiment, but …
  + Risky to make a statement about all Romani based on one group
  + Some speak dialects of Romani, mutually comprehensible or not, some other languages.
  + Legal rules broadly similar across the groups
    - Ordinary rules of dealing with other Romani
      * Do not cover Gaije
      * If Gaije cause harm, blame the Rom’s who caused them to.
    - Rules of pollution, marime
      * Top/bottom half of the body
      * Rules start a puberty, end in age (menopause?)
    - For most groups contagious, for Kaale not
  + Enforcement mechanisms and social structure varies
    - All the groups seem to practice some version of feud
      * Romanichal by direct violence
      * Vlach Rom in the U.S. largely by manipulating gaije
      * Kaale in Finland by family against family, mainly via avoidance
    - Some do and some do not have a court, the *kris romani*
    - Most have adopted some version of the local religion, plus …
      * Islam in the Islamic world
      * Catholicism in medieval Europe
      * Evangelical Christian in modern U.S.
    - Family structure varies
      * Some have extended families, bride price, elders in charge
      * Some have nuclear families, marriage by elopement
      * And Kaale don’t have marriage at all
    - Is there a connection among these features?
      * Authors of one chapter in Gypsy Law argued there was
      * Other scholars, looking at more systems, don’t see the pattern
* How do they maintain effective independence?
  + Low profile. Don’t register births. In U.S., don’t identify as Romani. 3-15 million.
  + Names are interchangeable (U.S. Vlach Rom)
  + Have their own spoken language, others do not understand
  + Targeted by the Nazis, but did much better than the Jews. 220,000 out of a million?
* How do they enforce their own rules under the shadow of state law?
  + Legal penalties such as ostracism, hostile gossip
  + Illegal non-violent such as manipulating gaije authorities
  + Illegal use of covert force
* What are the potential weak points
* Anne Sutherland as a source
  + First book, helping run their school, socializing with them
    - Taught herself Romani, didn’t tell the Romani
    - Spoke to many different people to get a consistent story
    - Obviously liked them, gives a vivid and warm portrait
    - Of a very different society
      * Gaije medicine for gaije diseases
      * Romani medicine for Romani diseases
      * Living in three generation family houses
      * Life expectancy about sixty

**The Amish** 1/19/17 Rm 139

* questions
  + Last week
  + Amish reading
* Amish languages
* Amish: Considered as a government
  + Anarchy?
    - Rules by unanimous assent (sort of)
    - Binding only by agreement
    - Level of “government” small enough to make competition easy
  + Political structure
    - Lifetime appointment, semi-random selection
    - Considerable de facto power, but …
    - Limited by both unanimity and exit
    - Multiple affiliations, splitoffs, …
    - Market for legal rules?
    - Evolution of the Ordnung.
  + Threats: Problems above the congregation
    - Lancaster county and uniformity
    - Bargaining with the state over schooling
    - Bargaining with the feds over the draft, Social Security
  + Interaction with the government—why so successful?
    - For most purposes, very obedient, but …
    - When essential, civil disobedience. Went to jail over schooling.
    - Or moving
    - And they are both popular and a valuable tourist asset
    - Buggy warning signs still an issue for lowest groups
* As a legal system
  + Rules cover local “public goods,” made by local “governments.”
  + Oral not written in most cases
  + Created by practice, not legislation
  + Shunning punishment enforced by bootstraps
* Why does it work? Defined as:
  + Retains most of the next generation
  + Congregations (mostly) don’t slide up and out of being Amish
  + Example of groups that did?
* How do they solve the embedded system problems?
  + Ostracism (Meidung) but
    - Can be accepted by a less strict Amish or Mennonite congregation
    - Schwartzentruber want a cartel
    - So losing the people close to you, not all people like you
    - No external hostility
    - Contagious (deliberate association with shunned grounds for shunning)
  + An inward focused social net helps make this work
  + Don’t cooperate with the legal system, stays below the radar.
  + Jewish law and informing
* Compare to gypsies
  + Oral law—but explicit and discussed and changed, rather than “known”
  + Extensive restrictions, but arguably functional rather than superstitious
  + Small units:
    - Congregation like an association of households
    - But nuclear rather than extended families
  + Much less mutual hostility with host culture
  + Look more productive rather than predatory? Fortune telling? What do gypsies do?
  + Arguably fit host culture mythos better. But original gypsies in western Europe …
  + Parental control over marriage in Saudi society? Our society?

**Jewish Law** 1/24 Bannon 139

A different approach to embedded

And a legal system claiming divine inspiration as its basis

Two problems of divine law: Uniformity and change

Reputation vs position. The American Law Institute

Eliezer, oven of Akhnai, explanation.

Hallaj (Husayn ibn Mansur 858 - 922 AD)

Explain Ashkenazim and Sephardim

Oaths and violations

* Jewish law intro?
  + Sources
    - Torah
    - Mishnah
    - Talmud
    - Everything else, including Maimonides
      * Tension between wanting an answer and
      * Wanting to hear all the arguments
  + Authority
    - Sanhedrin
    - Babylonian academies
    - Scholars such as Maimonides
    - Maintained a legal system without central authority
    - Eventually almost all accepted Joseph Caro
  + Working around the Torah
    - Oral torah
    - Fence around the law
    - To preserve the people
    - Communal authorities as substitutes for the King of Israel
    - Marriage problem
* General points from *The Book of Torts*
  + **Theft and robbery are being treated as if they were torts**
    - Appear to be privately prosecuted
    - Penalty is a payment to the victim
    - Forgiveness by the victim morally but not legally needed
    - There are things punished by flogging or execution
      * Murder and
      * Religious violations of various sorts
      * But if there is a corporal punishment, no fine or damage payment!
  + Theft is treated more severely than robbery!
    - Penalty for theft is return of object plus a fine of its value
    - Penalty for robbery is return of object. Additional fifth? If swore falsely?
    - Also reference in Mishnah to a guilt offering if he swore falsely
    - Law modified to the advantage of robber—return only value of returning object is very costly (rafter in a building)
    - Robbery also includes borrowing without knowledge, not returning, etc.
    - And the rules mix with rules for someone entrusted with something—who is responsible when for what happens to it.
    - Iceland
  + Perhaps robbery less severe because greater chance of recovery?
  + Confession (rather than conviction by witnesses) cancels fine but not compensation
    - So presumably return the stolen object but
    - Not an addition of its value
    - Point is made in discussion of torts—treatise 1.
    - Man may be sold for compensation, but not fine—remains a future obligation
  + A lot of weight on whether the owner has given up hope of recovery
    - For theft, determines whether owner or innocent purchaser ends up with object
    - For found object, if presumption, finder can keep (stuff washed away in the river)
    - Normally finder must hold, advertise, return only with evidence of ownership (similar rules in Sharia)
    - How do you know? Sometimes presumption, other times by what he said?
      * Rescued from flood, presumed
      * Stolen by Israeli brigand, presumed
      * Heathen brigand, not presumed, because …
  + **Weight on whether the thief was a notorious thief, or reason to suspect**
    - Notorious thief, owner does not have to compensate buyer, buyer sues thief
    - Should not buy in suspicious circumstances
      * Shepherd or olive treader selling small amounts
      * Seller asks you to conceal
  + A lot of discussion of fine points.
    - Stolen property changes its value after stolen—which value counts?
    - Thief does or does not get to keep revenue from stolen property
    - Thief does or does not get compensated for improvements to stolen property
  + **Lots** of cases where the amount owed is unclear, and plaintiff can keep the larger amount if he has seized it
  + **Liability for injury**
    - Five effects. Are they all in U.S. tort law?
      * Damage—reduced value as slave
      * Medical care—actual, but based on estimate unless defendant objects
      * Pain—by what one would pay to avoid it
      * Lost labor—actual profession, or maimed profession
      * Humiliation. Scholars get compensation for insult. Lots.
    - Injury too small for compensation results in flogging—because …
* Particular points
  + “**forewarned” roughly equal to our negligence**
    - **Ox forewarned for goring only if he has gored**
      * And lots of details—gored what sort of animal?
      * On the sabbath?
    - Capital punishment of ox that kills a man (but not a heathen)
      * If forewarned, owners owes ransom as well
        + He has killed three men? How come not dead?
        + Killed three heathens. Or each time he killed, escaped. Or …
      * Capital punishment only if killing was intentional. Stoning.
    - **Ox forewarned for eating or stepping automatically**
      * No liability in a public place where he has a right?
      * But if he eats stuff, owner liable for benefit
      * Full liability if on someone else’s property
    - **A human is always forewarned**
      * So human injuring human liable for full damage, animal for half if not forewarned.
      * Two men sleeping next to each other, one rolls over, injures other, liable
      * Unless the other lay down after the first was asleep!
    - For trespass by chattels (roughly our tort)
      * Half payment from the body of the offending chattel if not forewarned
      * Full payment from the best of your land if forewarned
  + **Conflicting claims: Creditor vs tort victim**
    - Tort victim wins, because if debt prior to tort
    - Then creditor is liable for animal’s actions
    - If posterior, then animal already encumbered
  + Property conflicts:
    - Cutting your way out of a vineyard.
    - Trespassing for a bowel movement! Or when public road is too muddy
    - May pick wild plants, take a cutting from a tree—with limits.
    - Unclaimed dead body acquires title to land it is lying on—to be buried in.
    - Limit on projecting balconies—and can’t reclaim at ground level after moving your wall back.
  + **Killing a thief**
    - Justification is that you are in fear, so …
    - May not if you are sure thief won’t kill you—on his way out, for example.
  + 3/Chapter 5, paragraph 14 when taxes are or are not robbery
  + Obligations to heathens
    - Find their lost property, don’t return it—**unless to get credit for Israelites**. 3/11/3-5
    - Similarly if you detect them making a mistake, use appropriate words
    - 3/14 details of deduction from scripture.
    - Scholars are presumed honest, even if they lied in defensible contexts: 3/14/13
  + Informers: Apparently telling thieves or tax collectors where your stuff is 4/8
    - If warned, can kill before or after informing, but …
    - M. thinks after only if habitual informer.
    - In the Maghreb, handed over to authorities. For informing to authorities or robbers?
  + **Killing**
    - Avenger of blood=heir; if he refuses, court executes. Criminal not civil.
    - Permitted to kill to prevent murder or rape of a betrothed maiden, if necessary
    - Killing when wounding would do deserves death, but not by the court
    - Abortion to save life of the mother, but not partial birth abortion.
    - Indirect killing
      * Death from heaven, but not from the court
      * But court may execute if necessary, king may, otherwise
      * Court mistreats prisoner, probably to his death. Deterrence. 5/2/2-3
    - Person dying getting away with murder—because witnesses are only believed in a capital case if …
  + Safety precautions
    - Must have a wall around your roof
    - Should not drink uncovered water that a snake might have poisoned
    - Heathens not to be trusted ... 5/12
    - Not to be sold weapons. ITAR
* **Do they believe in it?**
  + Problem: Interpretation or invention
    - Killing disobedient sons p. 365
      * Parents must both be alive, not blind, crippled, mute or deaf
        + To "take hold of him"
        + "bring him out"
        + "say"
        + "this son of ours does not heed us"
      * Identical in voice, height, appearance, since …
        + "he does not heed our voice."
      * Only three months to do it in
        + Can't be a minor or
        + An adult or
        + A daughter
      * Must eat meat and drink wine (glutton and drunkard)
      * Would never happen
    - Standards for execution
      * Two warnings
      * Absolute certainty
      * But …
        + King not bound by those—so communal authorities are not
        + Imprison and starve him to death
  + Early period, pre-Mishnah
    - Written Torah and Oral Torah
    - Moses Story—so was the Oral Torah really given to him?
    - Must abide by the views of the majority
    - Oven of Aknai: School of Shamai, School of Hillel. Read it.
      * Eliezer: Clean. Sages unclean.
      * Miracles in support of Eliezer, but the sages won't accept
      * Because the law is to be determined by the majority, not by God
      * Encapsulates victory of Hillel over Shammai?
* **"The Perfect One Who made the Law also made the loopholes." (Binyamin, online discussion)**
* Power of the court (Halakhic authorities)
  + Blank check to interpret Torah, even implausibly
  + What about changing it? Better one letter than all, better one Sabbath than many
    - To cancel positive obligations, yes
    - To permit forbidden, eventually no
  + Court has the power to expropriate property
    - Avoids the 7th year cancellation of debts: Prosbul. "I give into your charge, judges, that every debt due to me I may collect whenever I desire."
  + Impose criminal punishments inconsistent with Torah
    - Fence around the Torah
    - Necessities of the time require
  + **Temporary measures** when required to maintain the faith. Like amputating hand or foot.
    - Aguinot, one woman's testimony that her husband is dead. Normally two.
    - Or executing an informer
    - "Temporary" means they say it is second class law—may last forever.
* **Communal authorities** powers become important end of 10th c.
  + Civil law, public law (taxation), much criminal law
  + Communal enactments same status as legislation by Halakhic authorities—for mammon
    - May not permit usury—issur
    - Imprison debtors? If he has the money, a way of forcing him to pay it, not punishment
    - Similarly for marriage?
  + So "the court," can still transfer property.
  + And acting according to communal enactments not bound by Talmudic rules
    - Who can be a witness
    - Punishments
    - Evidence required, etc.
  + Part of the reason: Gentile authorities gave us authority over criminal matters, need to keep it. Must justify to them—can't let murderers go free.
  + And community as heir to king?
  + Marriage law
    - Requirements via confiscation of ring
    - Via compel to divorce
    - Problem—other communities. Pulled back from the first approach.
  + Imprisonment for debt
  + Witnesses related, execution, etc.
  + **Transfers** 
    - Biblical: paying money transfers ownership.
    - Sages:
    - Contract and acquisition linked
      * Requires possession—otherwise insufficient care by possessor: Kinyan
      * Problem—what if property not available to be possessed?
        + Barter—I possess what you pay, so you now own what I sold
        + Sudar—symbolic barter. Handkerchief
      * Exception for land. Includes things on the land. So …
        + Give a bit of land plus (distant) X to someone, he now owns X
        + And if you have no land? Imaginary land in Israel
      * You cannot transfer something that doesn't yet exist
        + But (Maimonides) you can swear a binding oath that you will transfer it when it comes into existence. Biblical reference.
  + Expanded Eruv
  + Usury—elaborate rules.
    - Sell with byback.
    - Sell with discount for immediate payment.
    - Rule of torah vs of sages. Prohibited vs non enforceable.
* Remnants of feud system?
  + Killing
    - The avenger of blood: the heir
    - If none, up to the court. (Islamic version?)
    - Wergeld to avenger or court forbidden!
    - Killing not capital if plausibly accidental, as
      * Not with a weapon that would normally kill
      * Not a blow with strength and location that would
      * Not pushing him off a roof high enough to …
      * Etc.
    - If it would be capital murder but conditions of evidence not met,
      * Two sequential witnesses, or no warning, or …
      * Lock him up, bread and water, then barley, stomach splits
      * But not true for other serious non-capital crimes—if not liable goes free
* Religion and the law: Large parts of the law are about religious obligations
* Religious law can be read stringently, civil law cannot
  + Because stringent for one party is easy for the other
  + Whereas stringent for man is easy for God
* Gambling is rabbinic law theft
  + but winnings are not recoverable
* On the other hand, other parts of rabbinic law are enforceable

*And he said, This will be the manner of the king that shall reign over you: He will take your sons, and appoint them for himself, for his chariots, and to be his horsemen; and some shall run before his chariots. And he will appoint him captains over thousands, and captains over fifties; and will set them to ear his ground, and to reap his harvest, and to make his instruments of war, and instruments of his chariots. And he will take your daughters to be confectionaries, and to be cooks, and to be bakers. And he will take your fields, and your vineyards, and your oliveyards, even the best of them, and give them to his servants. And he will take the tenth of your seed, and of your vineyards, and give to his officers, and to his servants. And he will take your menservants, and your maidservants, and your goodliest young men, and your asses, and put them to his work. He will take the tenth of your sheep: and ye shall be his servants. And ye shall cry out in that day because of your king which ye shall have chosen you; and the LORD will not hear you in that day.* [I Samuel 8]

**Islamic Law 1/26/17**

* Any questions on what you read?
* **Origin of *Shari’a/Fiqh***
  + Traditional version:
    - Start with the *Qur’an* and Hadith
      * Sometimes given as Qur'an and *Sunna*
      * Sunna of the Prophet is his practice—what he did
      * Hadith are the traditions about what the Prophet said and did
      * And his Companions, who presumably were familiar with his practice.
    - Two centuries of interpretation starting with the *Qur’an* and using
      * Independent reasoning
      * *Qiyas* is arguing from analogy—**gap filling**
      * Traditions
        + 130 A.H. about 600 traditions in one book
        + By the end of the 2nd century, one compilation contained 50,000
        + Chain of transmission—isnad
        + Authentication a human project, not a matter of faith
      * Third century, authoritative collections compiled—in the thousands of traditions.
      * Consensus: My people will never agree on a mistake
    - Ended up with four mutually orthodox schools
    - In theory, legal scholars didn’t want to be judges, constrained by the state
      * My story—Caliph and the ascetic
      * From Mohammed’s People p. 293. also 279
    - And in theory, they were merely applying the jurists’ law without innovation
    - The court was not supposed to be making or interpreting law—applying it.
      * Rather like common law with
      * Court decisions replaced by law review articles
      * Almost the opposite of “qadi law” as the term got used later in the west.
    - By the end of the tenth century, little interpretation?
      * Closing of the gates of ijtihad (legal reasoning)
      * In favor of *taqlid*  (following past example)
      * They thought they had it right.
      * But not everybody agreed—or now agrees in that reading of what happened
      * And reopening the gates, or denying that they were closed, a live issue today
  + **Orientalist version: Schact’s version**
    - Initially, *Qur’an* source of religion, law was
      * A few *Qur’an*ic rules
      * A lot of existing custom in Arabia and
      * Imperial regulation in the conquered provinces.
    - *Qadi*s, appointed by Umayyads, formed legal schools
    - Opposed by religious movement to islamicize the law
    - Both sides used bogus traditions to support their views
    - The real substance of *Shari’a* ended up a mixture of
      * *Qur’an*ic rules
      * Pre-Muslim custom
      * Umayyad regulations
      * Doctrines of the schools etc.
      * Defended by invented traditions
    - In nothing do we see learned men more prone to untruth than in the fabrication of traditions. P. 281-2.
  + Evidence
    - Authenticated early writings have almost no mention of traditions
    - Early doctrines of the schools purport to trace to early jurists or Companions, not Mohammed
    - Many examples of early legal decisions that are inconsistent with (later) traditions
* **The Abbasid Empire**
  + Law theoretically autonomous of the state, based on religion, but …
    - The Caliph and the poet
  + The state had its own police
    - functioning independently of the *Shari’a* courts.
    - And for a lot of criminal offenses, *Shari’a* didn’t provide clear rules
  + Muhtasib—inspector of the market. Story. Mu’tadid
  + Mazalim: Special court to deal with complaints against office holders (Prussia too)
    - Over time, took jurisdiction over a variety of other things
    - With Caliphs and sultans transferring jurisdiction from *Shari’a* courts
  + Sovereign can pass administrative regulations to help effect *Shari’a*
  + Ottoman *Kanun*
  + In practice, both independence of *Shari’a* from the state and existence of other forms of enforced law part of Islamic tradition from the start.
* **Crimes**
  + Offenses are classified by punishment
    - Specified punishment (*Hadd*)
    - At judges discretion (ta’zir)
    - Retaliation or blood money by kinsmen (*jinayat*)
    - Offenses against public policy with administrative penalties (*siyas*)
  + *Hadd* offenses: *Qur’an*ic
    - Unlawful intercourse
      * Intercourse with one not one’s lawful spouse or concubine
      * Penalty is
        + Death by stoning

Not in the *Qur’an*, inflicted by early Caliphs

Only if free, not a minor, has had lawful intercourse

* + - * + or 100 lashes (fifty for a slave)
      * Requires four eyewitnesses to the same act at the same time,
      * or confession, which can be retracted at any time
      * or pregnancy of an unmarried woman.
    - False accusation of unlawful intercourse against a Muslim (only)
      * Punishment is 80 lashes for a free person, 40 for a slave
      * Special case—husband accusing wife or denying paternity of her child
        + Husband may charge safely by a five fold oath
        + Wife may rebut with a five fold oath
        + Accusation other than in that form requires the *Hadd* punishment for false accusation (presumably if not proved)
        + Wife refusing her half of the oath makes her punished as guilty
        + Only way to contest paternity (modified Lord Mansfield rule?)
        + Here and elsewhere, as in Jewish law, oaths matter.
        + Winning side in a case must swear to his claims, or loses.
    - Wine Drinking
      * 80 lashes for free man, 40 for slave
      * Prohibition in the *Qur’an*, punishment by analogy to false witness
      * One school makes it 40/20
      * Some schools extend to other intoxicants, drugs, etc.
      * Hanafi applies it to wine drinking and drunkenness from other things.
      * Two witnesses to drinking, smell on breath, state of drunkenness
    - Theft
      * Removal by stealth intentionally of certain sort of item of a minimum value
      * From a guarded place, with no claim of right
      * Penalty amputation of one hand
    - Highway Robbery
  + *Ta’zir*—discretionary punishment
    - * Offenses covered include perjury, usury, slander, and *Hadd* offenses that don’t quite qualify for *Hadd* punishment. Selling wine may be covered.
        + Opposite of Chinese system

Covers most of criminal law, but

No sophisticated rule to determine penalties.

* + Homicide and Bodily Harm--*Jinayat*
    - Comes out of Arabic law, blood feud, arbitration, blood money to end feud
    - Changes it by
      * Abolishing blood feud—not entitled to kill relatives of the killer of your relative.
      * Trial is required
      * Punishment scaled by culpability and harm
    - Possible punishments
      * Retaliation (Mohammed ibn Tugluq story)
        + Same degree of harm as inflicted (“an eye for an eye”)
        + Inflicted by closest kin of the victim (or victim, if bodily harm but not homicide)
        + Retaliation only happens if after conviction the victim himself or (he being dead) his nearest relative demands it
      * Blood money
        + Two fixed amounts

defined in camels, greater and lesser

owed by near relatives

if they cannot be found, by the state!

* + - * + Proportional rule for injury short of death

Full proportion for unique organ (nose)

Half for arm, leg, eye

Tenth for a finger, etc.

* + - * + For a woman half the amount for a man, but never less than a third (in proportional cases—what about fingers?)
      * Penitence
        + Attached to the payment of *diya*
        + Freeing a Muslim slave, or if you don’t have any
        + Fasting during daylight for two consecutive months.
    - Those entitled to retaliation or blood money may forgive it, or agree to some lesser punishment.
    - Charge must be brought by nearest relative, or victim before death
      * Still strong elements of private rather than state law
      * Like our civil
      * Compare civil homicide in 18th c. England
  + Homicide or bodily injury is excused if
    - Of wife, daughter, sister or their lover discovered in unlawful intercourse
    - Harm or death inflicted with consent of the victim (3 schools) (duel?)
    - Self-defense is excused
* Apostasy (*ridda*)
  + Some schools classify as *Hadd* offense, some don’t
  + Some hold an apostate may be killed without a trial
  + Hanafi, male given three days to repent, female imprisoned and beaten until she does
  + Some moderns argue that penalty for apostasy is not Qur’anic but a later addition
* **Discretionary administrative penalties** (*Siyasa*)
  + In theory, enforce *Shari’a*, fill gaps, don’t conflict
  + In practice, largely shifted criminal enforcement to the state
* **Theft and punishment**-Modern defenders of Shari’a are concerned about this one.
  + One of the most explicit prescriptions in the *Qur’an*
  + Amputation of a hand for the first offense
  + Qualify what counts as theft
    - Must be above some minimum amount
    - Things in a wild state (unharvested fruit) not yet property
    - Stealing when starving isn't theft--generalized to perishable goods
    - Stealing anything that you have some claim to isn't stealing
      * If you are a part owner
        + (but some schools disagree)
        + If you steal more than your share, theft
      * If you think you are an owner
      * If you say you thought you had a claim to it (some schools--get out of jail free card)
      * If it belongs to the state, in which you have a share.
        + Some schools disagree
        + Only applies if stolen from parts of the state fund to which you had a claim
    - Not theft if the goods are not secure
      * Stealing from a house where you are a guest isn't theft (but is a greater violation of traditional Islamic rules of honorable behavior!)
      * Taking things that are left lying around isn't theft
      * According to some schools, stealing an animal from a herd not a *Hadd* offense, nor from a stable if not near the owners home!
    - Stealing a shroud not *Hadd* offense either because not in a safe place or because it no longer belongs to anyone, depending on the school.
    - Taking things that aren't property isn't theft
      * Kidnapping a free child (some schools)
      * Stealing a cross (not allowed to own one--planned to destroy it?)
      * Stealing forbidden things--pork or wine
      * Stealing real estate doesn't count.
      * Stealing a book
        + value is the contents, not property
        + possible exception if materials the book is made of are valuable enough
        + Exactly the same distinction in an early computer crime case

"stole" a large amount of computer services, but …

services aren't covered by Virginia law of theft

* So interesting as evidence of how a system works around fixed points
  + Analogy in our system--the Constitution
    - Interstate Commerce Clause
    - Second Amendment
    - Putting in …
      * Substantive Due Process--Stephen Field
      * Right of Privacy--penumbra
  + 18th c. English--pious perjury. Value of 39 shillings.
  + In the other direction--benefit of clergy
    - Following out the logic of the existing system …
    - Solved the problem in the opposite direction
  + Note that all of the requirements are for the *Hadd* offense of theft, which requires amputation. An offense that does not meet them all can still be punished in other ways.
* What happened to Islamic law? My blog, link.
* Galton v. Hallaq:

"In nineteenth century Europe, the blood of a nation was not only a matter of symbolism and semiotics, but a scientific project. Galton, Spencer, Darwin and Gardiner, among others asserted that every part of the human body and every attribute of personality contribute, through the blood, to the formation of the sperm. ... From this logic followed the conception that it was the man, not the woman, who determined national attributes, ..."

* Why it matters. General problem of evaluating sources of info

**Feud Law**

3/2/17

* Note that some paper suggestions are on the web page
  + These are legal systems that have not been covered in the past
  + I do not know whether the information to write a paper on them is available
  + That is for you to discover if you think one of them looks interesting
* Standard modern legal model
  + Law is made by legislatures or judges
  + Offenses are detected and proved in government courts
    - By police and prosecutors for criminal law
    - By plaintiffs and their attorneys for civil law
  + Punished by government actors
    - Force losing defendants to pay fines or damage payments
    - Lock up or execute convicted criminals
* There is a different model that I call Feud Law
  + In which most or all of the process is private and decentralized
  + It is historically common, including some societies we have looked at
  + It may be the original legal system on top of which others were built
  + And elements of it exist *de facto* if not *de jure* in modern societies
* The basic logic is simple
  + If you have wronged me, I will harm you
  + Unless you compensate me for the wrong
* For it to work, it must satisfy four conditions
  + My threat must be more believable when you have harmed me than when you have not
    - Otherwise I can use it as extortion rather than law enforcement
    - We need some way that right makes might
  + There has to be a reason for me to carry out my threat, even if it is dangerous
    - It doesn’t work if every time you refuse to pay
    - I back down for fear that if I try to carry it out I will get hurt
  + There has to be a way of making it work even for the weak
    - That includes people without much money or power
    - And includes people who are dead—otherwise you kill me and nothing happens to you
  + There must be a way of terminating feud
* Right make might: some examples
  + The simplest version: The Rominchal
    - In a small society, other people know if you have wrong me
    - If you have, my friends back me, yours don’t back you
    - If you have not, the other way around
  + A more formal version: Saga period Iceland
    - There is a court system
    - If I won the case, you refused to pay, and you got outlawed
    - Everyone else knows that when I kill you that is law enforcement, not crime
    - And that if they back the outlaw, they will get in legal trouble with anyone on the other side who gets hurt
  + In between: Somaliland
    - Mechanisms for setting up a court to deal with a particular dispute
    - Which let people know who owes what to whom
* Making it in your interest to carry through on your threat despite the risk
  + Consider territorial behavior in animals
    - Enforcing property rights before our species existed
    - One animal somehow marks the territory it claims
    - Turns a switch in its brain (???) that commits it
    - To fight a trespasser of its own species and gender
      * More and more desperately the farther into the territory it comes
      * And a fight to the death is usually a loss for both sides
      * So the trespasser usually retreats
  + The equivalent mechanism in us is vengefulness
    - We usually think of the desire to punish those who wrong us as irrational
    - But it can be viewed as a hardwired commitment mechanism
      * When you have to avenge a wrong, it might be safer not to
      * But the knowledge that you will is a reason not to wrong you
  + There are additional reputational mechanisms
    - Knowing you backed down marks you as a wimp—and target
    - It costs you status
  + And the fact that if you succeed you collect a damage payment
    - Is an incentive to try even if it is risky
    - Which the territorial animal does not have
* Protecting the weak
  + The range of strength is probably greater in humans than in animals
    - A fight to the death is usually a loss for two birds
    - Not so clear for a weak human against a strong human with allies
  + The Icelandic solution is making a tort claim transferable
    - If you can’t enforce it yourself, give it to someone who can
    - He collects the money, and may share some of it with you
    - Or even all of it if he is doing it for status or to injure an enemy
  + The Somali solution is to be a member of a dia-paying group
    - Which has an incentive to collect damages for you
    - Both because they get part of it and for their reputation
    - To deter other offenses against other members
* Terminating Feud
  + Especially a problem if both sides think they are in the right
  + A common solution is arbitration
    - Find someone both sides, and others, trust and respect
    - Ideally someone powerful
    - Get him to agree to arbitrate
    - And both sides to agree in advance to accept his arbitration
  + Another Somali solution is, by mutual agreement, to raise the price for killing
  + A solution for the Kaale is avoidance, to prevent the cost of violence without conceding
* Fossilized Feud: The evidence
  + There is evidence that other systems may have started with it
    - Anglo-American law comes out of Anglo-Saxon, which is pretty nearly Icelandic plus a king
    - Jewish law:
      * The rules for killing give the heir of the victim a special role
        + In some cases the right to vengeance killing of someone who would not be executed
        + And forbid him from accepting payment not to avenge
      * Some legal rules assume that a claimant may seize property prior to a court decision
    - Islamic law: Jinayat looks like Bedouin feud incorporated in a later system
      * Killing or injuring gives a claim to the victim or his heirs
      * They can choose not to pursue it
      * They can settle for a damage payment
      * They can retaliate
      * The difference from pure feud is
        + Guilt is determined by a court
        + And the claim can be enforced by the court
    - Roman law, which European Civil Law grows out ot: Less clear but some evidence
      * The Law of the Twelve Tables has some bits about the victim killing the thief
      * And later law has a lot of the enforcement done by the victim
    - Chinese law? I don’t know. Possibly a paper?
* Feud in the modern world
  + Feud still exists among some embedded systems such as the Romani
  + Most obviously in social interactions, norm enforcement
    - Ellickson in *Order Without Law* describes it
    - If your cattle stray into my field, trample my tomato plants
    - You are expected to help replant them
    - And if you don’t, I have ways of inflicting costs on you
    - Social sanctions, negative gossip, even …
    - Driving your straying cattle away in the direction away from your farm and leaving them for you to try to find
  + Much crime may really be a feud system
    - Think about gang killing
    - You killed one of ours, so we will kill one of yours
  + Feud Law in Silicon Valley
    - Suppose Apple is considering suing Samsung for patent infringement
      * They think the case is weak, they will probably lose, but …
      * They might win, and even if they don’t
      * While the case is going, people will buy fewer Samsung phones, helping Apple
      * Looks like a good gamble. But …
      * Samsung can sue Apple on similar grounds as retaliation
      * So better only to sue when you have a strong case
      * Right makes might via the court system
    - But consider the patent troll problem

I was in Mahdi’s presence, says Ibn Hakim, when Sufyan Thawri the ascetic was brought in. He gave Mahdi only the common greeting, not the salutation fit for a Caliph, although behind Mahdi towered up his Headsman Rabi, leaning on his sword.

“Well, Sufyan,” said Mahdi, with a smile, “once you escaped us, and again. Now we have you. Are you afraid of what our doom may be?”

“Doom me, and a King shall doom thee who is powerful to sort true from false.”

“Prince of the True Believers!” cried Rabi, “shall such a one affront you so? Let me give him a tap on the neck.”

“Nay,” said Mahdi. “He and his like want nothing better, that we should kill them and be damned, while they are saved. Rather let be made out at once his commission as judge at Kufa, and let it be stated that no judgment he makes shall be subject to revision.”

So it was done, and the commission handed to the ascetic. He departed the Palace, threw the commission in the Tigris, and took to his heels.

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.[[1]](#footnote-1)

### 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 drunk upon the pavement, he would turn to his companion and say “a hundred for eighty is a bad bargain.”[[2]](#footnote-2)

Now this is the tale of how the long war between the brother tribes of ’Abs and Dhubyân was ended. Al-H�rith was a great man of the tribe of Dhubyân, a lord of the Arabs. On a time, he asked his cousin Kh�rija son of Sinan if there was any man of the Arabs who would refuse him his daughter’s hand in marriage; “yes,” Kh�rija answered, “Aus son of Haritha of the tribe of Taiy.”

They mounted their camels and traveled to the territory of Aus who, being told al-H�rith’s errand, rudely refused. After al-H�rith had departed, the wife of Aus, a woman of the tribe of ‘Abs, asked who it was who had come and ridden off, and why. When her husband explained, she upbraided him for his foolishness and persuaded him to ride after al-H�rith, apologize, and bring him back.

Aus called before him the eldest of his three daughters and asked if she wished to be wed to al-Harith. She replied that as she was neither beautiful nor of a winning character and no kin of his, and he lived too far off to fear her father, she feared that he might in time divorce her. The second daughter gave the same answer.

When Buhaisa was brought and the question put to her, she replied that she would do as her father thought best. Her father told her what her sisters had said. She replied that she was good looking, of lofty character, and had a most distinguished father, and if her husband divorced her God would never be good to him again.

When all had been agreed to, a tent was pitched and Aus sent his daughter in to al-H�rith. When al-H�rith emerged, (said Kh�rija son of Sinan) I asked if he had finished the job.

“No, by God. When I stretched out my hand towards her she cried, “Stop that! What, here in front of my father and brothers? Impossible.”

When we had gone a little ways on our journey, al-H�rith told me to ride ahead, while he turned off the road with his bride. In a little while he caught up with us. “Finished?” I asked.

“No, by God. She said to me “What, would you treat me like a slave-girl out of the market, or a woman taken in battle? First you must kill the camels and slaughter the sheep and invite the Arabs, and do all that should be done for one such as me.”

“I see she’s a girl of spirit and good sense,” I replied.

When we had come to our own country and prepared the feast, again he went in to her, and again I asked if the job was done, and again he replied that it was not. I asked him the reason.

“I went in to her, desiring her mightily. “You see, we’ve made ready the flocks,” I said to her. “How is it you find time to go about marrying women, while the Arabs are busy killing each other?” she asked (for this was during the war between ’Abs and Dhubyan.) Go out and make peace between those people, then return to me, and you shall have all that you desire.”

“She has spoken well,” I replied. So we went forth to the warring tribes and proposed peace, and it was agreed that the dead should be counted up and that side that had killed the greater number should pay reparations. It came to 3000 camels, paid out over three years. And when we returned, al-H�rith went in to his wife, and she bore him many sons and daughters.

When God is the Legislator 1/31/17

* Revised syllabus
* Amish not based on God except in a very general sense
* When God Gets It Wrong
  + Examples
    - Disobedient son
    - Second amendment
    - Hadd theft. Not just modern worries.
    - Expiration of debts in the seventh year
    - Prohibition of interest in Muslim, Jewish and Christian doctrine.
  + Solutions to the first three by interpretation
  + By unrestricted power of interpretation
    - Oral Torah plus majority
    - Hadith plus Ijma
    - Marbury v. Madison plus time
  + By additional rules
    - Rabbinic Law: Hillel invents Prosbul.
    - Communal authorities to deal with
      * Too strict requirements for capital crimes
      * Restrictions on witnesses, imprisonment for debt, …
      * Too easy marriage
    - Non-Koranic courts
    - Regulations of executive agencies
  + By working around the rules
    - How to pay interest without paying interest (*riba/Usury*)
      * Partnership contracts
      * Artificial uncertainty: Borrow in Florins, pay in Ducats
      * Other solutions? “Islamic Banking”
    - Eruv
    - Shabbat Mode Oven
    - Catholic Divorce: Discover that you were not married
    - Other Examples?
* Maintaining judicial uniformity
  + What if legal scholar/judges disagree? No legislature.
    - Truth is not decided by vote
      * R. Eliezer and the Oven of Akhnai
      * *Mina* under al Ma’mun. Mahmud ibn Hanbal
    - But law might be
    - Jewish solution:
      * Sanhedrin: Oven of Akhnai
      * Babylonian Academies
      * Regional authorities—took a lot of expertise
      * Eventually one authority accepted by most
    - Islamic solution?
      * Consensus?
      * Dominant school in an area—like Jewish
      * Rules for determining which court a case went to
        + The court where the contract was created
        + The court of the defendant
        + Others?
      * Live with diversity
      * Ottomans.
      * 2/2/17
* Review of last time
  + When God is the Legislator: two problems
    - Changing law that is supposed to be unchangeable
    - Getting legal uniformity
  + Solutions to the first:
    - Flexibility through ordinary interpretation: Wine drinking, Hanafi & Turks
    - Getting a license for unrestricted interpretation
    - Adding another legal system that you can control
    - Working around the rules: Riba/Usury. Eruv.
    - A new revelation, heresy
      * Mormons and polygamy
      * Rise of the Hassidim, Fatimid Mahdi, Sudanese Mahdi, Albigensians…
      * Arguably Jesus as a Jewish heretic. Also Mohammed.
  + Solutions to the second
    - An authority determining how judges must rule
    - Reputational authority that people find convincing
    - Local uniformity, global diversity
    - Living with diversity, polylegal system with rules
      * Four schools in Islam
      * State law, law of the circuit, in the U.S. system at present
  + Questions?
* Pirates
  + Questions from the chapter?
  + Brief summary
  + Then questions of why, contrast to merchant, military, barbary
* Brief summary
  + Caribbean (and Indian ocean) pirates were democratic
  + And egalitarian
  + And had explicit legal rules for each ship
    - Like the Amish—very small political unit
    - Arguably true of universities and firms as well
  + Details
    - Shirking: The public good problem
      * Punish if observed, but hard to do
      * Reduce incentive by compensation for injury. ~30 years income.
    - Recruitment and fake draft
    - Commitment strategy and the pirate flag
* Contrast to
  + Merchant ships—fixed authority, uneven distribution
  + British navy ditto.
    - Rule by the captain
    - Prize Money: 2/8 to the captain, 1/8 admiral, 3/8 various officers, 2/8 crew
    - Why?
      * If democracy worked for pirates, why not for merchants and war ships?
      * Conflict of interest between principle and agents
      * Sailors couldn’t buy a ship and crew
      * But the pirates were the main asset of the pirate ship
        + Evidence—captured ships sunk or set free
        + Apparently no ready market for selling ships back into trade
        + Surplus of ships for pirates
    - Suppose someone invested in a very good and expensive pirate ship. How does he maintain ownership?
    - Similarly for navy—ships expensive
    - Pattern for privateers?
  + Barbary pirates—old paper
    - State sponsored from the three barbary ports, division of territory
    - Owned by investors
    - Captain got 12 times a sailor’s share.
    - Military force from the Ottomans
    - Ship and slave rowers a major capital asset
    - Government of port could enforce the contract
    - Make deals with victim nations—tribute for immunity.
  + Knights of St John/Malta: Parallel Christian force
    - Similarly uneven division
    - Some of it going to the investors
  + Contracts with the state run pirates, not with the independent pirates
    - Because lots of separate pirate firms?
    - But the pirate commitment rule was a sort of contract

**2/7/17**

* Review: Pirates
  + Caribbean and Indian Ocean Pirates, 18th c.
    - Democratic rule over each ship
    - Relatively egalitarian sharing of loot
    - Why did that work for them but not for merchants, navies?
  + Conjecture
    - The main asset of a pirate ship was the crew
      * Because captured ships were worth nothing
      * Pirates didn’t need to buy ships–they were capturing more than they could use
      * And who else would buy stolen property?
      * And if someone had bought a warship, how would he keep control over it?
    - For a merchant ship, the ship and cargo belonged to the owners
      * If the crew controlled, they would act in their interest, not the owners
      * If the crew got most of the revenue, what would pay for ship and cargo?
      * And the property rights of the owners could be enforced
  + Evidence: The Barbary Pirates and the Knights of St. John
    - In the same business as the Caribbean pirates, but …
    - Sponsored by a government, loosely speaking
    - So could resell captured ships, could enforce the rights of an investor
    - And had investors, undemocratic rules, and unequal sharing of loot
    - And accepted advance payment to agree not to attack a ship
* Prison gangs: Mostly California, but the book covers a wider range
  + The problems
    - Safety
    - Allocation of scarce resources: Basketball courts and the like
    - Enforcement of (mostly illegal) contracts
  + The old solution: The Prisoners Code
    - Informal norms of behavior
    - Enforced by reputation
    - If you played by the rules, other prisoners might protect you
    - If you didn’t …
  + Broke down because the number of prisoners sharply increased
    - Informal norms depend on a small enough population
    - And uniform enough population
    - So that reputation works
    - Your experience with norms? Student law.
* Gangs as a solution
  + If you beat me up, my buddies will beat you up. Feud law.
  + Fight over scarce resources, then “own” them.
  + Gang has a reputation to keep up, so enforces rules on its members
    - Group responsibility system
    - Smith vs Hume on established religion
  + Evidence: Killing in California prisons declined sharply
* Problems
  + Decision making mechanism: Small core, sometimes elected leader
  + Sometimes written constitution: Like pirates
  + How do you know who is in which gang? Divide on ethnic grounds
  + Possibly label by tattoos.
  + So more racial division than under the old system
* Group responsibility system elsewhere?
  + ‘*Akila* in Islamic law
  + Dia-paying group in Somali law
  + Other examples?
* Other stuff in Skarbek book
  + Prison gangs as an overgovernment for street gangs
  + Because eventually you are going to be in prison
  + And it would be better if the people in charge don’t have a grudge against you

**2/9/17**

* Prison gangs: Mostly California, but the book covers a wider range
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  + Because eventually you are going to be in prison
  + And it would be better if the people in charge don’t have a grudge against you
* Embedded and Polylegal Systems
* Embedded Systems
  + Jewish, Amish, Romani, SCU, Mafia, Student Law
  + Problem: Enforcement
    - Delegated authority (Jewish law, SCU, maybe Romani?)
    - Illegal Force (Mafia, Prison gangs, Romani)
    - Legal sanctions (Ostracism: Romani, Amish, Prison gangs)
    - Ostracism requires cost to leaving
  + Problem: Evasion of the system’s rules
    - By permission: Jews (Usury to non-jews), Amish
    - By secrecy: Romani, Mafia
  + Problem: Keeping your members
    - Particularly hard if there are costs to membership (Kosher, Ordnung, Marime rules)
    - And you need strong fences to give ostracism bite
* Keeping your members:
  + Outside hostility helps. Nobody else will deal with you.
  + Lock-in helps. You speak Romani but not English.
    - Amish don’t have social security, unemployment insurance
    - Do have community based equivalents
    - And all their friends and relatives are Amish
    - Strong barrier against leaving, weaker against not joining.
  + Indoctrination helps. Hostility from the inside
    - Romani view of gaiji as all polluted
    - Amish view of English as materialist, keeping up with the Joneses, unhappy
  + Benefits of membership help. Amish take care of each other
  + Tradeoff between high barriers to keep people in, low barriers to let the discontented out
* Threats to the system
  + Increasing control by the overgovernment
    - Forced settlement of Romani
    - Forcing a naming system. *Seeing Like a State*. Draft evasion and longevity.
    - Insisting on fingerprints or the like, eventually biometrics
  + Toleration
    - Reduces the barriers that make ostracism work
    - Reduces the feeling of group membership
    - Jews and Romani are dissolving. Quote from Sutherland book.
    - Amish are not, although more tolerated
    - Yet Meidung still works
  + Acculturation
    - Amish and schools
      * One room to large, centralized
      * Compulsory attendance past eighth grade
    - Romani and schools
      * Mostly evasion
      * Romany school in Richmond
    - In both cases partly to keep the social net inward focused.
    - Amish and C.O. service
    - Amish and radio, television, cars, phones, …
    - Jews in America
      * Largely culturally absorbed. My grandmother kept kosher.
      * Some subgroups such as Hasidim, holding out
  + Dealing with the overgovernment
    - Start with a decentralized system: Romani, Amish
    - Need someone to speak for the group in dealings with overgovernment
    - Which gives that someone power that could destroy decentralization
* Polylegal system
  + Examples
    - Traditional Islamic system
    - Church courts and Royal Courts and … in medieval Europe
      * Division by people—benefit of clergy
      * Division by subject. Marriage law vs criminal law
    - State law and federal law. Law of the circuit.
    - Welsh law and English law in Wales under English rule
      * By person and
      * By location
      * By subject
  + The problem: What law, court, applies to a conflict?
    - If the division is by people, interaction mostly intracommunal, no problem
    - Shafi’i contracts with Hanbali—register in a court, no problem
    - Criminal charge against individual, his court. Benefit of clergy
    - What about the cross cases?
      * Go to the court of the dominant? Christian vs Muslim
      * Go to the court of the defendant? Discourage litigation
      * Plaintiff chooses the court? English story

2/14/17: Iceland

* Seating chart.
* How I got into this
  + Iceland is both the origin of the seminar
    - First place where I found very different law interesting
    - And suggestive for modern legal issue
  + And what pulled me into L&E
  + Academic dispute: Becker&Stigler vs Landes&Posner
    - Replace criminal law with tort law. Incentive compatibility problem.
    - Problems raised by doing so
    - I knew about Iceland, wrote an article, submitted to JLS
    - Review: we
    - Ended up spending ten years in Chicago
* Rough chronology
  + Discovery c. 870
  + Settlement possibly associated with Harald’s unification of Norway
  + Legal system set up c. 930
  + Additional developments through 1000
  + Christian/Pagan dispute
  + Sturlung period c. 1200+
  + End 1262-3
* Sources of information
  + Family sagas
    - Accounts of events c. 10th century
    - Written down 13th, 14th c.
    - Dispute on whether composed then
    - Byock/Egilsaga evidence. Scientific American article
      * Grandfather, father, Egil
      * Bald, odd looking. “More like a troll …”
      * Egil went blind early in old age
      * Had cold hands and feet
      * Skull ridged like a scallop shell
      * Padgett’s syndrome
      * Suggests the saga assembled shortly after the events happened
    - Some checking against foreign historical sources
    - Highly realistic, understated—no thousand enemy fights.
    - Links on the web page. Fun reading.
  + Sturlung sagas
    - Written down shortly after the events, by participants
    - Pictures the period of breakdown
  + Surviving written law codes.
    - From the very end of the period and after
    - Private notes. “If disagree”
  + Gragas vs the sagas
    - Several places where they are inconsistent
    - Including with Sturlung saga
    - Private settlement requires permission
    - Forfeit immunity
    - If in doubt, believe the sagas
      * At least for law in practice
      * Possibly for law in theory
* Basic system:
  + Godi aka “chieftain”
    - 9 each in three quarters, 12 in North Quarter
    - Transferable franchise—godord (also means his “customers”)
    - Connection to the legal system
      * Each farmer had to be the thingman of a Godi
      * But it was a voluntary connection
      * And determined what court you got sued in
      * A little like a non-geographical state citizenship--jurisdiction
    - Seat in the legislature
    - Get to appoint one judge for a case.
  + Lawspeaker—elected by one quarter for a three year term
    - Memorized the law, answered questions
    - Recited all of it during the three years. If he left something out …
    - Presided at the logretta
  + Logretta: Legislature
  + Feud system
    - No executive arm of government
    - If I am injured, I and my friends deal with the matter.
    - If I am killed, the claim is inherited by my kin
    - With elaborate "inheritance" rules to determine who gets what
  + Feud can be resolved by
    - Court decision, wergeld or other damage payment, outlawry
    - Arbitrated decision
    - Agreement between the two parties
    - About 90% privately settled
      * For killing, wergeld + outlawry in Gragas
      * In practice, almost always settled for wergeld
* Logic of how it works
  + Court’s enforcement comes from acceptance of
    - Its decisions in general, but in particular
    - Outlawry
    - Which means that if you don’t go along, the coalition keeps expanding.
  + If you don’t have the resources to enforce your rights
    - Your claim is transferable and valuable
    - Both for money collected, and
    - A chance to be in the legal right, hence
    - Hurt an enemy or gain reputation
  + If enforcement is costly, why might you still do it?
    - Deterrence
    - Your coalition wants the reputation to protect its members
    - Also, facts of the offense were generally public—like our tort system
    - Concealing an offense was both legally risky and shameful
      * Egil’s honorable behavior
      * Erik Bloodaxe and night killing
      * Forfeit all defenses—he was an outlaw or forfeit immunity
  + All law is private, enforcement is decentralized.
  + Outcome
    - Sagas describe the violent bits, but …
    - Telescope the action
    - Sturlungasaga estimate
    - Conversion comparison
      * Pagan to Christian—about 6
      * Catholic to Lutheran—about 60
  + Why did it break down?

2/16/17 Somali

* Review: Iceland
* Rough chronology
* Sources of information
  + Family sagas
    - Histories and historical novels
    - Written long after the events
    - May or may not be reliable information on history and institutions
  + Sturlung sagas
    - Written down shortly after the events, by participants
    - Pictures the period of breakdown
  + Surviving written law codes.
    - From the very end of the period and after
    - Private notes. “If disagree”
  + Gragas vs the sagas
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  + If you don’t have the resources to enforce your rights
  + If enforcement is costly, why might you still do it?
  + Concealing an offense was both legally risky and shameful
  + All law is private, enforcement is decentralized.
  + Outcome
  + Why did it break down?

**Somali**

* Student questions and comments?
* Sources
  + Mostly I.M. Lewis, mainly on the north (Somaliland)
  + Also Van Notten
  + Both appear to think the traditional system better than what replaced it
* The history
  + 1960 England and Italy pull out
    - establish a single modern centralized democracy
    - for a country with no history of such
  + becomes a military dictatorship under Siyad Barre
  + fights a war with Ethiopia, the traditional enemy
  + USSR switches sides, Somalia loses, Barre assassinated
  + Things reverting to normal until
  + U.S. and U.N. decide Somalia needs a government
  + And try to establish one using Ethiopian troops
  + Republic of Somaliland in the north
  + Continued conflict around Mogadishu in the south
  + If there is going to be a government, better to be ruler than ruled
  + Link on readings page
* Agnatic system
  + Define
    - Memorize
    - Covertly edit
    - Insert Islamic connection at the top
  + Implies presumptive coalition just below split
    - And if a conflict with not enough strength
    - Move one step up the tree, fuse with parallel group
  + But actual structure mixes that with contract
  + And sometimes “pile of shields” Commonwealth
  + How do we look to them? Address/kinship
  + The structure of the dia-paying group
    - Mutual obligations defined by contract—example in my chapter
    - Made up of smaller subgroups
      * structured largely by agnatic kinship
      * if necessary uterine
      * sometimes just contract
    - Obligations to share in paying damage payments
    - Right to share in receiving damage payments
    - Rules for conflicts within the group
    - The possibility of restricting or expelling members
    - Temporary fusing of groups to increase the size
    - Splitting off to form new groups
  + Economies and diseconomies of scale in dia-paying group
    - Enough to spread the cost of paying damages
    - Enough to have the manpower to force opponents to pay damages
    - Not enough to create internal tensions that break up the group
    - 300-3000 males
    - Clan size in the Islamic system? Decision making? **Paper**?
* Contrast with Icelandic
  + Both feud systems, fine systems, but …
  + Legislature and law code
    - vs customary+Islamic (marriage and inheritance)+contract within the group in Somali
    - “Between religion and tradition choose tradition” also a view expressed in Iceland
      * why should we prefer the advice of a foreign priest
      * to the wisdom of our fathers?
  + Hierarchical court vs ad hoc court
    - May not be possible to agree on a court
    - In which case back to feud
    - Appeals widen the judge pool—like high level Icelandic cases
  + Agnatic kinship+formal contract vs ad hoc coalitions
  + Payment explicitly by kin-group, dia-paying group
    - A pattern that shows up in Islamic law: ‘Akila
    - And Irish law. Also sick maintenance
    - And land sometimes belonging to a kin group
  + Formal outlawry vs withdrawal of support
* Like Amish, social contract is real.
* Blood feud:
  + Killer’s life or (usually) payment of dia if kin accept
  + If killer gets away, any of his kin may be killed instead
  + If of different clans, two for one, dia less likely to be accepted
  + Nuer an extreme example—blood money institutions within the tribe
* Penalties:
  + Tort rule for accidental damage
  + 2 for one for theft, as in Jewish law
* Stability:
  + Van Notten—defend not attack
  + Lewis—raise wergeld
  + Expand coalition if outnumbered
* Vs sharia
  + 3 witnesses, not 2 or four
  + penalty in camels, similar but not identical schedule
  + for intentional, double penalty. Also theft vs accidental damage double.
  + use of oaths (like Jewish also)
    - with explicit penalty sworn to in oath—dissolve marriage, say
    - could we use that?
    - Do we? Perjury.

2/23/17: **Irish Law**

* + Concerning Papers
  + Review of Somali
  + Irish: Questions on chapter?
  + History
    - Pagan society until about the Fifth Century, converted to Christianity
    - Conquered by the Normans in the 12th century
    - Largely absorbed the conquerors culturally
    - “Reconquered” 16th and 17th century, in part Protestant vs Catholic
    - Became independent in the 20th century
  + Sources
    - Legal texts c. 8th century surviving in 14th-16th c. material
      * Material dated on linguistic grounds, but …
      * There may have been some deliberate archaisms making that unreliable
    - Wisdom texts
    - Sagas
    - Observations of the society after the Norman conquest
    - Different descriptions may be errors, different places, different times
  + history
    - pagan society, with a class of legal experts, customary law
    - converted to Christianity c. 5th c.
    - shift over time from very local power to provincial royal dynasties
    - claim of high king, probably never entirely real
    - conquered by the Normans in the 12th c.
  + political structure
    - king of *tuath,* ~100*,* perhaps 3000 people
      * owed some taxes and military service
      * leader in war—raids and defense
      * role in legal system unclear
    - over king—had several kings in allegiance to him
      * gave them gifts
      * received service
    - most individuals had rights only within their own *tuath*
      * hermits and poets, at least, were exceptions to that
      * treaty could give inhabitants of one rights against another
      * or subjection to a common over king
    - provincial king
  + kinship structure
    - *fine* is kingroup,
      * *derbfine* kin agnatic group of 4 generations
      * male line descendants of a common great grandfather
      * held much farming land in common, allocated to members
      * alliance for feud
      * liable for damages owed by member
      * kin collected for killing of a member—not just *derbfine*
      * Like the dia-paying group, but purely by kinship, save for adoption.
    - Larger kin group relevant to reallocating land if derbfine went extinct
    - Kin group relevant to royal kin
      * Not strict inheritance—tannist system
      * Possibly not son because not old enough?
      * Grandson? At least of a king, so …
      * Tendency two alternate between branches
  + Marriage
    - A range of different marriages, depending on
      * Resources each party contributed–determined their mutual rights
      * Degree of consent from the woman’s kin
        + The greater their consent, the weaker her ties to them
        + Reflected in their claim to fines for her death, obligation to pay fines for her acts
    - Husband could have both a wife and concubine/secondary wife
    - Woman under the authority of father/husband/son (like Athens)
    - Limited rights in the legal system
  + Class structure
    - Noble/free/unfree
    - Further division within each category
    - Noble
      * mostly lords, defined by number of clients
        + Could leave that category by losing clients
        + Join it, in three generations, by acquiring them
        + Two sorts of clients

Each case, lord provides cattle or other stuff, gets services

Free clientage, can pull out at any time

Unfree more limited, but gets the stuff after some period of time

* + - * Hospitaller
        + Limitless obligation of hospitality
        + Must be wealthy—twice the land and property of a lord
        + Chief hospitaller equal in rank with a *tuath* king
      * Some professions at the edge of noble class, such as poets
      * Noble class had higher honor price, some other legal advantages
      * Which cut both ways
    - Freeman
      * Mainly big farmer vs small farmer
      * Defined by size of herd and other wealth
      * Hard to know how all of this was determined in practice
    - Unfree
      * Ranges from landless but free to move
      * Down to slaves
* Honor price
  + Defined by status for adult male freemen, relationship for dependents
  + Determined how much you were owed for an injury
    - To yourself or …
    - Killing of kinsman
  + Determined how much you could contract for on your own
  + Determined the weight of your oath in testimony
* Contracts: Private law
  + Pledges
    - Give something of value to guarantee performance—hostage
    - In some cases during a legal controversy
    - But some seem to be in anticipation of a controversy
    - How do mutual pledges work? Hostages? Maybe just symbolic.
  + Surety
    - *Naidm*. Right to use force. Possibly powerful—lord or kinsman
    - *Rath* surety
    - Hostage surety. Possibly between tuaths or between kindreds?
    - Possibly as a standing surety—two different terms
    - Sureties on both sides—at least for substantial contracts
    - Entangle enough neighbors to know and enforce rights? Right makes might solution.
  + Interdependence and resulting limits
    - Father/son: Some ability to dissolve each others contracts
    - Husband/wife.
      * If marriage on husband’s property he had more ability to dissolve her contracts
      * If marriage on wife’s property, the reverse.
      * If marriage on joint property, either could dissolve the other’s contracts if any risk
    - Kin group
      * Can forbid contracts that risk common land, adoption or sale
      * Can refuse to back contracts that they might be responsible for
      * Kin represented how? Not clear.
  + Distraint
    - Apparently a private procedure to collect what is owed
      * Both debts, damage payments
      * And land
    - Elaborate ritual, with delays to pay, post pledge, or agree to arbitrate
    - Ending by confiscating cattle to pay the debt
    - Arbitration puzzle—what counts?
    - Fasting against *nemeds*
      * Apparently he cannot eat while the other is fasting
      * Until he has given a pledge or appointed a *rath* surety
      * If he does, owes double damages.
      * Apparently collected by distraint
* Death, injury and feud
  + Death: Wergeld that is a fixed amount for any freeman
    - plus fine to kin on both sides
    - depending on the honor price of the kin and the closeness of the relation
  + Injury: Price based on honor price, plus sick maintenance.
  + Enforced by feud. If not paid, offender can be killed or enslaved.
  + Are his kin liable? For money, apparently not for life.
* Royal court
  + Elaborately described
  + Possibly for conflicts involving the king?
  + Or overking or provincial king’s court for conflicts between tuath?
  + But “he is not a king who does not have …”
* Procedure
  + Elaborate description of five paths, but …
    - Only from one source, and
    - Division among them less clear than the book makes it sound
  + Another source has king etc. present. Always? Ever?
  + What determines the judge? One for tuath? Anyone competent?
  + Supernatural punishment for unjust verdicts. Suggests china. Also Cheyenne.
  + Oaths: strength depends on your honor price
    - Overswearing. Higher status could overswear lower.
      * A reason not to contract with high status people
    - One oath could be supported by another. Do they add up?
    - Women’s oath only for special cases—as in Islamic. Periods of fertility.
    - Evidence up to your honor price.
  + Ordeals if the judge could not tell who was in the right
  + Duels: Agreed to by both sides, sureties.
* Is what we are seeing
  + Private law early, curial law late?
  + Both coexisting for different categories?
    - Authors trying to shift from one to the other
    - A feud system, with elaborate procedures to involve others and minimize violence?
    - Private enforcement of the king’s judgement, a la Iceland and courts?
    - Similarity to Somali? Medical, kinship, cattle stealing, …
* Elaborate and sophisticated system
  + Of which we have very imperfect knowledge
  + A private and decentralized system of law enforcement
  + Also a Curial system
  + And is not clear how they interacted
* (Ordeals: Leeson)

**Plains Indians**

2/28/18

* Review Irish
* Questions about Plains Indians?
* Introduction:
  + A new life style
  + Three different groups
* Comanche
  + No government
  + In their terms, wealthy—lots of horses
  + War chief as entrepreneur
  + Peace chief as whoever the band follows
  + Spectacularly successful at warfare
    - Against other Indians, Mexicans, Americans
    - Blocked expansion across Texas for decades
    - Eventually defeated by overwhelmingly stronger opponent
    - Warfare as a private good for loot and status
  + Wife stealing for status
    - Done openly, husband demand compensation with threat of killing
    - Bluff both ways—killing results in revenge killing by kin
    - Bilateral monopoly
      * The simple bargaining game
      * The game of chicken
    - If husband outmatched
      * Could call in his brothers, they get the damage payment
      * Get a champion, he gets status, husband gets the payment
  + Charge of adultery against a wife
    - Husband can torture or kill the wife
    - Wife can swear by earth and sky that she is innocent
    - Husband accepts oath, expects earth and sky to kill if false
  + For other disputes
    - Who in a war party got credit for what: Again the oath
    - Theft? Beneath the notice of a warrior
    - Murder?
      * Killer was killed by kin of victim, which ended it
      * Killing by sorcery a special case
        + Try to get another medicine man to cure
        + Or get the suspect to stop, but …
        + No obligation to kill him if he didn’t
        + He swears innocence by sun and earth
      * Multiple killing by sorcery might result in group retaliation
        + Killing him or
        + Tricking him into violating his taboo and dying
* Kiowa
  + Class system
    - Onde—high status warriors
    - Ondegupta—would-be Onde. Source of conflict trying for status.
    - Commoners
    - Dapom. Tolerated low status.
  + Political structure
    - War chiefs like Comanche
    - Headmen who made decisions for the band
    - Ten keepers of medicine bundles, magic things.
  + Conflict and status: Ondegupta who claims he was wronged
    - Threatens violence, let himself be restrained
    - Until a medicine bundle bearer shows up to suggest peaceful settlement
    - If necessary a second, third, fourth
    - Refusal of the fourth results in death by supernatural agency
  + If someone does get killed
    - Possibly retaliation by kin of the victim
    - Possibly compensation
    - Killer becomes unlucky, as in Athens
* Cheyenne
  + Pattern
    - Summer, ~4000 together (whole tribe
    - Winter split up into ten bands
    - Summer a sort of government
      * Council of 44, ten year terms, each chief chooses his successor.
      * 4 from each band, plus
      * 4 priest chiefs+1 keeper of the sweet-medicine.
    - Soldier societies, military fraternities
      * Dog soldiers their own band, other nine dispersed in winter
      * Two war chiefs, two “servants”—junior chiefs, but …
      * War party could be formed by anyone.
    - Decisions by the council, consensus, interaction with soldier societies
  + Buffalo hunt
    - Controlled by the council
    - Nobody allowed to attack the herd until everyone did
    - Story: two young men breaking the rules
      * Enforcers shot their horses, smashed their guns
      * Boys’ father came up and told them they were in the wrong
      * Once it was clear the boys recognized the authority they violated
      * Members of the enforcer group gave them two horses, a gun.
    - Why destruction instead of fine? Incentive
    - If purpose is to establish authority, recognizing it was sufficient
  + Problem of violence
    - Solution: Exile, no excuses
    - Not punishment but hygiene.
    - Contagious pollution, like Romani marimé.
    - Eventual readmission, but …
    - According to Grinnell, feud, possible revenge killing, possible settlement, followed by exile for some time.
* Sources:
  + Cheyenne
    - Llewellyn and Hoebel based on two summers interviewing on reservation, 1935-6.
    - Grinnell visiting the Cheyenne from 1890 on.
    - Grinnell better informed, but different prejudices.
  + Comanche.
    - Went on reservation in 1868
    - Wallace and Hoebel interviewed interviews from 1933 to 1945: 65 yrs+
    - Objects of sympathy, so ugly things minimized
      * Male captives routinely tortured to death
      * Female captives gang raped
      * As seen by Lee, who was a captive of the Comanche
    - The Comanche we are interested in were an arrogant and powerful people
* "In nineteenth century Europe, the blood of a nation was not only a matter of symbolism and semiotics, but a scientific project. Galton, Spencer, Darwin and Gardiner, among others asserted that every part of the human body and every attribute of personality contribute, through the blood, to the formation of the sperm. ... From this logic followed the conception that it was the man, not the woman, who determined national attributes, ..."

Athenian Law 3/16/17

* Papers stuff
* Athenian democracy
  + All adult male citizens could vote in the assembly if they showed up
    - Which meant those who lived outside of the city were at a disadvantage
    - And much of the population consisted of non-citizens
      * Slaves were something like half of the population
      * Metics were resident aliens
        + Sometimes resident for several generations
        + Limited rights. No vote, could not own land in Attica
        + Required a citizen sponsor
        + Perhaps half as many metics as citizens
  + All positions other than generals were filled by lot
    - A system of amateurs
    - Designed to work that way
* Court System
  + multiple courts, depending on the law charges were brought under
  + each court supervised by a magistrate
  + charges were private prosecuted
  + trial by majority vote of jury
    - total of 6000 jurors, selected by lot
    - payment about half the wage of a rower
      * so a sort of low level welfare
      * and a jury mostly of the poor
    - 200-500 jurors for one case
    - elaborate procedures to make bribery harder
    - prosecutor and defendant each proposed penalty, jury chose.
      * Socrates first suggested a reward, than modest fine
      * The jury voted for execution
  + No lawyers, each side spoke for himself
    - Could give some of your time to a friend
    - Could hire an orator to write an oration for you to memorize and deliver
* Laws
  + We have only fragments of the laws
  + Largely from orations
  + Some of which are in a book on reserve
  + Penalty often left to the jury
* Prosecution: Public cases and private cases
  + Public case
    - Like our criminal, supposed to be for an offense against the community
    - But privately prosecuted, as in 18th century England
      * If the verdict was a fine, prosecutor usually got a share
      * So an incentive prosecute, unlike the English case
    - Obvious risk of targeting deep pockets, unpopular defendants
    - In many categories of cases, if the prosecutor failed to get 20% of the vote
      * He was fined 1000 drachmas, 2 years wages for an ordinary worker
      * Barred from future suits of the same kind
      * Also a procedure for charging a prosecutor with “sycophancy,” abusive prosecution
  + Private case: Like our tort case
    - In some cases, arbitration was required
      * Arbitrator a citizen in his 60th year
      * Either party could appeal the verdict
      * But no new evidence could be introduced at trial
    - In some cases, the losing plaintiff owed the defendant 1/6th the amount claimed
      * We do not know if that applied to all private cases
      * Or if it was limited, as in public cases, to getting under 20% of the votes
  + Murder cases
    - Prosecution by kin of the victim
    - Execution for intentional killing, exile for unintentional (Cheyenne)
    - Defendant had the option of going into exile if he thought he was going to lose
  + Theft
    - The victim gets back his property plus twice its value
    - He can search the house he thinks his property is in, but …
    - He has to do it naked.
* Miasma: Greek Marime, Cheyenne smelling of death
* Marriage
  + One wife, could also have a non-citizen concubine
  + Any free woman must have a lord: Kyrios
    - Responsible for supporting her
    - And representing her at law
  + Father, then husband, then household head of what had been her husband’s household.
    - 3/21/17: Ways of Enforcing Law

Enforcing Law Outline

* Many ways of enforcing rules
  + Three parts to the job: Catch, try, punish
    - Criminal, tort, Privately prosecuted criminal
    - Feud system
      * Violence constrained by third parties
      * Depends on their knowledge
    - Community responsibility system
      * Prison gangs, Vitsa, Dia paying groups
      * Smith vs Hume on established religion
    - Reputational enforcement
      * Department store, Diamond dealers
      * Sentence of ostracism
        + Public good problem
        + Solution
      * Norm enforcement
    - Religion as a solution
      * Obedience to god or
      * Supernatural pollution that is contagious
      * Oaths as lie detectors
      * Divine intervention—trial by combat or ordeal: Leeson on ordeals
      * Religious rules obeyed because
        + They are right
        + Got will enforce
        + His fellows will enforce
        + Test: when nobody is looking. Romani.
* And what is wrong with each
  + Criminal
    - Enforcers act in their interest, not our interest
    - Many costs are imposed on others
    - Perhaps deliberately—my sourdough story
    - Becker/Stigler incentive problem
  + Tort
    - Why criminal incentive problems are less but not zero
    - Damage payment trying to optimize for two things problem
    - Incentive to commit, incentive to sue problem
    - English incentives, Icelandic solution to poor victim problem
  + Feud
    - Commitment requirement. Vengefulness
    - Less bloody than commonly thought
    - Needs court or commonality to agree on terms
  + Reputation
    - Repeat player vs one time player
    - Incentive not to cheat because of other transactions, social effects
    - Difficulty of being a cheater
      * Humans reflect the state of their minds
      * Firms might not, but can post a reputational bond
    - Third party information issue
      * If they can’t tell, I never report
      * Small society or arbitration to generate information
      * Design contracts to make it easy to tell who violated them
      * Put the temptation on the party with a reputation
  + Community Responsibility?
    - Enforcement and decision methods could be anything, but
    - Incentive is group reputation, which solves the repeat player problem
  + Ostracism
    - Requires a mechanism to decide who to ostracize, widely accepted
    - Requires that ostracism has bite
      * Enough people in the society go along and
      * Barriers to interaction outside of the society
      * Either isolated small society or embedded in hostile
  + Divine Enforcement
    - Problem of maintaining belief
      * Either almost nobody violates and is known to or
      * Punishment is unobservable: Afterlife or bad luck
    - Test to identify believers
      * Keep kosher or
      * Join the group with large costs—Early Mormon and Muslim cases
* Conclusion
  + All alternatives have problems, but not the same problems
  + So what is best probably depends on details of the society
  + Making Law and Guarding the Guardians
* Divine Inspiration
  + Risk of inconsistency
    - with variant versions of the text, how dealt with
    - with variant interpretation
      * dealt with by majority rule
      * later most disputes intracommunal
    - Problem of a new revelation
      * Oven of Aknai as a blanket rejection
      * Mohammed as the final prophet
    - Problem of multiple interpretation due to variant Hadith collections
  + Problem of interpretation
    - Jewish approach
    - Muslim approach
      * Four schools, individuals choosing
      * Doctrine of consensus
    - Wife ending marriage approaches in both
* Legislation
  + By different authorities
    - Democracy
    - Sovereign
    - Colonial power
  + Interpretation in practice intervenes
* Binding Precedent
  + Advantages over legislation
    - More detailed than legislation
    - More flexible
  + Disadvantages
    - Inconsistency until resolved by a higher court
    - Forum shopping incentive biases courts: Klerman story
  + Slow response to change–bug or feature?
* Customary law
  + Somali or Bedouin: Judges as arbitrators interpreting not creating
  + Modern example: Annie Lee Turner
  + Amish Law: Legislation, but due to changes like customary law
  + Jewish law: Experts discovering law not creating it
  + Norms as customary law
    - Professor example—obeying norms
    - Violating norms
    - Getting away with it changes norms
* Flexibility: Good and bad
  + Makes it possible to correct errors, adjust to change
  + Increases uncertainty, expenditures changing results
* Making Good Law
  + Divinely inspired, legislated by the wise, maybe
  + Democracy
    - Argument for—civics class model
    - Argument against
      * rational ignorance
      * Trade restrictions
  + Judge made law: Posner thesis and problems with it
  + Customary law
    - Evolution of locally efficient norms
    - Problem with globally efficient norms
      * Whaling example
      * Why it didn’t work
  + Competitive Legal system where parties choose in advance
    - Islamic choice of *madhab*
    - Corporate choice of state
    - When someone got very sick, they all flocked to the hospital and to the funeral. The living were never left alone day or night. Everyone brought food or took up a collection for the family so ones far away could come. People took care of each other. That is gone now. In the past anyone could drop by the house and you would feed them, they could stay the night. Now you have to phone if you want to visit, and they often say, “No. We are busy.” Someone throws a party and makes a lot of food and hardly anyone shows up. The saddest thing is the loss of community. We never visit with the *Machwaya*. They keep to themselves and we keep to ourselves.  
        
      The *Machwaya* still have the *slava* and *pomani* and *kris*. They are mostly not Christian and only go to a priest for baptism of a baby. The ones who have become Christian have their own churches and we do not go to their churches, and they do not come to ours. In the past we all were part of the *kumpania*, we had *slavi* together, and we all went to the *pomani*. Now everyone keeps to his own kind. The children are not taught our language, go to school, and have no respect for elders. We don’t even have any elders anymore. They are all dead.

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Bay area fence.com**Islamic Law**

Ibn Taymiyah on Zina. Compare to disobedient son and theft

Murder as a tort.

Dinar is 4.2 g gold, 24K is $39/gram, so about $160. Heavier diya is 1000 dinar or about $160,000.

1. Mohammed’s People, pp. 281-2. [↑](#footnote-ref-1)
2. The Subtle Ruse, pp. 153-154, not verbatim. [↑](#footnote-ref-2)