

Negotiating State and Non-State Law

THE CHALLENGE OF GLOBAL AND
LOCAL LEGAL PLURALISM

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The Resolution of Disputes in State and Tribal Law
in the South of Iraq

Toward a Cooperative Model of Pluralism¹

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Do we wish to have more disputes enter the official system and proceed further toward definitive resolution? Is the utopia of access to justice a condition in which all disputes are fully adjudicated? Do we want a world in which there is perfect penetration of norms downward through the pyramid so that all disputes are resolved by application of the authoritative norms propounded by the courts? We know enough about the work of courts to suspect that such a condition would be monstrous in its own way.

– Marc Galanter²

If every working matter comes to the law, believe me, neither the Iraqi courts nor the religious authorities could handle it . . . There are a lot of things the state doesn't know, and we solve it among ourselves mutually. . . . What, every suit, every working matter is going to go to court?

– Shaykh Mazen Falih Muhammad Al-'Araiby³

If we adopt a conventional, but by no means unchallenged, definition of legal pluralism as the existence of two or more legal systems operating within the same social field,⁴ is it necessarily the case that these legal orders are

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² Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 3–4 (1981).

³ Interview with Shaykh Mazen (Apr. 25, 2013).

⁴ John Griffiths, *What Is Legal Pluralism?* 24 J. LEGAL PLURALISM 1, 38 (1986); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 870 (1988). Respecting debate over the contours of

in perduring and well-nigh irresolvable conflict? Based on our own work among Iraq's Shi'i tribes, we answer the question emphatically in the negative, and assert that more attention needs to be paid to the possibilities of some form of cooperation between seemingly inconsistent legal systems. Although these have been discussed before, all too often the study of the relationship between state and non-state law presumes a high level of competition that may well be accurate in some contexts, but is fundamentally misplaced in others. Our work in Iraq has demonstrated that far from resenting state law, or regarding its rules as ineffective, alien or inferior, Iraq's Shi'i tribes often embrace Iraq's state law, and quite often regard the tribal law as being in broad cooperation with it in the maintaining of order within their respective social field.

To demonstrate this thesis, this chapter proceeds in six parts. The first part is a highly general and necessarily far from comprehensive survey of what we might call the "conflict paradigm" in legal pluralist literature. This part seeks to demonstrate the existence of a predominant (but by no means exclusive) narrative in the context of the descriptions of the interaction of state law to indigenous, customary or religious forms of non-state law that presumes a significant level of conflict and competition. This part also demonstrates, in connection with the burgeoning "private ordering" literature in the American legal academy, that such competition and conflict among systems may not be as prevalent as is often believed. The next part turns to Iraq itself, to outline the rules of order within the tribe and to demonstrate their obvious divergence from principles of state law.

Inconsistency, however, does not necessitate conflict, as inconsistent legal systems may just as readily *cooperate* with one another using their disparate rules to maintain order as they might be in conflict over which rules to apply. The third part of the chapter therefore explains the modalities of cooperation generally in Iraq as between tribe and state as we have found it. This part also provides a fuller definition of the "thin" version of cooperation between tribe and state, which we claim is present in Iraq, to be distinguished from a "thicker" conception, which would involve more sustained interaction between state and non-state authorities. The fourth part offers some limitations on the thesis, in particular on the manner in which even a cooperative paradigm does not preclude the existence of some level of conflict between the inconsistent legal systems. The fifth part offers an application of the same principles in the

the concept of legal pluralism, see generally Gordon R. Woodman, *Ideological Combat and Social Observations: Recent Debate about Legal Pluralism*, 42 J. LEGAL PLURALISM 1 (1998). Suffice it to say, it is not the intention of the authors to offer a radically new conception of such a vast and varied field of law given how much attention has been dedicated to that subject over the past several decades, hence our use of a conventional definition.

context of a case that we had an opportunity to follow closely. The case is of the type that Llewellyn and Hoebel might describe as a "trouble case,"⁵ one that threatened some level of disruption if left unresolved. It demonstrates the use of both state and non-state law to effect resolution. Finally, in the sixth part, we try to draw some broader lessons from the exercise on the manner in which the divide between state and non-state law might be understood and mediated.

LEGAL PLURALISM AND LEGAL COMPETITION

In offering a different, potential approach to understanding the interaction of state and non-state law in particular contexts, we do not contend that we are the first ever to have considered the possibility that the two forms of law cooperate with one another. To the contrary, the matter has received modest attention. In the first case, there are, of course, many instances of "state law pluralism," wherein the state explicitly defers to a foreign body of law in one or more areas. In such cases, some broad level of cooperation must have at least been presumed by the drafters.⁶ To the extent that one regards federalism – or a clause in a constitution forbidding legislation that is repugnant to Islam or the *sharia* – to even be a form of pluralism, then instances of cooperative pluralism abound.⁷

Yet even when considering "strong" forms of pluralism, where state law does not itself formally sanction the operation of plural legal systems in the same social field, instances of cooperation between legal orders unmistakably appear in the literature. Sarah Ben Nefissa has written of "implicit delegation" on the part of the state to Arab tribes as concerns the administration of justice in the context of blood feuds.⁸ The context in that case was not entirely dissimilar to that which we engage here. In an entirely different context, and many years

⁵ KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* 61–62 (1941).

⁶ Woodman, *supra* note 4, at 34.

⁷ For his part, Griffiths dismisses this sort of formal legal delegation as a "weak" form of legal pluralism that is more the study of legal doctrine than the descriptive assessment of how plural legal orders apply in any given social field. It does little to dispel the legal centralist "myth" that all legal order arises from the state, in that the alternative order is presumed only to have force because the state chooses to recognize it. Griffiths, *supra* note 4, at 8. The categorical nature of this distinction as between state law pluralism and other forms of legal pluralism has been criticized by others. Woodman, *supra* note 4, at 35–37. We take no view on the subject, noting only that our work in these pages deals exclusively with a "strong" form of legal pluralism, as there is no express constitutional delegation of authority to the tribe in Iraq's state law system, as discussed in greater detail herein.

⁸ Sarah Ben Nefissa, *The Haqq al-'Arab: Conflict Resolution and Distinctive Features of Legal Pluralism in Contemporary Egypt*, in *LEGAL PLURALISM IN THE ARAB WORLD* 154 (Baudouin Dupret, Maurits Berger & Laila al-Zwaini eds., 1999) (quoting Bernard Botiveau).

earlier, Stuart Henry described the manner in which housing communes, while proclaiming their opposition to prevailing state structures of capitalism, in fact at times benefitted from the very laws they opposed and sought to use those laws to enforce their own forms of communal justice.⁹ Perhaps most pertinently, the legal anthropologist Larry Rosen has done extensive work in Morocco to demonstrate that within the specific Moroccan, cultural context, legal pluralism exists in abundance, and among Moroccans there is "a very diminished sense of contradiction among identifiably distinct legal orders."¹⁰ Brian Tamanaha is therefore surely correct, and certainly in keeping with legal pluralist literature, in indicating that the mere fact that legal systems within a particular social field are *inconsistent* does not mean that they will necessarily *clash*.¹¹

At the same time, it is difficult to read legal pluralist literature without discerning a dominant narrative of conflict and competition between inconsistent legal orders, in particular in the context of the relationship between state law and indigenous, customary, or religious forms of ordering. In the words of Bernard Botiveau, a leading legal anthropologist who has studied the Arab world:

While accepting that a single society contains a multitude of normative fields and that an individual may, at one time, be involved in several of those fields, we cannot hope to maintain that these fields coexist peacefully. In fact each of them is constantly vying with the others for greater legitimacy. . . . Competition is a reality.¹²

In a less absolutist fashion, Tamanaha indicates, as we do, that the coexistence of inconsistent legal orders does not necessarily result in perduring conflict among them. However, he devotes most of his attention to the subject of conflict. Tamanaha, that is, seems to suggest by his focus that harmony and cooperation among different legal orders is a sort of exception to an implicitly general modus operandi of conflict.¹³ As Sally Engle Merry remarked in 1988 in a highly satisfying review of legal pluralist literature, "the theme . . . is the

⁹ Stuart Henry, *Communal Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative*, 19 L. & SOC'Y REV. 303, 311-14 (1985).

¹⁰ Lawrence Rosen, *Legal Pluralism and Cultural Unity in Morocco*, in LEGAL PLURALISM IN THE ARAB WORLD, *supra* note 8, at 92-93.

¹¹ Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 405 (2008).

¹² Bernard Botiveau, *Palestinian Law: Social Segmentation Versus Centralization*, in LEGAL PLURALISM IN THE ARAB WORLD, *supra* note 8, at 76.

¹³ Tamanaha, *supra* note 11, at 405.

penetration and domination of state law, and its subversion at the margins."¹⁴ This is no less true today.

Within the American legal academy, one of the most significant early contributions to the ways of non-state law is located firmly in a context where conflict with state law was almost sure to predominate. Llewellyn and Hoebel's *The Cheyenne Way* maintains that the Cheyenne had an elaborate and carefully constructed legal system and seeks to examine that system through the Cheyenne administration of "trouble cases."¹⁵ In its efforts, it presages much of the work of the legal pluralists in the decades following its publication in 1941. As with the later legal pluralists, its authors insist that there is more to "law" than that issued by the political state.¹⁶ They maintain that even in the political state, there are plural bodies of law that constrain conduct, not all of which are recognized in a court of law (or in Llewellyn's words, constitute "Class A Law-stuff").¹⁷ And perhaps most importantly, in keeping with what would become the obsession of legal pluralists for a period of decades,¹⁸ they insist both that there must be a distinction between "law" and "norms" and then seek to find a satisfactory definition for law that does not depend on state promulgation.¹⁹

Equally importantly, the absolute incompatibility of the Cheyenne ways with those of the white man is not so much stated as presumed. Given the nature of the political disputes between the United States and the Native

¹⁴ Merry, *supra* note 4, at 886.

¹⁵ LLEWELLYN & HOEBEL, *supra* note 5, at 61–62.

¹⁶ *Id.* at 52–53.

¹⁷ *Id.* at 52.

¹⁸ The central problem with which legal pluralists have grappled is the method by which one determines precisely what "law" is once it is determined that it is independent of the law of the state. Tamanaha, *supra* note 11, at 391. Merry's indication in 1988 that "the literature in this field has not yet clearly demarcated a boundary between normative orders that can and cannot be called law" remains true to this day. Merry, *supra* note 4, at 878–79. Some have argued that even attempting such a distinction is impossible. Joel-Noël Ferrière, *Norms, Law and Practices: The Practical Obstacles That Make It Impossible to Separate Them*, in LEGAL PLURALISM IN THE ARAB WORLD, *supra* note 8, at 21. Tamanaha offers a definition wherein law is that which is socially recognized as such. Tamanaha, *supra* note 11, at 396. In an interesting article on legal pluralism as it operates in Egypt, Baudouin Dupret elaborates on (and to some extent criticizes) Tamanaha's rather straightforward idea by giving more robust recognition to the practical and temporal context in which social actors may choose to deploy the term "law" to refer to a particular normative system. Baudouin Dupret, *What Is Plural in the Law: A Praxiological Answer*, 7 EGYPT/MONDE ARABE 160–61 (2004). Given our approach herein, we are obviously sympathetic to the realist and praxiological claims that underlie the analyses of Tamanaha and Dupret, respectively. However, a conclusive answer to the question of what type of non-state normative systems may be termed "law" is far beyond the scope of this chapter.

¹⁹ LLEWELLYN & HOEBEL, *supra* note 5, at 24–25.

American tribes, there is some sense to this. It is almost unimaginable that the two systems could in fact work in any sort of harmony.²⁰ The arrival of American law and order, Llewellyn and Hoebel make clear in the memorable passage at the end of the book, necessitates the end of the Cheyenne ways: “while the buffalo vanish, and the white man moves exorably in. Cheyenne law leaped to glory as it set.”²¹

The context of a colonial power imposing imperial law in a developing society is different, and the role of the Western-inspired legal transplant in a postcolonial society more different still. Dupret is correct respecting a regrettable tendency in legal pluralist literature toward a certain cultural essentialism that somehow regards every influence deemed to have arisen outside the “native” culture as unwelcome and inauthentic.²² “Authenticity” then seems to be found, Dupret notes, in some sort of pristine “indigenous” law that hardly seems to exist outside of the mind of the scholar describing it.²³ The reality is that legal transplants are not foreign systems with which local populations are unfamiliar. In the Arab world, the primary, transplanted civil and criminal codes are drafted by local authorities, rendered binding law by local legislatures, taught by local law professors to local students and interpreted by local scholars and judges.²⁴ The Iraqi Civil Code, to take the simplest example, was drafted by the greatest Arab jurist of the twentieth century, Abdul Razzaq al-Sanhuri, enacted in 1951, decades after Iraq was recognized as an independent state, and has been in effect ever since, through Arabist revolution and Islamist revival alike.²⁵ The Civil Code self-evidently adopts a number of principles from Continental Law, including the all-important general theory of obligation.²⁶ It would be a mistake to take from this any sort of principle of legal centralism – where courts interpreting the Iraqi Civil Code

²⁰ There is also the point, of course, that the Cheyenne “law ways” and United States law are, to use a phrase developed by Kilian Bälz in a different context, “radically autonomous.” Kilian Bälz, *Shari’a and Qanun in Egyptian Law: A Systems Theory Approach to Legal Pluralism*, 2 Y.B. ISLAMIC & MIDDLE EAST L. 37, 39 (1995). Any attempt to formally integrate one into the other would result in its effective displacement and reimagining in the context of the surviving system, similar to what Bälz claims occurs whenever a secular national court attempts to interpret *shari’a*. Bälz, *supra* at 47.

²¹ LLEWELLYN & HOEBEL, *supra* note 5, at 340.

²² Dupret, *supra* note 18, at 158.

²³ *Id.*

²⁴ On the general centrality of the transplant in much of the Muslim world in establishing the state’s legal order, and the insistence of all too many scholars to deem it less authentic and worthy of study than the far less applicable *shari’a*, see Lama Abu Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 790–92 (2004).

²⁵ Civil Code No. 40 of 1951 (Iraq).

²⁶ Haider Ala Hamoudi, *The Death of Islamic Law*, 38 GA. J. INT’L & COMP. L. 293, 310–11 (2010).

determine the outcome of any tort related dispute that might arise as between private parties, for example. Yet it would be equally a mistake to veer toward what Eric Feldman aptly calls “norm centralism,” where somehow the state’s law was almost by necessity an inefficient, bumbling, and hostilely regarded interloper and the “true” manner of dispute resolution something deemed more “authentic” and “local.”²⁷

There are of course very serious problems relating to state legitimacy in Iraq, and consequently the legitimacy of state law. This is particularly so in light of the rise of the Islamic State of Iraq and Syria (ISIS) in 2014 and its assumption of control of large swaths of Iraqi territory, including the major urban center of Mosul. This phenomenon is orthogonal to the themes of this chapter, however, for two reasons. First, and most importantly, our work here relates to Shi’i tribes and Shi’i resolution processes, and the problem of state illegitimacy is not one that is prevalent in the majority Shi’i community. Thus, the broadly revered Shi’i cleric Grand Ayatollah al-Sistani reacted to the ISIS threat by urging Iraqis to join state institutions for the express purpose of reversing the ISIS gains.²⁸ The call was, to say the least, well received within the Shi’i community, demonstrating a significant level of commitment on the part of Iraq’s Shi’a to the state in at least some contexts.²⁹

Secondly, to the extent that the minority communities are less than enthused with the operation of the Iraqi state, their demands relate to a better functioning state, or perhaps in the Kurdish case a different state exercising effective political control, and not the withdrawal of state authority entirely.³⁰ Thus, the existing cleavages within Iraqi society that threaten its very existence do not

²⁷ Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CAL. L. REV. 313, 316 n.8 (2006).

²⁸ Thomas Erdbrink, *Challenges to Shi’ite Establishment Further Threaten the Future of Iraq*, N.Y. TIMES, June 24, 2014, at A11 (noting Sistani’s position and contrasting it with that of a more junior cleric, Muqtada al-Sadr).

²⁹ *Id.* It bears mentioning that Sistani has also promulgated rules respecting marriage that derogate quite significantly from the law of the state. See, e.g., 3 ALI AL-SISTANI, MINHAJ AL-SALIHEEN 16 (2008) (deeming a “temporary” marriage to be permissible, in a fashion that it is decidedly not in Iraqi law). This demonstrates in a separate context from that discussed in this chapter the means by which prominent Iraqi actors embrace state authority for particular purposes (for example, national security) while at the same time eschewing it for others (for example, marriage).

³⁰ Thus, there is some dispute in the academic literature respecting whether or not the Sunni community in its political demands wishes to see some greater level of local, state-based autonomy, or it seeks a more inclusive national state. Compare HAIDER ALA HAMOUDI, NEGOTIATING IN CIVIL CONFLICT: CONSTITUTIONAL CONSTRUCTION AND IMPERFECT BARGAINING IN IRAQ 179–82 (2014) (taking the position that the Sunni demands were for a strong, central state that included them) with Feisal Amin Rasoul al-Istrabadi, *A City of Two Tales*, 68 MIDDLE EAST J. 333, 335–36 (2014) (arguing that Sunni protestors seek greater separation from Baghdad). The dispute, however, relates to the form of state authority rather than to its existence. No scholar

arise because of a conflict between two conceptions of authority, one vested in the state and the other in the tribe, but rather in two disparate conceptions of statehood, one presuming a strong central authority and the other presuming more localized control. Hence, when trying to understand the relationship of state to non-state law in a nation like Iraq, reference to colonial era efforts is not useful.

More useful analogies, we submit, are offered in the substantial amount of "private ordering" literature that has arisen in the American legal academy to describe rulemaking and application in various, discrete "semi-autonomous social fields"³¹ as they exist in the United States. The domestic law in Iraq, in other words, is likely to be regarded by its population less like a colonial imposition and more like any state law would to private actors operating in a semiautonomous social field in a developed nation such as the United States.

The two leading, seminal works on "private ordering" demonstrate the importance of cooperation of disparate legal systems quite well, even if they had a primary purpose that was different. The first, Lisa Bernstein's well-known article concerning diamond sellers in New York City, describes how individuals involved in the diamond industry have developed their own rules pursuant to which they adjudicate disputes. The manner in which they manage this is through rules of membership in the all-important diamond exchange, the New York Diamond Dealers Club. Members are obligated to submit their disputes, whether they concern the sale of rough diamonds or polished stones, to an arbitration board in the Club pursuant to the Club's rules. The board then adjudicates according to the bylaws of the Club as well as trade customs and usages. Failing to abide by the contractual, arbitral agreement and proceeding to court is against the Club's rules and can result in expulsion from the Club.³² Though disputes with nonmembers do not have to be submitted to the Club, often they are, for a variety of reasons, including minimizing transactional and reputational costs.³³

of note to our knowledge takes the position that any minority community wishes to see state authority replaced with a pure tribal system as opposed to a differently oriented state system.

³¹ The phrase "semi-autonomous social field" was coined by Sally Falk Moore in a highly influential 1972 article wherein she maintained that the appropriate subject of study of the interaction of law and other normative ordering was a "semi-autonomous social field," which was capable of making its own rules, but also set in a larger social matrix which affects it. Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC'Y REV. 719, 720 (1972).

³² Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 119-20 (1992).

³³ *Id.* at 126.

In terms of decision making, the arbitration board never publishes its rulings or its basis for them.³⁴ However, failure to comply with a ruling comes with the stiff reputational penalty of broad publicity of such failure to comply, which seriously hinders the ability of the reluctant party to continue to do business.³⁵ Apparently, it is this extralegal reputational sanction that tends to influence compliance the most, rather than any sort of threat of legal action.³⁶ Bernstein points out that this organizational system bears a striking resemblance to Jewish law, which strictly forbids a Jew in quite strident terms from seeking redress in gentile courts to resolve commercial disputes, and subjects a person to ridicule and shame if the prohibition is ignored.³⁷

The other seminal work on private ordering, a book by Robert Ellickson, describes in some detail the conduct of farmers and ranchers in Shasta County, California. Ellickson's extensive research indicates that these actors in their semi-autonomous social field very rarely litigate their disputes, at least to the extent that such disputes relate to damage caused by trespassing animals and responsibility for building and repairing fences.³⁸ In fact, most of the time, they do not even know the underlying law particularly well.³⁹ Rather, the community has developed its own norms and has developed its own forms of policing, which involve shaming and a variety of other self-help mechanisms, used incrementally and with restraint so as to avoid feuding.⁴⁰ Although the community does not invariably ignore state legal rules (motor vehicle accidents, for example, are routinely referred to law), they seem to do so in their "workaday" affairs in a manner that derogates considerably from the state law rules.⁴¹

It is important when considering such valuable work to keep in mind Moore's famous phrase describing the social field as *semiautonomous*. As with Moore before them, Bernstein and Ellickson have identified social fields that are capable of generating their own rules, and yet, as Moore has properly indicated, the social field is affected by its location within a larger social matrix, which certainly includes the state, the state's law, and those officers and agents responsible for its promulgation and enforcement.⁴²

³⁴ *Id.* at 124.

³⁵ *Id.* at 128.

³⁶ *Id.* at 152.

³⁷ *Id.* at 141.

³⁸ ROBERT C. ELICKSON, *ORDER WITHOUT LAW: NOW NEIGHBORS SETTLE DISPUTES* 52-53, 69 (1991).

³⁹ *Id.* at 49-50, 70.

⁴⁰ *Id.* at 57-59.

⁴¹ *Id.* at 94-95, 174.

⁴² See *supra* note 31.

Put more concretely, it simply is not true that the farmers and ranchers of Shasta County have managed a form of "order without law." Law, in fact, is everywhere in this social matrix. It merely has been internalized by the social actors and therefore is out of view. Shasta County does not have its own rules on murder, for example. These come from the state of California. The same is true of arson. Hence, when the ornery villain in Ellickson's absorbing narrative, Frank Ellis, continues to permit his cattle to maraud his neighbors' property and proves impervious to the reputational sanctions the community seeks to impose upon him, nobody in Shasta County seems particularly inclined to shoot him, or to burn his house down. It is highly likely that their conscious motivations for doing so involve considerations beyond violations of state law. It is also highly likely, or at least perfectly plausible, that in the absence of such "exogenous" rules, to use Ellickson's preferred economic phrasing of the matter, Shasta County might not exist as Ellickson describes it.⁴³ The remedy of murder, arson, or something equally felonious might be used, at least at times, leading to a rise in blood feuds. Alternatively, and perhaps more plausibly given the structure of contemporary American society, the entire two industries of ranching and farming would be taken over by organized criminal syndicates who would not shy away from deploying methods that the current citizens would not consider. The normative order of Shasta County *cooperates* with a state law paradigm that its residents broadly regard as legitimate to prevent more serious disputes. That the state's law against theft, for example, is by Ellickson's own reckoning viewed overwhelmingly positively by the residents of Shasta County demonstrates this more than anything.⁴⁴

At the same time, the state law might well be understood to be cooperating with the normative order as well. It is true that in a narrow, formal sense, some of the self-help remedies to which Ellickson's social actors frequently resort are illegal. A rancher may not, we may fairly assume, legally castrate a person's bull because it has repeatedly caused damage to his property, nor may a landowner legally shoot trespassing cattle. These are both examples offered by Ellickson as examples of self-help deployed when reputational sanctions do not seem to work.⁴⁵

⁴³ Ellickson, *supra* note 38, at 174–75. Given Ellickson's reference to the need for such exogenous rules, and his certain knowledge that these come from state law in this instance, we do not believe we are asserting anything he might necessarily disagree with, so much as elaborating on a point that he may not have felt required the same emphasis we do for our purposes. We do, however, have a quibble with the title of his work – "Order Without Law" – for the reasons explored in the main text.

⁴⁴ *Id.* at 175.

⁴⁵ *Id.* at 58.

Yet even the example of the castrated bull, quite intriguing by Ellickson's reckoning and ours, points to a some level of cooperation in the management of disputes using both state law (to limit the possibilities of feuding) and non-state law (to administer the disputes once the background, exogenous rules are set). For although the rancher in the case of the trespassing, castrated bull may fairly be credited with some restraint, turning to that remedy only when others failed him, and the owner of the castrated bull can be credited with similar restraint for not retaliating, the involvement of state officials was also quite notable. For the rancher in that case did not merely decide to castrate the bull without notice. Before doing so, *he informed a law enforcement official of his intent to do so, and the law enforcement official indicated he would "turn a blind eye" were that to occur.*⁴⁶

The rancher, that is, sought state sanction before deploying his remedy – he wanted to make sure that he did not exceed the bounds that the state's officers permitted him in administering his workaday affairs and negotiating his relations with his fellow Shasta County residents. This restraint on the rancher's part was coupled with restraint on the part of the state officer as well. Here, the state officer chose to leave the matter for the residents to resolve without state interference, at least for so long as the matter related only to castrated bulls, even if he could have deployed state law to force a different resolution.

The decision to defer was almost surely not due to any sort of hostility to the state on the part of the state officer. We may fairly assume that the law enforcement official in question took the role of state officer seriously, and did not join the police force to undermine it. The officer, again we may assume, would not have "turned a blind eye" if the rancher had threatened to kill or burn down the home of the offending bull owner. Instead, the officer was choosing to grant some space to the rancher to maintain order, an "implicit delegation" of sorts. Far from a model wherein each normative order is competing for respective supremacy, here each is pulling back to avoid interference – seeking to work together in maintaining order in the social fields. The cooperation is "thin" in that it involves limited, ad hoc interactions between the inconsistent legal systems rather than a sustained and highly systematized means of engagement across them. Nevertheless, it is very much a form of cooperation, in that each of the two systems is managing itself in a manner that minimizes difficulties with the other system.

If this is the case with respect to Shasta County, it is doubly so in the case of New York's diamond sellers. In fact, one might take issue with describing

⁴⁶ *Id.*

the contracts in which the parties engage as “extralegal” at all. There are no violations of law involved in the negotiation, administration and enforcement of these contracts. Quite the opposite is true. Not only might a member who ignores her agreement to arbitrate be suspended or expelled from the New York Diamond Dealers Club, but also under formal, state law, *the court will stay her state court suit because of the binding arbitration agreement that exists pursuant to Club rules.*⁴⁷ If a member fails to comply with the arbitral ruling, not only will he be exposed to the reputational sanction of being publicly described as one who failed to comply, but the ruling can be confirmed in a state court, which will not look to the substantive basis of the arbitral decision in upholding the ruling.⁴⁸ Bernstein’s point is well taken that it is not the state law’s rules that in fact induce compliance given how infrequently the state law’s apparatus are used, even when they can be.⁴⁹ Our only elaboration here is to demonstrate that the state is not competing with the normative order for greater influence, but rather voluntarily restraining itself in order to create the space for the normative order to proceed as it has.

Similar to the farmers and ranchers, we must assume that the non-state agents of the normative order are doing the same, using prudence and restraint in deploying their own rules in order to avoid conflict and competition with the state. Although the similarities of the diamond sellers to Jewish law are certainly striking as Bernstein notes, what appear to be the dissimilarities are also quite notable. The authority cited by Bernstein respecting Jewish law does not merely indicate that a Jew should not go to a gentile court to resolve a *commercial dispute*, but rather that to seek redress in a gentile court *at all* was to be “deemed to have reviled and blasphemed and rebelled against the Torah.”⁵⁰ Such a broad and strident rule, laid down at a time when Jewish courts were struggling to maintain their autonomy,⁵¹ hardly seems the basis upon which the New York Diamond Dealers Club operates, whatever its applicability in other contexts.⁵² Although we do not know, it is hard to believe that the

⁴⁷ Bernstein recognizes this, of course. Bernstein, *supra* note 32, at 120.

⁴⁸ *Id.* at 125.

⁴⁹ *Id.* at 152.

⁵⁰ MENACHEM ELON, *I JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 13–14 (Bernard Auerbach & Melvin Sykes trans., 1994). (“Resort to a non-Jewish court was compared to the denial of the existence of God and his Torah. . . .”). We pretend no mastery of Jewish law, and merely rely on the authority cited by Bernstein herself.

⁵¹ *Id.*

⁵² The press has reported on the presence of some religious Jewish communities who shun members of their community who report crimes as serious as child abuse to state authorities. Sharon Otterman & Ray Rivera, *Ultra-Orthodox Shun Their Own For Reporting Child Abuse*, N.Y. TIMES, May 9, 2012. We claim no expertise in Jewish law, and so we have no comment

New York Diamond Dealers Club would have a rule expelling a member who sued another member whom he accused of burning down his house, or that they would in fact expel such a member for seeking redress for such an injury from a state court. The semiautonomous social field appears to have internalized a great deal of state law in setting the rules of the game.

To be clear, these are not criticisms of the laudable work of Bernstein and Ellickson, nor are they remarks with which they would necessarily disagree. Our purpose in describing and elaborating on the idea of private ordering as it has been laid out in leading scholarly accounts in the American legal academy is not to attack it, but to make a more modest point. Even in such accounts, where the role of a normative order – a non-state law – is emphasized, the existence of a thin, but real, form of cooperation between state and non-state law in maintaining the broader order in the social field should not be minimized.

In the commercial context, this is an easy fact to overlook because the state's role can be buried deeply in the background, though other leading scholarly accounts point to situations where it is not, in particular in developing societies.⁵³ Once the state's laws against murder, theft, arson and the like are not only presumed, but also deeply internalized by social actors, they can be swiftly forgotten, and the state's role might then be understood to be more minimal in ensuring the continuation of the order than is appropriate. It takes a different social field to notice the cooperation at work more clearly, one where

on the extent or prevalence of such practices. Our point is only that it is highly unlikely in our estimation that the New York Diamond Dealers Club would operate on this basis.

⁵³ In particular, in studying the phenomenon of private ordering in the context of societies where the state courts are to some extent dysfunctional, McMillan and Woodruff point out the possibility of criminal violence in the context of private ordering in the absence of public law. They indicate, in a statement with which we wholeheartedly agree, that as a result of problems such as this, "private order can usefully supplement public law, but cannot replace it." We only seek to emphasize herein the means by which such supplementing, which we describe as a thin version of cooperation, takes place in one social field we have had the opportunity to study. See John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2423 (2000).

It should be noted in addition that the importance of state law and its potential to cooperate with informal norms has been discussed in the literature as well. Most notably, Eric Feldman has written an illuminating work on the tuna court that exists in Tokyo's Tsukiji Fish Market. Feldman points to an interesting circumstance where informal normative ordering mechanisms and formal state law machinery is combined to create a widely used hybrid formal/informal adjudicative tribunal responsible for administering disputes over the quality of tuna. Feldman, *supra* note 27, at 352–59. The form of cooperation in Feldman's account is admittedly thicker than that which prevails in Iraq, where the interactions between state and tribe are far less formal and sustained than would exist in a hybrid tribunal.

the state plays a role in maintaining order, but is simply not as effective as the police of Shasta County and New York City in limiting violence. One where non-state application of violence would quite plainly exist, and yet tribal feuds might be limited in form and extent by virtue of an imperfect, only partially functioning state system that cooperates with the tribes in maintaining order. Such is the case of Iraq, as the balance of this chapter shall demonstrate.

DISPUTE RESOLUTION UNDER THE LAW OF THE TRIBE

The Role of the Tribe in Iraqi Society

The importance of tribes in maintaining order in the territory currently known as Iraq precedes the actual Iraqi state by centuries. While the Ottoman Empire nominally came to be in control of Iraq in the sixteenth century, the territory lay at its eastern periphery near the Persian Empire with whom the Ottomans were frequently at war.⁵⁴ As such, the Ottomans tended to neglect Iraq, and left the tribes to operate in whatever manner they saw fit.⁵⁵ Some of this changed in the latter part of the nineteenth century, in particular with the enactment of the Tanzimat reforms and the efforts of the Ottoman governor of Baghdad, Midhat Pasha.⁵⁶ Nevertheless, the tribes remained a central force in maintaining order in Iraq's earliest years, an important player in the semiautonomous social fields in which they tended to operate. Marr reports that as late as 1933, Iraqi tribes possessed roughly six times as many guns as the entire government.⁵⁷

Much has changed since 1933, the year after Iraq obtained independence. Iraq's police and military forces now number nearly one million.⁵⁸ Iraq's state institutions, from courts to law schools to its government ministries and independent agencies, are far greater in size and influence after a massive expansion in the middle of the twentieth century.⁵⁹ Still, Iraq's 150 existing tribes continue to provide an important source of order throughout much of

⁵⁴ YITZHAK NAKASH, *THE SHI'IS OF IRAQ* 14 (2003).

⁵⁵ *Id.*

⁵⁶ *Id.* at 32–33; PHEBE MARR, *MODERN HISTORY OF IRAQ* 7 (3d ed. 2011) (describing reforms of Midhat Pasha).

⁵⁷ Marr, *supra* note 56, at 19.

⁵⁸ Iraq's military and nonmilitary security forces aggregate to approximately 800,000 people. Robert Perito & Madeline Kristoff, *Iraq's Interior Ministry: The Key to Police Reform*, UNITED STATES INSTITUTE OF PEACE, July 2009, available at http://www.usip.org/sites/default/files/iraq_interior_ministry_perito_kristoff.pdf.

⁵⁹ See, e.g., PETER SLUGLETT & MARION FAROUK-SLUGLETT, *IRAQ SINCE 1958: FROM REVOLUTION TO DICTATORSHIP* 248–50 (3d ed. 2001) (describing vast increase in government bureaucracy in the early 1970s).

Iraq.⁶⁰ Indeed, every Iraqi belongs to a tribe, and we personally know of no Iraqi who is entirely unaware to what tribe he belongs.⁶¹

That said, this does not mean that every Iraqi relies exclusively, or even extensively, on tribal resolution procedures. Importantly, there is a significant level of geographic variation in the influence of the tribes. At one extreme, urban elites often dismiss their tribal affiliation as irrelevant, and view tribal order with some level of contempt. Beyond the urban elite, tribal affiliation carries at least some significance, and among rural populations, it bears particular importance.

To add further complication, according to the tribal leaders with whom we spoke, there is temporal variation in the extent to which tribes exercise meaningful authority in Iraq relative to the state. When the state is in a position of relative strength, the state tends to adjudicate more disputes. When it is not, tribal authority increases accordingly. The precise ebb and flow of tribal authority relative to the state over the course of Iraq's history is a matter we do not explore in detail here, though it is worthy of further study that we hope to undertake in the future.

Because every Iraqi belongs to a tribe, there are tribes among all segments of Iraq's population, and some of the larger tribes span the Sunni-Shia divide.⁶² Among the larger and historically more influential tribes among the Arabs are the Shammar, the Dulaym, the Jibur, the Rubai'e and the Zubaydis, each of which has at least several hundred thousand members.⁶³ The largest and influential Kurdish tribes are the Jaf and the Barazan. Many Iraqis are affiliated with tribes that are smaller in population than these extremely large tribes.⁶⁴ Even these larger tribes are divided into smaller subtribes, or clans, where it seems that more meaningful authority was effectively exercised.

⁶⁰ HUSSEIN D. HASSAN, CONG. RESEARCH SERV., RS22626, IRAQ: TRIBAL STRUCTURE, SOCIAL AND POLITICAL ACTIVITIES 1 (Apr. 7, 2008).

⁶¹ Cf. Neil MacFarquhar, *Unpredictable Force Awaits U.S. in Iraq: Storied Tribes in the Middle East, Devout, Armed and Nationalistic*, INT'L HERALD TRIB., Jan. 7, 2003, at 2 (describing three quarters of Iraq's population as belonging to tribes). It is possible that MacFarquhar's errant number comes because the estimation is of those who affiliate closely or moderately closely with their tribe, thereby excluding casual members whose sole affiliation is symbolic or nominal.

⁶² HASSAN, *supra* note 60, at 2.

⁶³ *Id.* at 3. Obviously, dispute resolution cannot in each instance demand the full attention of leaders of hundreds of thousands of people. Tribes are thus divided into subunits such as clans, which tend to address most ordinary affairs. Because we treat the tribe as a discrete unit, as described below, we do not address herein the internal organization of the tribe in any depth. Suffice it to say, a local or regional tribal leader has the authority to manage disputes of the type discussed in this chapter on behalf of his tribe with counterparts in other tribes.

⁶⁴ *Id.* at 1.

According to the tribal authorities with whom we spoke, tribal affiliation is passed exclusively along the male line. This means that the tribes are not opposed to, and indeed often welcome, intertribal marriages as a means to cement a reconciliation process. The woman in such a marriage would retain her original tribal identity, and her children would obviously be nephews of men of a different tribe, making conflict less likely. However, whatever (maternal) *family* connections might exist, as a *tribal* matter children would be regarded as belonging to the tribe of their father.

Our field research was conducted solely among the Shi'i tribes in Iraq's south, whose reach extended through to the heavily Shi'i areas of Baghdad, such as Sadr City, which is in effect an immense squalid neighborhood filled with recent migrants from Iraq's south. All of the tribal leaders we interviewed told us that the system of resolution they described that related to their tribes did not differ significantly from that used by tribes firmly located in Iraq's center, such as Baghdad, nor was it very different from the practices of the predominantly Sunni tribes of the west, except as specifically indicated herein. We have not sought to ascertain this directly, however.

Methodology

We conducted a series of interviews with eight tribal leaders who led entire tribes or at least significant branches of them and therefore managed disputes on a regular basis on behalf of the tribe, or branch thereof. Our early interviews were highly general and designed primarily to grasp the basics of the dispute resolution processes deployed by Iraqi tribes. We used later interviews to seek clarification, to discuss actual examples of the principles described, and to elicit answers to more pointed questions in regard to the relationship of particular tribal procedures to state law. Finally, we had the opportunity to attend a single large dispute resolution ceremony. All this field research was conducted during the spring of 2013, beginning in April and ending before the middle of June. Unless otherwise indicated, our knowledge of contemporary tribal practices derives from these experiences.

Although we strongly believe that our methods have yielded broadly accurate and interesting findings, it is important to note their limitations. There are two in particular that stand out. First, we did not conduct interviews with state law officers and personnel to elicit their views on the manner and extent to which the state deferred as a matter of practice to tribal processes in particular circumstances. We did attempt this as a preliminary matter, but received largely formal and highly practiced answers to the effect that the state uses its investigative powers thoroughly to pursue every possible crime and will not

relinquish a case until it has been satisfactorily resolved. As Iraqi law does not recognize the tribal resolution procedures at all, these officials insisted, there was no deference on their part to the tribes, or any other non-state actors, at any time or in any place. Not only was that plainly not true in the particular context of Iraq, it is not true in any jurisdiction of which we are aware. To conduct useful interviews, we found that we would need more time than we had to gain the trust of judges and other state law officers so they would speak more candidly with us.

That said, direct interviews with state officers, although they would be quite helpful, are probably less important than they are in the tribal instance simply because the state keeps ample records of its activities while the tribe's records are comparatively scant. Of course, there is value in understanding when a police officer might turn a blind eye to particular activity without filing a report. It would also be useful to know when a police officer might arrest and detain a person, followed by a release ordered by an authority in a police station before a file is prepared and after tribal intervention. A more complete description of the interaction between state and tribe would require that such important fieldwork be undertaken.

Nevertheless, we can glean much of the state's passive, "thin" cooperation with the tribes from court records. Hence, in addition to the interviews described, we spent days in the summer of 2013 researching court files in Baghdad's Rusafa criminal court, as well as criminal courts in Basra and 'Amara, a smaller city in Iraq's south. Records from police files are not as accessible, and are hardly as important as they might be in the United States. This is because under Iraq's inquisitorial system, the police must record any information respecting a potential crime and immediately transfer the case to the investigative courts, where an investigatory judge is then responsible for gathering facts and evidence to make a preliminary determination of whether further criminal proceedings are warranted.⁶⁵

Secondly, with the one exception of the tribal settlement we witnessed, we derived our findings not from our own direct observations of the tribal processes at work, but rather accounts of those processes from the actors operating in the social field. Ideally, given sufficient time, we would directly follow a series of disputes as they wound through tribal and state law processes to determine

⁶⁵ Criminal Procedure Code No. 23 of 1971, art. 49(a) (Iraq) ("It is incumbent on any responsible authority in the police station upon the reaching to him of any news of the commission of a felony or a misdemeanor that he record immediately the statements of the informant, obtain [the informant's] signature thereon, and send a report of that to an investigative judge or an investigator . . .") (translation by authors).

their ultimate outcomes. Although it is possible to discover active cases in court files, connecting them to the tribal resolution processes that appear to have transpired alongside those active cases would take considerable work to unearth and explore. We have been unable to do this in the time we have devoted to the matter to date.

Addressing these two limitations in future work would, we strongly believe, unearth further findings that might prove more interesting, and we hope to do this in the months and years to come. However, we stress that it would be extremely unlikely to change our conclusions so much as develop them further.

The Tribe as Corporate Unit

On its surface, it may appear incongruous to relate the dispute resolution processes between Iraqi tribes to those that arise in much of the private ordering literature in the American academy. Yet the similarities are in fact quite remarkable. To see how this is so, it is important to note at the outset that we focus on the tribes as discrete, self-contained units, interacting with other, similar units much like individuals. A rough analogue would be the manner in which modern company law invests various types of companies, most particularly corporations, with legal personality and treats them as individuals though they are, like tribes, not natural persons.

This approach greatly simplifies our examination of the resolution procedures, though it does leave unexplored important areas of Iraqi tribal law that certainly deserve greater study. Most glaringly, by treating the tribe as a single corporate person, we do not address issues of tribal governance in any level of detail. Hence, the relationship of the branches of the major tribes to the larger tribe, both fiscally and administratively, is a matter we do not touch upon. Nor do we discuss the manner in which the tribe might choose to address disputes within the tribe, or across branches of it, as opposed to disputes arising between members of two distinct tribes. Finally, there may be important issues relating to how to handle claims of compensation within the tribe due to an injury caused by an outsider that resulted in harm to several victims. We leave all of this to a subsequent and more extensive study.

The advantage of our more focussed approach, however, is that it makes much clearer the relationship of tribal ordering and private ordering. As with actors in the private ordering literature, the tribes are certainly "close-knit" and interact with each other frequently. Tribes are not all of precisely the same size and influence, but informal power is about as evenly distributed among them as it is among private, commercial actors in many private ordering settings.

Information certainly circulates among the tribes extremely fluidly as it does among actors in private ordering accounts.⁶⁶

Finally, and most importantly, the tribes are "repeat players" in their dealings with one another, and they are perfectly aware of this. They have frequent disputes, and they can expect such disputes to continue over the near-to-medium term. One of our interviewees, Shaykh Chamil of the tribe of Abu Muhammad, summarized the situation using a popular tribal adage: "today you have means, and we complain to you of misfortune, but tomorrow, in your home, you shall find need to complain to others." This is important. Richman notes that it is a "mainstay" of private ordering literature that "prospects for future transactions induc[e] compliance with current contractual obligations."⁶⁷ This expectation of repeat interaction is entirely true of the Iraqi tribes, the only difference being that the obligations to which compliance is induced are not only, or even primarily, contractual, but rather delictual.

The Mechanisms Deployed to Resolve Intertribal Disputes

Given the similarities in structure between the Iraqi tribes on the one hand and individuals in the literature of private ordering on the other, the means by which they resolve disputes tend to be quite similar. Iraqi tribes tend to rely on reputational sanctions in their early phases. They then resort to escalating self-help remedies that are used with some level of restraint to avoid the negative consequences and threats to public order that can attend as remedies grow more severe. They turn to the more extreme remedies only in the rare case.

Notification

In keeping with the desire to rely on reputation and avoid remedies that could escalate out of control and thereby garner the attention of the state, the tribal disputes begin with what is known as a *tanbih*, or notification. Effectively, an injured party from one tribe sends notice to the perpetrator from the second tribe that an injury is claimed, and that recompense is demanded. Importantly, in particular for smaller injuries (anything from a stolen car to an unpaid debt) this does not need to involve significant tribal elders. The notice is sent through a *sayyid*, meaning a direct descendant of the Prophet Muhammad (such figures being universally respected throughout Iraq, and within the Shi'i

⁶⁶ See, e.g., Ellickson, *supra* note 38, at 179.

⁶⁷ Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards A Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2339 (2004).

community in particular). If it is responded to, an accommodation might be reached quickly and with minimal reputational damage to the offending party. The notification, in other words, is an opportunity to resolve the matter in a sort of mediation, without resort to the more elaborate tribal processes.

In more serious cases, the notification process might be forgone, though it need not be. As an example that was given to us, two young men from opposing tribes were in a drag race, and due to the negligence of one of the drivers, the second was killed, before a number of witnesses. The first youth never informed his tribe of the death of the second and instead hoped, as adolescents always do, that the problem would somehow resolve itself. In such fatal cases, it is the male members of the immediate family of the victim who are expected to raise the matter with their own tribe in order to initiate formal dispute resolution procedures. This would be the father if he is living, but if not, it would be the closest male relatives, which could be brothers, uncles, or even sons depending on the age of the victim.

However, in this particular case, rather than escalate the dispute formally, the broader family of the victim sent a notification to prominent family members of the perpetrator, believing (accurately) that it was impossible that the offending tribe was ignoring a death and that instead the matter was not being reported to the family and the tribe. Promptly after the notification, the matter was resolved among the immediate families, without broader tribal involvement.

The Confrontation

If the notification does not lead to a fruitful result, the next self-help mechanism is known as the *guama*, perhaps best translated as the confrontation. It is here where reputational sanctions begin to have their bite. The injured party invokes tribal processes, and the tribal *shaykh*, presuming that he accepts the legitimacy of the complaint, authorizes a sizable delegation to go to the home of the perpetrator in full view of the neighborhood. The delegation will be composed of those who are, to use the words of one tribal *shaykh*, "severe personalities" [*nas al jalda*]. They will be accompanied by a third party to act as witness as to the occurrence of the confrontation. They will, in strict fashion, note the injury, demand recompense, and insist on a visit from the perpetrator's tribe to the victims within a set period.

The confrontation is intended to be nonviolent, and violence does not generally result from it. It serves the dual purpose of warning the perpetrator of further consequences and initiating reputational sanctions against the perpetrator and by extension, his tribe.

The Striking

It is important to note that the vast majority of disputes are addressed in a mutually beneficial fashion before this next, more serious dispute resolution stage arises. As noted, the tribes are "repeat players"; they are well aware that although there may be a claim against them one day, they will be making a claim on the next. It is therefore in their interest to avoid reputational sanctions, and to cooperate with those who make claims against them for the benefit of the easier settlement future claims they might make. By and large, they do this.

Nevertheless, if following a confrontation, the offending tribe does not pay a visit to the injured tribe, the first actual use of violence ensues. The injured tribe sends armed men to the home of the perpetrator and sprays it with some number of bullets in a process known as the *degga*, or the striking. The striking can be repeated one or more times, in each case involving more bullets and more damage to the home. The visits might be in the middle of the night, or during the day, and although the risk of personal injury is obviously present, the clear intention is not to harm any person.

Though it is a clear use of violence, and the threat of harm is obvious, in fact the striking has very much the same dual purpose as the confrontation, but in escalated form. It is not only a threat; it is also a serious reputational sanction to the individual and to the tribe. The entire community is aware when a striking occurs, and news travels relatively fast within Iraq. It is unwise for a tribe to earn a reputation for having to endure a striking before it is willing to compensate for an injury that one of their own may have caused.

Kidnapping

In the rarest of cases, members of the injured tribe kidnap members of the offending tribe and hold them until the offending tribe agrees to pay the requisite compensation. Although the measure is permissible under the tribal law in extreme circumstances, when other measures have been exhausted, it is rarely employed. If it is used, it is considered a matter of considerable honor to treat the kidnapped members of the tribe well. A failure to do so would lead to severe reputational sanctions. An analogy to Shasta County is notable, though in the cases reported by Ellickson, the matter involved the abduction and holding of cattle, not human beings.⁶⁸ The reason for the difference, of course, lies in the relative role of the state in maintaining order, which is

⁶⁸ Ellickson, *supra* note 38, at 63.

discussed in the next section. One presumes that the state of California would not turn a blind eye to the kidnapping of human beings. Neither does Iraq, as we shall see, though its ability to police the matter is considerably more limited.

Arbitration

It is important to note that until this point, we have proceeded under the assumption that there is some clarity as to who the responsible party happens to be for any given injury. This is often true in cases ranging from assaults to theft to intentional and unintentional killing. Of course, it need not be. If it is not, then prior to escalation and upon notification or confrontation, the allegedly offending tribe may demand an informal arbitration to be handled by a single, well-respected senior figure selected by the parties known as a *faridha*. (In practice, there are only a handful of such figures to whom tribes turn, making the selection process relatively straightforward.) The arbitrator is authorized to hear evidence, to take witness statements from those who have been endorsed as reliable by their own tribal leaders and to render rulings on the basis of those statements in a process that is quite informal and relatively swift, usually taking no more than a day or two in the most. Naturally, no self-help remedies may be used pending the outcome of the tribal arbitration.

The only relatively unique aspect of the arbitration that bears mentioning is the role and form of oath taking. At times, there is no evidence in favor of a claim on the part of an injured party, nor against it. Neither witnesses, nor pictures, nor documentation appears, and of course the tribe lacks capacity to engage in any sort of extensive forensic analysis. In such cases, what is resorted to is known as taking an oath of the tomb of Abbas. In Shi'a lore, Abbas is the half brother of the Prophet Muhammad's grandson, the Imam Hussein, who is himself deemed the third righteous leader of the Muslim community following the Prophet's death.⁶⁹ Imam Hussein's killing in an area of southern Iraq known as Kerbala by the then Sunni caliph is regarded by the Shi'a as a cataclysmic event, commemorated with excessive lamentations to this day. Abbas, who died with Imam Hussein in Kerbala, was regarded as one of Imam Hussein's most fearsome warriors, one who continued to fight even as his right hand, and then his left, was severed by the caliph's forces. Both he and his half brother are buried in Kerbala.⁷⁰

⁶⁹ MOOJAN MOMEN, AN INTRODUCTION TO SHI' I ISLAM: THE HISTORY AND DOCTRINES OF TWELVER SHI'ISM 30-31 (1987).

⁷⁰ *Id.* at 31-33.

So as to ensure the veracity of a particular party claiming injury where no evidence exists in either direction,⁷¹ a victim can be taken to Kerbala at the insistence of the offending party and be made to swear on the tomb of Shi'a Islam's mightiest warrior that what he or she claims is true.⁷² Once undertaken, a party's honor, referred to among the tribes using the colloquial term *bakht*, is invoked, and to involve one's *bakht* is a serious matter.⁷³ Were the party later deemed not to be telling the truth, then the person will be committing a grievous sin, a matter that cannot be readily ignored among a deeply pious people. Moreover, high levels of communal shaming would result. They would no longer be deemed to be honorable members of the community, their testimony would be deemed worthless, they would not be lent money, and other similar social consequences would follow.⁷⁴ As a result of this combination of divine and human sanction, we are told that it is not unusual for an injured party to insist that a particular injury arose from a particular person to demur once the other party insists on an oath at the Abbas tomb.

The Respite

Whether the result of an adverse arbitrary ruling or self-help remedies directed against it, when an offending tribe relents, it must then seek a respite,⁷⁵ or *atwa*,

⁷¹ Importantly, the process is used as a substitute for evidence when no conclusive evidence exists. It does not supplant evidence should there be enough for the arbitrator to make a ruling in the absence of an oath. Nor would it be wise for any person to seek to make an oath in the face of considerable contrary evidence, given the severe reputational sanctions that can attach.

⁷² While we do not doubt that there is some form of oath taking that takes place among Sunni tribes, it almost surely does not involve travel to the tomb of Abbas, a person of no particularly important stature within Sunni Islam. As our work did not involve the investigation of Sunni tribes, however, this is entirely a matter of speculation.

⁷³ It is not strictly necessary to take one to the tomb of Abbas in order to invoke their *bakht*. An arbitrator could simply require a swearing on the Qur'an, or even ask them "on their *bakht*" if a particular matter was true. At the insistence of the allegedly offending tribe, however, a matter of sufficient importance is taken to the shrine of Abbas.

⁷⁴ Reliance on social sanctions to induce compliance with rules is by no means unique to Iraq's tribes, even if the particular religious manifestations of it are more unusual. As McMillan and Woodruff report, circumstances where spontaneous cooperation thrive tend to be those where groups "lack the ability to implement formal sanctions . . . although they may, and generally do, rely on social sanctions as an enforcement mechanism. These social sanctions usually operate through ostracizing or excluding members from the group." McMillan & Woodruff, *supra* note 53, at 2434.

⁷⁵ Interestingly enough, one of the tribal leaders we interviewed, attempting to justify all of these various processes as being in accordance with the *shari'a*, insisted that the origins of the respite are from the Prophet's ceasefire with the non-Muslim tribes in Mecca. The analogy is strained and difficult to support. The Prophet's ceasefire was between warring parties who saw mutual advantage in a break from fighting that both intended to continue at a later time, after the

from the injured tribe. The respite is designed to give the offending tribe an opportunity to gather its members and others for the large resolution that will take place. It is effectively an admission of guilt, however, and an agreement to pay whatever compensation the injured tribe demands. In return, the offending tribe is prohibited from pursuing any self-help remedies during the period of the respite. The length of the respite varies depending on the circumstances, but usually runs from a month to two months.

The *Fasl*

The final step in the process is what is known as the *fasl*, the best-known part of the tribal proceedings throughout Iraq, and the most difficult to translate. The term encompasses both the convening of the tribes to effect a final resolution, and the resolution arising therefrom. Because a phrase like “convening and resolution,” although accurate, is awkward and cumbersome, we will in this case adhere to the Arabic term *fasl*.

To hold the *fasl*, the offending tribe pays a visit to the injured tribe – either at the home of the injured party, or, if they demur because they do not wish to permit the perpetrator in their home, then in the home of the injured party's *shaykh*. They invariably bring a *sayyid* with them to memorialize the ceremony. Formally, there is no negotiation during the *fasl*. The injured tribe indicates its demands, and the offending party does not challenge them.

As a matter of practice, this is not what occurs. Instead, the injured tribe demands compensation that is many multiples of the amount that they ultimately seek. They then reduce it based on those who happen to be present – the *sayyid*, notables from the other tribe, and others. Ultimately, as the injured tribe reaches a compensatory demand that is closer to that which might be expected, members of the offending tribe urge some level of restraint on any basis that might seem reasonable under the circumstances. In the end, the injured tribe settles on a reduced amount.⁷⁶

At this point, the parties engage in a formalization ceremony to memorialize the deal. The offending tribe representative ties a cloth to a wooden stake that

ceasefire ended. The respite in this context is one that effectively acknowledges a surrender of sorts. The difference can be demonstrated by the period of time set for the ceasefire alone. The Prophet's ceasefire was ten years long, unthinkable in the context of an injured tribe offering a respite for a rival offending tribe prior to final resolution. This is not the only tendentious reference to Islamic history to support the almost unsustainable claim that the tribal compensation system is based largely on *shari'a*. Unfortunately, the very important matter of the relationship between tribal law and Islamic law is beyond the scope of this chapter.

⁷⁶ We were told that this system was different among the urban tribes of Baghdad, such as the Rabi'a, and in the Euphrates Valley, among the Sunni tribes. There, the amounts demanded for compensation were firmly set by custom, and not subject to variation during the *fasl*.

the *sayyid* declares to be the Banner of Abbas – the flag that Abbas held to represent the warring party of Imam Hussein in Kerbala.⁷⁷ The injured party then attaches a similar cloth, and the deal is thereby formalized, on the staff carried by Shi'a Islam's noblest warrior in the most important battle in Shi'a Muslim history. The *sayyid* then has the discretion to reduce the compensation, and frequently does so, by half typically, though more or less is always possible. As a matter of practice, the *sayyid* has cleared the reduction amount in advance with the injured tribe, but formally the sealing of the staff of Abbas ends any discretionary power on the part of either party. They have done the equivalent of take an oath on the tomb of Abbas, and no retraction is possible without severe reputational sanctions regardless of what reduction the *sayyid* orders.

Generally, the compensation demanded and received is money. In that event, the perpetrator is usually responsible for one-third of the payment, with the tribe supplying the other two-thirds.⁷⁸ Payment can be immediate or delayed, depending on the amount. On the receiving end, the injured party is entitled to two-thirds, with the tribe entitled to the final third. Tribal leaders hold the tribal share in a fund pending future disputes, thereby demonstrating their full awareness that the tribe is effectively a repeat player in this semiautonomous social field.

The *fasl* may also involve matters beyond the mere payment of money, including, for example, a requirement that a party leave their home and move to a location farther away from the home of the victim or other members of his tribe. That may be accompanied by a written guarantee that the perpetrator will not return again to the same city, neighborhood, or village. If he is then seen in the place where he had promised not to appear any longer, then, to use the tribal phrasing, "his blood could be shed with impunity."

Although more uncommon than it was in the past, the use of women as compensation for injury remains possible among Iraqi tribes. Hence, for example, a tribe that has suffered the death of a young man may still in some cases insist on compensation in the form of both money and women. In these cases, the expectation is that the women will be married to the immediate male relatives of the victim so as to heal the rift by making the families relatives of

⁷⁷ It is almost surely the case that the resolution is not formalized among Sunni tribes on anything like the banner of Abbas, given the marginal importance of Abbas within Sunni Islam. Precisely how a resolution is formalized among such tribes is, unfortunately, beyond the scope of this chapter.

⁷⁸ An exception exists when an injury arises from the commission of a *sauda*, or "black," crime. Injuries caused by drunk driving constitute a central example of this given the Islamic prohibition against the consumption of alcohol. In such a case, the offending party must pay the entire compensation without contribution from the tribe.

one another. This is unheard of in the cities and practiced in only more remote areas, and even then, we are told, with steadily decreasing frequency.

The more common instance where women are part of the bargain is when they are offered to an injured party if he fails to recover from his injury. The idea here is that the injury will prejudice his ability to marry. However, even when this condition comes to fruition, the normal course is to then offer monetary compensation in the place of a woman, and the custom has developed to accept it. In effect, the woman serves as a placeholder of sorts, so that if the victim does not recover as expected, the tribe is able to demand more money for the injury suffered.

The Treatment of Honor Crimes

No discussion of tribal resolutions can be complete without mention of honor crimes, and in particular the treatment of situations where a young male from one tribe seeks a relationship with a young woman from another tribe⁷⁹ without obtaining permission from their respective male kin. In such situations, the easiest result, and the one that the tribal leaders encourage and facilitate in many instances, involves a hasty marriage between the two to avoid any reputational repercussions. The previous relationship between the parties in such cases is left a secret. This, we are told, occurs nearly all of the time. If, however, despite the urging of tribal leaders, immediate male family members of either of the two parties (usually, the father) object to the marriage strenuously, as does occur from time to time, only one solution is possible under the tribal law. Both of the romantically involved parties are killed, and the father or nearest male relative of the young woman has a right to compensation from the father of the young man on the belief, we presume, that it was the young woman who was seduced and therefore her death was the responsibility of her paramour.

Intratribal Discipline

The focus of this chapter is on the tribes as self-contained units. Largely, so long as the acts of an individual are attributed to the tribe, as they certainly are under the tribal law, this works well. Nevertheless, the question may well be asked, what constrains a tribal member from ignoring the dictates of his

⁷⁹ Although this chapter treats tribes as self-contained units and therefore is concerned only with intertribal disputes, it bears mentioning that tribes treat honor crimes similarly whether committed within the tribe or beyond it. In fact, while we are aware of no studies on the subject, the majority of illicit unions are probably intratribal, simply because exposure of young men and young women from different tribes to one another is rather limited.

tribe and thereby repeatedly entangling the tribe in difficulties that need to be resolved through this system? The perpetrator is required to pay one-third of the damages in a *fasl*, but this may not act as sufficient deterrent.

Overwhelmingly, given that an individual's reputation is derived largely from dealings within the tribe, informal reputational sanctions, bolstered by negative gossip respecting "shameful," or *'aib*, activity, work remarkably well to constrain individual behavior. This does not seem entirely dissimilar from relations in other societies with significant levels of legal dysfunction, among them merchants in pre-communist South Vietnam.⁸⁰ In these close-knit contexts, the instances of derogation from the norm of compliance with tribal dictate are rare indeed.

Still, they do exist, and the tribe has mechanisms to deal with them. In the first instance, it can agree to a *fasl* that includes a sentence of individual exile from a particular village, neighborhood, or city, accompanied by a written indication that if the perpetrator is found again in that prohibited area, his blood may be shed with impunity. The perpetrator then knows his tribe will not protect him if he ignores the mandate.

If this is insufficient, or inapplicable in a given circumstance (perhaps because the injured tribe had no interest in exile), then the tribe may escalate the matter to what is known as an internal, conditional expulsion. They inform the perpetrator that although they will represent him in a subsequent resolution should one arise, he will be responsible for all damages. The tribe thus does not, for its own internal purposes, regard him as one of their own. This will certainly have a severe impact on the perpetrator's social status, and will make it difficult for him to marry or carry out commercial activity. Even if he wishes to direct such activity solely beyond the tribe, nobody within the tribe will be willing to vouch for him (even if they do not formally disown him), and his social and commercial prospects will be limited.

If even this is not enough, and there exist exceptional times when it is not, then the next step is a formal expulsion announced through a document known as the *sanad*, or certification, that is sent to all the tribes. The certification informs the tribe that a particular member of the tribe has been expelled, and that any activity he undertakes from that point on is on his own account, and not the responsibility of the tribe. (The certification is applicable only for activity undertaken after its issuance; a tribe cannot issue a certification after one of their own commits a particularly grave offense and before a *fasl* in order to avoid responsibility for harm arising from the offense). In our discussions with them, tribal leaders strongly resisted our suggestion that this renders the object of the *sanad* liable to be killed upon its issuance. After all, whatever

⁸⁰ McMillan & Woodruff, *supra* note 53, at 2434.

the person had done in the past had already been settled through a *fasl*, and one could not simply kill a human being because a document was issued. The point is well taken, but from the sole perspective of the tribal law, the issuance of the *sanad* is the same as declaring the person's blood liable to be shed, because no tribal action is possible to defend him if violence were directed against him. The state law, however, may prove applicable in such instances, as further explored in the next section.

THE COOPERATIVE PARADIGM

The inconsistencies with state law should be perfectly obvious, once two facts are borne in mind. The first is that there is no formal recognition of tribal resolution procedures within state law for the most part. The Iraq Constitution does indicate that the state will "strive to restore the Iraqi tribes and clans, and to take heed of their affairs to the extent they accord with religion and law, and to strengthen their noble human values."⁸¹ The same provision also says that the state will prohibit tribal customs that violate human rights. To date, this provision has not been understood to require the state to recognize tribal dispute resolution procedures as a form of legally binding arbitration, though that is certainly a plausible reading of it. In any event, absent a radical change in the approach of the courts, and in particular the Federal Supreme Court, toward of the dispute resolution procedures of the Iraqi tribes, Iraqi law takes no formal heed of them.

The second fact to bear in mind is that Iraq generally derives its Penal Code and its Criminal Procedure Code from continental law.⁸² It is clearly illegal to spray homes with bullets.⁸³ It is an even more serious crime to kidnap members of a rival tribe, as kidnapping is now a capital offense in Iraq in response to the rise of criminal gangs that engage in the practice routinely.⁸⁴ Iraq does not permit the marriage of women without their consent.⁸⁵ It certainly does not countenance the privately ordered killing of people for any reason, including those relating to honor.

⁸¹ Article 45, Section 2, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (translation by authors).

⁸² Dan E. Stigall, *Comparative Law and State-Building: The "Organic Minimalist" Approach To Legal Reconstruction*, 29 *LOX. L.A. INT'L & COMP. L. REV.* 1, 27 (2007) (also noting, correctly, the failure of the Ba'ath regime to adhere to these rules in practice).

⁸³ The Penal Code of Iraq, No. 111 of 1969, as amended [hereinafter Penal Code] Art. 430 (prohibiting a threat to commit a felony against a person, which spraying bullets against a home certainly is).

⁸⁴ *Id.* at art. 421.

⁸⁵ The Personal Status Code, No. 188 of 1959, art. 9(1) (Iraq).

Moreover, in a manner strikingly similar to that of Ellickson's actors in Shasta County,⁸⁶ Iraqi tribal leaders have fundamental misapprehensions of law. In the Iraqi tribal context, however, these misapprehensions are of the sort that those within Western societies, even those who reside in a social field that has very little interaction with the state law, would find difficult to fathom. Some tribal leaders seemed to think, for example, that the state could not initiate legal proceedings for a killing in the absence of a complaint by a living person. That the presence of a dead body self-evidently killed by another automatically opened an investigation came as some surprise to them. They seemed to believe that a written undertaking that a tribal member's blood was subject to being shed with impunity as a binding legal commitment that a state court investigating a murder would take seriously. While conceding that the state could vindicate the public's right to order, they seemed to conceive of such a public right in narrow terms. They failed to see, for example, why it would be that an ordinary theft would involve the state at all if the parties to each side, victim and perpetrator alike, could settle the matter between them. That there was a public interest in seeing a car thief put into prison did not meet their conception of public right. By comparison, New York diamond sellers and Shasta County ranchers are surely aware that the police will investigate a dead body irrespective of whether anyone has come forward to register a complaint and irrespective of whether the family declared the victim's blood for the taking. This demonstrates that American laws of murder are deeply internalized among nearly all actors in the United States in a manner that Iraqi laws are not among many Iraqis.

Still, to speak of *competition* in providing broader security in the state, in the manner that organized crime competes with state law to provide security to local businesses,⁸⁷ is to miss the point. In reality, the tribes do not seek to compete with the actual operation of state law, but to cooperate with it in maintaining order in the social field. To be clear, we refer to "cooperation" in a thin sense of the word. Thus, the tribes and the state do not cooperate with state officials in criminal investigations in the same manner that, for example, state and federal authorities in a jurisdiction like the United States might cooperate. They do not share information, second officials from one office to another, or coordinate intelligence gathering. Nevertheless, the tribes and the state do engage in a thin form of cooperation. Specifically, the tribes adopt a series of maxims when deploying tribal rules to avoid conflict with the state.

⁸⁶ Ellickson, *supra* note 38, at 48–50.

⁸⁷ Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41 (2000).

In turn, the state does something of the same, declining to enforce its own formal rules in areas where the public interest might be slighter and the tribal interests in enforcing their own order comparatively stronger. Each side, that is, does not seek *maximum influence*, but rather *shows notable restraint* when conflict seems to arise. It is in this sense that they can be understood to be cooperating with one another. To demonstrate this, we lay out the maxims, and explain each one in turn.

Maxim #1: The Tribe Purports to Prefer State Law Where It Works

Though listed first, this is the one that might be discounted to some degree because it relies to a large extent on a counterfactual. Tribal leaders insist that much of the reason that they resort to their procedures so extensively is because they have no real choice. The state has proven self-evidently ineffectual in addressing claims for recompense arising from car accidents, thefts or other disputes, and the tribes therefore handle these lower level matters on their own. When the state was even less effectual, immediately after the American invasion, the tribes assumed even greater responsibility, handling on their own virtually any disturbance to the public order that arose – including, for example, deterrence against acts of terrorism. They then happily ceded back much of this authority when the state regained its footing, and they would cede back even more were the state to become more functional.

This is not to suggest that the tribes are legal centralists who think proper order always lies with the state. That would surely be preposterous given the elaborate nature of their normative system. They do thus insist with some vigor that the tribe must handle certain matters on its own – among them slander of one of their own, or addressing issues relating to stains on honor. They further insist that Iraq is not a society where every dispute can be settled in the courts. (Naturally, a legal pluralist would maintain this was equally true of any society, but tribal leaders appropriately focused their remarks on the society they knew best.) Yet they did insist, repeatedly and often without solicitation, that they were ready to cede more duties to state courts if only they functioned better.

This seems rather consistent with much private ordering in societies where the legal system is in some level of dysfunction. McMillan and Woodruff examined the conduct of merchant communities from places like precommunist Vietnam, where there was little faith in the courts, to those of Eastern Europe and the former Soviet Union, where confidence in the court was somewhat higher though not as much as it might be in developed societies. They found that merchants use “social networks and reputation” as the bases for contract

enforcement most often when the merchants could not rely on the courts.⁸⁸ Tribes are among the most significant social networks that exist in Iraq, particularly beyond the urban elite, and it would therefore make sense that part of the reason for the reliance on them to resolve disputes is not because the tribes particularly relish that role, but because there is no viable state alternative in many instances.

Nevertheless, as noted, there is something of a counterfactual inherent in this. Iraq's formal justice system is highly imperfect to put the matter charitably, and the tribes are not so much making a real concession as expressing an abstract sentiment that binds them to little. That the tribal leaders were speaking to three *law* professors and might have felt some desire to earn our endorsement of their activities may well have played a role as well.⁸⁹ Still, the tribal sentiment was noteworthy for two reasons. First, the mere expression of the sentiment disposes of any argument that the tribes regarded Iraqi law as some sort of postcolonial construct imposed on them against their will, which they were dedicated to resisting. Surely, Llewellyn's Cheyenne would not have expressed any desire for American law to somehow supplement their tribal ways, even if they were speaking to an American law professor. At the very least, the mere expression of this sentiment on the part of the tribal leaders revealed a broader conception of cooperation that we found to be of fundamental importance.

Second, the matter was not entirely an abstraction. One leader provided us with a remarkable, concrete example where tribal law now supplants state law, and where the tribe indicated a strong desire to return to the past. Prior to the fall of the Ba'ath, Iraq had a national insurance scheme that dealt with car accidents. Pursuant to the scheme, the National Insurance Company was required to offer a rather generous payout upon injury or death in a car accident – slightly less than double what a *fasl* would be likely to yield – irrespective of fault.⁹⁰ Tribal leaders thus were in the practice of permitting a party to choose among the two different options available – payment through the National Insurance Company pursuant to state law, or whatever emerged from the *fasl*. Overwhelmingly, the state law process was chosen and one of the major forms of tribal dispute – injuries arising as a result of automobile accidents – was thereby transferred to the state realm, with the consent, it

⁸⁸ McMillan & Woodruff, *supra* note 53, at 2453.

⁸⁹ There is no doubt in our mind that the tribal leaders were in no way intimidated by us – in reality they were far more powerful than we were as academics, and they surely knew it. Yet the desire to be approved and deemed meritorious in one's activities is a natural one, and we would not discount its effect here.

⁹⁰ Law for the Mandatory Insurance for Car Accidents No. 52 of 1980 (Iraq), as amended, art. 2.

must be stressed, of the tribal actors. It was only the fall of the regime and the resulting dysfunction⁹¹ of the formal national insurance scheme that caused the tribes to assume the role of adjudicating disputes arising out of automobile accidents once again.

It is not difficult to see what made the state insurance scheme superior in this instance. Iraq is largely a rentier economy heavily reliant on oil exports to fund itself and provide social and economic benefits to its citizens. The National Insurance Company was a form of government largesse that the state provided. To accept the state system was effectively to accept free money, and it would have made little sense for any tribal member to turn that down, particularly when the alternative would be to make a claim against another tribe and thereby risk poorer relations with it. As others have pointed out, where a community that has developed its own semiautonomous rules of order is capable of "externalizing" costs onto a third party, it will do so, precisely so as to minimize the costs falling on the community itself.⁹²

Others have described what circumstances must exist for private ordering to be effective enough to supplant state law ordering.⁹³ We do not intend to undertake such an exploration in this largely descriptive account of how order is maintained in the semi-autonomous field of the south of Iraq. We note only that the tribes seem to hold to the principle, at least at times, that where the state's resolution mechanisms work better for them, however that might be measured, they will not seek to challenge them.

Maxim #2: The Principle of "Complementarity"

The principle of complementarity is best known in the context of the Rome Statute, where the International Criminal Court is not permitted to pursue claims of violations of international criminal law except to the extent that the relevant domestic legal system is unwilling or unable to do so.⁹⁴ Iraqi tribes adopt something of the same. When they feel that they are capable of handling a matter on their own, they do so. It is only when they cannot or one tribe is unwilling that the state system becomes an acceptable venue.

⁹¹ Formally, the national insurance scheme remains in effect but as a matter of practice, it does not exist. The payments made under its aegis dwindled during the hyperinflation of the 1990s brought about by United Nations sanctions. Eventually the relevant offices and institutions were shuttered, rendering the law even before the U.S. invasion one of many Iraqi laws whose existence extended no further than the paper it was printed on.

⁹² Ellickson, *supra* note 38, at 258.

⁹³ See generally Richman, *supra* note 67; Ellickson, *supra* note 38, at 94-95.

⁹⁴ Rome Statute of the International Criminal Court, 37 I.L.M. 1002 (entered into force July 1, 2002), art. 17(1)(a).

Hence, for example, tribes feel that they are perfectly capable of addressing an ordinary, garden-variety theft that arises when a member of one tribe steals something from a member of another tribe. They see no particular need to involve the state and are almost always willing to use the tribal processes to solve it. *Importantly, this by no means precludes the injured tribe from initiating a case in the courts.* Often it will, as another means of pressuring the offending tribe to seek a settlement – in addition to the “striking” previously discussed. The injured tribe will even pursue the state law claim for as long as is necessary to induce resolution. However, once there has been a *fasl*, the victims stop pursuing the case. In other words, pursuant to the principle of complementarity, it would only proceed to judgment under the state system if the offending tribe refused to adhere to the tribal procedures.

Moreover, the state broadly *cooperates* in the scheme in the thin sense of the word. It does not pursue claims of garden-variety theft unless the victims are actively pursuing the case. For example, if alleged victims file a claim and then, after pursuing it for some period of time, seem to abandon it, the case sits on the record books, formally active but in reality unpursued by the state authorities. In other words, the tribe does not need to find a reason to drop charges, nor does the state need to find a reason to close the file. It is left to wither and die.

We have been able to confirm this on our own primarily through extensive examination of court files, where numerous examples of ordinary crimes appear, complete with ample witness statements and photographic evidence. Although some of these cases have moved to resolution, many more appear to be lingering for years. The case is not exactly closed, but little more appears in it than an annual scribbled notation by some sort of judicial officer indicating that the investigation is ongoing. It is hard to believe that the court will ever take action to investigate these ordinary crimes, ranging from arson to theft to slander many years after they allegedly occurred. The state seems to be engaging in purposeful delay because, it seems, the matter has been addressed elsewhere.

The tribe, similarly, cooperates by limiting its use of self-help remedies that might very well induce a state law response for these types of cases. There is no reason, for example, for a tribe to kidnap a rival tribe member to ensure that the offending tribe agrees to tribal resolution of a garden-variety theft claim. The state might respond to a kidnapping with more vigor than it would to a theft given the extremely strong punishment for kidnapping and the increased interest of the state to prevent it. Moreover, the state law processes for prosecuting theft, if actively pursued by the victims, provide sufficient inducement to the offending tribe to negotiate. After all, if the victims file the case and allow the state process to go forward, and the perpetrator is found

guilty as a result, he will be imprisoned. This is far more likely to influence a tribe to negotiate a tribal settlement than a temporary kidnapping of one of its members will be.

The situation is obviously different for murder than it is for theft. The state does not neglect corpses found on the street, even if its ability to limit murder through effective crime management seems quite limited. Hence, there are unsolved murders in the case files we examined that bear some resemblance to those of ordinary crimes, with little more than a notation roughly annually that the matter remains under investigation. The file, however, never appears to have any sort of evidence in it, and it thus appears to be not so much an example of state acquiescence to murder as a general incapacity to deal with such crimes in an adequate fashion. When evidence does appear, the murder case either seems to proceed to fruition, or it is dismissed for lack of sufficient proof to convict (at times under mysterious circumstances, as we shall describe).

Therefore, it is unlikely that the tribe could keep the state away from a murder entirely once information of the perpetrator reaches the police. Nor is it clear that they would want to, given that the tribe can only demand compensation. It has no means of punishing the perpetrator for murder other than by engaging in more killing, thereby garnering even more state attention. Hence the tribe cooperates by not seeking punitive measures, *indeed by allowing the state to undertake whatever punitive measures the injured tribe seeks.*

In other words, where a punishment is merited, *the tribal system relies upon the state to carry it out.* To achieve this, quite often in the case of murder, an injured tribe will insist not only that a sum of money is paid to recompense a killing, but also that *the perpetrator turn himself into the authorities.* The state can then mete out whatever punishment it seems appropriate, and each tribe can argue to the court what it will respecting the appropriate punishment. In this highly symbiotic method of interaction, the state gets its perpetrator, and the injured tribe gets its compensation.⁹⁵

*Maxim #3: The Tribe Avoids Deploying Formal Traditional Mechanisms
to Which the State Objects*

As noted, the state is not likely to neglect dead bodies that it finds in the street. As a result, though the tribes often do issue a note promising that a particular person will not appear in a particular area again for a period of years, or for

⁹⁵ There would be, of course, no ready means to confirm that this transpires from state records. All that would appear in the file is a guilty person confessing to a crime, which happens a great deal in Iraq whether or not a tribe is involved in the disposition of the case.

life, and declaring that his blood can be shed with impunity if it is, in practice, they do not effect this remedy very often. Instead, if the perpetrator is found in the prohibited area, rather than kill him, they initiate another tribal resolution process and demand compensation. Part of this is because money is preferable to blood, at least if the person exiled poses no serious threat to the community. Part of this, however, is a clear effort on the part of the tribes to operate in a fashion that does not involve such an open and notorious violation of state law as intentional killing is. Even if tribal leaders are not always aware of the precise contours of the state law, they are aware enough to know it is best to avoid killing where possible.

A similar result attaches with respect to the traditional involvement of women as part of the compensation for an injury. Although in the past the practice was common, almost customary in cases of death, the use of women as objects of exchange has been reduced drastically everywhere, and to virtual extinction in urban areas. Where it is used in the cities, the matter is a formality and broadly not implemented. The woman is offered as compensation if an injury does not heal. If it does heal, then nothing is due. If it does not, the method effectively permits the injured party to demand more monetary compensation, with the woman acting as placeholder. The system is more efficient than fixing a sum in the case of the failure of an injury to heal, given the uncertainty attending to the level of evaluating the cost of future injuries.

To be clear, these remarks are not meant to suggest that we condone this offensive practice of using human beings as placeholders, nor do we deny the obvious negative social repercussions that arise when women are treated as objects for trade, even symbolically. Indeed, we condemn it in the strongest possible terms. We only seek to highlight the fact that even as the tribal practices show remarkable resilience, certain aspects of them, those most likely to result in conflict with the state, are noticeably declining in practice if not in form, thereby demonstrating a thin form of cooperation between the non-state legal system and that of the state.

REMAINING AREAS OF CONFLICT

Though we have highlighted and emphasized the areas of cooperation between the state and the tribe, we of course acknowledge that there is conflict and tension between the tribe and the state at times. There is no reason to replace the "conflict" centralism that dominates the literature with a form of "cooperation" centralism. We group the inevitable conflicts that arise by virtue of the inconsistencies in the normative systems into three categories to be discussed in turn.

The Resilient Remnants

One breakdown in the system arises from the stubborn resilience of some tribal practices to which the state plainly takes exception, but which the state and other social forces are not powerful enough to eradicate. The trading of women as compensation in a *fasl* is declining, but very much present, particularly in more remote areas where the presence of the state is less keenly felt. The same might be said respecting the use of killing to avenge death, rather than the compensation/state imprisonment scheme that has largely been adopted by the tribes over the past two decades. In a more remote area, where no one would think to report a tribal killing, the tribe may feel confident that a police investigation will likely not result in any conviction of one of their own because of the lack of evidence. Hence, almost certainly, some of the unsolved murders that appear in the court files we have examined, particularly in 'Amara, where the numbers of such cases seem comparatively high, are the result of a tribal blood feud, though it is impossible to know how many.

The use of killing as a form of self-help, when combined with tribal notions of collective responsibility that are broadly unrecognized in modern criminal law, can lead to disturbances in the public order that can be serious. In 2010, for example, a dispute between Bani Malik and the Frayjat tribe that had clearly spun out of control resulted in roadblocks in Basra, an individual being dragged from his car whose sole crime appears to have been belonging to the wrong tribe, followed by his killing and the burning of his corpse, a matter that is a violation of both state and tribal law. The state intervened at that point, and such outbreaks as between tribes are not common. However, they occur frequently enough to demonstrate that the system does not always work in perfect harmony, and resorting to forms of self-help of long pedigree among the tribes is not impossible, even if it is less common nowadays.

Settlement of Disputes of Public Interest

A more frequent, though less spectacular, area of conflict lies in something of the opposite direction – when the tribe seeks to deploy *restraint* as to matters in which the state would naturally claim an interest. For example, where a theft occurs that is only witnessed by members of two tribes – the offending and the injured – the state's mechanisms are often not invoked, and once invoked, are readily abandoned. But if a third-party witness reports the incident, or a police officer apprehends the suspect, the state's ability to drop the matter is

compromised significantly, despite the tribal preference for the matter to be handled swiftly and beyond the state's purview. If this is the case with theft, it is even more so with murder, as to those cases where the injured tribe has no interest in seeing the perpetrator punished. Where it is easy to rely on the state to *carry out* punishments for serious crimes for which there is a valid confession, it is hard to expect the state to simply abandon a case involving a serious crime for no formally valid reason when its agents have witnessed it merely out of informal deference to tribal rules.

Here the tools deployed by the tribe clearly involve the manipulation of the state processes in a manner that confounds and frustrates those responsible state officials seemingly intent to try to extend their jurisdiction. If no case file has been opened at all, and nobody has died (such that there is no death certificate that mandates an investigation), the matter is easy to dispose of. A jail officer can be convinced, or bribed, to let one in custody go free without any case file report ever being written.

If there is an active case file, or an official death certificate, the matter is more complex, because it is harder to close an open case file than it is not to open one in the first place.⁹⁶ A reason must exist. Yet the tribes have ways to find one in some cases. Third-party witnesses who report crimes to state courts are subject to receiving a "confrontation" on the ground that this was not their business and therefore there was no cause for them to interfere. (This shows the rather narrow grounds on which tribal leaders construe conceptions of public interest.) Leaders of injured tribes tell us that they direct their members to lie in court as to murder case files that have been opened – perhaps opened by the injured party itself, prior to a *fasl* – so as to let the perpetrator go free, if that is the outcome decided upon in the *fasl*. If all else fails, court officials can be persuaded to close open case files at times, though this usually requires a high-level tribal intervention. The case files seem to reflect this, through examples of unexplained recanted testimony and, even more telling, cryptic references to a file being closed for lack of evidence without elaboration despite what appears to be a plethora of evidence in the file itself concerning the identity of the perpetrator. That this appeared more often in 'Amara, where the tribal role in maintaining order is more pronounced, than it did in Baghdad or Basra, is further evidence that some sort of manipulation of state judicial process was involved.

⁹⁶ This appears to be the case in Egypt as well, to little surprise. Sarah Ben Nefissa gives an example of a blood feud that resulted in the arrest of thirty detainees. The police agreed to release all of them after a protracted negotiation except for the three against whom the police had already opened case files. Ben Nefissa, *supra* note 8, at 146.

In our opinion, these examples of corruption and manipulation differ markedly from a state officer exercising restraint in deference to a genuine conviction that a matter is best handled privately and informally. One involves an honest and sincere attempt to fulfill a duty using discretion, and the other is a failure to do so through fraud, perjury and manipulation of records, often in anticipation of private gain. The latter is less an example of legal systems cooperating as it is a demonstration of the weaknesses of the state legal system in this particular context.

The Honor Crimes

A third, important area of conflict involves honor crimes, no doubt because it is where state law norms differ from those of the tribe most markedly. Where the tribes, the state, and Iraqi society converge is in a general belief that it is not the function of the state to engage in broad morals policing.⁹⁷ Nobody particularly thinks of it as the job of the police to arrest a consenting, unmarried couple for engaging in sexual activity, a fact reflected in the lack of any reference to a crime of fornication in the Penal Code.⁹⁸

Yet where the state would then deem such conduct legally permissible, neither the tribes, nor Iraqi society, regard fornication as socially acceptable. Although much of Iraqi society might regard (quite severe) reputational sanctions as sufficient, the tribes would take matters considerably further. In fact, they would regard illicit relations between the unmarried as being a crime under the tribal law to be punished with death.

In keeping with the maxim that it is best to avoid contravening central state law principles when possible, tribal leaders seek to resolve the matter without killing, notably through a swift and secret marriage. To the extent that the woman's closest male relative (usually her father) still wants the man to be modestly punished notwithstanding the marriage, a false crime can be concocted (perhaps that of slander, carrying a lighter sentence) and reported to state authorities, and to the tribes, thereby avoiding the need to pursue the honor crime. Tribal leaders indicated that they had arranged this on more than one occasion, though it is impossible to confirm this through a reading

⁹⁷ Haider Ala Hamoudi, *Brandon Davies, Iraq and the Privatization of Islamic Law*, MUSLIM LAW PROF (Mar. 25, 2011), <http://muslimlawprof.org/2011/03/brandon-davies-iraq-and-the-privatization-of-islamic-law/>.

⁹⁸ Adultery is a crime under the Penal Code, though it is one that can only be initiated by the wronged spouse as a matter of law. Penal Law No. 11 of 1969(Iraq), art. 378(1). The state has no authority in the absence of a spousal complaint to initiate an investigation or prosecute an offender.

of court files, which would reflect nothing more than a confession for, and a conviction on the basis of, slander.

However, because there is no crime for fornication per se, and because the right of the father of the woman to demand the death of the parties is unconditional in the tribal law, then an obvious conflict arises when the woman's father insists on his right. The only way that the tribes can conceivably carry out their sentence is through the privately orchestrated killing of both parties. They do this generally with impunity, particularly beyond the larger cities, because of the unwillingness of witnesses to report the matter. The victims are then among the countless numbers of other unsolved murders that appear in Iraqi court files.

Still, it would be wrong to describe this as something that the state tolerates. In 2007, male relatives of a teenage girl of the Yazidi faith publicly stoned her to death for falling in love with a Muslim, with the police watching. There was a large public outcry in protest, and the state at least professed to take measures to prevent such things from happening again given the broad public expressions of disgust.⁹⁹ This surely would not have been the case if two tribes settled a dispute over a stolen automobile among themselves and the police did not pursue the matter. Yet even if stoning is not tolerated, the state is sufficiently weak, and the tribal values sufficiently strong, that broad violations are frequent enough. Thus, the conflict between the values that the state seeks to vindicate and those of the tribe are particularly stark when honor crimes are involved.

THE CASE OF THE REPEAT ARSONIST: FROM NOTIFICATION TO RESOLUTION

The foregoing describes the Iraqi tribal system generally, and the manner in which Iraqi tribes tend to broadly cooperate with state authorities in maintaining order, even if serious conflicts do continually arise as well. This section attempts to develop some of these themes in a case we observed, that of the repeat arsonist. In the interests of privacy, we will not use his real name, but refer to him herein as Issa.

The story began when a dispute erupted between Issa, from the tribe of Bani Uqba, known also as the Uqbis, and a young member of the tribe of Abu Muhammad, otherwise known as the Muhammadawis. In the initial dispute, Issa was stabbed, and a tribal resolution process initiated that resulted in an

⁹⁹ Natalie Clark, *The Girl Who Was Stoned to Death for Falling in Love*, DAILY MAIL, May 17, 2007.

award to Issa and the Bani Uqba tribe of 8 million dinars (roughly equivalent to \$7200) and a woman, should he fail to recover from the stab wounds. The Uqbis did not file a claim in state court, and Issa did recover.

Unfortunately, Issa had a reputation for being what the tribes describe as *ma'tuh* – wild, uncontrollable, or, to put the matter in terms more familiar in the private ordering literature, not easily swayed by reputational sanctions. He was also known as a drunkard and a drug addict. Accordingly, he ignored the resolution, bought a canister of gasoline, and used it to set fire to the door of the stabber's home, threatening even more damage before being restrained. The amount of property damage was minimal, but according to the Muhammadawis, the injured family feared his return and had difficulty sleeping as a result. Moreover, and quite significantly, Issa had broken the pact signed on the banner of Abbas, pursuant to which the Muhammadawis had paid 8 million dinars to settle the claim fully and finally. This breach was quite serious given the reliance on the banner to formalize the *fasl*. Without respect for the sanctity of the banner, there was no reliable way to end a feud.

Given the gravity of the situation, two actions were taken, one by each tribe. The Muhammadawis, for their part, took the case to court, filing a complaint against Issa for his activity. The Uqbis, equally aware of the ramifications of a violation of the pact formalized by the banner, visited the Muhammadawis and asked for, and received, a respite. It seemed as if the matter might yet be resolved.

During the respite, Issa initiated another arson, causing nominal property damage once again. The Muhammadawis filed a second case, and the Uqbis immediately sought, and received, a second respite. To this point, interestingly, the Muhammadawis refrained from initiating a striking, or engaging in any other tribal form of self-help. The sole means by which they sought to apply pressure was another lawsuit, which they were willing to drop if they were paid money. The effort to use the tribal mechanisms in a way that harmonized with the state law is quite notable.

As for why they demonstrated such restraint, the reasons seemed clear enough. The Uqbis had immediately recognized their own fault in the matter, had conveyed to the Muhammadawis their own distress over the conduct of one of their own, and had assured the Muhammadawis that they would address the matter. Given that there are surely "wild" youth among the Muhammadawis who are difficult to control, and given the likelihood that the Uqbis would be before the Muhammadawis in the future making their own claims for compensation, restraint seemed the proper course.

When Issa attempted arson a third time during the respite, this time causing slightly more damage to the home, the Muhammadawis felt that they had

to respond using different means. More restraint, in their view, would be a sign of weakness, so they undertook a striking, *in addition to* filing yet another complaint about Issa in the criminal courts. The Uqbis asked for a respite, received a short one, and the resolution was planned for April 2013, in the home of one of the tribal leaders of the Muhammadawis.

The resolution took place out of doors, under a tarp that was perhaps half the length of a football field, with long rows of plastic chairs lined up facing each other along the two sides. The elder tribesmen from the injured tribe, the Muhammadawis, sat at one end and along one side as they waited for the offending tribe and the *sayyid* to appear. The rest of the tribe was seated along the same side, generally in rough order of their station within the tribe, such that elders and notables were closest to the leaders (and most likely to speak during the resolution) and those who had barely emerged from adolescence were furthest away. In all, perhaps several dozen members of the Muhammadawis were present, not including the young men from the tribe who were shuttling back and forth bringing tea, setting up tea tables, and obeying orders barked at them from their elders.

When the Uqbis made their appearance, led by the *sayyid*, instantly recognizable by his black cloak and turban, the entire group stood, and a long ceremony transpired where each of the several dozen visitors greeted each of the several dozen hosts. The process was not entirely different from a wedding's "greeting line" though many more people were being greeted on each side, thereby causing small talk to be kept to a minimum.

When the parties were finally seated, and tea had been swiftly served by the Muhammadawi boys, the process began. It did not take long for voices to rise, with leaders of the Muhammadawis wanting to know why a particular notable was not present. The Uqbis pointed out that other, even more senior notables had appeared, and this should suffice, but the Muhammadawis did not seem mollified. They raised another complaint – that of security. It had become apparent, they told the leaders of the Uqbis, that they could not control this wild member Issa in their midst, who was a drunkard and a drug addict and who listened neither to his tribe, nor to his family *nor to the law*. What use was the resolution if he will simply do this again? While taking some exception to indications respecting what they could and could not control, the Uqbis showed remarkable restraint in the uncharacteristically sharp attack on one of their own. They seemed nearly as tired of Issa's antics as the Muhammadawis. They simply asked what it was the Muhammadawis wanted, as they had the right to ask, instead of piling attack after attack on the renowned tribe of the Bani Uqba. There appeared to be no method in the gathering once it was fully underway, no order by which people spoke, and at times they attempted

to speak over one another. To one unaccustomed to the practice, the idea that violence might break out at the *fasl* seemed somewhat plausible, but for the dignified presence of the *sayyid*, respected by both parties and hardly a person either side would wish to see stuck in the middle of a knife fight. The reputational consequences would be severe.

But there was no real threat of violence. As tensions rose, cooler heads caused them to dissipate. Usually this was done through quoting the Prophet Muhammad, or one of the Imams of Shi'a Islam to one effect or another. As everyone naturally agreed on the wisdom of the words spoken (even if they might disagree vigorously on their application in the given circumstance), this served to defuse tension, and to bring the parties together in a common language.

After perhaps twenty minutes of introductory complaints and objections, the Muhammadawis began their demands. First, the initial *fasl* for the stab wound to Issa was revoked and all sums theretofore paid were to be returned immediately. The Uqbis accepted this immediately, it would be unimaginable otherwise. Second, the young man was to leave the relevant quarter of Sadr City where the offenses took place and he was not to be found within its confines again, or his blood could be shed. This caused some hesitation among the Uqbis, for they felt the need to speak to Issa's father. Issa was unmarried, and Iraqi children live with their parents until they marry and often after that if they do not have means. Issa had no means to support himself, and hence an order of exile for him effectively required his father to sell his house and move with Issa somewhere else.

Issa's father was called forward. He was present throughout, though far from where the negotiations were taking place. This is common, to avoid the emotional consequences of involving perpetrators, victims, and their immediate family directly in the negotiations. Passions then could fly out of hand. The Uqbi leaders negotiated with him, perhaps agreed to help him financially with a move (we can only surmise, as the discussions were done quietly enough that bystanders could not hear), and the father agreed. The guarantee document was signed. All that was left in the *fasl* was to discuss compensation for the arson.

The price began at 150 million dinars, or roughly \$135,000 – an extraordinary sum for an arson that resulted only in a burned door. Silence followed. Then the Muhammadawi leaders continued. However, they indicated, the *sayyid* had honored them with his presence, and out of respect for him, they would reduce the sum by 20 million dinars. Other notables were mentioned, for whom a reduction of 5 million dinars per notable was given. There was a tribal leader from the Dulaym, a predominantly Sunni tribe, who was present.

The Muhammadawis wished to express their open mindedness and their lack of sectarian sentiment. (As with racism in the United States, sectarianism is publicly denounced regularly by all in Iraq. This is different from saying that it does not exist.) For the presence of the Dulaymi, then, the reduction was to be 10 million dinars, twice that of the others. Ultimately, the price lowered to 20 million dinars, and the Muhammadawi leaders announced there was no space for further reduction.

It is here where the Uqbis for the first time began to implore for greater restraint in demands. They were content for what seemed like good reasons to us to sit in silence and watch the Muhammadawis steadily reduce their own figures, but when the number seemed stuck, they spoke. They pointed out the hardship that would befall the father who now had to move to another location. They indicated that the matter could not happen again as Issa would no longer be near them. And they reminded them that restraint has its virtues in the afterlife (and, of course, in repeat dealings in this life). Eventually, the price settled on 10 million dinars. Each side tied its ribbon to the banner of Abbas (which was represented in this case by a crutch carried by the *sayyid*), and the *sayyid* formalized the deal and used his discretion to cut the sum by half, resulting in a total payment of 5 million dinars, or roughly \$4,500.

The sum was paid immediately given that it was not of the amount that would be difficult to raise. As for the legal case, it was never mentioned in the proceedings, because there was no need to. For our own scholarly purposes, we asked after the *fasl* what would become of the suit. The case would not be pursued by the Muhammadawis, and the state would know not to pursue it further either. Effectively, legal proceedings ended once the *fasl* had come to an end.

BROADER LESSONS

We have intended a descriptive account of a cooperative method of achieving order as between a state and non-state system in the context of a developing state where state processes are functioning, but ineffective and weak. We do not seek to advance any particular normative case in favor of nor in opposition to the model heretofore described, other than to say that in the context of Iraq, to call for the eradication of either of the two systems of law described herein is to engage in an exercise of hopeless utopianism given how deep rooted they are. Nevertheless, there is some sense to addressing in this concluding section the substantial literature on the advantages and disadvantages of the use of state law and non-state legal systems in resolving disputes.

The flaws in the state system are more readily apparent to some legal pluralists. The state legal system, it is often said, is almost always more costly and cumbersome than informal resolutions.¹⁰⁰ Because it is designed to apply to all actors in the political state, it is less responsive to their individualized particular needs.¹⁰¹ Law is also more easily subject to manipulation by equally distant interest groups and requires the use of professionals to make it understandable.¹⁰² In many states, court orders are simply not as reliable a means to ensure compliance with a norm as informal determinations may be.¹⁰³

On the other hand, wiser commentators are quick to note that it is a mistake to discount the problems that non-state law produces. Non-state legal systems tend to be hierarchical and closed. It is difficult to penetrate them, and those who are not participants are almost always at a disadvantage.¹⁰⁴ If there are going to be rules preventing gender and race discrimination, for example, they are less likely to come from a homogenous merchant group that has set its own rules than they are from the state.¹⁰⁵ External costs are often shunted onto the broader public through private ordering in a manner that can be brutally destructive of the public interest.¹⁰⁶ Finally, if non-state law achieves superior compliance, this is all too often because of "harsh and indiscriminate" coercion.¹⁰⁷

All these considerations apply to Iraq. Iraqi courts are notoriously slow and cumbersome, and court orders can be difficult to enforce. It would be a mistake to lump all developing countries into a single "dysfunctional" basket; Iraqi courts are not akin to those reported in other nations such as Afghanistan, where rulings seem almost entirely irrelevant.¹⁰⁸ At the same time, it would not be to our mind controversial to state that a tribe has an easier time ensuring compliance with a *fasl* sworn on the banner of Abbas than the state does ensuring compliance with a court order. Moreover, the rules of the Civil Code

¹⁰⁰ See McMillan & Woodruff, *supra* note 53, at 2421 (pointing out tendency to favor private ordering in states where court systems are particularly dysfunctional); cf. Richman, *supra* note 67, at 2366 (discounting role of administrative costs in determining when private ordering takes place).

¹⁰¹ Ellickson, *supra* note 38, at 250.

¹⁰² *Id.* at 252.

¹⁰³ See Richman, *supra* note 67, at 2366 (emphasizing importance of the ability of the state to enforce agreements when determining when private ordering will arise).

¹⁰⁴ Galanter, *supra* note 2, at 25; Ellickson, *supra* note 38, at 250.

¹⁰⁵ McMillan & Woodruff, *supra* note 53, at 2423.

¹⁰⁶ Ellickson, *supra* note 38, at 249 (pointing out how whaling norms result in overfishing).

¹⁰⁷ Galanter, *supra* note 2, at 25.

¹⁰⁸ Jennifer Kristen Lee, *Legal Reform to Advance the Rights of Women in Afghanistan Within the Framework of Islam*, 49 SANTA CLARA L. REV. 531, 544 (2009).

are completely incomprehensible to the tribes, require the intermediation of lawyers and certainly from the tribe's perspective are readily subject to manipulation and corruption in their application. By contrast, tribal resolutions are swift, understandable, and compliance with them is broadly achieved.

The disadvantages are equally clear. The idea of women participating meaningfully in tribal resolution is impossible to consider. Not only are they completely excluded, they are treated as objects of exchange in a broader compensation system, even if for the most part the matter is symbolic. External costs do exist when blood feuds erupt, as they have from time to time. And woe is the Kurd, the urban professional, or the non-Iraqi Arab who finds himself in a car accident and called to a *fasl* in Sadr City, unable to turn to anyone to represent his interests in this closed and insular system. Finally, nobody who has seen an honor killing take place, either directly or on television, could possibly describe the sanction being deployed as anything but harsh and indiscriminate in the extreme.

What we have sought to demonstrate in this chapter is not that one system is "superior" to the other in any normative sense, but rather that in seeking to integrate the legal with the nonlegal, as we must to make the social field intelligible, it is not necessary to think of one value, or the other, triumphing in any given context. Rather than imagining the integrated system as a war, with separate battles being fought and won either by state law in some cases, or the non-state law in others, it might be more fruitful to consider the systems engaged in a thin form of cooperative interaction.

Hence, when the state makes its abhorrence of forced marriages, kidnappings and killings clear, the tribe works to steer clear of them, internalizing to some extent the state values within its system so as to remain in broad harmony with it. Similarly, as to disputes where the tribes appear able to handle the matter and the public interest is comparatively lower, the state seems content to defer to the tribe and acknowledge its limitations, though it never does so formally.

Conflict is present in some contexts, to be sure. If Iraq is to be rid of the scourge of honor crimes, then forceful state action and imposition would be necessary in the near term, as the tribes seem nowhere near internalizing broader state values on the point. However, these circumstances should be the exception, not the rule. Iraqi tribes are, after all, part of Iraqi society, and it would seem incongruous that the laws of the society would be at such stark odds with tribal values as a universal matter, any more than they would, or should, be in the United States. We have a hard time believing that however insular the actors of Shasta County are, they somehow have failed to internalize not only values as against murder or theft, but also as against racism or sexism.

They do live in the same country that went through the civil rights movement and women's rights movement, and they do, presumably, watch the same television, listen to the same radio and read the same newspapers as the rest of the country. Surely inasmuch as the law reflects American social values, it reflects the values of the people of Shasta County as well.

Thus, we need not view tribes either as an enemy of the broader social good, nor as its faithful defender. Nor do we need to assume that state law changes will result in resistance and conflict. Something quite the opposite might occur – the tribe might well find a way to cooperate with the state, and in so doing, incorporate and internalize some of its values. The state might do something of the same. And through the interaction of the two, along with some level of deliberate, limited, and careful design, perhaps better justice might be done.