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An Economic Interpretation of the Pashtunwali

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Law as we know and conceive of it is a product of the modern state. Most of us, especially in law schools, think of rules as being primarily enacted by the legislature or administrative agencies; we think of courts as the primary adjudicative institutions; and we think of enforcement as being a product of state bureaucrats, including police and prosecutors. As has been long recognized, however, this concept of legal centrism is radically incomplete, even within the zone of the nation-state.¹ It is an especially poor fit when one examines groups at the periphery of nation-states who operate quasi-legal systems of varying degrees of efficacy and persistence. These systems provide a good deal of “order without (state) law.”²

This Article analyzes the Pashtunwali, the tribal code of the Pashtuns, from a political-economy perspective. The Pashtuns are the ethnic group of some forty million that occupies a large swath of territory across Afghanistan and Pakistan that has never been completely integrated into a state.³ The decade-long conflict in Afghanistan has brought renewed attention to the Pashtuns, whose members are prominent in both the pseudogovernment and the Taliban. The tribal code is a central element of

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¹ See generally Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 *Sydney L Rev* 375 (2008); David D. Friedman, *Law's Order: What Economics Has to Do with Law and Why It Matters* (Princeton 2000). See also Robert D. Cooter, *Book Review: Against Legal Centrism*, 81 *Cal L Rev* 417, 421 (1993), reviewing Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard 1991).

² See generally Ellickson, *Order without Law* (cited in note 1).

³ Akbar S. Ahmed, *Pukhtun Economy and Society: Traditional Structure and Economic Development in a Tribal Society* 92, 99 (Routledge 1980) (“[The region’s] external political history has been a constant struggle to maintain its boundaries against larger state systems attempting to capture, cage, subjugate or encapsulate it.”).

Pashtun identity: indeed, it is said that to be a Pashtun is to observe the Pashtunwali.⁴

Though the Pashtun customs bear some similarity to customary laws of other Afghan tribes, they are distinctive both for their persistence and harshness. They form the primary normative rules in force in the region: governments in both Pakistan and Afghanistan have tenuous reach into the areas where many Pashtuns live and in some cases have no contact at all with these populations. Afghanistan has never really had a central government with effective reach throughout the country, and Pakistani criminal and civil law does not apply, even nominally, in the so-called Tribal Areas of the Northwest Frontier Province.⁵

Many of the harsh rules of the previous Taliban government have their origin in Pashtun custom, rather than classical Islamic sources; in particular, the treatment of women has garnered a good deal of negative attention in recent years.⁶ The Pashtunwali, it is implied, is a barbaric code, whose replacement with modern law would be an advance for all concerned. This way of framing the problem contrasts a primitive rural population with the enlightened moderns who live under the rule of law. Bringing law to the barbarian is a modern *mission civilisatrice*, helping to justify a continued Western presence in Afghanistan.

I argue, instead, that the Pashtunwali has a particular logic of its own and is an example of what Richard McAdams and I called in another context “adjudicating in anarchy.”⁷ In a society in which there is no effective state government, citizens will have to develop alternative ways of resolving disputes. Sanctions in such a society are private and are carried out by the victim himself (usually not herself) rather than any centralized govern-

⁴ See *Pashtoonwali*, (Khyber.org) online at <http://www.khyber.org/culture/Pashtunwali.shtml> (visited Sept 9, 2011) (“Pukhtoonwali, Pukhto and Pukhtoon have become almost synonymous terms. . . . This un-written code is the keystone of the arch of the Pukhtoons’ social fabric. It exercises a great influence on their actions and has been held sacrosanct by them generation after generation.”); Asta Olesen, *Islam and Politics in Afghanistan* 33 (Curzon 1995). Note that many urban and educated Pashtuns disdain this image. See Declan Walsh, *Arithmetic on the Frontier*, 112 *Granta* 161, 171 (2010).

⁵ Ahmed, *Pukhtun Economy and Society* at 9 (cited in note 3); see Pak Const Art 247 §§ 3, 7 (establishing that neither Parliament nor the Supreme Court has jurisdiction to regulate Tribal Areas).

⁶ See, for example, Peter Marsden, *The Taliban: War, Religion and the New Order in Afghanistan* 88–101 (Zed Books Ltd 1998); Nancy Hatch Dupree, *Afghan Women under the Taliban*, in William Maley, ed, *Fundamentalism Reborn? Afghanistan and the Taliban* 145, 146–159 (Hurst and Company 2001).

⁷ See generally Tom Ginsburg and Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 *Wm & Mary L Rev* 1229 (2004).

ment. But private violence carries the risk of retaliation and the escalation of violence to higher levels. The need to limit the escalation of violence requires institutions both to define violations and to adjudicate disputes so that parties do not spend too many resources on conflict. The Pashtunwali provides a rough guideline for determining legitimate subjects of conflict and also a system, the *jirga*, for resolving disputes once they arise. It thus presents a protolegal system, cohabiting with, supplementing, and sometimes clashing with the formal system of state law.⁸

The Pashtunwali does *not* provide detailed rules for every contingency. As we shall see, the normative content of the Pashtunwali is very fluid, and it is best thought of as a code of honor rather than a legal code in the conventional sense. Legal codes, after all, are products of the modernizing state and its impulse toward organization.⁹ Instead, the Pashtunwali consists of a set of metarules about the legitimate subjects of conflict and legitimate ways of resolving them. It is a cultural system that channels, and thus limits, private violence.

My analysis is consistent with other recent work on private ordering and stateless peoples, as well as the broader literature on social norms.¹⁰ The new institutionalism in the social sciences has focused attention on the economic functions of legal and quasi-legal norms, showing how both can resolve various institutional problems.¹¹ The gist of this literature is that people have great capacity for self-organization. In contrast with the Hobbesian vision of the state as a necessary imposition to prevent people from engaging in endless conflict, we observe the possibility of emergent social order that can produce effective systems of law and norms. Surely the Pashtunwali is one of the more vital examples of such a normative system, simply by virtue of its geographic spread and temporal resilience, even during periods of extended conflict. It thus provides an opportunity to extend our understanding of private ordering. I point out at the end of this Article that this functional success comes at a great cost, namely

⁸ See generally Sally Engle Merry, *Legal Pluralism*, 22 L & Soc'y Rev 869 (1988).

⁹ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* 27–33 (Stanford 3d ed 2007).

¹⁰ See generally Ellickson, *Order without Law* (cited in note 1); Peter T. Leeson, *The Laws of Lawlessness*, 38 J Legal Stud 471 (2009); Peter T. Leeson, *Gypsies* (unpublished manuscript, 2010), online at <http://peterleeson.com/Gypsies.pdf> (visited Sept 9, 2011).

¹¹ See generally Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge 1990); Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge 1990).

the suppression of half the population. In addition to the gender inequities associated with Pashtun society, the violence of the region poses further normative problems.

The Article is organized as follows: Part I considers the problem of law in an anarchic environment, summarizing recent literature. Part II introduces the institutions of Pashtun society and the norms of the Pashtunwali, analyzing the logic of retaliation and the institutional solutions provided by the *jirga*. Part III considers the two normative problems identified above: gender inequities and relatively high levels of violence in the region. It considers a simple strategy for introducing greater normative coherence to the Pashtunwali that might also ameliorate its morally troubling aspects—the expansion of literacy. While not a panacea, greater levels of education could potentially facilitate clearer substantive norms as well as an improved quality of life for women. Part IV concludes.

I. THE PROBLEMS OF STATELESS SOCIETIES

James C. Scott, in his recent magisterial treatment of upland Southeast Asia, notes that many of the histories of the region are fragmentary and are written from the perspective of the governors rather than the governed.¹² These accounts depict state-building as a benign and even benevolent process of bringing peoples into the fold of the court center, where they can enjoy the benefits of civilization. In actual fact, however, state-building involves massive amounts of conscripted labor, capture of populations, and the imposition of hierarchical social structures. Concentrated populations in urban centers are also more subject to disease, especially before the emergence of modern scientific medicine. It is thus not surprising that, in many times and places, people *fled* from state-building projects to more peripheral geographic locales, where they were able to take shelter. For much of history, “it is abundantly clear that it was at least as common for people to flee the state as to approach it.”¹³ For peoples fleeing states, private ordering was the best option.

The origins of the Pashtuns are shrouded in mystery, but from what we can tell, their history is not completely consistent with Scott’s account of Southeast Asia.¹⁴ It is true that Pashtuns

¹² James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* 160–61 (Yale 2009).

¹³ *Id.* at 162.

¹⁴ Walsh, 112 *Granta* at 170 (cited in note 4).

frequently live outside the effective authority of a state, but their history is a bit more complicated in that Afghan state-building, such as it is, has also been a Pashtun project. Afghanistan as an idea dates back to the eighteenth century Pashtun leader Ahmed Shah Durrani, who unified various tribes to form a new state. But that state did not have extensive reach. It was only at the turn of the twentieth century that Durrani's successor, Abdul Rahman Khan, began to fashion a civilian bureaucracy.¹⁵ Scott characterizes the Pashtuns as having an "antistate nationalism" that has led not only to demands for a separate autonomous state, but rather to the maintenance of a stateless society.¹⁶ Whether these demands for maintaining statelessness are the cause or consequence of Afghanistan's weak state is unclear, but the fact is that the Afghan government has not touched the lives of many of its citizens in any positive way.

The Pakistani side of the border has a different history, but the same basic result. The Pakistani portion of the Pashtunistan region was part of British India, though it was administered quite indirectly as a remote corner of the Raj. To this day, the primary governing instrument for Pakistani Pashtunistan is a British-era colonial act called the Frontier Crimes Regulation. Constitutional rights do not apply in the region, and each tribal agency is governed by a "political agent" appointed by the center, who wields all executive and judicial power.¹⁷ Pakistan has essentially ignored the Pashtuns and other "tribals" through a policy of benign neglect.¹⁸

Whatever the causes, many Pashtuns receive few services from the states in which they nominally live. Stateless societies, though, need rules just as much as those with established governments. The difference is that, without a state, centralized sanctions cannot be assumed. Instead, law in stateless societies must be enforced by communities and individuals themselves. One way to think about this is that norms must be *self-enforcing*,

¹⁵ Vartan Gregorian, *The Emergence of Modern Afghanistan: Politics of Reform and Modernization, 1880-1946* 134-51 (Stanford 1969).

¹⁶ Scott, *The Art of Not Being Governed* at 244-45 (cited in note 12). See E.J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* 64 (Cambridge 2d ed 1992).

¹⁷ Aziz Z. Huq, *Mechanisms of Political Capture in Pakistan's Superior Courts*, 10 YB Islamic & Middle E L 21, 28-30 (2003-2004).

¹⁸ See International Crisis Group, *Pakistan: Countering Militancy in FATA*, Asia Report No 178 1-2 (Oct 21, 2009), online at http://www.crisisgroup.org/-/media/Files/asia/south-asia/pakistan/178_pakistan__countering_militancy_in_fata.ashx (visited Sept 9, 2011).

meaning that it is within each individual's interest to comply with them even without centralized coercion.¹⁹

In a very different context—namely, international law—Professor McAdams and I explored how adjudicative institutions can be effective even without effective sanctions.²⁰ The central argument is that legal institutions can work by coordinating private expectations of other parties' likely behavior. The theory relies on a class of games in which players wish to coordinate their behavior, but disagree over how to coordinate.²¹ Consider, for example, a pair of disputants engaged in a fight over land. Each wants to maintain possession of a piece of property, and so signals to the other that he will fight hard to keep it. But fighting is costly and socially destructive. Other things being equal, each disputant would prefer not to fight. However, revealing this preference would induce the other party to be more aggressive about pursuing the property. This situation is captured in the "Hawk-Dove" game, and it represents a common social situation.²²

In the Hawk-Dove game, Hawk represents the aggressive strategy, while Dove represents the passive strategy. Each player would prefer to play Hawk to the other's Dove. If both players play the aggressive Hawk strategy, however, a fight ensues. On the other hand, if both play the passive Dove strategy, neither gets the property, which is suboptimal from a social perspective. Each player's preference ordering is such that he wishes to coordinate with the other party, so as to avoid a costly fight, but the parties disagree over *how* to coordinate their behavior.

How might law without central enforcement resolve this problem? Suppose that the two disputants cannot resolve the problem. Each mobilizes his supporters—relatives, friends, and community members—and asserts that he will fight to win the dispute. The situation now threatens to escalate, potentially harming many members of the community. Suppose next that someone—a local notable, a neighbor, or even a judge—steps forward to help resolve the dispute. This person has no coercive power over the disputants, but after hearing evidence, pronounces that one side or the other is in the right. One side of the dis-

¹⁹ See generally Kai A. Konrad and Wolfgang Leininger, *Self-Enforcing Norms and the Efficient Non-Cooperative Organization of Clans* (Ruhr Economic Papers No 16, June 2007), online at http://www.rwi-essen.de/media/content/pages/publikationen/ruhr-economic-papers/REP_07_016.pdf (visited Sept 9, 2011).

²⁰ See generally Ginsburg and McAdams, 45 *Wm & Mary L Rev* (cited in note 7).

²¹ Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 *U Ill L Rev* 1043, 1052–74 (2005).

²² *Id.* at 1054–57.

pute is surely happy. But consider the situation from the perspective of the loser.²³ The loser is unhappy about the result and must decide whether or not to comply. No doubt the loser's first choice would be not to comply; but knowing that the other party has "won," the loser may suspect that the winner will be more recalcitrant and less likely to back down. Further, the winner's supporters may be willing to help him, whereas the loser's supporters, expecting the winning side to defend its claim, may now back down. In such a situation, the adjudicator's decision may in fact be self-fulfilling, in that parties' expectations about others' behavior may lead to compliance without centralized sanctions.

Such situations are common in stateless societies. In medieval Iceland, for example, there were no centralized enforcement bodies, but a set of courts issued rulings that typically were complied with by private actors.²⁴ One of the mechanisms for ensuring compliance was that the legal announcement created common knowledge, so that the disputants and others in the society updated their assessments about the likely behavior of the other party. Even without directly imposed sanctions, law can make a difference if it shapes private beliefs about the likely strategies of other players. The job of legal institutions in such settings is to *coordinate* private behavior rather than coerce it.

As in medieval Iceland, the Pashtunwali is an example of a system of non-state norms and institutions in which self-help and noncoercive adjudication are the chief mechanisms of resolving problems. The key is to have norms and institutions that can coordinate private behavior and reduce violence. The next Section of the Article describes the institutions in more detail.

II. THE PASHTUNWALI AND THE INSTITUTIONS OF PASHTUN SOCIETY

A. Honor and Equality

The Pashtunwali (sometimes spelled Pashtunwalli or Push-tunwali) is usually translated as the tribal code or tribal law of the Pashtuns. Though referred to as a code, it is more a code of behavior or honor than a legal code. The rules are not written down, and many of them involve the central concept of *nang*,

²³ Martin Shapiro, *Courts: A Comparative and Political Analysis* 2 (Chicago 1980).

²⁴ Friedman, *Law's Order* at 263–64 (cited in note 1); William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* 228 (Chicago 1990); Ginsburg and McAdams, 45 *Wm & Mary L Rev* at 14–15 (cited in note 7).

usually translated as honor.²⁵ Certain actions are seen as helping to build honor, while others are seen as hurting it. One can think of *nang* as loosely analogous to a positive reputation, a capital good that is accumulated over time and can be lost.

Pashtun society is noted for its lack of hierarchy: each Pashtun male possesses unassailable rights, though there is deference given to elders and those who attain leadership positions.²⁶ A gun is an essential possession and serves as an equalizing force.²⁷ The Pashtunwali has also become an object of fascination and revulsion from outside for its treatment of women. Women are inferior and subordinate but are also a locus of honor, to be protected above all.²⁸ Dishonoring a man's wife is certain cause for conflict.

The society is segmentary, meaning that it comprises numerous small self-regulating groups that periodically come together to form a larger group.²⁹ Such societies are riven by conflict. As one scholar puts it, "Rivalry and status competition [are] key defining element[s] within as well as between . . . the segments."³⁰ *Tarboorwali*, or cousin rivalry, and *siyali*, or status envy, are key factors, so that even within small family groups there are sources of tension and centrifugal pressure.³¹ But when faced with external pressures, segmentary societies are capable of coordinating action against outsiders. Hence, we see the long Pashtun history of successful repulsion of foreign invaders, who in modern times include the British, the Russians, and the Americans.³²

Preserving honor is essential in a stateless society, particularly one that is segmentary. The risk of stateless societies is that stronger actors will prey on weaker ones. Stronger actors

²⁵ See *Pashtunwali: Honour among Them*, *The Economist* 36, 37 (Dec 23, 2006).

²⁶ Willi Steul, *Paschtunwali: ein Ehrenkodex und Seine Rechtliche Relevanz* 309 (Steiner 1981).

²⁷ See Walsh, 112 *Granta* at 164–65 (cited in note 4).

²⁸ Steul, *Paschtunwali* at 310 (cited in note 26).

²⁹ Ahmed, *Pukhtun Economy and Society* at 116–25 (cited in note 3).

³⁰ Craig Cordell Naumann, *The Pashtunwali's Relevance as a Tool for Solving the "Afghan Crisis"**131 (research report submitted to the American Institute of Afghanistan Studies, 2009) (on file with University of Chicago Legal Forum).

³¹ See *id.* (*siyali*); Ahmed, *Pukhtun Economy and Society* at 3, 94 (cited in note 3) ("Cousin rivalry levels as it consumes the Pukhtun. The Father's Brother's Son is the bane of his existence and main rival for power and status.").

³² *Addiction, Crime, Insurgency: The Transnational Threat of Afghan Opium* 123 (2009), online at http://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghan_Opium_Trade_2009_web.pdf (visited Sept 9, 2011) (UN Office on Drugs and Crime report documenting Pashtun pride in repelling invaders); Julie Williams, *Islam: Understanding the History, Beliefs and Culture* 48 (Enslow 2008) (overview of Pashtun history).

will be aggressive, assuming that weaker actors will play a passive strategy in the Hawk-Dove game described above.³³ Honor norms may emerge in situations in which each member of the society has private information about his ability to defend himself and to assert claims. To avoid becoming a target of predatory attack, each actor has an incentive to signal that he is willing to assert and defend himself, which in turn can crystallize into norms about honor.³⁴ Honor norms deter aggressors from engaging in predatory behavior, since they force all individuals to signal that they will play the Hawkish strategy. Still, there will inevitably be conflict. If even the weak have an incentive to signal that they will fight, strong players will not be sure whom to prey on and may make a mistake. This leads to conflict, and a need for institutions to resolve it.

B. Institutions

A central institution in village life is the *jirga* (or *shura*), an institution common to central Asian tribes that consists of a public meeting of the notables of the community. The term is familiar to some in the West for the *loya jirga*, or grand *jirga*, called on periodically to decide national affairs of the various Afghan tribes, but *jirgas* are more common at local levels where they decide disputes. *Jirgas* are formed by local notables, who are neither elected nor appointed but are seen as having the wisdom and knowledge necessary to resolve disputes.

From our perspective, the *jirga* is a key institution for coordination in an internally riven society. In a *jirga* procedure, each member of the *jirga* has equal status and deliberation is open. (Though *jirgas* are open to the public, women and children are not typically allowed to attend). A *jirga* involves people connected with one or the other side in equal proportions. All sit in a circle as formal equals, and each is permitted to speak. There is no fixed time period for deliberation: some cases take weeks. Sanctions can include ostracism, fines, and the specification of compensation.³⁵

³³ See McAdams, 2005 U Ill L Rev at 1054–57 (cited in note 21).

³⁴ Richard E. Nisbett and Dov Cohen, *Culture of Honor: The Psychology of Violence in the South* 4–6, 89 (Westview 1996).

³⁵ Disobedience to the *jirga's* sanctions may result in severe punishment, such as burning a house. See Ahmed, *Pukhtun Economy and Society* at 91 (cited in note 3).

Before a *jirga* session, a bond is sometimes collected from the parties and given to a third person for safekeeping.³⁶ This bond can take the form of cash, property, guns, or even a person who is pledged to guarantee enforceability. A party that does not accept the decision will have to forfeit the bond. *Jirga* decisions are not written down, which is hardly surprising given low rates of literacy. Nevertheless, good decisions are seen as having precedential value.³⁷ There is no formal structure of appeal, but parties can ask for a second *jirga* to be formed to review the case if they are unhappy with the first decision. There is no way to know how frequently this form of appeal is utilized, but many descriptions of the *jirga* leave this feature out, so it is probable that most *jirgas* are able to resolve disputes on the first try, or alternatively that disputants do not try again when the first *jirga* fails.

The institutional structure of the *jirga* means that its decisions are “*common knowledge*” among the disputants and other members of the community.³⁸ Common knowledge refers to the idea that we are all aware of the content of the decision but also that we know that we share this knowledge. Not only do I know that the decision has been issued, but I know that you know, and that everyone else knows.³⁹ As Benson puts it:

In order for a dispute to end satisfactorily, a decision has to be acceptable—verifiable—not just to the parties most directly affected, but to the groups or firms representing these parties *and* to groups who, although not directly involved, might be drawn into a confrontation with one of the groups in the dispute under consideration.⁴⁰

A public pronouncement that A or B is correct will inform not only the parties about each others’ likely behavior, but will also inform others who might join one side or the other as allies. For example, if B loses a case, B’s relatives now have an excuse to beg off from the battle, since they can argue that A’s relatives will fight harder for the right in question. This in turn affects the

³⁶ International Legal Foundation, *The Customary Laws of Afghanistan* 8 (Sept 2004), online at <http://theilf.org/wp-content/uploads/2011/08/reports-ilfa-customary-laws.pdf> (visited Sept 9, 2011).

³⁷ *Id.* at 9.

³⁸ Michael Suk-Young Chwe, *Rational Ritual: Culture, Coordination, and Common Knowledge* 3–4 (Princeton 2001).

³⁹ *Id.*

⁴⁰ Bruce L. Benson, *Customary Law with Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order without State Coercion*, 9 *J. Libertarian Stud.* 25, 36 (1990).

disputants' assessments about whether it is worth continuing to fight. Common knowledge facilitates dispute resolution.

Besides the *jirga*, there are other institutions in Afghan village life that contribute to dispute resolution: a *malik*, who holds a kind of executive authority and may be a local notable or literate person whose function is to interact with the state on behalf of the community; and a *mullah*, who is the repository of religious law. Islamic law, or sharia, differs from the Pashtun norms in a number of areas, including the rights of women.⁴¹ The relationships among these authorities and their relationships with the *jirga* are quasi-constitutional in that they involve a separation of powers of sorts, in which each body derives authority from a different source of legitimacy.⁴² *Mullahs* represent Islam, *jirgas* reflect the will of the community, and *maliks* derive their authority from a mix of sources, including level of education, position in the social structure, or wealth.

One can think of this structure as involving three competing authorities, preventing the dominance of any one of them. If a dispute arises, one can go to the *malik* or *mullah*, or to the *jirga* itself. Even within a *jirga*, parties can choose the governing law, either sharia or pashtunwali (meaning the local customary variant in this context). The competition among authorities means that any one institution has a greater incentive to provide a substantively just decision, or at least one capable of being enforced.⁴³ Otherwise, the institution will not be utilized in the future and its members will lose status. Without the centralized enforcement machinery of a modern state, compliance will depend on the attitudes of the members of the society, and this forms a constraint on decision makers.

Of the various institutions, the *jirga* seems to have the highest normative authority, as befits a society of radical democracy, though this will depend on particular times and places, and in particular the relationship with the outside world. Indeed, while the structure of the *jirga* has been remarkably enduring, it has come under some pressure in recent years. The Taliban sought to promote sharia over the Pashtunwali and placed the *mullah* at

⁴¹ Proof of adultery under sharia requires the testimony of four male witnesses but in Pashtunwali can be based on hearsay. Women have no right to inherit under Pashtunwali and can almost never divorce. Major Richard Tod Strickland, *The Way of the Pashtun: Pashtunwali*, 10.3 Canadian Army J 44, 52 (2007).

⁴² Jennifer Brick Murtazashvili, *The Microfoundations of State Building: Informal Institutions and Local Public Goods in Rural Afghanistan* *11–12 (unpublished PhD dissertation, The University of Wisconsin-Madison, 2009) (on file with U Chi Legal F).

⁴³ Ginsburg and McAdams, 45 Wm & Mary L Rev at 1274 (cited in note 7).

the center of the village, undermining traditional structures.⁴⁴ War has also disrupted structures, as the warlords displace the traditional *jirgas*. The actual situation of village governance at any particular time and place, then, is quite fluid.

In institutional terms, the *jirga* has an advantage over others in that its decisions are issued in public among the representatives of the entire community. It is therefore not surprising that outsiders—the state, the Taliban—have sought to undermine the *jirga* and to promote the authority of the *malik* and *mullah*. In essence, outsiders seek to end the stateless, self-regulating character of the community and to provide channels for outside interests to determine important policies. Yet the institutions of local society have remained remarkably persistent and hence resistant to state-building efforts.

C. Norms of the Pashtunwali

Because the Pashtuns are largely illiterate, their tribal law is not written down in a legal code. The actual substantive norms that are applied may differ from place to place and are of fairly simple elaboration: wrongs involve death, physical injury, offenses against the sexual purity of women, and injuries to honor or rights.⁴⁵ Yet Pashtuns talk about the Pashtunwali as if it were a unified code. How can this be? The analogy here may be to privately developed language.⁴⁶ Although language in most places is not centrally regulated, the spontaneous development of language allows it to spread over a large geographic scope. There are, to be sure, local variations in the way English is spoken in various jurisdictions around the world, but the basic rules are such as to allow someone from Cornwall to communicate with people from California and Calcutta. Similarly, different villages and regions have different versions of the tribal code, yet it bears enough unity to be considered a single object.

The Pashtunwali is noteworthy for its simplicity. It contains very few rules of substantive law, mostly revolving around the protection of one's own honor and the honor of women (the latter referred to as *tor*).⁴⁷ Gender segregation rules, or *purdah*, are rigidly enforced.⁴⁸ The central concepts are behavioral and in-

⁴⁴ Murtazashvili, *The Microfoundations of State Building* at *82 (cited in note 42).

⁴⁵ Steul, *Paschtunwali* at 311 (cited in note 26).

⁴⁶ See Benson, 9 *J Libertarian Stud* at 28 (cited in note 40).

⁴⁷ Ahmed, *Pukhtun Economy and Society* at 3, 202 (cited in note 3).

⁴⁸ See Palwasha Kakar, *Tribal Law of Pashtunwali and Women's Legislative Author-*

volve the specification of compensation to be offered for a set of loosely defined wrongs. A primary norm is to uphold individual, group, and tribal honor. Thus, when one's honor is harmed, one has a normative duty to respond using one of the modalities of the Pashtunwali. This Section describes the norms in greater detail.

1. Hospitality, revenge, and submission.

The Pashtunwali is conventionally described as comprising three key concepts: *melmastia*, hospitality; *badal*, revenge; and *nanawati*, submission or asylum.⁴⁹ Specific bad actions are accompanied by *nerkhs*, the recognized sanction to be imposed. These can consist of a fine or debt (*por*) to be paid as compensation for liability (*tawan*) or of other penalties. The content of the *por* can involve compensation in cash or women, and there is a preference for women as they are seen as binding the families together, thus reducing the risk of future flare-ups.⁵⁰ In case of an ordinary murder among the Ahmedzai, for example, two young women are required to be transferred to the other party.⁵¹ This practice, known as *swara*, is an object of fascination and repulsion for the outside world.⁵²

Let us examine each of the central concepts.⁵³ *Melmastia*, or hospitality, involves the requirement of giving shelter and protection (*panah*) to those who ask for it, even if the person is a criminal. There are anecdotal stories of families giving protection to people who have just killed a family member, thus maintaining the *panah*. Once the perpetrator leaves the home, however, he may be killed. On the other hand, someone who injures a guest will have to pay *por* to the shelterer, whose honor has been implicitly violated.

Badal, or revenge, allows one to seek retribution against someone who has caused one harm. There is some evidence that

ity *4–6 (unpublished research paper, Harvard University, 2003), online at <http://www.law.harvard.edu/programs/ilsp/research/kakar.pdf> (visited Sept 9, 2011).

⁴⁹ James W. Spain, *Pathans of the Latter Day* 42 (Oxford 1995). See also James W. Spain, *The Way of the Pathans* 46–47 (Oxford 2d ed 1972).

⁵⁰ *Pushtunwali: Honour among Them*, *The Economist* at 38 (cited in note 25); Walsh, 112 *Granta* at 177 (cited in note 4).

⁵¹ International Legal Foundation, *The Customary Laws of Afghanistan* at 11 (cited in note 36).

⁵² Ashfaq Yusufzai, *Blood Feuds Trap Girls in 'Compensation Marriages'*, Inter Press Service News Agency (Apr 1, 2006), online at <http://www.ipsnews.net/news.asp?idnews=32737> (visited Sept 9, 2011).

⁵³ See Ahmed, *Pukhtun Economy and Society* at 90–91 (cited in note 3).

revenge should be greater than the initial slight, as captured in the proverb “He is not a Pukhtun [sic] who does not give a blow for a pinch.”⁵⁴ While decentralized sanctions carried out by the victim are common in societies without state law, the Pashtunwali is unusual in imposing an affirmative duty to seek revenge: failing to do so will cause one to suffer a reputational sanction in being thought of as a coward. For example, in the case of the murder of one’s relative, the reputational sanction creates a partial or contingent duty to kill a member of the aggressor’s group.

This duty is not perfect. An alternative to being killed is for the murderer to offer the victim’s family *nanawati*, a formal apology that consists of symbolic submission of the wrongdoer to the victim’s family. A sincere offer of *nanawati* is to be accepted. *Nanawati* can also involve the relatives of the wrongdoer. For example, in the case of a murder, the murderer’s relatives may help carry the victim’s body to the grave or accompany the wrongdoer to the victim’s house to slaughter one or more sheep.

We can now summarize the Pashtunwali in a few simple principles:

- 1) Honor is paramount, and the honor of women is to be protected.
- 2) Gender boundaries must be rigidly maintained.
- 3) One has a right to compensation, or *por*, when one is wronged.
- 4) Revenge is tolerated and even encouraged.
- 5) Apologies accompanied by *por* are to be accepted.
- 6) Guests are to be sheltered.
- 7) The *jirga* is to be obeyed.

These rules are not, obviously, a detailed code of substantive rules of conduct like a true legal code. But they do provide a framework for behavior and for managing conflicts among people. The next Section provides two illustrative cases of how disputes over murder were resolved in accordance with this framework.

2. Examples.

Let us provide some examples from Pakistan of how the system works in practice. Two Waziris, Haji Sardar and Shah

⁵⁴ Id at 90, quoting Akbar S. Ahmed, *Mataloona: Pukhto Proverbs* 57 (Oxford 1975). See also Walsh, 112 *Granta* at 186 (cited in note 4) (“You kill two of my people; I will kill ten of yours.”).

Tofan, had a dispute over water allocation.⁵⁵ The dispute escalated and Haji Sardar's son shot and killed Shah Tofan's son. Haji Sardar's family was then forced to leave. Village elders then stepped in and decided that the underlying dispute and the resultant murder should be resolved by the murderer's family giving two girls and 300,000 Pakistani rupees to the family of Shah Tofan. Shah Tofan's family, in turn, was required to provide a girl for marriage into Haji Sardar's family, in order to signify its acceptance of the *jirga's* decision. Shah Tofan ultimately rejected the cash payment, but agreed to the exchange of girls. The *jirga's* decision effectively resolved the dispute.

In another case, a farmer borrowed money from a local businessman and pledged his forthcoming poppy crop as collateral.⁵⁶ But a severe drought destroyed the poppy crop, so the farmer could not repay his loan. In response to a demand for repayment, as well as in an attempt to gain sympathy,

the farmer explained that he only had his wife and children to offer in exchange for his debt. . . . To the farmer's surprise, the businessman demanded that the farmer turn his family over to repay the loan. The farmer told his wife and children to go with the businessman, but as they were leaving the house, the farmer retrieved his rifle and shot and killed the businessman.⁵⁷

When the *jirga* heard the case, it decided that the farmer was not required to pay compensation to the victim's family.⁵⁸ In this second case, one sees that the businessman violated implicit norms, probably because asking for the man's wife violated norms of protecting women's honor.

D. The Logic of Mandatory Retaliation

As the examples make clear, the Pashtunwali relies for its efficacy on the threat of collective retaliation for wrongs suffered by a family member. Blood feud, in which families or clans take revenge on each other, is a characteristic of some premodern societies and persists in other places around the world.⁵⁹ In such

⁵⁵ The following draws on International Legal Foundation, *The Customary Laws of Afghanistan* at 12–13 (cited in note 36).

⁵⁶ *Id.* at 19.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ William Ian Miller, *Eye for an Eye* 119–21 (Cambridge 2006).

societies, revenge is not merely an option but a duty.⁶⁰ The duty to blood feud can be thought of as providing a credible deterrent to murder. Knowing that a potential victim will be dishonored if he does not seek revenge, a potential aggressor will assume a high probability of response and hence will be more reluctant to engage in aggressive action. This is somewhat offset by the fact that a revenge killing must be accompanied with *por*. Thus, if a member of group A kills a member of group B, A will owe B compensation; but B can choose to seek revenge, in which case B will have to compensate A for any deaths exceeding B's loss. This device serves to prevent escalation: B will not want to kill three members of group A, but will seek to kill only one to ensure that any *por* will offset.⁶¹

In equilibrium, a society with mandatory blood feud might be expected to be one with low levels of violence. In fact, however, we observe a good deal of violence in Pashtun society. Indeed, the response and counterresponse frequently results in an escalation of violence. Why might this be?

First, the culture of honor and reputational considerations in a stateless environment mean that, notwithstanding the universal interest in avoiding conflict, parties will act aggressively when they enter into Hawk-Dove interactions. The penalty from playing Dove is very high in such an environment. Without a centralized state to protect the weak, stronger actors may attack them with impunity. As Thucydides classically put it, "[T]he strong do what they can and the weak suffer what they must."⁶² When a dispute arises, both sides will frequently signal that they will play Hawk and refuse to back down, leading to a good deal of conflict. Since failure to respond is a source of dishonor, people may be overly quick to respond, leading to high levels of aggressive behavior. The emphasis on honor may thus be related to the need to avoid being seen as a patsy or sucker.

Second, ambiguities in the underlying norms might contribute to conflict.⁶³ If parties are uncertain about the precise rules that govern their interaction, there may be cases in which each

⁶⁰ Peter Stein, *Legal Institutions: The Development of Dispute Settlement* 10–11 (Butterworth 1984); E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* 87 (Harvard 1954).

⁶¹ Other norms include limitations on shooting during village level conflicts, and conceding defeat after capture of a village water well. See Ahmed, *Pukhtun Economy and Society* at 5 (cited in note 3).

⁶² Thucydides, *The History of the Peloponnesian Wars* Book 5 394 (J.M. Dent 1910) (Richard Crawley, trans.).

⁶³ Ginsburg and McAdams, 45 *Wm & Mary L Rev* at 1257–61 (cited in note 7).

party genuinely believes that the norm is on his side. Thus, each party will play an aggressive strategy in the encounter, leading to conflict. Normative ambiguity is conflict generating.

Third, even if the norms are clear, there may be disagreement about facts.⁶⁴ Suppose that two farmers have land next to each other and discover a valuable resource, say a spring, on the boundary between their land. The farmers may both agree that the spring belongs to the owner of the underlying land. But they may disagree about the precise boundary line. Such disputes are frequent in areas without state-organized cadastral systems. While farmers are capable of marking boundaries without the state, it may have not been worth delimiting the precise boundary, for example if the land was marginal before discovery of the valuable resource.

All these factors mean that it may be helpful to have a third party to help the parties to avoid conflict. The *jirga* serves in part to help coordinate the understandings of wrongdoing and to resolve the Hawk-Dove problem. At a *jirga*, the disputants make their claims (sometimes through proxies), and the community pronounces a decision. The deliberation allows the parties to come to a common view. Because the parties observe the process, they have common knowledge of the proposed solutions and change their expectations about the strategy to be played by the other party. The *jirga* itself does not typically punish one side or the other but simply facilitates the operation of private sanctions by announcing the *por*. (Note, though, that in extreme cases, a *jirga* can expel someone from a village or burn a house down, so there is some capacity for collective enforcement. But, in most cases, the *jirga* simply announces a remedy that is privately enforced among the parties.)

The *jirga* often comes into play only after disputes have arisen. It is not really a lawmaking body that announces generally binding norms, but rather, it enforces rules that are known to all, or makes collective decisions. Thus, the lack of ex ante clarity about norms can contribute to violent conflict.

Another reason that Pashtun society may be violent is that it occupies economically marginal territory, and hence is not a wealthy society. Societies with a large social surplus typically observe the monetization of sanctions, so that restitution is paid in money. In a society that is relatively poor, however, other forms of compensation are used instead of scarce cash. Indeed,

⁶⁴ Id at 1261–62.

the use of women as a form of compensation may be explained this way. Women are particularly useful as a form of compensation in that they intertwine the families of the disputants across generations and hence serve to reduce the incentive to engage in violence.

The lack of resources may in part explain why the Pashtun tribal areas have been left essentially ungoverned by modern states into the twenty-first century. States will take territory when the benefits of doing so outweigh the costs in terms of securing the territory from other states and providing services to the local population. If there are few resources to be had, the benefits of control are minimal. Further, the character of the tribal society, in which each Pashtun is armed, raises the costs of securing the territory. For most modern states, it seems, Pashtunistan is not worth trying to control, and governments have generally left it alone. At the same time, Afghanistan as a whole is something of a “rentier state” in which foreign powers have historically been manipulated and exploited to obtain political support and economic resources.⁶⁵

Note that, in many of the examples discussed so far, money plays a role. A bond is seen as essential for a *jirga* decision, and *por* is a core part of the system. This point bears some consideration, for it implies that honor is *fungible* and can be restored not only through violence but through material compensation.⁶⁶ Note that women are also seen as a means of compensation; *nang* (honor) is quite different from our own notions of honor. But this expanded concept of different “currencies” of compensation for honor helps to reduce the level of violence among groups. A Pashtun world where *only* violence could restore honor would be a violent one indeed.

Though much of the literature emphasizes restitution as the point of sanctions, in fact, the Pashtunwali sanctions seem to involve both restitution and an element of deterrence. When someone steals private property, the stolen goods must be returned along with a penalty.⁶⁷ This makes sense from an economic perspective in order to deal with the possibility of nondetection: if only restitution were required, then there would be un-

⁶⁵ Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* 48–49, 65 (Yale 1995).

⁶⁶ I am indebted to Aziz Huq for this analysis.

⁶⁷ International Legal Foundation, *The Customary Laws of Afghanistan* at 16 (cited in note 36).

derdeterrence.⁶⁸ The additional penalty helps to approach the optimal level of punishment to deter theft in a world of imperfect detection.

In sum, Pashtun society is violent, but has robust mechanisms to manage conflict. I see the *nanawati* (submission) and the *jirga* as devices designed to minimize the endless spiral of violence in the blood feud. Perversely, however, these institutions may facilitate the seeking of *badal* (revenge), as the perpetrator knows that the tit-for-tat will not be infinite. In addition, the institution of paid compensation for retaliation, just as if one was a primary perpetrator, disincentivizes retaliation and makes initial violation more likely. Pashtun society has an equilibrium level of violence that is somewhat high; yet it would be a profound mistake to see it as a society without order.

III. NORM CHANGE

This Section considers strategies for norm change in the Pashtun region. It first identifies two major targets for reform: the treatment of women and high levels of violence. It then considers literacy as a key background condition for norm change.

A. The Treatment of Women

This Section considers some of the more problematic norms of the Pashtun code. Of these, the treatment of women has received a good deal of popular attention but has been little researched.⁶⁹ Many norms of the Pashtunwali concern women and the protection of their honor. The kidnapping of a married woman is punished to the level of seven murders, which apparently has some deterrent effect, as cases are rarely found.⁷⁰ Kidnapping other women is also punished severely.⁷¹ Adulterers (both male and female) are killed without a requirement of *por*. A woman who does not resist rape will be deemed complicit and killed.⁷² In some cases, these killings will be carried out by family

⁶⁸ See generally Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 *Tulane L Rev* 235 (1986).

⁶⁹ Kakar, *Tribal Law of Pashtunwali and Women's Legislative Authority* at *1 (cited in note 48).

⁷⁰ International Legal Foundation, *The Customary Laws of Afghanistan* at 14 (cited in note 36).

⁷¹ See, for example, Walsh, 112 *Granta* at 173 (cited in note 4) (describing the kidnapping of two women and the severe response).

⁷² International Legal Foundation, *The Customary Laws of Afghanistan* at 14 (cited in note 36).

members of the perpetrator who are eager to redeem their honor.⁷³ For example, Ahmed recounts a case in which a married couple arrives in a village, and the son of a villager begins having an affair with the wife. When the villager is informed, he holds a feast, asks everyone to pray, and then pulls out a revolver to shoot his own son. He then hands the revolver to the husband of the adulterer, who shoots his own wife. The villager then declares the husband his legal son and marries him to his dead son's wife.⁷⁴

Though women's honor is central, women are in no sense equal to men. The forced transfer of women as compensation makes them seem akin to property. Paradoxically, and much like slaves in the antebellum South, women have high value and are also to be protected. For example, a man who injures or kills his wife can be subject to a claim of *por* by her father, leading to a justified killing if the *por* is refused. But women's agency and legal personality are highly restricted. For example, women are not able to inherit land under many versions of the Pashtunwali, in direct contradiction with the sharia.⁷⁵ Among some groups of Pashtun, only elderly women and young children are allowed to leave the house without a complete veil.⁷⁶ The rules of *pardah* (gender segregation) mean that women are sometimes denied access to health care and education.⁷⁷

To be sure, women do have some social space in Pashtun society, but it is generally a private one.⁷⁸ There are certain realms, however, in which senior married women have authority, including making marriage decisions for the children, making decisions about household management and resource allocation, and even arbitrating disputes.⁷⁹ There are, of course, significant local differences, with women in sedentary Pashtun tribes having more authority than those in nomadic tribes.⁸⁰

⁷³ Id at 203–04.

⁷⁴ Id at 205.

⁷⁵ Strickland, 10.3 Canadian Army J at 52 (cited in note 41). See, for example, Ahmed, *Pukhtun Economy and Society* at 50 (cited in note 3) (noting that shift from Pashtun custom to sharia meant women could legally inherit land in one Pakistani district, but is rarely practiced).

⁷⁶ Kakar, *Tribal Law of Pashtunwali and Women's Legislative Authority* at *5 (cited in note 48).

⁷⁷ Id.

⁷⁸ See Nancy Tapper, *Bartered Brides: Politics, Gender and Marriage in an Afghan Tribal Society* 105–06, 212 (Cambridge 1991).

⁷⁹ Kakar, *Tribal Law of Pashtunwali and Women's Legislative Authority* at *8–10 (cited in note 48).

⁸⁰ Id at *9.

The transfer of human beings is obviously in grave conflict with modern notions of morality and with international human rights law. More broadly, Pashtun practices violate virtually every provision of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the equality provisions of the Universal Declaration of Human Rights.⁸¹ Yet Afghanistan was one of the original states to approve the Universal Declaration in 1948; it has acceded to the International Covenant on Civil and Political Rights and to the CEDAW. It is worth considering, then, how the Pashtunwali might be modified to comply with international norms.

B. The Prevalence of Violence

A second area in which the Pashtunwali seems normatively problematic is the regulation of violence. Pashtun areas tend to have high rates of murder and violence, even if they also have high levels of social order. While statistics are not easily available, anecdotal evidence from the Tribal Areas of Pakistan suggests that this is the case.

C. Imposed Solutions?

There are two major normative problems with the Pashtunwali. One concerns the treatment of women, and the other concerns the high levels of violence associated with the region.

What should Western governments that are concerned about these issues do about the Pashtunwali? By far, the dominant approach to date has been to build up institutions of state law that are ultimately designed to displace tribal custom in favor of more Western or universal norms.⁸² Extending the reach of the Afghan state would allow the government to comply with its international obligations while also eliminating more egregious violations of human rights norms.

Unfortunately, this approach is unlikely to succeed. The historic weakness of the centralized state in Afghanistan is one factor, and even if it were able to extend its reach, it might not dis-

⁸¹ *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 14 (1979), online at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (visited Sept 9, 2011); Universal Declaration of Human Rights, GA Resolution 217 (III) A, UN Doc A/810 at 71 (1948).

⁸² Stephen Biddle, Fotini Christia, and J. Alexander Their, *Defining Success in Afghanistan: What Can the United States Accept*, 89 *Foreign Affairs* 48, 49–51 (2010).

place the Pashtunwali.⁸³ Furthermore, the Pashtunwali has proved resistant even to the more liberal provisions of Islamic law with regard to the treatment of women; *mutatis mutandis*, it is less likely to accommodate norms that originate with infidel Europeans.

Perversely, attempts to spread human rights norms to the Pashtun areas, particularly norms regarding the treatment of women, may actually increase violence by undermining the Pashtunwali. To understand this, suppose that there was a rule that compensation for disputes could no longer include the transfer of women from one disputing side to another. This would mean that compensation would have to be paid in cash. Cash, because it is fungible, is an inferior device to bond disputants together across generations. In addition, one might expect that the scale of compensation might rise—if we can no longer give two young women in exchange for a woman's murder, demand for the substitute (currency) will increase. But the basic poverty of the region limits how much upward pressure on cash compensation is feasible. Ultimately, this may mean that there is less deterrence from wrongdoing, and more violence. To put the matter simply: knowing that my daughters are not at risk, I am *more* likely, not less likely, to pick a fight with my neighbor.⁸⁴

At the same time, a switch to such a system would have the advantage of reducing the oppression of women. The treatment of women in Pashtun society is so severe that this tradeoff seems to be worthwhile. I simply point out the internal tensions between trying to solve the gender problem and the violence problem at the same time, given the political economic logic of the Pashtunwali.

D. Nonstate Strategies for Norm Change

Imposing norms from the outside is rarely as effective as encouraging bottom-up strategies. This is particularly true with regard to legal institutions in this part of the world. The assumption that the rule of law could be built through the construction of formal state-centered legal institutions in Afghanistan seems

⁸³ See, for example, Ahmed, *Pukhtun Economy and Society* at 94 (cited in note 3) (telling the story of an elder pleading with the ethnographer to arrange bail for a man in prison, so the man could return to the local area and be shot to redeem the honor of the victim).

⁸⁴ To be sure, another possibility is that the inadequacy of money as a deterrent means that, if you dishonor your neighbor, you can no longer save yourself from being killed by offering your daughters.

to have been overly optimistic. It thus makes sense to consider how norms can be changed from below. There are some comparative and historical examples of deeply entrenched social norms being changed rather quickly with the right combination of incentives, and these might have some relevance to the Pashtunwali.⁸⁵

Let us begin with violence. If the above analysis is correct, much of the violence in Pashtun society has to do with norms of honor that lead to aggressive responses to insults. However, this Article has also emphasized the ambiguity of the norms themselves as being a source of uncertainty. The instruction not to dishonor one's fellows is pitched at a fairly high level of abstraction, with its actual content determined in very local circumstances. It follows that clearer norms might in fact reduce the level of conflict.

How might outsiders increase the precision and certainty of the Pashtunwali? One way to do so is to recognize that the system is essentially one of dispute resolution, not norm generation. Dispute resolution is effective for dealing with the past. Full-fledged legal systems, however, also have ways of articulating norms for the future. Courts routinely engage in both functions, helping to articulate new rules through the resolution of old disputes.⁸⁶ This, in turn, can *reduce the number of disputes in the future*, as potential litigants have a clearer idea of what norms will be enforced. Precedent is conflict reducing.

My proposal is to domesticate the Pashtunwali by appearing to reinforce it. To do so requires the introduction of literacy and a recording system for *jirga* decisions. Literacy would have two effects. First, it would allow *jirga* decisions to be recorded, and thus to potentially have precedential value beyond the living memories of current villagers. Recording *jirga* decisions would make the Pashtunwali stronger, not weaker. It could lead to intervillage communication about proper norms, and allow for wise decisions to guide future decision-makers. It might also minimize the likelihood of disputes because it would allow future disputants to know what the rules are in advance. To give an example, the businessman in the second case noted in Part II.C.2 above

⁸⁵ See generally Lesley Wexler, *Allowing Girls to Hold Up Half the Sky: Combining Norm Promotion and Economic Incentives to Combat Daughter Discrimination in China*, 7 Chi J Intl L 79 (2007); Gerry Mackie, *Ending Footbinding and Infibulation: A Convention Account*, 61 Am Socgl Rev 999 (1996).

⁸⁶ Shapiro, *Courts at 12* (cited in note 23) (noting that lawmaking and dispute resolution are two functions of courts).

would have been aware that he could not legitimately demand the wife of a debtor (though he may have been able to demand a daughter), and hence would not have made the fatal error of asking for the wife.⁸⁷

Crucially, introducing literacy is consistent with demands emanating from tribal society. As documented in Greg Mortenson's *Three Cups of Tea*, there is a great deal of demand for education among the rural Pashtuns and other Afghans living in villages.⁸⁸ Whatever its other developmental benefits, literacy has the potential to improve the operation of the indigenous village-level norms as captured in the Pashtunwali. Framing the recording system as being designed to reinforce, rather than undermine, the Pashtunwali will also make the proposal more palatable. Literacy could transform the Pashtunwali from a code of honor into a real code of law.

How would literacy address the other normative concern about the Pashtunwali, namely the treatment of women? Literacy, if extended to all, might help to improve the lot of women, though the predictions here are a little more ambiguous.

As an initial matter, it is worth pointing out that the most egregious abuses of women seem to happen in the context of disputes. If literacy made for clearer law, there might be fewer disputes and hence less need for remedies, including the abhorrent practice of transferring women among families as compensation. This alone would be of normative value, though it does not address the core structure of gender inequalities.

More broadly, other examples of normative change have relied on relatively equal levels of education and literacy between men and women.⁸⁹ Female literacy in Afghanistan has risen dramatically since 2001, but it is still appallingly low. Illiteracy no doubt weakens women's relative status in society, and there seems to be a genuinely high level of demand among rural women for more education.⁹⁰ Educating women would no doubt increase their ability to contribute to the household economy and would itself go a long way toward improving their status. Literacy would also allow women to learn about international norms.

⁸⁷ See notes 55–57 and accompanying text.

⁸⁸ Greg Mortenson and David Oliver Relin, *Three Cups of Tea: One Man's Mission to Fight Terrorism and Build Nations . . . One School at a Time* 244, 317 (Viking 2006).

⁸⁹ Wexler, 7 Chi J Intl L at 90–91 (cited in note 85). See generally Ronald Inglehart and Pippa Norris, *Rising Tide: Gender Equality and Cultural Change Around the World* 152 (Cambridge 2003).

⁹⁰ Mortenson and Relin, *Three Cups of Tea* at 330 (cited in note 88).

One might even imagine women using a system of recorded decisions to demand improvements in the rules as they shop for relatively egalitarian decisions that push norms in the direction of better treatment.

Literacy might also affect the Pashtunwali by improving development more generally. We know that the norms of blood feud and such tend to be less strong among more urban and educated Pashtuns.⁹¹ Richer, more educated Pashtuns are less likely to practice gender violence as well.⁹² Though Afghanistan is unlikely to become as peaceful and prosperous as Switzerland, gradual improvement in living standards may lead to changes in norms.

The difficulty with relying on literacy to effectuate change, of course, is ensuring that all have access to education. Designing a program wherein women as well as men are guaranteed education is beyond the scope of this short Article, but there is evidence that it is occurring in some regions.⁹³ If literacy were restricted to males, it might have some effects through its general effect on development but would actually disempower women even further within the family and village. It is also possible that selective introduction of literacy could undermine the Pashtunwali by introducing status differences among the men. As described above, one of the important norms of Pashtun society is the equality of all males.⁹⁴ If power and wealth differences are exacerbated, the equality norm itself might be undermined.⁹⁵

Still, the literacy proposal has the advantage of being consistent with local demands and has the potential to disrupt the most abusive practices of the normative order. It would allow an organic evolution in the substantive Pashtunwali, while preserving the procedural institutions that are essential to governance in a region where the state's reach is likely to remain limited for some time to come.

IV. CONCLUSION

The Pashtunwali is one of the larger "quasi-legal" systems in the world in terms of the number of people subject to it, and it may be the largest such system of any stateless society. This Article

⁹¹ See Walsh, 112 *Granta* at 171 (cited in note 4).

⁹² *Id.*

⁹³ Mortenson and Relin, *Three Cups of Tea* at 209 (cited in note 88).

⁹⁴ See note 26 and accompanying text.

⁹⁵ Kakar, *Tribal Law of Pashtunwali and Women's Legislative Authority* at *12 (cited in note 48).

has explained how many of its norms and institutions seem to be designed to minimize the escalation of private violence, and hence to preserve social order in an area where state law has minimal reach. This case study provides some evidence that adjudication in anarchy can be functionally effective, even if it is embedded in a set of norms that violate the rights of half the population.

At the same time, the rules themselves are ambiguous. This creates situations in which conflict erupts with great frequency. Norms of honor probably make conflict more prevalent than it would otherwise be, and the dispute resolution system, by minimizing the chance of escalation, may actually encourage quickness to claim injury. The *jirga* system, of course, is the backbone of dispute resolution in rural society in this region, and I do not assert that it should be replaced. Rather, what is needed is an evolution in substantive norms to be applied within the Pash-tunwali framework.

I propose a simple solution to facilitate normative evolution: literacy. A system of recorded precedent would reduce the ambiguities about what counts as a violation and what level of private retaliation for wrongs is acceptable. This would in turn have the effect of minimizing violations while coordinating punishments. This solution is one that takes advantage of the decentralized nature of Pashtun society—it does not impose top-down norms, even in the contentious area of the treatment of women, but might ultimately facilitate convergence with more universal standards. The key is to leverage bottom-up sources of social ordering rather than top-down commands in a region where no state has ever held sway.