# Feud Law

As we shall see, what usually happens in our early medieval sources is that, when one social group, usually a family or kindred but occasionally an institution such as a monastery, is wronged, it makes a great display of its anger, of the fact that it has been wronged and of the fact that it has the right to extract vengeance upon the wrongdoers. Pressure is thereby brought upon the original attackers to make reparation, either informally or through the local officers of the law, or sometimes through the mediation of the church. Where compensation is not paid, the aggrieved party sometimes carries out a retaliatory attack. If the correct procedures have been followed, a successful vengeance killing is held to be quite legal, and terminates the dispute. There is little conception that the recipients of the retaliatory attack have any right to feel aggrieved, or that they would be justified in responding violently to it.

(Guy Halsall, “Reflections on Early Medieval Violence: The Example of the Blood Feud”)

Most moderns take it for granted that law is, must be, enforced by the state. Criminal offenders are detected and arrested by police, prosecuted by government prosecutors, tried in government courts and punished by the government. Eighteenth-century England had a modified version of that system, with criminals, like tortfeasors in a modern system, detected and prosecuted privately but tried and punished by the state.

We have now seen a number of societies in which law enforcement was private and decentralized.[[1]](#footnote-1) That pattern, although strange to us, is historically common.[[2]](#footnote-2) It seems likely that in many, perhaps most, societies it was the original form of law on top of which later legal systems were constructed. I call it feud law[[3]](#footnote-3). Its logic is simple. If you wrong me, I threaten to harm you unless you compensate me.

In order to work, it must solve four different problems.

## The Requirements of Feud Law

1. My threat to harm you must be more believable if you have wronged me than if you have not.

2. There must be ways of making it likely that I will carry out my threat despite the risks.

3. There must be ways of enforcing the rights not only of the strong but of the weak.

4. There must be ways of terminating feud, preventing the pattern of continued back and forth violence that the word suggests to the modern ear.

All of these problems must be solved for feud to provide an adequate mechanism to enforce law. All have been solved in real-world feud systems.

### 1. Right Makes Might

If my threat is equally effective whether or not you have actually wronged me, it works as well for extortion as for law enforcement. A feud system requires some mechanism that makes the threat more believable when you have wronged me than when you have not.

Saga-period Iceland shows one way of solving this problem. If I believe you have wronged me, I take you to court. The court gives a verdict–you owe me fifty ounces of silver. You pay or you do not pay. If you do not pay, you are outlawed, making it legal for me to kill you, illegal for anyone to feed you, shelter you, defend you. Friends who might want to defend you know that any clash will lead to further legal suits in which they will be on the losing side. If they refuse to pay damages, the kin of anyone they injure will be pulled into the coalition against them. The court system is the mechanism through which right, as defined by the existing law code, makes might. The Romanichal achieve the same objective in a less formal way. Instead of a law code there is a system of community norms. If you have wronged me as judged by those norms and fail to compensate me, my friends will back me in the resulting clash, your friends will not back you.

The legal system of Somaliland is somewhere between the two. Law is customary–unlike the Icelandic case, there is no legislature. The courts that settle disputes are ad hoc, formed for the dispute. But they have enough legitimacy in the eyes of neighbors and potential allies of both sides to give their verdict weight.

When I first read about Gypsy law I interpreted the Romanichal’s legal system as a feud system, the Vlach Rom’s as a system of communal control operating through the *kris*. A more detailed account[[4]](#footnote-4) of the Vlach Rom in America, however, made it clear that they too had a feud system, with feuds fought out in large part by manipulating the *gaje* authorities to impose costs on opponents. The *kris* of the Vlach Rom is no more a government than the court of the Somali. Both are, like the Icelandic court, mechanisms for settling disputes in a feud system by involving members of the society not themselves party to the feud, using ad hoc judges rather than professionals.[[5]](#footnote-5)

The details vary from one system to another but the basic logic is the same.

### 2. Commitment

When I threaten to harm you, you respond that if I do you will retaliate, making the exchange a loss for both of us. For the system to work, I need some way of committing myself, making it in my interest to carry out my threat despite the risk, in your interest to back down and compensate me.

One solution predates our species–territorial behavior.[[6]](#footnote-6) One member of a territorial species somehow marks the territory he is claiming. Doing so turns a metaphorical switch in his brain, commits him to fight more and more desperately against a trespasser the farther into his territory the trespasser comes. Unless the aggressor is much stronger than the defender, a fight to the death is a loss for both. So once the commitment is clear, it is in the interest of the trespasser to retreat.[[7]](#footnote-7)

The corresponding mechanism in humans, used to defend a much broader set of claims, is vengefulness. When someone has wronged you, you very much want to get back at him, even at some risk to yourself. Considered *ex post*, after the fact, it looks like an irrational passion, one that can quite easily get you killed. Considered *ex ante*, it may well be a rational commitment strategy, hardwired into us by evolution. The fact that you will revenge yourself against anyone who wrongs you, even at considerable cost to yourself, is a reason not to wrong you.

Human societies provide other commitment strategies as well, most obviously reputation and status. Your failure to carry through on your threat, to revenge yourself on one who has wronged you and refused to pay compensation, marks you as a wimp. Being known to be a wimp lowers your status. It also marks you as a safe target for future wrongs.

Failing to avenge wrongs to yourself costs status. Forcing the person responsible for a wrong to pay compensation gains status, even if the wrong was to someone else. That explains the volunteer enforcer, someone who faces down an aggressor on behalf of a victim too weak to do it himself, a pattern we observe in the Icelandic sagas and in accounts of conflicts among the Comanche Indians.

What if the wrong you suffer leaves you dead, unable to either threaten or execute vengeance? To deter killing, you need a commitment strategy that lasts past death. Real-world feud systems provide it.

Under Icelandic law, killing me gives my kin a claim against you, the right to collect money damages and, if not acceptably compensated in an out-of-court settlement, have you outlawed. The kin have a double incentive to enforce that claim. It may let them collect a considerable amount of money. It also gives anyone who might want to kill one of them a reason not to. The same mechanism, a claim for damages inherited by the living, exists in other feud systems such as the Somali.

### 3. Protecting the Weak

A fight to the death between two birds may be a loss for both but a fight to the death between an elderly man with no allies and an aggressor backed by half a dozen friends is likely to be a loss for only one. In order for feud to do an adequate job of protecting rights, it needs some mechanism that works for weak as well as for strong.

The Icelanders solved that problem by making claims for damages transferable. The elderly man who knows that if he tries to prosecute his claim himself he is likely to be beaten up on his way to the court transfers his claim to a friend or neighbor who can enforce it. If enforcing it is not too hard, they split the cash. And however the compensation is divided, at least the aggressor has paid for his crime.

The Somali had a different system. The individual is a member of a *dia*-paying group, a coalition formed in advance. If he is wronged, the other members of the group are entitled to part of the damages. Just as with the Icelandic kin group, that gives them a double incentive, cash and reputation, to make sure they are paid.

### 4. Terminating Feud

The simplest way of ending a feud is for one side to compensate the other for the damage done, ideally at the first step. One reason not to do so is the belief by the initial aggressor that he can get away with refusing, that the other will back down. Another is the belief that he does not owe anything, that he is in the right. If he is in the right and pays anyway that will mark him as a wimp, an easy target for extortion. Better to respond to force with force and hope the other party will back down instead.

The Icelandic solution was arbitration. Find someone prominent, respected, powerful. Have both parties agree to accept his settlement of the dispute. Paying what he says you owe does not mark you as a wimp. Refusing to do so not only makes you look bad and makes settlement more difficult in any future dispute, it gets you a new and powerful enemy. A similar approach was used by at least some other feud societies, including the Romani.

“When a problem arises, initially, attempts are made to resolve the problem on the spot in order to avoid convening the court. This is usually done when the parties engaged in a dispute approach some respected person (or several respected members of the community) for assistance, who then make their pronouncement on the spot.”[[8]](#footnote-8)

The Somali system also offers a different solution. When the amount of killing reaches an unacceptable level, raise the price–have the clans whose members have been feuding agree to increase *dia*, the damage payment for killing.

## The First Legal System

No modern state uses a feud system to settle conflicts among its citizens, although some groups within modern states, such as the Romanichal or Kaale, continue to do so. But a number of existing legal systems show evidence of having been built on top of pre-existing feud systems.

The clearest example is Anglo-American common law. It evolved out of Anglo-Saxon law. Anglo-Saxon law, at least prior to its final century, was essentially Icelandic law plus a king. The king claimed that some offenses were violations of the king’s peace, hence that offenders owed damages to both him and the victim. Expand that approach enough and eventually the exception swallows the rule, converting all crimes into offenses against the crown alone.

For another example, consider Jewish law. The rules for killing, described in Chapter XX[Jewish], put the job of executing a killer whose crime is ruled capital on the Avenger of Blood, the heir of the victim. They also give him the right to kill a killer whose crime is ruled not capital if he can intercept him on the way back to his city of refuge. Similarly, Islamic law assigns the job of prosecuting a killer to the victim’s kin, gives them the right to retaliation if the killing was capital and of collecting *diya,* wergeld, from a non-capital killer or a capital killer against whom they choose not to retaliate.

Roman law, on which European civil law is ultimately based, is a less clear case. Its earliest known form, the Law of the Twelve Tables, has survived only in fragments deduced from other documents. It has features that suggest a pre-existing feud system, such as references to the circumstances under which the victim of a crime is entitled to kill the criminal. Later Roman law preserved extensive elements of private action, obligating the plaintiff to bring the defendant to court, if necessary by force, and giving a successful plaintiff in some contexts the right to kill the defendant or sell him into slavery. Theft in early Roman law was treated as a tort, only later also as a crime.[[9]](#footnote-9)

## Feud in the Modern World

Modern formal legal systems are based on enforcement by the state but much informal enforcement follows the logic of feud law. Private norms of behavior are enforced by private action, at least some of which involves the threat of retaliation–true hostile gossip and sometimes more. Robert Ellickson, in his description of the system of norms of neighborly behavior in modern-day Shasta County, California,[[10]](#footnote-10) gives an example. If a neighbor who repeatedly lets his cattle stray into another’s field and damage his crop fails to apologize and help undo the damage, the victim may respond by driving the cattle off his property and some distance down the road in the direction away from their owner’s farm.

Much of the crime in a modern society can be interpreted as private enforcement. A retaliatory killing in the course of a conflict among urban gangs is one example, a husband who discovers another man in bed with his wife and shoots him another. Donald Black has argued that “most intentional homicide in modern life is a response to conduct that the killer regards as deviant.”[[11]](#footnote-11)

## Appendix: Hatfields and McCoys, The Feud that Mostly Wasn't

According to a popular tale, the Hatfields and McCoys, two families of Appalachian hillbillies living on opposite sides of the Tug Fork, the border between Kentucky (McCoys) and West Virginia (Hatfields), started killing each other before the end of the Civil War and continued to do so through a long series of revenge killings, each inspiring the next, for some decades thereafter.

The real history is shorter and less dramatic. Asa McCoy volunteered for the Union Army, was invalided out, returned to the Tug valley and was killed, a murder often claimed to have been the first in the feud. There is, however, no evidence that his death had anything to do with a family feud and who killed him was never discovered. Practically everyone in the Tug Valley other than Asa, both Hatfields and McCoys, was pro-Confederate, providing an obvious motive for his killing.

The first definite conflict between Hatfields and McCoys occurred 13 years later, when Old Ranel, the patriarch of the McCoy clan, suspected that Floyd Hatfield had stolen one of his hogs. Instead of getting down his rifle and telling his boys to fetch theirs, however, Ranel took his suspicions to the nearest Justice of the Peace. Floyd Hatfield was tried and acquitted. A year and a half later, two of Ranel's nephews got into a fight with Bill Staton, a relative of both families who had been a witness for Floyd Hatfield's side in the trial, and killed him. They were arrested, tried, and acquitted on grounds of self-defense–on the Hatfield side of the river by a Hatfield judge. No revenge killings followed.

The first violence fitting the pattern of a proper family feud occurred in 1882. In the course of an election-day fight, Ellison Hatfield was badly wounded–shot and stabbed–by three of the McCoys. The three were arrested and on their way to the Pikeville, Kentucky jail when their party was intercepted by a larger group led by Anse Hatfield and the prisoners seized. The captors, uncertain whether Ellison's wounds were mortal, waited until he died and then, on the Kentucky side of the river, killed the three McCoys.

That should, of course, have brought forth return violence from the McCoys. What actually happened was that they took the matter to a Kentucky court, which issued warrants for twenty-one of those involved in the killing but did nothing else. Five years passed with no further violence.

At which point a new governor of Kentucky was elected who happened to be a friend of Perry Cline, a lawyer, friend and distant relative of Ranel McCoy who had lost out to Anse Hatfield in a lawsuit over land some years before. Cline persuaded the governor to announce rewards for Anse Hatfield and his fellow killers and begin extradition proceedings. While the governor of West Virginia was still considering the request for extradition, a Kentucky posse crossed the state border into West Virginia and captured Selkirk McCoy, despite his name considered a Hatfield supporter.

That set off the second instance of retaliatory killing. A group of Hatfield supporters attacked Ranel McCoy’s home, burned it, and killed two of his adult children. That was the point at which the conflict began to draw national attention, with newspapers describing it in dramatic and wildly exaggerated terms. Shortly thereafter further raids into West Virginia killed Vance Hatfield, Anse Hatfield’s uncle, and captured seven more Hatfield supporters while another voluntarily surrendered. The West Virginia court responded by issuing warrants for the arrest of the twenty members of the posse responsible for killing Vance Hatfield. Continued efforts by Kentucky bounty hunters, most of whom had no connection with the McCoys, led to a battle between a Kentucky posse and a West Virginia posse and the murder by the leader of the former of one member of the latter. At which point the conflict was over, at least for the two families.

Not, however, for the lawyers. The governor of West Virginia demanded the return of citizens of his state who had been kidnapped to Kentucky to be tried in a Kentucky court. The case eventually reached the Supreme Court which held that although the kidnapping was illegal there was no recourse; once the nine were in Kentucky, the Kentucky court could try them.

Two things are worth noting about the story. The first is that, by Waller’s account,[[12]](#footnote-12) only six killings were directly due to conflict between the families–five revenge killings of McCoys, one the killing of Ellison Hatfield that inspired the first revenge. One Hatfield and one member of the West Virginia posse were killed by Kentucky posses and one Hatfield condemned to hang by a Kentucky court.

The other is that, so far as we can tell, the feud would have ended with a total of only four killings–for five years had ended–had not the governor of Kentucky chosen to revive it.[[13]](#footnote-13)

1. Describing it as private raises the question of how one distinguishes between a government and private institutions to enforce rights, commonly regarded as a governmental function. For my answer see Friedman 2014, Chapter 52. [↑](#footnote-ref-1)
2. The feud systems we have looked at are saga-period Iceland, northern Somalia, Comanche Indians, and Romani–different versions for Vlach Rom, Romanichal, and Kaale. Other feud systems I am aware of include the Bedouin system described in a paper by one of my students, webbed at http://www.daviddfriedman.com/Academic/Course\_Pages/Legal\_Systems\_Very\_Different\_13/LegalSysPapers2Discuss13/Bedouin\_Law.htm, the Nuer described by Evans-Pritchard and the northern Albanian system described in *The Code of Lekë Dukagjini* (Fox 1989)*.* [↑](#footnote-ref-2)
3. A feud system is not the same thing as a feudal system. The two words sound similar but are unrelated in both meaning and etymology. “Feudal” comes from medieval Latin “feodum,” meaning a fief or fee, from Frankish fehu (cattle, owndom, property, fee) possibly from proto-germanic “fehu” (cattle) from Indo-European \*peḱu-, livestock. “Feud” comes from “fede” (“enmity, hatred, hostility”) ultimately from proto indo-European root \*peig- “evil minded, hostile.” [↑](#footnote-ref-3)
4. Sutherland 1986. [↑](#footnote-ref-4)
5. p. 87: “The main aim is to bring together the opposing parties, and, through a compromise, to allow consensus to be reached. After the judges decide that a common position has been established to some extent, they hold consultations (they may also retire), formulate a decision in the case that is acceptable to everyone involved, and publicly declare it.” Marushiakova and Popov, p. 87, describing the *kris* in Eastern and Central Europe. [↑](#footnote-ref-5)
6. See Alcock 2013. For a webbed discussion, see http://people.eku.edu/ritchisong/birdterritories.html. [↑](#footnote-ref-6)
7. I discuss rights among humans, considered not as a moral or legal category but a description of behavior, as a more elaborate version of the same pattern of behavior in Friedman 1994 and Friedman 2014, Chapter 52. [↑](#footnote-ref-7)
8. Marushiakova, Elena and Popov p. 78, describing conflict settlement among the Romani. [↑](#footnote-ref-8)
9. Friedman 2017??. [↑](#footnote-ref-9)
10. Ellickson 1994. [↑](#footnote-ref-10)
11. Black 1986. “Like the killings in traditional societies described by anthropologists, then, most intentional homicide in modern society may be classified as social control, specifically as self-help, even if it is handled by legal officials as crime.” [↑](#footnote-ref-11)
12. Different sources vary in detail. [↑](#footnote-ref-12)
13. A good source on the details of the feud is Rice 1978. Waller 1988 provides an account sympathetic to the Hatfields, setting the conflict in the context of economic and social changes occurring in the area at the time. [↑](#footnote-ref-13)