

Stoning and Hand-Amputation :

the pre-Islamic origins of the *hadd* penalties for *zinā* and *sariqa*

by

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Abstract

Determining whether stoning for adultery and hand-amputation for theft were practiced in pre-Islamic Arabia represents the first phase in exploring the origins and evolution of these penalties in Islamic law. Should both punishments prove to predate Islam, then it would appear the Qur'ān broke with stoning and confirmed amputation of the hand. An extensive survey of pre-Islamic, Near Eastern legal materials in search of parallel penalties has thus been attempted in this thesis. Remarkably, not only stoning and hand-amputation, but nearly the entire range of Islamic adultery and theft legislation have pre-Islamic parallels. The nature of these parallels, however, does not conform to the paradigm of 'borrowing' from 'foreign' sources. Rather, Arab customary law – a major contributor to Islamic law in general – appears to have diverged from an ancient Semitic 'common source' once shared with other Near Eastern cultural entities. Most major elements of Islamic criminal law, including stoning and hand-amputation, therefore represent the culmination of an ancient Semitic common law.

Précis

Répondre à la question de si, en Arabie préislamique, l'on appliquait la peine de mort par lapidation pour adultère ou l'amputation de la main pour vole représente un premier pas vers l'élucidation des origines et de l'évolution de ces peines qui font parties de la loi islamique. Si c'est le cas que ces deux types de peines précèdent l'avènement de l'Islam, il semble donc que le Qur'an voulait mettre fin à la lapidation mais confirmer l'amputation de la main. Ce disant, la présente étude s'est dédiée à une vaste enquête sur les matériaux légaux du Proche-Orient préislamique afin de trouver des peines parallèles. Remarquablement, non seulement la lapidation et l'amputation de la main, mais presque tout l'ensemble de la législation dédiée à l'adultère et au vol ont un parallèle préislamique. Cependant, les caractéristiques de ces parallèles ne se conforment pas au paradigme « d'emprunts » de sources « étrangères ». Il s'agit plutôt que le droit coutumier arabe—qui a fait de nombreuses contributions à la loi islamique en générale—s'est peut-être écarté d'une ancienne « source commune » sémitique, qui, à un moment donné, était partagée par plusieurs entités culturelles du Proche-Orient. La majorité des éléments du droit criminel islamique, y compris la lapidation et l'amputation de la main, représentent ainsi la culmination d'un ancien droit commun sémitique.

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This venture would never have been possible at all if not for the continual, friendly, and professional guidance from the staff of our much-loved Institute of Islamic Studies. Ann Yaxley and Kirsty McKinnon, with their persistent and patient assistance through the red-tape battles of my untimely departure for Cairo, are deserving of a special mention and my most heart-felt thanks. Without their efforts on my behalf, this thesis may never have seen submission. In the library, the assistance of Salwa Ferahian in obtaining hard-to-find texts with speed, consideration, and a friendly smile has been an invaluable support; as has the kindness and patience of Wayne St. Thomas in solving such mysteries as seemed, somehow, only to manifest themselves to me. Thanks also to Heather Empey for her superb French translation of the abstract.

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Introduction

Background

The aims of this thesis are simple, but they were only arrived at after a long and arduous process of questioning and research that has unearthed material enough to fill several volumes. It is appropriate, therefore, that this background be given before the goals and methods of this research are outlined. It began with the vexatious questions of the stoning penalty in Islam. Why do those traditions which relate or enjoin the stoning of convicted adulterers seem to overshadow the Qur'ānic punishment of flogging?¹ Why are the explanations and justifications for the 'specialization' (*takhṣīs*) of this Qur'ānic penalty so complex, when other Qur'ānic penalties – such as those for slander (*qadhf*), theft (*sariqa*), or brigandage (*ḥirāba*)² – seem to have translated into the *sharī'a* more or less directly and seamlessly?

These and related questions led to an exploration of that area of Islamic criminal law subsumed beneath the title of *al-ḥudūd*, in order to attain a general knowledge of the Islamic conception of these crimes, their punishments, and related procedures.³ Along the way, the works of several scholars raised various questions and criticisms concerning these *ḥudūd*, many of which centered on issues of origin and influence. According to certain of them, very few aspects of Islamic law in general were to be attributed to the Muslims' own ingenuity, or even to that of the Arab peoples among whom the religion was born. Various regulations, punishments, methods – even terminology and principles, we are told – are of 'foreign' origin and were 'borrowed' by Islamic jurists at some stage in the early development of Islamic law. This includes the punishment of stoning, and several of the precepts and rulings of the *ḥudūd*.

This discourse, however, is narrow, often politically driven, and riddled with problematical assumptions, including the unsightly specter of assumed cultural superiority. A much more thorough and holistic investigation into the potential

¹ Q.24:2.

² Q.24:4, 5:38, and 5:33-4, respectively.

³ I have largely depended on more comprehensive works such as those of Ibn Rushd (d.595/1198) and al-Jazīrī (d.1360/1941); although close attention was paid to some of our earliest legal works, especially the *Majmū' al-fiqh* attributed to Zayd b. 'Alī (d.122/740), the *Tafsīr al-khams mi'at āyah min al-Qur'ān* of Muqātil b. Sulaymān (d. 150/767), the *Muwatta'* of Mālik b. Anas (d.179/795), and the *Muṣanna'* of 'Abd al-Razzaq al-Ṣan'ānī (d.211/827).

origins of the concerned criminal legislation had to be attempted, therefore, and the greater bulk of research undertaken has thus been dedicated to an inclusive survey of pre-Islamic Near Eastern legal material in search of parallels and potential origins.⁴ The results were in many ways conclusive, and told a very different tale than what certain scholars have projected as the mostly ‘foreign’ origins of Islamic law.

At any rate, once the survey was completed to the extent possible, the first stage was set for addressing the troublesome issue of stoning in Islam. To be certain, in order to even attempt an understanding of the evolution of the various *ḥudūd* in Islamic law, it must first be established whether such punishments were practiced *before* Islam. After all, if we could say with certainty that amputation of the hand for theft was practiced in Arabia before Islam, then we could say that the Qur’ān confirmed this punishment; and thus it was smoothly conveyed into the *sharī‘a*. If we could say, however, that stoning for adultery was also practiced in Arabia before Islam, it would appear that the Qur’ānic revelations conflicted with this punishment, attempting to supersede or abrogate it. Stoning would thus appear as a pre-Islamic survival, twice-replaced by new Qur’ānic injunctions, yet somehow explained into the *sharī‘a* by those jurists who supported it.

This is precisely what this thesis will attempt to prove. Tracing the punishments from early Islam through to the first formulations of Islamic law will remain for future scholarly endeavor, though it will certainly be no easier due to the difficulties posed by the first 150 years of Islam, which, as Robert Hoyland notes, “is an era that we do not understand very well [due to] the problematic nature of the literary source material.”⁵

⁴ Sources of pre-Islamic law surveyed for this thesis include collections of ancient Mesopotamian codes and documents, records of ancient Egyptian law, pre- and post-biblical Judaic law, Hellenic law, Roman classical, Byzantine, and Provincial law, Christian Canon law, Sāsānid Persian law, and the extant legal materials of the North and South Arabian civilizations. The obvious lacuna of ancient Ethiopian law is not through negligence but rather a seeming complete lack of sources predating the birth of Islam; while ancient Egyptian and Hellenic law does not receive a section in this paper due to their relative lack of relevant parallels to Islamic criminal law.

⁵ Robert G. Hoyland, *Seeing Islam as Others Saw It: A Survey and Evaluation of Christian, Jewish and Zoroastrian Writings on Early Islam* (Princeton: The Darwin Press, 1997), 2. Significantly, he also observes that for this same period of time “Byzantinists find themselves faced with a plethora of religious compositions and a dearth of history writing, [and] Judaicists and Persianists suffer a scarcity of texts of any kind...” (ibid. and nn. 3,4). For a brief overview of this vexatious problem see also Wael B. Hallaq, ed. *The Formation of Islamic Law* (Aldershot: Ashgate, 2004), xiii.

Method

Even in the initial stages of research, it became apparent that a study of the origins and evolution of the Islamic penalty for theft would serve as a useful counterpoint to that of adultery. To begin with, hand-amputation found its way directly into Islamic law, while the punishments of flogging and stoning took a somewhat more oblique path. Secondly, there is a curious and recurring phenomenon whereby, in many source materials – whether works of *fiqh*, ancient codes of law, or even literary works – crimes pertaining to fornication or adultery are often presented in juxtaposition with crimes related to theft. This occurrence is so regular that I have called it the ‘theft-adultery link.’ An added bonus of studying the two crimes together, therefore, has been an increased understanding of the relationship between them in ancient laws, the precepts behind this relationship, and greater insight into what much of the time seems utterly alien ideas of crime and punishment. All of the research for this topic, therefore, was undertaken with an eye to both of these crimes and their penalties.

Once again, the first stage in addressing the issue of stoning for adultery, and consequently the primary aim of this thesis, is to prove that stoning for adultery and hand-amputation for theft were part of the corpus of Arab customary law before the revelation of the Qur’ān. Due to the above-mentioned assumptions of the ‘foreign’ origins of Islamic law, however, and the findings of the research, which very much contradict those assumptions, a secondary goal soon developed. This is simply to argue what the material plainly suggests: Islamic law is a natural outgrowth of its Near Eastern Semitic heritage.⁶ Although some amount of ‘foreign influence’ must be inevitable, Islamic law has not been ‘influenced’ or ‘borrowed’ to the extent that certain scholars would have us believe. It has, however, to a large extent, been *inherited*, primarily from the collective customary traditions of Arabia, which in turn must be considered the outgrowth of a greater, integrated, Near Eastern and Semitic legal milieu whose true origins stretch beyond our limited written history of the region. Similarities between Islamic and other Near Eastern legal systems – particularly Judaic law – is, as this thesis shall therefore argue, more likely the result of a common legal heritage than of ‘borrowing’ or ‘influence.’

⁶ I was first introduced to this theory by a lecture delivered by my esteemed advisor Dr. Wael Hallaq in the Fall of 2002 at McGill University’s Institute of Islamic Studies, and have benefited greatly from his subsequent encouragement.

In short, the dual goals of this thesis are 1) to prove that stoning and hand-amputation were pre-Islamic Arabian practices for adultery and theft, and 2) to argue that neither Arab customary nor Islamic law is to any significant extent ‘borrowed’ from ‘foreign’ sources. The greater part of the parallels we find in other legal systems are the result of a commonly inherited source with subsequent (and usually divergent) development. By way of presenting the research in support of these aims, the following steps have been taken: 1) the related *ḥudūd* of illicit sexual activity (*zinā*) and unfounded accusation of the same (*qadhf*) are explained according to the Qur’ānic injunctions themselves and the rulings of the Sunni schools of law; 2) the related *ḥudūd* of theft (*sariqa*) and brigandage (*ḥirāba*) are also explained by the Qur’ān and Sunni schools; 3) early opposition to the stoning penalty is explored, along with the response of the Sunni schools; 4) variant opinions of the Shī’a in relation to the above legislation are discussed; 5) the theories of scholars who have dealt with the issue of stoning are addressed, followed by a general critique of the assumptions concerning origins and influences; 6) the ancient Arabian concept of *sunna* is illustrated as the means by which customary law may preserve an ancient heritage; 7) the ancient Near Eastern legal milieu is briefly described, followed by an illustration of the interaction of the Arabs with other groups within this milieu throughout history; 8) traditions which exemplify the continuity of ancient custom in the region are discussed, as are the methods by which this was achieved, both before and after Islam, and the issue of the ‘common source’ is touched upon; 9) the results of the survey of ancient Mesopotamian law, with all of its *zinā* and *sariqa*-related precedents, are presented; and the same is done for Judaic and pre-Islamic Arabian law; 10) some relevant notes concerning Roman Classical, Byzantine, Provincial, and Christian Canon law are presented with the same being done for aspects of Sāsānid law; 11) a summary of all precedents and parallels is provided; and 13) a few conjectural theories on the entry of stoning into Islamic law are suggested.

It is hoped that further research may be undertaken in the near future, standing on the basis of the premises established by this thesis; mainly that Islamic law is the culmination of a vast and ancient Near Eastern tradition, and many of its precepts and rulings – including those for the *ḥudūd* of *zinā*, *qadhf*, *sariqa*, and *ḥirāba* – are the natural outgrowth and continuation of this heritage.

I. Sexual Offense and Theft in Islamic Law

The ḥudūd

Before delving into the rulings of Muslim jurists (*fuqahā*), it is necessary to recognize that the greater part of Islamic penal law is subsumed beneath a scripturally sanctioned body of punishment and procedure known in works of jurisprudence (*fiqh*) as the *ḥudūd* (sing. *ḥadd*). Derived from the Classical Arabic root (*ḥ-d-d*) and its associated meaning of “the prevention and separation between two things,”⁷ the *fuqahā* note that “the *ḥadd* applies to the sin (*al-dhanb*) as in His speech, exalted be He ‘These are the *ḥudūd* of God so don’t approach them’ and it applies to the punishment which the *sharī’a* associates with the sin, such as they (the *fuqahā*) say: ‘I established the *ḥadd* upon him.’”⁸ More simply put, “the *ḥadd* is a punishment decreed in the *sharī’a* for (certain) fixed crimes,”⁹ and as such it is to be distinguished from “the so-called *jināyāt*, i.e. misdemeanors consisting of killing or wounding, which must be punished with retaliation (*qisās*) or with payment of the *diya* (‘price of blood’) or other damages... [and] all other kinds of transgressions which must be punished with *ta’zīr* (‘correction’).”¹⁰ The *fuqahā* are unanimous in that among the crimes which necessitate the infliction of *ḥadd* penalties are illicit sexual activity (grouped under the category of *zinā*), theft (*sariqa*), false accusation of illicit sexual activity (*qadhf*), and consumption of alcohol (*shurb al-khamr*).¹¹ In addition to these four crimes, certain schools include willing apostasy from Islam (*ridda*), brigandage (*qat’ al-tarīq* or *ḥirāba*), and/or what is usually translated as rebellion (*al-baghī*). It is with *zinā* and *sariqa* that this thesis is mainly concerned, although the related *ḥudūd* of *qadhf* and *ḥirāba* will also be investigated.

⁷ ‘Abd al-Rahmān al-Jazīrī, *Kitāb al-Fiqh ‘ala al-madhāhib al-arba’a*, (Beirut: Dār al-kutub al-‘ilmīya, 2001), v.47; this and subsequent translations are mine unless otherwise noted. Al-Jazīrī goes on to cite the *Miṣbah*, saying: “and among [the meanings of *ḥ-d-d*] are the predetermined *ḥudūd* in the *sharī’a*, because they prevent the initiative of the sin... and legally it is the predetermined punishment rightly belonging to God Most High just as is mentioned in the Noble Qur’ān...” (ibid.)

⁸ Ibid.

⁹ Muḥammad Rawwās Qal’ajī, *Mawsū‘at fiqh Abī Bakr al-Ṣiddīq* (Beirut: Dār al-nafā’is, 1994), 98.

¹⁰ Th. W. Juynboll, “Crimes and Punishments (Muhammadan),” *ERE*, iv.291. This latter category of punishment (*ta’zīr*) should be taken note of, in that it may figure into potential Caliphal and administrative contributions to the nascent *sharī’a*, and may be defined as “discretionary punishment, e.g. by the *kādī*, for the offences for which no *ḥadd* punishment is laid down” (M.Y. Izzi Dien, “Ta’zīr,” *El*², x.406); see also al-Jazīrī, *Kitāb al-Fiqh*, v.13.

¹¹ See al-Jazīrī, *Kitāb al-Fiqh*, v.12-13.

The definitions of zinā and sariqa

Ibn Rushd (d. 595/1198) in his *Bidāyat al-Mujtahid* explains: “*zinā* is (defined as) all sexual intercourse that occurs outside of a valid marriage, the semblance (*shubha*) of marriage, or lawful ownership (*milk yamīn*). This is agreed upon, as a whole, among the scholars of Islam, though they did differ about what constitutes doubt that is sufficient to waive the *ḥadd* penalty.”¹² Despite this general agreement, the Sunni *madhāhib* often word their technical definitions of *zinā* quite differently with an eye to what they consider included under the category.¹³ Nevertheless, for the purpose of tracing the evolution of jurists’ attitudes towards this crime in early Islam, it is sufficient to understand *zinā* as “any sexual intercourse between persons who are not in a state of legal matrimony or concubinage;”¹⁴ indeed we often see it simply translated as ‘fornication’ or ‘adultery’ although these terms can be misleading.¹⁵

Of further note, and closely related to the *ḥadd* of *zinā* is the *ḥadd* of *qadhf*, the technical definition of which, according to the Ḥanafīs and Ḥanbalīs, is simply “accusation of *zinā* (*al-ramy bi’l-zinā*),” to which the Shāfi‘īs add “in the manner of condemnation (*fi ma’riq al-ta’yīr*).”¹⁶ The Mālikīs define it as “a legally capable

¹² Abū al-Walīd Muḥammad b. Aḥmad ibn Rushd (*al-hafīd*), *The Distinguished Jurist’s Primer: A Translation of Bidāyat al-Mujtahid*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 1996) ii.521. Cf. R. Peters’ definition of *zinā* as “unlawful sexual intercourse, i.e. intercourse between a man and a woman who are not married to one another nor in a state of lawful concubinage based on ownership” (“Zinā,” *EI*², xi.509); and al-Jazīrī’s “*al-zinā* is a term for the sexual union of a legally capable (man) in the sexual organ (*farj*) of a compliant woman, devoid of lawful ownership or its semblance” (*Kitāb al-Fiqh*, v.48).

¹³ According to the *Jurisprudential Encyclopedia*: “The Ḥanafīs know it by two definitions: one more general and one more specialized. As for the more general: it includes that which necessitates the *ḥadd* and what does not necessitate it, being the sexual congress of the man with the woman in the front-side (*fi al-qubli*) without lawful ownership (*milk*) or its semblance (*shubhatihī*).... For indeed the *sharī‘a* did not specify the noun ‘*al-zinā*’ by what obliges the *ḥadd* for it, rather it is more general.... For if a man has sexual union with his son’s handmaid, the *ḥadd* for *zinā* is not imposed on him.... And the more specialized legal meaning of *zinā*: it is that which obliges the *ḥadd*, and it is ‘sexual union of a willing, legally competent (individual) with the object of lust, presently or in the past, in the front-side, devoid of lawful ownership or its semblance, in the *dār al-islām*.... And the Mālikīs define it [as] the sexual union of a legally competent Muslim with the human sexual organ (*farj ādamī*) (there being) to him no ownership of it, without a doubt, intentionally (*ta’ammudan*). And with the Shāfi‘īs, it is: insertion of the penis or a part thereof into a female sexual organ forbidden (to the *zānī*), due to his specifically desiring it, naturally and without reasonable doubt. And the Ḥanbalīs define it [as] the action of obscenity (*fāhisha*) in the front-side or in the rump (*dubr*)” (“Zinā,” *MF*, xxiv.18).

¹⁴ Joseph Schacht, “Zinā,” *EI*¹, viii.1227.

¹⁵ Particularly ‘adultery,’ in that the Sunni concept of *iḥṣān* refers not only to a legally married state, but also applies to widows / widowers and divorcees. Thus a divorcee, having previously enjoyed legal intercourse, might receive the stoning penalty although unmarried at the time of having committed *zinā*. Stoning a widow or divorcee for *adultery* hardly makes sense according to current English usage of the term (*infra*, p.17).

¹⁶ “Qadhf,” *MF*, xxxiii.5.

individual (*mukallaf*) accusing a free Muslim by denial of parentage of father or grandfather or by *zinā*.¹⁷ Most often, *qadhif* is simply translated as ‘slander,’ with the understanding that it consists of either a false accusation of *zinā* or a denial that one is descended from one’s father (tantamount to an accusation that one’s mother committed *zinā*).

Commonly translated as ‘theft,’ *sariqa* knows a somewhat more complex definition with the *fuqahā*, being “the sane adult’s removal (*akhdh al-‘āqil al-bāligh*) of [at least] a minimal amount (*niṣāb*) from a ‘safe place’ (*hirz*), or of what has value of *niṣāb*, belonging to another, there being no doubt (*shubha*) for him about it, in a clandestine manner.”¹⁸ All of these conditions must be met in order to justify implication of the *ḥadd* of amputation.

Related to *sariqa* is the *ḥadd* of *ḥirāba* or *qaṭ‘ al-ṭariq*, which is commonly translated as ‘brigandage,’ or ‘highway robbery;’ and though occupying a category of its own, may be seen as a kind of ‘theft with force.’ Brigandage often appears in relation to theft in ancient laws, demanding, as in Islam, a punishment even more severe.

The ahkām al-Qur’ān relating to the ḥadd of zinā

As a crime obliging implication of a *ḥadd* penalty, *zinā* owes its legal existence firstly to the Qur’ān, and besides several verses dealing with a general condemnation and prohibition of the evils of *zinā* and less specific ‘obscene behavior’ (*fāḥisha*), we find more than a few of direct legal impact.¹⁹ The first of such *ahkām* (‘rulings,’ sing. *ḥukm*) we shall consider is found in Q.4:15 and reads:

وَاللَّاتِي يَأْتِينَ الْفَاحِشَةَ مِنْ نُسَائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِّنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّىٰ يَتَوَقَّاهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا (15)

¹⁷ Ibid., cf. al-Jaziri, *Kitāb al-Fiqh*, v.189-91.

¹⁸ “Sariqa,” *MF*, xxiv.292.

¹⁹ As for the meaning of *fāḥisha*, Lane defines it as “[An excess; an enormity; anything exceeding the bounds of rectitude]... anything forbidden by God.... Also, particularly, adultery, or fornication” (as cited in Robert Roberts, *The Social Laws of the Qorān: Considered, and compared with those of the Hebrew and other ancient codes*, trans. of *Familienrecht im Qorān*, 1925 (London: Curzon Press, 1990), 34); and as for Qur’ānic warnings regarding it, see Q.17:32: “And don’t come near to *zinā*, for indeed it is *fāḥisha*. What an evil practice it is!”; and Q.25:68-9: “[Servants of the Most Merciful are those who] don’t commit *zinā*, and whosoever does so meets with a punishment...”; and Q.33:30: “Oh women of the Prophet, whosoever amongst you comes clearly to *fāḥisha*, the punishment will be doubled for her...”; all of which, for reasons unstated, Schacht concludes to be the result of Christian or Jewish influence (“Zinā,” 1227). Note also Q.6:151: “And don’t come near to *fāḥisha*, either what is external / open of it or what is internal / secretive of it...”; and Q.7:33: “Say: Verily that which my Lord has forbidden is *fāḥisha*, either what is external / open of it or what is internal / secretive of it....”

“15. And those from amongst your women who come to *fāḥisha*, establish over them four from among you as witnesses, and if they testify, then confine them in the houses until death completely overtakes them or God makes for them a way.”²⁰

Although “[t]he punishment mentioned in IV, 15... is commonly regarded as abrogated by XXIV, 2...,”²¹ Q.4:15 is of great procedural and hermeneutical import to the *fuqahā’*. First, for establishing the requirement of four male, Muslim witnesses;²² second, for the phrase “or God makes for them a way,” which, as we shall see, in conjunction with certain *aḥādīth* plays a crucial role in the juristic affirmation of the stoning penalty for *zinā* while in a state of *iḥṣān*.²³ It should be further noted that *fāḥisha* is here nearly universally equated to *zinā* by *mufasssīrūn* (Qur’ānic commentators) and *fuqahā’* alike. Finally, although abrogated, the punishment of confinement is of interest in that certain parallels existed in contemporaneous legal systems.²⁴

The subsequent verse, Q.4:16, “is sometimes with less probability referred to sodomy,”²⁵ and reads:

وَالَّذَانِ يَأْتِيَانِيهَا مِنْكُمْ فَأَدْوُهُمَا فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرَضُوا عَنْهُمَا إِنَّ اللَّهَ كَانَ
تَوَّابًا رَحِيمًا (16)

“16. And those two (meaning either two males or a male and a female) from among you who come to it, punish both of them. Then if they repent and make amends, let them be. Verily God is accepting of repentance, Most Merciful.”

That the *fuqahā’* seem to have paid little attention to this verse may be due to its apparent abrogation by Q.24:2, which Schacht considered “[a] new law... made as a result of ‘Ā’isha’s celebrated adventure in the year 6....”²⁶ Certainly very little – if any – legal material from Q.4:16 seems to have translated into the *sharī’a* in relation to *zinā*, the major Qur’ānic contribution originating in Q.24:2 which reads:

²⁰ For this and all other Qur’ānic verses I have favored my own, more literal translations, although relying at times on a comparison with the translations of Ahmed Ali, *Al-Qur’an: A Contemporary Translation* (Princeton: UP, 1984) and Abdullah Yusuf Ali, *The Meaning of the Glorious Qur’an* (Istanbul: Asir Media, 2002).

²¹ Peters, “Zinā,” 509.

²² The first condition being determined grammatically; the second from the phrase “from among you,” i.e. from among the Muslims.

²³ *Infra*, p.43.

²⁴ Specifically Eastern Canon law (*infra*, p.206).

²⁵ Schacht, “Zinā,” 1227.

²⁶ Schacht, loc. cit. Regarding ‘Ā’isha’s returning to Medina alone with Ṣafwān b. Mu‘aṭṭal al-Dhakwānī and the resultant scandal, see al-Wāqidi, *al-Maghāzī* (ii.166f.) [book online], accessed 6 August 2005, *Al-Waraq*, available from <http://www.alwaraq.com>; Internet.

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِئَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيَشْهَدَ عَذَابُهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ (2)
 “2. The *zānīya* and the *zānī*,²⁷ flog each one of them 100 stripes, and don’t allow yourselves to be taken by pity for them, in the *dīn* of God, if you are believers in God and the Last Day. And let witness their punishment a group from among the believers.”

As noted, the punishment of flogging here prescribed in Q.24:2 was universally regarded as an abrogation of the punishment(s) prescribed in Q.4:15-16.²⁸ Of particular legal import is the reference to *zinā* rather than *fāḥisha*, the corporal infliction of a hundred stripes, the admonition not to take pity upon the culprits, and the instruction that the application of punishment be witnessed by a group of believers. All of these prescriptions were translated by the *fuqahā*’ into the *sharī’a* in a more or less uniform manner across the Sunni schools. It should be noted, furthermore, that the same penalty is clearly to be applied to both the male and the female perpetrator.²⁹

The subsequent verse (Q.24:3) however “was regarded as problematical by later commentators [who] generally hold that the verse has been abrogated by later verses.”³⁰

الزَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ
 وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ (3)

“3. The *zānī* marries none but a *zānīya* or *mushrika*,³¹ and the *zānīya*, none marries her but a *zānī* or a *mushrik*, for God has forbidden that to the believers.”

The supposed abrogation of this verse is illustrated in the transmission of the *Muwaṭṭa*’ attributed to al-Shaybānī (d. 189/805), “who records that Sa’id ibn al-Musayyab said that... [Q 24: 3] had been abrogated (*nusikhat*) by verse 32 in the same *sūra* which says, ‘And help the unmarried among you to get married (*wa-ankihū*

²⁷ The masc. and fem. active participles of the verb *zanā*, i.e. the male and female perpetrators of *zinā*.

²⁸ In addition to the punishment of confinement in Q.4:15, one early *mufasssīr*, Muqātil b. Sulaymān (d.150/767), considered the punishment alluded to in Q.4:16 to consist of continuous and harsh verbal reprimand until the culprit repented (Muqātil b. Sulaymān, *Kitāb tafsīr al-khams mi’at āyah min al-Qur’ān*, ed. Isaiah Goldfeld, (Shafā ‘Amr: Al-Mashriq Press, 1980), 214).

²⁹ This fact alone makes this *ḥukm* regarding *zinā* almost unique in all extant Near-Eastern and Mediterranean legal systems from antiquity to well beyond the rise of Islam; most of which – if they regarded the infidelity of the husband or fornication of the unmarried male a punishable crime at all – penalized the male perpetrator less heavily than the female; unless, of course, the male perpetrator trespassed the rights of another male (i.e. by seducing or violating his wife / daughter), in which case he was often liable to be killed with impunity.

³⁰ Peters, “Zinā,” 509.

³¹ Often translated as ‘polytheist,’ literally ‘associator’ (here feminine).

l-ayāmā minkum), and the righteous (*ṣāliḥīn*) among your slaves and slave-girls', thus encouraging marriage between people in general, regardless of any considerations of earlier sexual impropriety."³²

The Qur'ānic *ḥukm* regarding the crime of false accusation is found in Q.24:4-5, and reads:

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ (4) إِلَّا الَّذِينَ تَابُوا مِنْ بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ (5)

"4. And those who accuse the *muḥṣanāt* (i.e. 'chaste ones') and then don't bring four witnesses, flog them with eighty stripes, and don't ever again accept testimony from them, for they are the *fāsiqūn*. 5. Except for those who repent afterwards and make amends, for indeed God is Most Forgiving, Most Merciful."

Key points which have been preserved in the *sharī'a* are that the accuser (*qādhif*), having failed to prove his charge by producing the requisite number of witnesses, is thus to be flogged with eighty lashes of the whip, and is to be considered a *fāsiq* ("a person not meeting the legal requirements of righteousness")³³ for the rest of his days unless sincere repentance and reparation is made.

The related Islamic institution of *li'ān* finds its textual origin in the Qur'ān as well, and appears to have survived in the *sharī'a* completely intact. The relevant verses follow immediately after those prescribing the *ḥudūd* for *zinā* and *qadhif* in *sūrat al-nūr* (Q.24:6-9), and read as follows:

وَالَّذِينَ يَرْمُونَ أَزْوَاجَهُمْ وَلَمْ يَكُنْ لَهُمْ شُهَدَاءُ إِلَّا أَنْفُسُهُمْ فَشَهَادَةُ أَحَدِهِمْ أَرْبَعُ شَهَادَاتٍ بِاللَّهِ إِنَّهُ لَمِنَ الصَّادِقِينَ (6) وَالْخَامِسَةَ أَنَّ لَعْنَتَ اللَّهِ عَلَيْهِ إِنْ كَانَ مِنَ الْكَاذِبِينَ وَيَدْرَأُ (7) عَنْهَا الْعَذَابَ أَنْ تَشْهَدَ أَرْبَعَ شَهَادَاتٍ بِاللَّهِ إِنَّهُ لَمِنَ الْكَاذِبِينَ (8) وَالْخَامِسَةَ أَنَّ غَضَبَ اللَّهِ عَلَيْهَا إِنْ كَانَ مِنَ الصَّادِقِينَ (9)

"6. And those who accuse their wives, and have not for themselves witnesses other than themselves, the testimony of one such is to be four statements in [the name of] God that he is indeed of the truth-speakers. 7. And the fifth that the curse of God be upon him if he was of the liars. 8. And that she (the wife) renders four statements in [the name of] God that he is in fact among the liars, averts the punishment from her. 9. And the fifth that the wrath of God be upon her if he was of the truth-speakers."

³² Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwaṭṭa' and Madinan 'Amal* (Surrey: Curzon, 1999), 124. He further notes "[t]his judgement was in fact shared by the majority of the 'ulamā', including Mālik, because of reports indicating that it was condoned by both the Prophet and various companions" (loc. cit.)

³³ *The Hans Wehr Dictionary of Modern Written Arabic*, 4th ed., 835.

This series of oaths not only clears the accusing husband of *qadhf*, thus averting liability of the *ḥadd* of eighty stripes, but, if unanswered by the accused wife is tantamount to a confession of guilt on her part. The only way which she might thus avert the *ḥadd* of *zinā* from herself is through her own series of oaths, the end result being equivalent in most schools to immediate and irrevocable divorce.

A *zinā* related *ḥukm* is also found in Q.4:25, prescribing the degree of punishment to be meted out to believing slave-girls for committing *fāḥisha* and is, according to Schacht, “later than the law in xxiv.2, of which it is a continuation.”³⁴ To better understand the context of the relevant lines, the verse is best considered in its entirety:

وَمَنْ لَّمْ يَسْتَطِعْ مِنْكُمْ طَوْلاً أَنْ يَنْكِحَ الْمُحْصَنَاتِ الْمُؤْمِنَاتِ فَمِنْ مَّا مَلَكَتْ
أَيْمَانُكُمْ مِنْ قَتَايَكُمُ الْمُؤْمِنَاتِ وَاللَّهُ أَعْلَمُ بِإِيمَانِكُمْ بَعْضُكُمْ مِنْ بَعْضٍ فَانكِحُوهُنَّ
بِأَذْنِ أَهْلِهِنَّ وَأَثْوَهُنَّ أَجُورَهُنَّ بِالْمَعْرُوفِ مُحْصَنَاتٍ غَيْرَ مُسَافِحَاتٍ وَلَا
مُتَّخِذَاتِ أَخْدَانٍ فَإِذَا أُحْصِيَ فَإِنَّ أَتَيْنَ بِفَاحِشَةٍ فَعَلَيْهِنَّ نِصْفُ مَا عَلَى
الْمُحْصَنَاتِ مِنَ الْعَذَابِ ذَلِكَ لِمَنْ خَشِيَ الْعَنَتَ مِنْكُمْ وَأَنْ تَصْبِرُوا خَيْرٌ لَكُمْ
وَاللَّهُ غَفُورٌ رَحِيمٌ (25)

“25. And those from among you who are unable (financially) to marry the believing *muḥṣanāt*, then (let them marry) from what your right hands possess: your believing young women. And God knows your faith, one for the other, so marry them with the permission of their families, and bring them their dowers in fairness. *Muḥṣanāt* are neither fornicators nor takers of companions. So if they attain *iḥṣān*, and if they (then) come to *fāḥisha*, then upon them is half of what is upon the *muḥṣanāt* of punishment. That is for those among you who fear adversity. That you be patient is better for you. And God is Most Forgiving, Most Merciful.”

The key element to bear in mind is that *muḥṣan* slave-girls are to receive half of the punishment meted out to *muḥṣanāt*; “*muḥṣanāt* being understood in this context, as at the beginning of the same verse... to mean ‘free women’....”³⁵

With the exception of a verse forbidding the compulsion of slave-girls to prostitution (Q.24:33), and another stipulating that a divorced woman is not to be banished from her former husband’s household during the period of her *‘idda* for anything less than *fāḥisha* (Q.65:1), the above represents the entire body of Qur’ānic legislation on illicit sexual activity. What the *fuqahā’* did with this revealed corpus

³⁴ Schacht, “Zinā,” 1227. Why he believes this is not explained in the short space of the article.

³⁵ Dutton, *Origins*, 92.

of rulings is the subject to which we shall turn next, staying for the time being within the parameters of the Sunni schools of law (*madhāhib*).

The opinions of the Sunni madhāhib on zinā

Ibn Rushd writes in his *Bidāya* that “[f]ornicators, for whom punishments vary according to their categories, are of four kinds: *muḥṣan* (married)³⁶ or *thuyyab* (non-virgins); *abkār* (virgins); free or slave; and male or female.” The *ḥadd* penalties related to *zinā*, he continues, “are of three kinds: *rajm* (stoning to death);³⁷ *jald* (whipping); and *taghrīb* (exile).”³⁸ The flogging punishment prescribed in Q.24:2 for “the *zānī* and the *zāniya*” has therefore obviously been greatly elaborated upon, both as to the qualities of the perpetrators and the types of punishments, and, as Ibn Rushd next explains, “[Sunni] Muslim jurists agreed about free *thayyib muḥṣans* that the *ḥadd* for them is *rajm*...”³⁹ So how did this come to pass? What are the origins of these classifications of fornicator and these non-Qur’ānic punishments? Before approaching the arguments and explanations of the *fuqahā’*, it may be instructive to further explore the extent to which these rulings regarding *zinā* have been elaborated.

Central to any discussion of *zinā* is the concept of *iḥṣān*, the definition of which became very precise quite early on according to our earliest works of *fiqh*. The *muḥṣan* is thus understood as “each legally responsible individual who is free, free-choosing, beholden to the rules of the *sharī’a*; who has had sexual intercourse to the fullest extent of the condition in a legal marriage, even if he/she is a *dhimmī* – with the majority (*‘inda al-jumhūr*) in contradiction to the Shāfi’īs – or an apostate; incumbent upon them are the rulings of the *sharī’a*.”⁴⁰ Even more specific is al-Jazirī in his *Kitāb al-Fiqh ‘alā al-Madhāhib al-Arba’a*:

“The Imāms agreed (that) amongst the conditions of *iḥṣān* were: 1) freedom, 2) puberty (i.e. full sexual capacity), 3) sanity, 4) that he (the accused) is married to a *muḥṣana* woman of like status / condition by a valid contract, 5) and that he has penetrated her and had sexual intercourse with her in a permissible condition of sexual intercourse, while they are both in the capacity of *iḥṣān*. Furthermore the *ḥadd* is

³⁶ It is tempting to translate *muḥṣan*, as Nyazee has here for the sake of convenience, as ‘married.’ Indeed, as Juynboll points out, “the original signification of this word is ‘well-guarded,’ but in Arabic it came to be employed metaphorically to signify a married woman, and later a married person in general” (Th. W. Juynboll, “Adultery (Muslim),” *ERE*, i.131). The technical legal definition, as we shall see however, became far more complex.

³⁷ As for the technical definition of *rajm*, “it is the stoning of the *muḥṣan zānī* by means of stones until death (*huwa rajm al-zānī al-muḥṣan bi’l-hijāra ḥatā al-mawt*);” (“*Rajm*” *MF*, xxii.124).

³⁸ Ibn Rushd, *Bidāya*, 523.

³⁹ *Ibid.*

⁴⁰ “*Rajm*” *MF*, xxii.125.

not imposed on the slave, nor the youth, nor the insane, nor the one married to a spouse properly as we have described (but), having had intercourse with his wife in the backside wasn't *muḥṣan*, or having had intercourse with his slave-girl in the front wasn't *muḥṣan*, or having had intercourse in a void marriage – having married her without a *wālī* or without witnesses – wasn't *muḥṣan*, or having had intercourse with his wife while he was a slave then was emancipated, or was a youth then reached the age of majority, or was insane then recovered.”⁴¹

Vital to this understanding of *iḥṣān* is the notion that “a person remains *muḥṣan*, even though his marriage may have been dissolved at a later period.”⁴² The implications of this for the widower or the divorcee are therefore much more grave in that “if he thereafter renders himself guilty of *zinā*, he must be stoned. In Islām, stoning is thus not a punishment exclusively of adultery, as was often incorrectly supposed.”⁴³ It should be noted at this point that the Sunni concept of *iḥṣān* differs from that of the Shī‘ī’s on this issue, and that the Shī‘ī conception mirrors much more closely that which might be interpolated from the ancient Semitic law codes, as we shall see.⁴⁴ At present, Schacht’s summary definition of (Sunni) *iḥṣān* should suffice: “By *muḥṣan* the law means... every individual who has reached years of discretion, is in possession of his faculties, is free and has had sexual intercourse in a legal marriage;” while keeping in mind that “they however always remain *muḥṣan* even after their marriage is dissolved...”⁴⁵

Whatever their exact definition of *iḥṣān*, the Sunni schools are in complete agreement that if an individual satisfies the conditions and is convicted of *zinā* via the proper legal proceedings, that individual is to be stoned. Moreover, as Ibn Qudāma (d. 620/1223) said: “There is no disagreement between the *fuqahā*’ as to the obligation (*wujūb*) of stoning on the *muḥṣan zānī*, whether a man or a woman.”⁴⁶ It was only if the convicted individual did not meet this condition of *iḥṣān*, i.e. by being

⁴¹ al-Jazīrī, *Kitāb al-Fiqh*, v.55.

⁴² Juynboll, “Adultery (Muslim),” 131.

⁴³ Ibid.

⁴⁴ *Infra*, pp.110 and 126.

⁴⁵ Schacht, “Zinā,” 1227. This is not to say that there was unanimous definition of *iḥṣān* even among the Sunni schools for, as Ibn Rushd points out, “[t]hey agreed about *iḥṣān* that it is one of the conditions of *rajm*, but differed about the conditions of *iḥṣān* itself.” The main differences he proceeds to delineate are, with Abū Ḥanīfa: that the condition of temporarily prohibited intercourse (i.e. during menstruation or while fasting) doesn’t waive the *ḥadd*, and that both the *zānī* and *zāniya* must be free; while “[a]l-Shāfi‘ī did not stipulate Islam as one of the conditions” (Ibn Rushd, *Bidāya*, 524-5).

⁴⁶ As quoted in “Rajm” *MF*, xxii.124.

either a *bikr* (virgin) or a slave, that the Qur'ānic punishments of flogging were to be imposed.⁴⁷

It should be further noted here that the stipulated condition of free-will in the definition of *iḥṣān* is one of great import in that it demarcates the various types of *zinā* from what the *fuqahā'* considered to be the related crime of rape (*ighṭisāb* or *istikrāh*). Indeed, Ibn Rushd tells us "[t]here is no disagreement among the Muslim jurists that there is no *ḥadd* for a woman coerced,"⁴⁸ nor does there appear to be disagreement that the punishment for a man who compelled a woman to *zinā* is the full application of the *ḥadd* of *rajm*.⁴⁹ What did constitute grounds for disagreement among the schools was whether or not the convicted rapist was also obliged to pay his victim her dower (*ṣaḍāq*); those saying 'yes' understood the rationale behind *ṣaḍāq* to be "compensation for utilization," in which case it would apply to both lawful and unlawful cases, while those saying 'no' understood its *raison d'être* to be a "gift," and thus applicable only to lawful marriages.⁵⁰ Another point of disagreement pertinent to this study is the case of a woman who, upon showing signs of pregnancy, has claimed rape as the cause. Mālik was of the opinion that, "unless she could provide evidence of coercion, as in case she was a virgin and complained while she was bleeding, or show[ed] on her body the signs of coercion," she was to

⁴⁷ Another cause for disagreement among the Sunni *madhāhib* involved the question of whether or not the convicted *zānī* should be first flogged, then afterwards stoned, with "the majority of the *fuqahā'* hold[ing] the view that stoning and flogging are not combined for the *muḥṣan zānī*, but Aḥmad b. Ḥanbal [saying] in one of the two reports attributed to him: 'Verily, he (i.e. the Prophet) flogged, then he stoned,' ("Rajm," *MF*, xxii.125). A similar view is attributed to "al-Ḥasan al-Baṣrī, Ishāq... and Dāwūd," who relied upon "the general meaning of the words of the exalted (Q.24:2)... which did not distinguish between the *muḥṣan* and the non-*muḥṣan*," as well as a tradition "that 'Alī (God be pleased with him) subjected Shurāḥah al-Hamdāniyya to stripes on Thursday and to *rajm* on Friday, saying, 'I awarded her stripes by the Book of Allāh and subjected her to *rajm* by the *sunna* of His Messenger'" (Ibn Rushd, *Bidāya*, 524). Additionally, combination-*ḥadd* supporters are said to have relied on one of several versions of the tradition relating that "the Prophet (God's peace and blessings be upon him) said, 'Take from me, take from me, verily, Allāh has ordained for them a way: the virgin with the virgin, a hundred stripes and exile for a year; the *thayyib* (non-virgin) with the *thayyib*, a hundred stripes and pelting with stones'" (ibid.) This last tradition purportedly being a continuation of Q.4:15, which concludes with 'or God makes for them a way' (supra, p.12). The majority opposed this combination of *ḥadd* punishments, arguing that the Prophet was never related to have done so, and moreover that, "[a]s a rational argument, the minor *ḥadd* is included in the major *ḥadd*, for *ḥadd* has been laid down as a deterrent and stripes are not effective as a deterrent along with stoning" (Ibn Rushd, loc. cit.)

⁴⁸ Ibn Rushd, *Bidāya*, 530.

⁴⁹ al-Jazīrī, *Kitāb al-Fiqh*, v.87: "If a *muḥṣan* man commits *zinā*, freely, with a virgin (*bikr*), or a slave-girl (*ama*), or a coerced woman (*mustakraha*), the community of 'Ulamā' have said: '[Inflicted] upon the *muḥṣan* for all of this is stoning, in an absence of the presence of doubt averting the *ḥadd*, and [inflicted] upon the virgin woman is flogging, and upon the slave-girl, fifty stripes. And there is nothing imposed upon the coerced one.'

⁵⁰ Ibn Rushd, loc. cit. Cf. al-Jazīrī, *Kitāb al-Fiqh*, v.87.

receive the *ḥadd*.⁵¹ The same was held to a claim of marriage: proof or *ḥadd*. In this regard Abū Ḥanīfa and al-Shāfiʿī disagreed, saying that her claim of coercion or marriage is akin to one who confesses, then claims coercion (and so introducing enough of a degree of doubt (*shubha*) to waive the *ḥadd*).⁵²

The original Qurʾānic punishment, as we have seen, has now been relegated to free, non-*muḥṣans* (one hundred stripes) with, as per Q.4:25, half that amount being dealt to slaves; and, furthermore, “followed, according to all schools except the Ḥanafis, with banishment for one year (six months for slaves).”⁵³ The opposition of the Ḥanafis to this latter addition of limited exile (*taghrīb*) is based not only on their perception of the apparent meaning of Q.24:2, but that “an addition to (the *ḥukm*) of the explicit text amounts to *naskh* (abrogation) of the text and the Book of Allāh cannot be abrogated through individual narrations.”⁵⁴ The majority, however, imposed it; al-Shāfiʿī absolutely, regardless of whether male or female, free or slave; Mālik only on free men; and the famed Syrian jurist al-Awzāʿī (d. 157/774) imposed a year’s banishment on non-*muḥṣan* men, but not women.⁵⁵ Lastly, it should be noted that opposing groups often relied on opposing traditions, some relating that ‘Umar did not impose banishment in addition to flogging, others that he and Abū Bakr both did.⁵⁶

The Qurʾānic *ḥukm* of Q.4:25 was to have far-reaching effect in Islamic penal law as far as its application to slaves was concerned. Indeed, as Juynboll summarizes, “[s]laves are not stoned for *zinā*, but only punished with fifty stripes.”⁵⁷ Al-Shāfiʿī even went so far as to apply the concept of ‘half for slaves’ to the additional punishment of *taghrīb*, resulting in a six-month sentence of banishment.⁵⁸ Ibn Rushd reports the matter succinctly in his *Bidāya*, observing that the Sunni jurists agree concerning the case of a married, female slave (and by analogy male slaves) that she

⁵¹ Ibid. The basis for his decision is found in the *Muwattaʿa*, and relates the practice of certain jurists in the tradition of ‘Umar b. al-Khaṭṭāb.

⁵² Ibid.

⁵³ Peters, “Zinā,” 509.

⁵⁴ Ibn Rushd, *Bidāya*, 526. Cf. N. J. Coulson, *A History of Islamic Law* (Edinburgh: UP, 1964), 90-1. Schacht claims that the Ḥanafis left the issue “to the discretion of the Imām” (“Zinā,” 1227); while Burton attributes the penalty itself to a derivation from Q.5:33, dealing with what the *mufasssīrūn* and *fuqahā* determined to be the *ḥadd* punishments for *ḥirāba* (John Burton, “The Origin of the Islamic Penalty for Adultery” *Transactions – Glasgow University Oriental Society* 26 (1979): 20).

⁵⁵ Ibn Rushd, *Bidāya*, 525.

⁵⁶ Ibid. 526.

⁵⁷ Juynboll, “Adultery (Muslim),” 131.

⁵⁸ Schacht, “Zinā,” 1227.

is to be awarded fifty lashes, but disagreed whether the unmarried female slave was to receive the same, or whether her punishment was to be *ta'zīr* rather than *ḥadd*.⁵⁹

A more complicated issue, and one with seeming universal presence in legal practices worldwide whether more traditional or more institutionalized, ancient or modern, is that of the husband who discovers his wife and her paramour *in flagrante delicto*.⁶⁰ Here, as elsewhere in the world, “the ‘Ulamā’ varied in ruling upon he who found a man with his wife and confirmed the presence of *fāḥisha* between them, and so killed him. Is he to be killed (i.e. in retaliation) or not?”⁶¹ Despite the conclusions of certain Western scholars that in Islam the husband with impunity may kill both wife and paramour,⁶² the issue is far more complicated. In fact, “the community (of *fuqahā*) have said: ‘It is not right that the man have the audacity to kill a man whom he found with his wife... due to what al-Bukhārī has transmitted on the authority of Abī Hurayra....’”⁶³ The *ḥadīth* in question recounts Sa’d b. ‘Ubāda’s sounding out of the Prophet’s opinion on the matter, and the Prophet’s rather involved answer confirming that he should let the wife and paramour be until he returns with the appropriate number of witnesses. Furthermore:

“If he (the husband) kills him (the paramour) he is to be retaliated upon (*yuqtaṣṣu minhu*), unless he furnishes proof of [the paramour’s] perpetration of the crime of *zinā*, and that he was a *muḥṣan*, or the slain [paramour] confesses to it. And as for his killing both of them, or one of them, being unable to furnish proof, or to bring witnesses of the *zinā*, or of the confession; then he requires retaliation (*al-qawad wa’l-qīṣās*), or blood-money (*diya*). For it is conceivable that a man invite another man to enter his house in order to do something, then kill him due to some ill will in his heart, and say, lying, ‘I found him with my wife.’ So is it conceivable that a man kill his wife in order to be free of her, due to something [he holds against her] in his heart, therefore inviting a visitor for her, that he might find with her a man perpetrating *zinā* with her. Therefore the Lawgiver (God) has been very cautious in this matter, safeguarding the souls, in that it is mandatory for the killer to establish

⁵⁹ Ibn Rushd, *Bidāya*, 526. Note that “another group said that there is essentially no *ḥadd* for a slave woman.” He also records the views of the Zahirites, who, true to their name, rely on the *ẓāhir* and general sense of Q.4:25, “which do[es] not distinguish a slave from a free man” (ibid.)

⁶⁰ See the article “Adultery” (*Encyclopedia of Religion and Ethics*, ed. James Hastings, i.122-37) which, albeit in antiquated language, provides at least an adequate summary of attitudes towards discovery *in flagrante delicto* in traditional and ancient societies across the globe.

⁶¹ al-Jazīrī, *Kitāb al-Fiqh*, v.61.

⁶² E.g. Schacht: “If the husband kills the guilty couple *in flagrante delicto* he is not liable to punishment” (“Zinā,” 1227); and Juynboll: “When a man takes his wife in the act of adultery, he may put her to death at once, along with her paramour” (“Adultery (Muslim),” 131).

⁶³ al-Jazīrī, *Kitāb al-Fiqh*, v.62.

proof of his allegation, and if he is able to establish such proof, there is nothing [imposed] upon him.”⁶⁴

This more or less summarizes the various views of the *madhāhib*, with differences occurring only as regards number of witnesses.

It should further be noted that the *fuqahā'*, as suits the gravity of the infliction of *ḥadd* punishments, were very precise as to the matter of evidence and establishment of proof. They were unanimous in that the textually derived methods of confession and testimony furnished evidence in a case of *zinā*, but they differed as to the conditions of such confession or testimony and as to the admissibility of circumstantial evidence, mainly the appearance of pregnancy in an unmarried woman.⁶⁵ As for what is unanimously agreed upon, Schacht summarizes it thus: “*Zinā*’ can only be proved by the evidence of four male, competent witnesses; as they must report all the details of the incident and, if their evidence is not sufficient, are liable to the *ḥadd* for *ḵadhf*...”⁶⁶ Regarding confession, he notes that “[a]ccording to the Ḥanafis and Ḥanbalis, this confession must also be made four times, and according to the general teaching can be withdrawn.”⁶⁷ Related to testimony and confession is the concept of *shubha* (uncertainty, doubt), the presence of which may negate liability for the *ḥadd*, “viz. uncertainty about the unlawfulness of the proven act, due to circumstances that confer to it a semblance of legality, such as intercourse between two parties to a marriage that is null and void, between the master and a female slave of whom he is co-owner or whom he has acquired on the strength of an

⁶⁴ Ibid.

⁶⁵ Ibn Rushd, *Bidāya*, 528. Under Mālikī law alone is “pregnancy of an unmarried woman... regarded as evidence of fornication (Peters, “Zinā,” 510).

⁶⁶ Schacht, “Zinā’,” 1227. The four male, Muslim witness are derived, as we have seen, from Q.4:15, with the further condition that they should be ‘*adl*’ (just). As for the character of the testimony, “it should describe the contact of the sex organs and... it should be rendered in explicit, not figurative (insinuating), language” (Ibn Rushd, *Bidāya*, 529). Nor, we are told, should it contain contradictions in respect to the time or place in which the act took place.”

⁶⁷ Schacht, loc. cit. As for the number of confessions necessary, Mālik and al-Shāfi‘ī found one to be sufficient, basing their decision on a different report than that favored by Abū Ḥanīfa, Ibn Ḥanbal and others. As for the reliance of the latter group, it involved the famous account of how the Prophet turned Mā‘iz away until he had confessed four times, then ordered that he be stoned (Ibn Rushd, *Bidāya*, 529). As for the retraction of confession (and thus the waiving of the *ḥadd*), the majority found such to be admissible; Mālik having added an additional stipulation that retraction should be accompanied with supporting *shubha*. The opinion of the majority is derived from the same *ḥadīth* concerning Mā‘iz, in that having confessed to the Prophet four times and submitted to the *ḥadd*, he cried out during its application that he wished to be taken back to the Prophet but was killed regardless. When the executioners related this to the Prophet, they were reprimanded for not letting Mā‘iz go in the hope he would repent and be forgiven by God (Ibn Rushd, loc. cit.)

invalid purchase, or between a blind man and a woman whom he takes for his wife or female slave.”⁶⁸

Assuming, however, that the convicted *zānī* or *zānīya* fulfills the conditions of *iḥṣān*, and that there is no *shubha* with the potential to waive the imposition of the *ḥadd*, the stoning is carried out according to precise instructions – guidelines determined by the *fuqahā*’ via exegetical and rational method. Of import to our study are the following conditions: 1) that “the witnesses begin the stoning if [the perpetrator’s] *zinā* was proven by means of testimony,”⁶⁹ 2) that “the *imām* attends the stoning, just as a group of Muslim men attends,”⁷⁰ 3) that “they stone with moderately-sized stones,”⁷¹ and 4) that “the *ḥadd* of stoning is not imposed on a pregnant woman until she gives birth and her child has been weaned from her, regardless of whether the pregnancy is a result of *zinā* or otherwise.”⁷² Disagreement among the *fuqahā*’ arises, however, over the issue of whether a pit should be dug in which to place the convicted *zānī* or *zānīya* during execution of the *ḥadd*; Abū Ḥanīfa and Mālik saying ‘No,’ while al-Shāfi‘ī contends that one should be dug for the *zānīya* but not the *zānī*. The pit, which is to be dug to the height of the *zānīya*’s chest, is presumably to prevent her from attempting to flee the punishment, or to keep her upright “lest her private parts (*‘awrātahā*) be exposed.”⁷³ There is also some discussion whether the *ḥadd* of *rajm* is to be applied to a sick person, or in climatic conditions of extreme heat or cold, with the majority maintaining that the *ḥadd* is not to be applied until the sick party recovers or the weather normalizes. Finally, “there is no disagreement amongst the *fuqahā*’ in that one stoned to death is wrapped (in a funeral shroud), and prayed over, due to his (the Prophet’s) speech (pbuh) regarding Mā‘iz: ‘Do to him that which you do for your own dead,’ and that he (pbuh) prayed over the Ghāmidīya.”⁷⁴

⁶⁸ Peters, “Zinā,” 510.

⁶⁹ “Rajm” *MF*, xxii.125. They are followed by the *imām*, then the attendant crowd, “while in the one proved by confession, the first person to commence stoning is the *imām* followed by the public” (Ibn Rushd, *Bidāya*, 527).

⁷⁰ “Rajm” *MF*, xxii.125. Cf. Q.24:2. Disagreement arose regarding the exact meaning of the Qur’ānic term *tā’ifa* (group, party), Mālik saying it incorporates four or more, while others holding that it might consist of two persons, three, seven, or more (Ibn Rushd, *Bidāya*, 527-8).

⁷¹ “Rajm” *MF*, xxii.125.

⁷² Ibid. This condition enjoys a measure of scholarly consensus due to the well known ‘pregnant woman of Ghāmid’ report.

⁷³ Ibid. 126.

⁷⁴ Ibid. 125.

For the *bikr* or slave convicted of *zinā*, a similar set of regulations was established to govern the application of the flogging *ḥadd*. Concerns include the areas of the body to which the whip is to be applied, the force of the blows, the condition of the whip, whether or not the convicted *zānī* is to be stripped, and whether or not he is to receive the blows in a seated posture.⁷⁵

The consequence for one who accuses another of *zinā* and then fails to bring forth the necessary evidence in the form of eye-witness testimony is, as we have seen in Q.24:4, to suffer the *ḥadd* of *qadhif*. This *ḥadd* has been elaborated upon by the *fuqahā* insofar that conditions governing the accuser, the accusation, and the accused have been more fully defined, and that a distinction has been drawn between explicit *qadhif*, and *qadhif* by insinuation. Liability for the *ḥadd* of eighty stripes is incurred only by the sane individual who has obtained legal majority, “irrespective of whether the accuser is a male or a female, free or slave, Muslim or non-Muslim.”⁷⁶ As for the false accusation, it must be either an allegation of *zinā* or a denial of the accused individual’s descent from his father “when his (the accused one’s) mother is a Muslim free woman.”⁷⁷ The accused must meet the conditions of “puberty, freedom, chastity, Islam, and a sound sex organ.”⁷⁸ Should any one of the above attributes be lacking, liability for the *ḥadd* is annulled. As for *qadhif* by insinuation, certain groups said there is to be no *ḥadd*,⁷⁹ others *ta‘zīr*,⁸⁰ while Mālik maintains the application of the *ḥadd* based on the reported practice of ‘Umar b. al-Khaṭṭāb.⁸¹ All the conditions being met, the *fuqahā* agree that the *qādhif* is to receive eighty stripes as per the Qur’ānic dictum, with disagreement surfacing over the case of a slave accusing a free man. Remarkably, the far-reaching implications of Q.4:25 are here apparent as the majority maintain the *ḥadd* for a slave to be half that of a free man’s, i.e. forty stripes.⁸² There seems to have been consensus in that such stripes were to be administered by the *imām*. The additional *ḥukm* of the Qur’ān that the *qādhif*’s

⁷⁵ See al-Jazīrī, *Kitāb al-Fiqh*, v.58-9, for a complete discussion of the details.

⁷⁶ Ibn Rushd, *Bidāya*, 531.

⁷⁷ Ibid. We are further informed that there is some disagreement about the mother’s status as a slave or non-Muslim; Mālik being of the opinion that the *ḥadd* is obligatory regardless, while Abū Ḥanīfa and al-Shāfi‘ī argue that it is thus annulled.

⁷⁸ Ibid. Ibn Rushd notes also that the majority stipulate freedom as a condition, and that Mālik added that if the accused be female, she must be of an age to be capable of intercourse.

⁷⁹ Sufyān Al-Thawrī (d.161/778) and Ibn Abi Layla (d.148/765).

⁸⁰ Abū Ḥanīfa and al-Shāfi‘ī.

⁸¹ Ibid.

⁸² Ibid., 534. The opposition (Abū Thawr and al-Awzā‘ī) apparently found justification in the reported practices of Ibn Mas‘ūd (d. 32/652), and ‘Umar b. ‘Abd al-‘Azīz (d. 101/720).

testimony never again be admitted unless he repented was cause for further disagreement, however. The determining factor resulted from the application of the exegetical understanding of *istithnā* ('exception') in Q.24:5 "Except for those who repent afterwards." Does this exception apply only to the *fāsiqūn* of the preceding verse, or to the inadmissibility of the *qādhif*'s testimony?⁸³ This should be noted as an outstanding example of the interrelatedness of *tafsīr* and *fiqh*. Other issues considered by the *fuqahā*' included what constituted proof that the false accusation was made, whether the falsely accused's forgiveness of the accuser was sufficient to waive the *ḥadd*, and how to adjudicate cases of multiple accusations or accusations against a party of individuals.⁸⁴

The husband who could not provide proof of his wife's guilt was provided by the Qur'ān with, as we have seen, recourse to another procedure: *li'ān*. This "gives a husband the possibility of accusing his wife of adultery without legal proof and without his becoming liable to the punishment prescribed for this, and the possibility also of denying the paternity of a child borne by the wife."⁸⁵ In his article in the *Encyclopedia of Islam*, Schacht also points out several issues resulting from the early scholarly discourse of the *fuqahā*', including: 1) whether or not *li'ān* required immediate divorce ('yes' eventually becoming the predominant view), 2) how this divorce was to be effected (i.e. "whether by a triple *ṭalāq*, which the husband has to pronounce against his wife, or by the decision of the judge before whom the *li'ān* is taken, or by the *li'ān* itself"), and 3) whether the husband and wife could ever remarry. Of further note were the implications if the wife refused "to pronounce the corresponding formulae," most saying that she thus became liable to the *ḥadd* for *zinā*, but Abū Ḥanīfa and Ibn Ḥanbal maintaining that she was to be imprisoned until either she pronounced the formulae, or confessed and thus incurred the *ḥadd*.⁸⁶

Now if one were to review the conditions expressed in the various definitions of *iḥṣān* previously discussed, it should be obvious that all of the above applies specifically to illicit sexual intercourse of the 'conventional' variety.⁸⁷ The *fuqahā*'

⁸³ Ibid., 533-4.

⁸⁴ Ibid., 532-4.

⁸⁵ Schacht, "Li'ān," *EI*², v.730. Cf. Coulson, *History*, 176-7; and Matthew Lippman, Sean McConville, and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (New York: Praeger, 1988), 71.

⁸⁶ Schacht, "Li'ān," 730-1.

⁸⁷ Note the *Jurisprudential Encyclopedia*'s differentiation between "in the front" and "in the backside" (supra, n.13).

however, by no means overlooked less conventional forms of illicit congress, usually treating them as a subgroup of *zinā*, under the headings of *liwāt*,⁸⁸ *siḥāq*,⁸⁹ and *bahīmīya* (*waṭ' al-bahīma*).⁹⁰ As for *liwāt*, we have already seen that Q.4:16 “is sometimes with less probability referred to sodomy,”⁹¹ and the fact that this seemed of little consideration to the *fuqahā'* is reflected in the diversity of their opinions regarding this particular type of illicit sexual behavior, none of which echo the punitive prescription expressed in the alleged Qur'ānic reference. The relatively varied Sunni responses to *liwāt* are summarized by Peters:

“The Shāfi'īs and Ḥanbalīs regard it as *zinā*. If the act has been testified to by four male eyewitnesses, the active partner, if he is *muḥṣan*, is to be punished with stoning, the passive partner with flogging and banishment. The Mālikīs do not require *iḥṣān* for the imposition of stoning. According to the Ḥanafīs, homosexual intercourse can only be punished on the strength of *ta'zīr*.”⁹²

Deliberations pertaining to *siḥāq* have also given rise to a diversity of opinion. As we shall see in our investigation of the early formulations of law, discourses on *liwāt* and *siḥāq* both were being transmitted and recorded, and were far from conclusive. Over time, however, “[t]he punishment for *liwāt* being the same for *zinā* appeared eventually not to be a suitable one, for Abū Ḥanīfa, Ṣufyān al-Thawrī, Mālik b. Anas and Ibn Ḥanbal... rejected this punishment in favour of judicial discretion (*ta'zīr*);”

⁸⁸ “Technically: the entering of the penis (*al-ḥashafa*) into the backside (*dubr*) of a male,” (“Zinā,” MF, xxiv.19). The etymology of the word is said to relate to the Biblical prophet Lot (Ar. Lūṭ), although “[t]here does exist in Arabic a verb *laṭa* meaning ‘to attach oneself, to join oneself to’” (Ed., “Liwāt,” *EI*², v.776). It is of interest to note that “[i]n a number of verses of the Qur'ān relating to Lot and his people, the word *fāḥisha*, which may be rendered as ‘depravity’, is clearly an allusion to the vice in question...” (ibid.)

⁸⁹ “In the vernacular and technically: the action of women with each other, and likewise the action of a eunuch with a woman is called *siḥāq*. The difference between *zinā* and *siḥāq* is that there is no penetration in *siḥāq*,” (“Zinā,” MF, xxiv.19). Once again there may be a connection to *fāḥisha*, in that there is at least one *mufassir* who connects the occurrence of *fāḥisha* in Q.4:15 with *siḥāq* and not *zinā* (G. H. A. Juynboll, “Siḥāk,” *EI*², ix.566-7). Furthermore, *siḥāq* is sometimes equated with masturbation (ibid., 566).

⁹⁰ Bestiality, connection with beasts. In addition to these three topics, the subjects of *ityān al-mayta* (necrophilia) and *istimnā'* (masturbation) are sometimes treated as well.

⁹¹ Supra, p.12. Cf. Roberts, *Social Laws*, 37, where he argues in favor of this interpretation, saying: “Zamaḥshari and Baidawi maintain that the reference is to two persons of different sex, while Galalain is of the opinion [sic] that sodomy is meant. The following points appear to me to favour Galalain's [sic] contention. a) That the masculine gender is used in both words. b) That it is this only that accounts for the smallness of the penalty. c) That the punishment of women according to the immediately preceding verse is different and much more severe.” Note that Roberts appears to have mistaken ‘the two Jalāls’ to be a single author.

⁹² Peters, “Zinā,” 509. Cf. Ed., “Liwāt,” *EI*², v.777: “These variations correspond to the uncertainties surrounding the definition of the penalty to be imposed for fornication....” See also al-Jazīrī, *Kitāb al-Fiqh*, v.125-34 for a more detailed discussion of *liwāt* in general.

the punishment for *siḥāq* followed suit.⁹³ For *bahīmīya*, as with *liwāt* and *siḥāq*, a lack of textual material resulted in a variety of legal view points, sometimes, as is the case with the Shāfi'īs, within the same school: “they have three opinions: the clearest of them (being that) the *ḥadd* is just as the Mālikīs said, so they judge it like *zinā*. The second saying: That he (the perpetrator) be killed, whether a *bikr*, or a *thayyib*.... The third saying: That he receive discretionary punishment, and there be no *ḥadd* [imposed] upon him, according to what the *imām* opines, in agreement with the *madhhab* of the Ḥanafīs.”⁹⁴

The aḥkām al-Qur'ān relating to the ḥadd of sariqa

The Qur'ān provides but one sparsely-worded *ḥukm* addressing the crime of theft, found in *sūrat al-mā'idā* (Q.5:38-9). This not only formed the basis for a major category of *ḥudūd*, but sparked the subsequent juridical discourse which eventually produced a more elaborate and workable set of rulings.

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِّنَ اللَّهِ وَاللَّهُ عَزِيزٌ
حَكِيمٌ (38) فَمَن تَابَ مِن بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ
رَّحِيمٌ (39)

“38. And the *sāriq* (m. ‘thief’) and the *sāriqa* (f. ‘thief’), cut (off) their hands, a recompense of what they have earned, as an exemplary punishment from God, and God is Most Mighty, Most Wise. 39. And whoever repents after his injustice and makes amends, then verily God will forgive him. Indeed God is Most Forgiving, Most Merciful.”

Of note once again is the explicit reference to both male and female perpetrators (cf. “The *zānīya* and the *zānī*...”), the famed *ḥukm* of amputation, and the reference to repentance.

Only five verses earlier in the same *sūra* there occurs another *ḥukm* generating the *ḥadd* penalty of *ḥirāba* or *qat' al-ṭariq*, found in Q.5:33-4. This too gave rise to copious discourse, and not a little disagreement among the *fuqahā'* over the particulars of its implementation. Although not within the scope of this thesis to explore fully, *ḥirāba* will be referred to in its capacity as a *ḥadd* punishment in relation to *sariqa*. The verses from which it is derived read:

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا
أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِّنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ

⁹³ Juynboll, “Siḥāk,” 566.

⁹⁴ al-Jaziri, *Kitāb al-Fiqh*, v.134-5.

خَزِيٍّ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ (33) إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ
تَقْدُرُوا عَلَيْهِمْ فَاعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَحِيمٌ (34)

“33. The punishment of those who wage war against God and His messenger and endeavor to spread corruption in the land, is that they be killed, or crucified, or that their hands and their feet be cut from opposite sides or that they be banished from the land. That is for them a disgrace in this world, and for them in the Afterlife is an awful punishment. 34. Except for those who repent before you overtake them, and so know that God is Most Forgiving, Most Merciful.”

Note that the *hukm* engendered in these lines closes once again with an article of *istithnā'* (exception), by which the repentant brigand might surrender before being captured (and thus meet, presumably, with a mitigated sentence). The various punishments of death, crucifixion, alternate side of the body hand and foot amputations, and banishment were linked by the jurists to various aspects of the act of brigandage and their combinations, though not without disagreement.

The opinions of the Sunni madhāhib on sariqa

As described earlier, “*Sariqa*, or theft, is defined as taking the property of another in a clandestine manner when such property is kept in custody.”⁹⁵ Furthermore, “[t]his definition, which also includes burglary, distinguishes theft from robbery, mugging, or purse-snatching in terms of associating the act with stealth rather than violence.”⁹⁶ This distinction is one with a long pedigree in ancient law codes, due to the sense of the perpetrator as being either within or outside the community; the robber, highwayman, or brigand being outside and thus operating in the greater sphere of war. The thief, on the other hand, operates covertly within the community, may well be one of its members, and must therefore be dealt with by communal law.⁹⁷ As Souryal, Potts, and Alobeid point out: “It is indeed the element of stealth which Islamic jurisprudence considered most betraying and bothersome. The intrinsic meanness associated with stealth – not the tangible loss inflicted on the victim – characterizes the perpetrator as a pariah in a communal sense.”⁹⁸ The Qur’ān, too, seems to have made this distinction, applying a separate *ḥadd* to the thief and the brigand. However, as a crime originating within the *umma*, the *fuqahā'* were required to develop a more elaborate set of rulings with which to establish and

⁹⁵ Sam S. Souryal, Dennis W. Potts, and Abdullah I. Alobeid, “The Penalty of Hand Amputation for Theft in Islamic Justice,” *Journal of Criminal Justice* 22 (1994): 260.

⁹⁶ Ibid.

⁹⁷ See, for example, the distinction the ancient Hebrews made between *ganav* and *gazal* (infra, p.168).

⁹⁸ Souryal et al., loc. cit.

execute the *ḥadd* than what the Qur'ān provides; “[t]hus, whereas [the Qur'ān] established the unequivocal punishment for theft, it was left to *Sunnah*... to specify the rules of evidence under which this stern punishment could be meted.”⁹⁹

The Qur'ān, for example, says nothing about the second or third offense of theft, and thus certain groups of *fuqahā'* resolved that, “for a first offense, the right hand shall be cut off; for a second, the left foot; and should the man steal a third time, he shall undergo a long term of imprisonment, that is, until he shall reform;”¹⁰⁰ whereas “[s]ome maintain that for a third offence the culprit's left hand should be cut off, and for a fourth offence, his right foot.”¹⁰¹ Certainly, the majority of the jurists agreed that “[t]he object of amputation (for the first offense) is the right hand, to be severed from the wrist;”¹⁰² although “[o]ne group said that only the fingers are to be severed.”¹⁰³ Furthermore, “[t]he punishment was inflicted in public; the thief was frequently led round the town seated backwards on an ass with the limb cut off hung round his neck.”¹⁰⁴ Finally, the crime of *sariqa* is unique in that it not only transgresses a ‘right of God’ (*ḥaqq Allāh*), but a ‘right of man’ (*ḥaqq ādamī*), and thus “the thief is bound to make reparation.”¹⁰⁵ Some groups disagreed with this, understanding amputation to be “a substitute for compensation;”¹⁰⁶ but supporters of reparation found a precedent in the reported practice of ‘Umar I, who “is said always to have condemned the thief to return double the value.”¹⁰⁷

As with the stoning and flogging *ḥadd*s of *zinā*, a strict set of regulations governed the exact execution of the *ḥadd* of amputation, where “[p]unishment could not be inflicted in cases of pregnancy, severe illness or when the weather was very cold or very hot.”¹⁰⁸ Further stipulations dictate that the *ḥadd* “shall not take place if the other hand has already been cut off, or is useless; or if the thumb or two fingers of

⁹⁹ Ibid.

¹⁰⁰ Roberts, *Social Laws*, 90.

¹⁰¹ Ibid. Cf. W. Heffening, “Sariqa,” *EI*², ix.62; al-Jazirī, *Kitāb al-Fiqh*, 143-6; Ibn Rushd, *Bidāya*, 544-5.

¹⁰² Ibn Rushd, *Bidāya*, 544.

¹⁰³ Ibid. This is an important point to remember, being that the same obscurity over hand or fingers for theft has a much earlier Semitic precedent (infra, pp.132f.)

¹⁰⁴ Heffening, “Sariqa,” 62.

¹⁰⁵ Ibid. According to Ibn Rushd, this was the opinion of al-Shāfi‘ī, Ibn Ḥanbal, al-Layth b. Sa‘d (d. 175/791), Abū Thawr, “and a group of jurists” (*Bidāya*, 544.)

¹⁰⁶ Ibid.

¹⁰⁷ Heffening, “Sariqa,” 62.

¹⁰⁸ Ibid.

the other hand has been cut off, or again the right hand is crippled.”¹⁰⁹ The hand, as mentioned, is severed from the wrist.¹¹⁰

The *ḥadd*, of course, is not to be applied unless all of the determined conditions have been fulfilled – *ta‘zīr* and reparation being enacted when they haven’t – and the *fuqahā’* as always were thorough in their specifications. As for the thief, he must have attained puberty, acted voluntarily, and “committed the crime through an act of stealth.”¹¹¹ Whether the thief was a runaway slave or not was also a matter of some concern with the *fuqahā’*. Ibn Rushd contends that “[t]he opinion of those who did not rule for the amputation of the hand of the runaway slave, is not supported by any argument except the analogy that waiving of half the penalty from him causes the entire penalty to be waived, that is, in the case of those penalties that are halved for the slaves, which is a weak argument.”¹¹²

The victim of the theft is also covered by a set of conditions which must necessarily be met for infliction of the *ḥadd*, as “a man may not be punished for stealing from his wife, or the wife from her husband, even if the husband has his goods under special care. Neither is a slave to be punished who steals from his master, or his master’s wife; nor the guest who steals from his host, or he who steals from the house of a near relative, even if the thing stolen should belong to another.”¹¹³ These conditions are seen to be such as constitute “substantial doubt with respect to ownership,”¹¹⁴ and thus in effect annul the *ḥadd*.

A further set of conditions applies to the stolen object itself, the most important of which for our purposes is the *niṣāb*, i.e., the minimal amount at which the stolen property must be valued in order to justify the implication of the *ḥadd*. The origins of the concept of *niṣāb* is an issue which we will deal with in subsequent sections. Suffice it to say at this point that the *niṣāb* was “among the Ḥanafīs... 10 dirhams, [and] among the Mālikīs [and] Shāfi‘īs... ¼ dīnār or 3 dirhams.”¹¹⁵ The

¹⁰⁹ Roberts, *Social Laws*, 91.

¹¹⁰ For a description of the traditional application as witnessed in modern Saudi Arabia, see Souryal et al., “Hand Amputation,” 255.

¹¹¹ Souryal et al., “Hand Amputation,” 260. Cf. Heffening: “[The *ḥadd* is] only applied to one who (1) has attained his majority (*bāligh*), (2) is *compos mentis* (*‘āqil*) and (3) has the intention (*niyya*) of stealing, i.e. is not acting under compulsion but freely (*mukhtār*);” (“Sariqa,” 62).

¹¹² Ibn Rushd, *Bidāya*, 538. The reference is again to Q.4:25.

¹¹³ Roberts, *Social Laws*, 91.

¹¹⁴ Ibn Rushd, *Bidāya*, 543.

¹¹⁵ Heffening, “Sariqa,” 62. Al-Ḥasan al-Baṣrī (d. 110/728) was held to have maintained there was no *niṣāb* at all based on the general wording of the Qur’ānic *ḥukm*, and possibly upon a tradition related

variance among the *fuqahā'* was a result not only of reliance on different *ahādīth*, but also on different versions of the same tradition. A final note on *niṣāb*: by one of the earliest known usages of the juridical tool of *qiyās*, the least amount payable for a woman's dower was fixed in Medina and Kūfa at the established *niṣāb* current in each city's legal tradition, i.e. "[a] parallel had been drawn between the loss of virginity as a result of marriage and the amputation of the hand as the penalty for theft."¹¹⁶

Of particular import in establishing liability of the *ḥadd* for *sariqa* was the condition that the stolen property must have been removed from a *ḥirz*, though there was some disagreement as to the exact definition of that term. As Ibn Rushd points out, however, "[i]t will be fairly accurate to say about the definition of *ḥirz* that it is a place or a condition in which wealth is preserved in a manner that its taking is made difficult, like a covering, or a fence, or what is similar."¹¹⁷ Thus, "[i]n this regard, amputation cannot be ruled for the theft of what cannot be guarded or is not worth guarding, such as dry wood, hay, grass, game, or fish."¹¹⁸ Juridical discourse on the characteristics of the *ḥirz* was complex, covering details such as doors and coverings, jointly-owned residences, stealing from the Ka'ba or mosques,¹¹⁹ or even grave robbery.¹²⁰ That the *ḥadd* was applied for removal of property from the *ḥirz* was more or less universally agreed upon, even if the thief did not in fact enter it. A final consideration is that "the thief's hand shall not be cut off if the thing stolen hath no commercial value, even though it be otherwise regarded as of great worth."¹²¹ Such property may have included wine, crosses, Qur'āns, and even, if only for analogy, the children of free people.

on the authority of Abū Hurayra, that the Prophet said "The curse of Allāh is on the thief, he steals a shield (could be an egg) and his hand is cut, he steals a rope and his hand is cut" (Ibn Rushd, *Bidāya*, 538). Ibn Rushd drives to the heart of the matter, observing that "[a]mputation because of three *dirhams* seeks to preserve smaller amounts of wealth, while amputation for ten *dirhams* passes over and overlooks trivial amounts attaching importance to the integrity of the limb" (ibid., 539).

¹¹⁶ Coulson, *History*, 40.

¹¹⁷ Ibn Rushd, *Bidāya*, 540. Cf. al-Jazīrī, *Kitāb al-Fiqh*, 151-2.

¹¹⁸ Souryal et al., "Hand Amputation," 261.

¹¹⁹ According to Mālik, there was no amputation for such *unless* the thief stole from these places at night (Ibn Rushd, *Bidāya*, 541). An important point to remember – in effect, that nightfall may render certain places into a *ḥirz* – as we shall see there is an ancient precedent for this.

¹²⁰ Ibn Rushd, loc. cit. As for the issue of graves, "Mālik, al-Shāfi'ī, Aḥmad (b. Ḥanbal) and a group of jurists said that it constitutes a *ḥirz* and the *nabbāsh* ('shroud-snatcher') is liable to amputation. This was also the opinion of 'Umar ibn 'Abd al-'Azīz." Apparently Abū Ḥanīfa and Sufyān al-Thawrī disagreed. Cf. al-Jazīrī, *Kitāb al-Fiqh*, 158-60.

¹²¹ Roberts, *Social Laws*, 91-2.

It is on the basis of the above conditions that *sariqa* was differentiated from similar concepts such as *ghaṣb* and *khiyāna*, the former meaning ‘usurpation’ and of which the theft of a slave might be considered an example, the latter meaning ‘embezzlement.’¹²² In these and other theft-like crimes which did not fulfill the conditions of *sariqa*, the culprit was to be punished with *ta‘zīr*, by which, as Juynboll explains:

“[T]he judge... must condemn the culprit to the punishment which seems to him to be the most suitable in view of the circumstances. He may, for instance, send him to prison, exile him, or sentence him to be publicly put to shame or scourged, etc. [...] The *ta‘zīr* is, among other things, applicable to a thief when the stolen property has not so much value that the culprit must be condemned to the *ḥadd*.”¹²³

As in the *ḥadd* for *zinā*, the establishment of proof of the crime of *sariqa* rests on either confession or testimony. For the former, “[a] single confession is considered sufficient, although the Hanafi school of thought requires a number of confessions equal to the number of required witnesses.”¹²⁴ Such confessions, also as in *zinā*, may be retracted with the possible consequence that the *ḥadd* be waived, i.e. if no other evidence supports the case. As for testimony, it is required “that two male witnesses give their testimony against the accused”¹²⁵ although “[s]hould there be fewer than two male witnesses, *Sunnah* permits a combination of one male and two female witnesses.”¹²⁶ Such witnesses, as for the other *ḥudūd*, must meet certain conditions: “(1) They must be persons of moral integrity whose credibility, righteousness, and sense of honor are above reproach; (2) they must be mature, over the age of puberty; (3) they must be sane both at the time of observing the offense and at the time of the testimony; and (4) they can never have been convicted of a serious crime or have engaged in deviant behavior.”¹²⁷

When the Qur’ān, in *sūrat al-mā’ida*, distinguished between *sariqa* and *ḥirāba*, it was in line with a long tradition of such distinctions spanning far back into the history of the ancient Near East. The *fuqahā’* were thus quick to establish the *ahkām* of Q.5:33-4 as a separate *ḥadd* bearing different penalties from the *ḥadd* for *sariqa*,

¹²² Heffening, “*Sariqa*,” 62.

¹²³ Juynboll, “Crimes and Punishments,” 293.

¹²⁴ Souryal et al., “Hand Amputation,” 262.

¹²⁵ Roberts, *Social Laws*, 91.

¹²⁶ Souryal et al., loc. cit.

¹²⁷ Ibid.

although certain rules and conditions applied to them both.¹²⁸ However, due to the wide latitude of interpretation for Q.5:33, “there arose much difference of opinion among Muslim lawyers as to the punishment of highway-robbers.”¹²⁹ An illustrative case is that of the Shāfi‘īs, who determined the application of the Qur’ānic punishments as follows: “(1) if the culprit has only made the road unsafe, he must be banished; (2) if he has also practiced robbery (namely, in the sense that he would incur the *ḥadd* for theft if he were not a highwayman), his right hand and left foot are cut off (in the case of a repetition of the offence, the left hand and right foot as well); (3) if he has deliberately murdered any one, he must be put to death, even though the heirs of the murdered person were willing to content themselves with the *diyya*; (4) if he has as a highway-robber robbed and killed, not only is he punished with death, but his corpse is exhibited for a time on a cross.”¹³⁰ Different variations and combinations of punishments were upheld by other groups of jurists, some even maintaining that the *imām* was to exercise his own absolute discretion in the meting out of the prescribed penalties.¹³¹ Juridical discourse on the meaning and method of crucifixion, as Ibn Rushd observes, were far-ranging, “with some saying that he is to be crucified till he dies of starvation... others said that it means he is to be executed and crucified at the same time... executed first and then crucified... crucified first and then put to death on the wooden prop...(etc.)”¹³² A similar debate evolved over the type and implementation of banishment.¹³³ Finally, due to the previously noted article of repentance-based *istithnā’* in Q.5:34, there was a host of disagreements concerning: (1) whether repentance was even acceptable, (2) what the *muḥārīb* must do to prove his repentance, (3) what his condition must have been prior to repentance, and (4) what to do in the case where the *imām* “offers him asylum on the condition he crosses back and surrenders.”¹³⁴

From this brief overview of *zinā-* and *sariqa*-related Sunni legal material, certain basic patterns become evident. First, that within the sphere of these *ḥudūd*, the original Qur’ānic *ahkām* are more or less wholly intact. Although Schacht

¹²⁸ “The same regulations hold regarding [the conditions of] the person and the object as [for theft], especially the *niṣāb*” (Heffening, “Sariqa,” 62).

¹²⁹ Juynboll, “Crimes and Punishments,” 293.

¹³⁰ Ibid. See al-Jazīrī, *Kitāb al-Fiqh*, 358-66, for a more complete discussion.

¹³¹ Ibn Rushd, loc. cit.

¹³² Ibid., 548-9.

¹³³ Ibid., 549.

¹³⁴ Ibid., 549-50.

contended that “[t]he Koran taken by itself... can hardly be called the first and foremost basis of early legal theory,” he also maintained that “[i]t is true that a number of legal rules, particularly in family law of inheritance, not to mention cult and ritual, were based on the Koran from the beginning.”¹³⁵ How, then, did he view these *ḥudūd*? Preserved in the *sharī‘a* as it has come down to us in works of *fiqh* is the entire corpus of Qur’ānic rulings concerning *zinā*, *qadhif*, *sariqa*, and *ḥirāba* as follows: 1) the required testimony of four, male, Muslims for proof of *zinā*, 2) the flogging of a hundred stripes as punishment for *zinā*, 3) the obligatory nature of the *ḥudūd*, 4) the witnessing of punishments by a group of believers, 5) the flogging of eighty stripes as punishment for *qadhif*, 6) that the testimony of the *qādhif* never again be accepted, 7) the factor of repentance in the future acceptance of his testimony, 8) the formulae of *li‘ān* and their function, 9) the application of half the *ḥadd* to slaves, 10) the amputation of the hand of the thief, 11) the various punishments for *ḥirāba*, and 12) the factor of repentance as a mitigation in certain cases. Indeed, it seems that these *aḥkām al-Qur’ān* form the very kernel of the *ḥudūd*, the base upon which the *fuqahā’* were to elaborate by means of exegetical and analogical tools, not to mention the *sunan* of their revered predecessors. At the very least, it appears they were certainly not “introduced into Muhammadan law almost invariably at a secondary stage.”¹³⁶

Over at least a century and a half then, the *fuqahā’* elaborated on these Qur’ānic regulations via rational tools in conjunction with *sunna*, the results of which, as we have seen, are: 1) a refined definition of *iḥṣān*; 2) the introduction of a harsher punishment (*rajm*) to supplant flogging in certain cases, as determined by *iḥṣān*; 3) the introduction of banishment in conjunction with the Qur’ān’s flogging *ḥukm*; 4) rulings on compulsion to *zinā*; 5) an elaboration in application of the ‘half-for-slaves’ rule; 6) rulings regarding *in flagrante delicto* cases; 7) developed rules of confession and *shubha*; 8) a consideration of pregnancy; 9) regulations governing how the *ḥadd* is to be executed; 10) series of conditions which the *zānī* and *qādhif* must meet to be liable for the *ḥadd*; 11) an extension of the implications of *li‘ān*, 12)

¹³⁵ Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 224. This theory of the relatively minor role played by the Qur’ān in early law is furthered by Crone, who in fact contends, “Schacht underestimated the discontinuity to which he drew attention” (Patricia Crone, “Two Legal Problems Bearing on the Early History of the Qur’ān,” *Jerusalem Studies in Arabic and Islam* 18 (1994): 10; as cited in Hallaq, *Formation*, xxiv.)

¹³⁶ Schacht, loc. cit.

discourse on the treatment of *liwāt*, *siḥāq*, and *bahīmīya*, and 13) a major development of regulations regarding *sariqa* and *ḥirāba* including: (a) the concept of stealth; (b) linking *ḥirāba* to brigandage; (c) conditions regarding the thief, victim, stolen object, and *ḥirz*; (d) the concept of *niṣāb*; (e) other types of theft (*ghaṣb*, *khiyāna*); and (f) rules of evidence. Despite all this subsequent legislation, however, the Qur'ānic material is obviously present, intact if somewhat augmented, and there has yet to arise a convincing argument evincing that it wasn't there from the beginning.

The obvious question at this point, then, is where did all the secondary legislation come from? In other words, if we accept that the Qur'ān, as regards these *ḥudūd*, formed the core upon which the *fuqahā'* built successive layers of *sharī'a* legislation, then what materials were they building with? What were their sources? Not surprisingly, there is a bewildering array of possibilities – some of which this thesis will survey in the hope of finding some answers. Before embarking on this exploration, however, we must approach the issue of where, exactly, the stoning penalty came from according to the *fuqahā'* and how, in a certain sense, it came to supercede the Qur'ānic *ḥukm*.

Opposition to the stoning penalty: the Khawārij and the Mu'tazila

Invariably, chapters concerning the *ḥadd* of *rajm* in *tafāsīr* or compendia of Sunni *fiqh* incorporate a phrase to the effect of: "The Muslim jurists agreed about free *thayyib muḥṣans* that the *ḥadd* for them is *rajm*, except that *a group of those who follow their own whims* held that the punishment for every fornicator is a hundred lashes."¹³⁷ Although not always named, it is clear that this 'group of those who follow their own whims' were either the Khawārij or that group which appears to have mirrored much of Kharijī doctrine, the Mu'tazila.¹³⁸ That there was opposition to the stoning *ḥadd* at all casts the formulations of the Sunni *fuqahā'* in a new light, adding an element of early competitive discourse that may have otherwise gone unsuspected. Certainly, the later Sunni jurists were unanimous amongst

¹³⁷ Ibn Rushd, *Bidāya*, 523 (non-Arabic italics mine).

¹³⁸ See, for example, "Rajm" *MF*, xxii.124-5: "Ibn Qudāmah said: We do not know about [the stoning *ḥadd*] a contradictory viewpoint except the Khawārij, for indeed they say: 'Flogging for the *bikr* and the *thayyib*,' due to the speech of God Most High: 'The *zāniya* and the *zānī*, flog each one of them 100 stripes.'" Cf. al-Jaziri, *Kitāb al-Fiqh*, 65-6, for "A Discussion of the Opinions of the Khawārij and the Mu'tazila." Additionally, Crone and Zimmerman supply a list of primary sources referring to the Azraqite rejection of *rajm*, see Patricia Crone and Fritz Zimmerman, *The Epistle of Sālim ibn Dhakwān* (Oxford: UP, 2001), 164, no. 70.

themselves in that the punishment was validly founded in the words and actions of the Prophet and his successors. Understanding, however, that there were dissenting voices earlier in the history of *fiqh*, before the eponymic founders of the Sunni *madhāhib* were generating legal discourse, permits us a more complicated view of the Sunni justification of *rajm*, in that it was not merely a confirmation of previous practice, but was also an argument against an opposing point of view. The later Sunni *madhāhib* were unanimous, but early Islam was not.

What do we know, then, of the opposition? Who exactly were these Khawārij that Ibn Rushd and Ibn Qudāma referred to? According to al-Shahrastānī's *Kitāb al-Milal wa'l-Niḥal*, "The most important groups among the Khārijites are the Muḥakkima, the Azāriqa, the Najdāt, the Baihasīya, the 'Ajārīda, the Tha'ālība, the Ibādīya and the Ṣufriya."¹³⁹ Later, when discussing the origins of the subgroup of the Ṣufriya Ziyādīya, al-Shahrastānī observes that "[t]hey differ on several points from the Azāriqa, the Najdāt, and the Ibādites [...] they do not give up the punishment of stoning to death...." From this we are left to infer that those of the Khawārij who rejected the *ḥadd* of *rajm* were the Azāriqa, the Najdāt, and the Ibādites.¹⁴⁰ Furthermore, we have reason to believe that "[b]oth the Azāriqah and the Najdāt were trying to base their 'community of saints' on the words of the Qur'ān;"¹⁴¹ and indeed, amongst the ranks of the Khawārij were respected *qurrā'*.¹⁴² Finally, as a brief overview of their social make-up, Watt notes their nomadic nature not only in group size, but outlook:

"Like nomads they were inclined to regard all outside their body, even Muslims who did not accept their distinctive views, as potential enemies whose blood might lawfully be shed.... They even, like some of the great tribes, became noted for their mastery of the Arabic language in both poetry and oratory."¹⁴³

As for the Ibādīs (the surviving works of whom are purportedly the only remaining records "[o]utside of general principles and a few particular cases [of] the

¹³⁹ A.K. Kazi and J.G. Flynn, trans, "Shahrastānī: *Kitāb al-Milal wa'l-Niḥal* (The Khārijites and the Murji'ites)," *Abr-Nahrain* 10 (1970-1): 49-75.

¹⁴⁰ Ibid., 68. Later Ibādite literature makes it clear, however, that they did not reject stoning.

¹⁴¹ W. Montgomery Watt, "Khārijite thought in the Umayyad Period," *Der Islam* 36 (1961): 221.

¹⁴² Jeffrey T. Kenney, "The Emergence of the Khawārij: Religion and the Social Order in Early Islam," *Jusūr* 5 (1989), 24.

¹⁴³ Watt, "Khārijite Thought," 217.

law and dogmatics of the *Khawārij*”),¹⁴⁴ if one were to rely on the epistle attributed to Sālīm b. Dhakwān¹⁴⁵ or the *Keshf-ul-Ghummeḥ-el-Jama’i ‘Akhbar el-Ummeh*,¹⁴⁶ then it would appear that they embraced the stoning penalty and rejected the doctrines of the more radical groups of the *Khawārij* as a whole. That leaves us, then, with the *Azāriqa* and the *Najdāt* as opponents to *rajm*.

Doctrinally, the *Khawārij* were noted as followers of the law,¹⁴⁷ though the specifics of that practice was often at odds with what was to become the Sunni majority. Similarities existed, however, with Sunni doctrine,¹⁴⁸ and were said to include the following points relevant to our study: 1) the existence of a *niṣāb* to justify the *ḥadd* for *sariqa* (although it was, according to them, 5 dirhams),¹⁴⁹ 2) the use of reason to extend Qur’ānic principles,¹⁵⁰ and 3) the belief that sexual intercourse “is legal and permissible on two grounds only – the dominion that a master possesses over his slave-girl or a valid contract of marriage (*nikāḥ*).”¹⁵¹ Concerning traditions of *sunna*, they were said “to possess their own collections which satisfied their own standards of authenticity,”¹⁵² and to have argued vehemently that *sunna* cannot abrogate Qur’ān.¹⁵³ Moreover, there may be some

¹⁴⁴ G. Levi Della Vida, “*Khāridjites*,” *ET*², iv.1077. Cf. Schacht, *Origins*, 261: “Whereas the political history of the Ibādīs goes back to the middle of the first century A.H., their law was derived from the orthodox schools at a much later date.” On the other hand, Dr. Joseph Lowry of the University of Pennsylvania’s Middle East Center has, in reviewing this thesis, directed my attention to the early 9th century Ibādī law book of Bishr b. Ghānim (d. ca. 199-200/815), the *Kitāb al-Mudawwanat al-Kubrā*. As Ibādī law at this early time might be more reflective of the doctrines of earlier Kharijite groups, future research into Bishr’s text may well yield insight into earlier attitudes towards stoning.

¹⁴⁵ See Crone and Zimmerman, *Epistle*, 30: “The Azraqites, Sālīm tells us...reject the stoning penalty for sexual offences; but they are wrong, for the Prophet once sentenced an offender to be stoned and this has been *sunna* ever since.” And in the attributed author’s own words (Crone & Zimmerman believe the work to in fact belong to Ḍirār b. ‘Amr; *ibid.*, 299-300): “They disbelieve in stoning even though the Prophet stoned a man of Aslam and this became *sunna*” (*ibid.*, 103).

¹⁴⁶ See Sirhān b. Sa’id b. Sirhān, *Annals of Oman to 1728*, trans. E. C. Ross (Cambridge: Oleander Press, 1984), 118: “These Azārekeh also reject stoning for adultery, and the beating of the drinker of intoxicating liquor, but allow attack on those who are inimical to their doctrines. These heresies must be avoided.”

¹⁴⁷ Watt, “*Khārijite Thought*,” 218. Indeed, the *Azāriqa* are said to have withdrawn in effect to recreate the original *umma* (“and they emphasized the similarity by speaking about the *hijrah* to their camp”), “and to ensure that at least among themselves the divinely-given law was observed” (*ibid.*, 220).

¹⁴⁸ Coulson holds that “the great bulk of Khārijite law – and certainly all its basic tenets – can find adequate authority among the Sunnite jurists” (*History*, 109).

¹⁴⁹ Schacht, *Origins*, 261.

¹⁵⁰ Coulson, *History*, 105.

¹⁵¹ *Ibid.*, 104.

¹⁵² *Ibid.*, 105.

¹⁵³ al-Jazirī, *Kitāb al-Fiqh*, 65.

indication that they had a greater distrust of prophetic *sunna* than their Sunni counterparts. As al-Shahrastānī reports, the Azāriqa believed:

“God may send a prophet of whom He knows that he will be an unbeliever after becoming a prophet, or that he was an unbeliever before being a prophet. Since grave and venial sins are the same in his eyes and constitute unbelief, and since there are some in the community who consider it possible for prophets to commit grave and venial sins, they would, therefore, constitute unbelief (for the prophets also).”¹⁵⁴

Other characteristics of Khawārij doctrines are said to have included: 1) a special reverence for ‘Umar I,¹⁵⁵ 2) a general distrust of the appointment of arbiters,¹⁵⁶ 3) a perceivable anti-government attitude,¹⁵⁷ 4) the famed precept of excommunication from the community for having committed a major sin, i.e. mortal sin = *irtidād* (apostasy),¹⁵⁸ 5) a lack of capital punishment,¹⁵⁹ 6) a more restricted understanding of *qadhāf*, in which the *ḥadd* applies only if the accused was a woman,¹⁶⁰ 7) a different understanding of the forbidden degrees of marriage,¹⁶¹ 8) no *ḥadd* for drinking,¹⁶² and 9) some different opinions on *sariqa* including, as we have seen, a different *niṣāb*¹⁶³ and amputation from the humerus rather than the wrist.¹⁶⁴

As we have seen, the Khārījī opposition to *rajm* seems to have been centered in the Azāriqa and the Najadāt, and it seems no coincidence therefore that “[t]he first (Kharijite) developments beyond the original kernel of doctrine are ascribed by the heresiologists to the sects of the Azāriqa and the Najadāt.”¹⁶⁵ Perhaps disagreement on such a fundamental issue as *rajm* stimulated a more complex set of discursive tools. Whatever the case, it seems that the starting point of one Khārījī argument is that “[i]ndeed the punishment of stoning was present at the dawn of Islam (*fi ṣadr al-islām*), then it was abrogated by His speech, exalted be He: ‘The *zānīya* and the *zānī*,

¹⁵⁴ Kazi, “Shahrastānī,” 55.

¹⁵⁵ Della Vida, “Khāridjites,” 1076.

¹⁵⁶ Kazi, “Shahrastānī,” 52, 53; see also Kenney, “Emergence,” 24.

¹⁵⁷ Kazi, “Shahrastānī,” 52.

¹⁵⁸ Della Vida, “Khāridjites,” 1076. This practice had a parallel in ancient Arabian and Hebrew law, wherein certain transgressors were ‘outlawed’ or ‘cut off from the people,’ and their blood thus considered lawful.

¹⁵⁹ Watt, “Khārijite Thought,” 220-1; and Kenney, “Emergence,” 24.

¹⁶⁰ Kazi, “Shahrastānī,” 55; and Crone and Zimmerman, *Epistle*, 179-80.

¹⁶¹ Kazi, “Shahrastānī,” 61.

¹⁶² supra, n.146.

¹⁶³ Interestingly, Ibn Rushd maintains that the Kharijites and a “group of the *Mutakallimūn*” rejected *niṣab* based on the tradition cited supra, n.115.

¹⁶⁴ R. Rubinacci, “Azāriqa,” *EI*², i.810.

¹⁶⁵ Watt, “Khārijite Thought,” 218.

flog each of them a hundred stripes.’ Thus the two perpetrators of *zinā* merit flogging regardless of whether they were *muḥṣans* or not.”¹⁶⁶ In short, stoning was to them the accepted punishment before the revelation of *sūrat al-nūr* (or perhaps even a pre-Islamic practice) and was abolished by God and replaced with a new divinely ordained punishment; with the added point that this divine *ḥukm* did not distinguish between *muḥṣan* or non-*muḥṣan*. This argument they further bolstered by the fact that *rajm* is not prescribed in the Qur’ān as a punishment for anything, much less adultery.¹⁶⁷ Accordingly, the *bikr* and *thayyib muḥṣan* both were to receive flogging.¹⁶⁸

The next stage of this particular Khārījī argument centers on a problem illustrated in the following report found in al-Bukhārī’s al-Ṣaḥīḥ: “Shaybānī asked ‘Abd Allāh b. Abī Awfā, ‘Did the Prophet ever stone?’ ‘Abd Allāh said, ‘Yes,’ and Shaybānī asked, ‘Before or after the revelation of Qur’ān 24?’ ‘Abd Allāh said, ‘I don’t know.’¹⁶⁹ In short, “[t]he draft of the question was quite simply: if the reports of Muhammad’s stoning referred to the time before the revelation of the Qur’ān’s flogging verse, then stoning had been abandoned. It had been set aside on the revelation of the Qur’ān’s flogging penalty.”¹⁷⁰ Still, as al-Jazīrī points out, “their proof of this (i.e. the Qur’ān’s abrogation of the practice of stoning) cannot be achieved except if it is proven that the Prophet (pbuh) didn’t stone anyone after the revelation of this *āya* (Q.24:4).”¹⁷¹ It is difficult to see how this would have mattered to the Khawārij, however, in view of the implications of their next argument, mainly: “abrogation of ‘The Book’ by the *sunna* is not permissible.”¹⁷²

A final note on the Khawārij before moving on to the Sunni response to their anti-*rajm* arguments. Although considered by some to at best number among the

¹⁶⁶ al-Jazīrī, *Kitāb al-Fiqh*, 65.

¹⁶⁷ Al-Shahrastānī reports that this was why Nāfi‘ b. al-Azraq “abandoned the punishment of stoning to death for fornication,” (Kāzī, “Shahrastānī,” 55). See also Rubinacci, “Azāriqa,” *El*², i.811; and al-Jazīrī, who notes “it is related in al-Baḥr about the Khawārij that *al-rajm* is not obligatory (*ghayr wajīb*) with them; and also reporting this about them is Ibn al-‘Arabī may God Most High have mercy on him, and he reports it also about the Mu‘tazila, such as Nizām and his disciples” (*Kitāb al-Fiqh*, 65 n.1).

¹⁶⁸ *Supra*, n.138.

¹⁶⁹ As cited in John Burton, “Law and Exegesis: The Penalty for Adultery in Islam,” in *Approaches to the Qur’ān*, eds. Haunting and Shareef (New York: Routledge, 1993), 279.

¹⁷⁰ Burton, “Origin,” 22-3.

¹⁷¹ al-Jazīrī, *Kitāb al-Fiqh*, 65.

¹⁷² *Ibid.*

“minor heterodox groups,”¹⁷³ the Khawārij nevertheless bequeathed a considerable doctrinal legacy to Islam. Watt, reflecting on the more moderate Khawārij living in Baṣra, notes that “the discussions which took place in Baṣrah at this time (‘the last two decades of the eighth century’), and in which these moderate Khārijites played a prominent part, were the foundation of most later theological developments in Islam.”¹⁷⁴ This may explain the reference not only to Khawārij, but Mu‘tāzila, for the former are said to have greatly influenced the latter,¹⁷⁵ and indeed “[t]he Khārijite insistence on justice is taken up into the Mu‘tazilite claim to be ‘the people of unity and justice.’”¹⁷⁶ Lastly, an offshoot of the Khawārij, the Wāqifiya, may have been progenitors of the Murji’a. The Wāqifiya were noted for “their suspension of judgement or refusal to pronounce on the ultimate fate of the wrongdoer,”¹⁷⁷ a stance which must have led to a virtual suspension of *ḥudūd* in their community. If we are to take the word of al-Shahrastānī,¹⁷⁸ however, some famous Murji’ites may have included Muqātil b. Sulaymān, Abū Ḥanīfa, and Abū Yūsuf; which if true would certainly indicate that rejection of the stoning *ḥadd* was not a Murji’a doctrine.

The Sunni response

According to Burton, it was this last Khārijī argument mentioned above – *sunna* cannot abrogate the Book – which led to the fabrication of that famous *ḥadīth* regarding a missing verse of the Qur’ān, with “[n]o less a personage than the magisterial ‘Umar b. al-Khaṭṭāb [being] put up to rebut this rejection of the stoning penalty.”¹⁷⁹ To better appreciate the nature of this fascinating *ḥadīth*, it would be best to reproduce it in full, as it appears in Mālik’s *Muwaṭṭa’*:

“Malik related to me that Yahya ibn Sa’id heard Sa’id ibn al-Musayyab say, “When ‘Umar ibn al-Khattab came from Mina, he made his camel kneel at al-Abtah and then he gathered a pile of small stones and cast his cloak over them and dropped to the ground. Then he raised his hands towards the sky and said, ‘O Allah! I have become old and my strength has weakened. My flock is scattered. Take me to You with nothing missed out and without having neglected anything.’”

¹⁷³ *Infra*, n. 179.

¹⁷⁴ Watt, “Khārijite Thought,” 222.

¹⁷⁵ Della Vida, “Khārijites,” 1077.

¹⁷⁶ Watt, “Khārijite Thought,” 231.

¹⁷⁷ *Ibid.*, 227.

¹⁷⁸ Kazi, “Shahrastānī,” 74.

¹⁷⁹ Burton, “Law and Exegesis,” 273. Note that nowhere in the space of this article (nor in “The Origin of the Islamic Penalty for Adultery” for that matter) does he mention the Khawārij by name, only using the likes of “some Muslims” (p. 272), “their opponents” (p. 273), and “those early scholars” (p. 282). The closest he comes to naming the opposition is “minor heterodox groups” (“Origin,” p. 24).

Then he went to Madina and addressed the people, saying, 'People! *Sunan* have been laid down for you. Obligations have been placed upon you. You have been left with a clear way unless you lead people astray right and left.' He struck one of his hands with the other and then said, 'Take care lest you destroy the *ayat* of stoning so that someone will say, "We do not find two *hadd*s in the Book of Allah." The Messenger of Allah, may Allah bless him and grant him peace, stoned, so we have stoned. By Him in Whose hand my soul is, had it not been that people would say that 'Umar ibn al-Khattab has added to the Book of Allah, we would have written it: "The full-grown man and the full-grown woman, stone them absolutely." We have certainly recited that.'"¹⁸⁰

As Burton points out, al-Shāfi'ī's followers took up this report as proof that "stoning had been the subject of a divine revelation which had originally stood in the Qur'ān texts¹⁸¹... although not taken up into the texts when the Qur'ān was collected after the death of the Prophet."¹⁸² In short, this was the answer to the opposition's argument that *sunna* cannot abrogate the Book, mainly that the Book was not a reference only to the Qur'ān, but "[i]t could equally well apply to those decisions of the Prophet's based on that aspect of revelation that is not recited or written down, *al-wahy ghayr al-matlū*, which is part of the *sunna* of the Prophet."¹⁸³

On top of this argument was layered another, namely, "abrogation of the recitation does not necessitate abrogation of the ruling."¹⁸⁴ In other words, simply because a divine ruling is no longer recited as part of the Qur'ān in no way means that its *ḥukm* is no longer to be applied. Such a fine point was necessarily made not only in response to the anti-*rajm* opposition, but due to the insistence by scholars such as al-Shāfi'ī that "the Qur'ān can only be abrogated by the Qur'ān and the *sunna* only by the *sunna*."¹⁸⁵ The role of the *sunna* is "explanatory," thus if it either contradicts or is contradicted by the Qur'ān, its purpose is nullified.¹⁸⁶

Among the other *ḥadīths* central to Sunni justification of the stoning *ḥadd* is one in which the practice of the Prophet supposedly makes clear the distinction

¹⁸⁰ Abū 'Abd Allāh Mālik b. Anas, *Al-Muwaffa' of Imam Malik ibn Anas: The First Formulation of Islamic Law*, trans. Aisha Abdurrahman Bewley (New York: Kegan Paul International, 1989), 346 (41.10).

¹⁸¹ "Indeed, according to Muslim tradition, such a verse is said to have formed originally a part of the thirty-third Sūra..." (Juynboll, "Adultery (Muslim)," 131).

¹⁸² Burton, "Origin," 24.

¹⁸³ Burton, "Law and Exegesis," 273.

¹⁸⁴ al-Jazīrī, *Kitāb al-Fiqh*, 65 n.1. This is an important feature of the Sunni theory of *naskh*.

¹⁸⁵ Coulson, *History*, 58.

¹⁸⁶ *Ibid.*

between *thayyib* and *bikr*. Again, a full rendering as it appears in the *Muwatta'* will best do justice to its many details:

“Malik related to me from Ibn Shihab from ‘Ubaydullah ibn ‘Abdullah ibn ‘Utba ibn Mas’ud that Abu Hurayra and Zayd ibn Khalid al-Juhani informed him that two men brought a dispute to the Messenger of Allah, may Allah bless him and grant him peace. One of them said, ‘Messenger of Allah, judge between us by the Book of Allah!’ The other, who was the wiser of the two, said, ‘Yes, Messenger of Allah, judge between us by the Book of Allah and give me permission to speak.’ He said, ‘Speak.’ He said, ‘My son was hired by this person and he committed fornication with his wife. He told me that my son deserved stoning and I ransomed him for one hundred sheep and a slave-girl. Then I questioned the people of knowledge and they told me that my son deserved to be flogged with one hundred lashes and exiled for a year, and they informed me that the woman deserved to be stoned.’ The Messenger of Allah, may Allah bless him and grant him peace, said, ‘By Him in whose Hand my self is, I will judge between you by the Book of Allah. As for your sheep and slave-girl, they should be returned to you. Your son should have one hundred lashes and be exiled for a year.’ He ordered Unays al-Aslami to go (to) the wife of the other man and stone her if she confessed. She confessed and he stoned her.”¹⁸⁷

So many points are of note in this *ḥadīth* that a full discussion would easily occupy several pages.¹⁸⁸ It should at least be noted that, based on this *ḥadīth*, al-Shāfi‘ī argued: “When Mohammad flogged the man’s son and then stoned the man’s wife, this made it abundantly clear that [the flogging *ḥadd*] is to be applied solely to the unmarried offenders – i.e. that is the penalty for fornication; Muhammad stoned the other man’s wife without flogging her.”¹⁸⁹ Therefore, “[t]he Qur’ān’s flogging penalty which was laid down for illicit sexual conduct refers thus to fornication only; in the case of adultery, it has been abrogated as the Prophet’s practice shows.”¹⁹⁰

The Practice of the Prophet, in other words, had ‘particularized’ (*khaṣṣa*) the Qur’ānic *ḥukm*, not abrogated it. This is the phenomenon known among the *fuqahā*’ as *takhsīs* (particularization). Understanding this, and having learned that the Ḥanafis argued against the additional punishment of *taghrīb* (banishment) based on

¹⁸⁷ Mālik, *Al-Muwatta'*, 345 (41.6).

¹⁸⁸ Consider, for example: Who were the “people of knowledge” the man consulted? What was the identity of the complainant? Might he and his wife have been Jewish? There are several examples in *ḥadīth* and historical / biographical narratives recounting the Prophet’s arbitration of Jewish claimants, including cases of *zinā* in which the ruling was based on the Deuteronomical penalty of stoning.

¹⁸⁹ Burton, “Origin,” 23.

¹⁹⁰ Ibid.

the Ḥanafī doctrine that “addition constitutes abrogation,”¹⁹¹ the question begs to be asked: Why did Ḥanafīs accept the stoning *ḥadd*? The answer must lie in their specification that an individual report (*ḵabar al-wāḥid*) “is not in fact sufficient to abrogate the text of the Qur’ān,”¹⁹² and it has indeed been contended that “*al-rajm* has been firmly established on the authority of the Messenger of God (pbuh) by his speech and his action, in reports resembling the *tawātur*.”¹⁹³ Such is the strength of *mutawātur* reports; the Qur’ān itself is said to be *mutawātur* due to the manner in which it has purportedly come down in a unified manner through many channels. Additionally, al-Shāfi‘ī noted that surely “[i]f a prior precedent of the Prophet was in fact contradicted by a later Qur’ānic revelation... there would certainly exist a further *sunna* in conformity with this later revelation.”¹⁹⁴

As regards the Kharijī contention that stoning was a practice which the Prophet never enacted after the revelation of Q.24:2, al-Jazīrī echoes the Sunni response, claiming “the community (of *fuqahā*) said: Indeed the Messenger of God (pbuh) had stoned after the revelation of this *āya*, by the proof that Abū Hurayra had attended the stoning, and he did not convert to Islam except after the year seven, while *sūrat al-nūr* (Q.24) was revealed in the year six or five.”¹⁹⁵ Now, considering the relative enormity of the penalty of *rajm*, and the technical sophistication with which the Sunni *fuqahā* refuted their opponents in the arguments above, this particular explanation appears rather weak; especially if we consider the condition that *ḥadd* punishments be witnessed by “a group of believers” was set down in Q.24:2, and there is no reason to believe that non-Muslims were disallowed from attending stoning executions before the revelation of this verse.

The two above reports are by no means the only *aḥādīth* involved in the dispute, though some understand “[t]he ḥadīth related by Abū Hurayra and Zayd b. Khālīd al-Djūhānī [to have] been the basis of the *fiqh* doctrine...”¹⁹⁶ due to its *takḥṣīs* of Q.24:2. Ibn Rushd notes “[f]or the majority the legal basis is ‘that the Messenger of Allāh (God’s peace and blessings be upon him) awarded *rajm* to Mā’iz, to a woman from Juhayna, to the Jews and a woman from (the tribe of) Ghāmid from al-

¹⁹¹ Coulson, *History*, 90.

¹⁹² Ibid., 91.

¹⁹³ “Rajm” *MF*, xxii.124. Cf. al-Jazīrī, *Kitāb al-Fiqh*, 65 n.1 “For verily *al-rajm* has been established by means of unanimously agreed upon *mutawātur sunna*.”

¹⁹⁴ Coulson, *History*, 58.

¹⁹⁵ al-Jazīrī, *Kitāb al-Fiqh*, 65.

¹⁹⁶ Peters, “Zina,” 509.

Azad.”¹⁹⁷ Of note are reports in which the Prophet is related to have received a spontaneous revelation, and cried out: “Take from me, take from me, God has made for them (fem.) a way: the *bikr* with the *bikr* a hundred stripes and a year’s exile, and the *thayyib* with the *thayyib* a hundred stripes and *al-rajm*.” This is obviously to be construed as a continuation of Q.4:15 which, as we have seen, prescribed confinement until death, or until “God makes for them a way.” It is of note not only for the double *ḥadd* of the *thayyib zānī*, which the majority of *fuqahā*’ reject, but for the fact that once again the stoning penalty is being attributed to a divine source. Indeed, it might be said that this verse complements the *ḥadīth* concerning ‘Umar’s ‘missing verse’, a topic to which we shall now return with a final note.

We have seen that Burton, on the basis of the wording of the famed *ḥadīth* relating ‘Umar’s ‘missing verse,’ was able to deduce that opposition to the stoning penalty had obviously existed at some point early in the formulation of the *ḥudūd*. Yāsīn Dutton, too, claims that Mālik, by including this report in his *Muwattaʿa*’ “was obviously aware of the contrary opinion of those who denied [the *ḥadd* of *rajm*] because it was not in the Qur’an (i.e. the opposition group implied by ‘Umar’s comment, ‘Let no-one say that [there] are not two *ḥadd*s in the Book of Allah’, and identified by Ibn Ḥajar as the Khawārij and some of the Muʿtazila).”¹⁹⁸ Being that historians have failed to provide other names associated with an opposition to the stoning penalty, it is only natural to tie the Khawārij and Muʿtazila to the opposition implied by ‘Umar’s purported proclamation. What Dutton and Burton fail to mention, however, is the inherent anachronism in such an assumption; neither the Khawārij nor the Muʿtazila existed until sometime after ‘Umar’s death. There are no two ways about it then: either ‘Umar’s proclamation addresses the Khawārij, thus constituting an anachronism and rendering the entire *ḥadīth* suspect to fabrication, or there were *other* groups opposed to the stoning penalty, either in ‘Umar’s time or after. The fact that it is ‘Umar’s voice telling this stray group that indeed the Prophet had stoned based on the Book of God seems to lend weight to the possibility of a Kharijite-oriented fabrication, based on the aforementioned reverence with which they were said to have held him.¹⁹⁹ What might help this theory even further would

¹⁹⁷ Ibn Rushd, *Bidāya*, 524. The *ḥadīth* regarding the Prophet’s stoning of Jewish *zānīs* on the basis of the Torah is of great import and will be discussed below (*infra*, p.52).

¹⁹⁸ Dutton, *Origins*, 124. Brackets are mine, parenthesis his.

¹⁹⁹ *Supra*, p.37.

be the discovery of a Kharajī argument framed as “We do not find two *ḥadds* in the Book of Allah.”

The opinions of the Shī‘a

The Khawārij were not the only group to oppose the Sunni majority on vital legal issues, however, with the Imāmī, or Shī‘a leading the way in developing alternate though often parallel strands of *fiqh*.²⁰⁰ A brief look at certain of these topics is worthwhile before delving into the past for parallels or precedents, especially considering that more than a few of their doctrines seem to be pre-Islamic survivals; this despite the fact that “Ithnā-‘asharite political theory... renounces any connection with pre-Islamic practice and sees the sole source of authority to lie in the founder-Prophet and his attributes as a religious leader.”²⁰¹ Indeed, unlike the Sunni model wherein the Caliph is beholden to the *sharī‘a*, “the doctrine of the Imamate dominates Shī‘ite jurisprudence to the degree that it produces a concept of law.”²⁰²

Among the remnants of apparent pre-Islamic custom that may have adhered to Shī‘ī *fiqh*, however, are, according to Patricia Crone, the “pre-classical position” on the institution of manumission: “Imāmī law... is unique in that it endorses the ancient custom of stipulating re-enslavement in the event of non-fulfilment of the contract.”²⁰³ This is not the most well known of Shī‘ī holdovers, however, pride of place going to the Imāmī doctrine of temporary *mut‘a* marriage. “*Mut‘a*...,” as Coulson explains, “is not simply a *nikāḥ*”²⁰⁴ with an accompanying time-limit, but is a distinct and individual legal institution.”²⁰⁵ The specifics of this doctrine are as follows:²⁰⁶ 1) it is a temporary relationship, 2) it is contracted for a specific period of time, 3) a “specific remuneration payable to the woman” (*ujra*) is required, 4) the barriers of ‘forbidden degree’ and difference in religion (as occur also in Sunni *fiqh*) still apply, 5) no limit is set on the number of contracts permissible (as opposed to the limit of four *nikāḥ* wives), 6) no rights of maintenance or obedience apply, and 7)

²⁰⁰ Here Coulson raises a valid point: “Since these three groups (the Zaydīs, Ismā‘īlīs, and Ithnā-‘asharīs) all possess their own distinct legal systems, the term ‘Shī‘ite law’ can only be used by way of the broadest generalization and is often, without further qualification, as meaningless as the term ‘Sunnite law’” (*History*, 106). In this particular section then, I will be using the term ‘Shī‘a’ only insofar as it pertains to the Ithnā-‘asharīs.

²⁰¹ Ibid., 118.

²⁰² Ibid., 106-7.

²⁰³ Patricia Crone, *Roman, provincial and Islamic Law: The origins of the Islamic patronate* (Cambridge: UP, 1987), 73.

²⁰⁴ *Nikāḥ*: the traditional Muslim marriage contract.

²⁰⁵ Coulson, *History*, 111.

²⁰⁶ The following is a paraphrasing of Coulson, *History*, 110-111.

early termination on part of the man does not allow for recovery of any part of the *ujra*. Understanding as we do the more or less universal Sunni definition of *zinā*, it becomes quite obvious that, with the Sunni *fuqahā'*, “the resulting relationship... amounts to the criminal act of fornication (*zinā*) and will, in strict theory, be sanctioned by the severe penalties prescribed therefor.”²⁰⁷ In short, what none would argue is a pre-Islamic practice equated by the Sunni *fuqahā'* with *zinā* has been preserved in Shī'ī tradition to this day.

Just as telling of a pre-Islamic customary link is the Shī'ī definition of *iḥṣān* which differs from the Sunni in that a *muḥṣan* is defined as “an adult, free Muslim *who is in a position lawfully to have sexual intercourse* and whose partner is actually available and not e.g. imprisoned or absent on a journey.”²⁰⁸ In other words, unlike the definitions of the Sunni *madhāhib*, widows and divorcees cannot be considered as *muḥṣanāt* – they simply have no access to legal intercourse. Their punishment – and it should here be noted that Shī'ī punishments for conventional *zinā* are exactly the same as the Sunni – would therefore place them in the same category as the *bikr zānī*. Putting it differently: with the Shī'īs, to be a *ṭhayyib* does not necessarily constitute being *muḥṣan*. Although the research conducted for this thesis has not yet uncovered comparable discussions of *iḥṣān* in ancient regional sources, there is still evidence to suggest that the Shī'ī tradition is far more reflective of ancient regional custom than the Sunni.²⁰⁹ It should also be noted that, unlike in Sunni *fiqh*, “a non-*muḥṣan* can be sentenced to death if there are aggravating circumstances such as incest..., rape or intercourse between a non-Muslim man with a Muslim woman.”²¹⁰

When it comes to the less conventional forms of *zinā*, the Shī'ā tend to be much more exact in their punishments, and have no hesitation of including “buggery, both with men and women, lesbian intercourse and petting”²¹¹ in their definition of *zinā*. *Liwāt*, in the strict sense of sodomy, is punished capitally by means of a *ḥadd*. Remarkably, however, “the *ḳāḍī* has the choice between execution with a sword, by stoning, by throwing the offender from a [high] wall or by burning him.”²¹² Again, as we shall see, certain of these modes of dispatching perpetrators of *liwāt* may have

²⁰⁷ Ibid., 111.

²⁰⁸ Peters, “Zinā,” 509. Italics are mine.

²⁰⁹ Infra, pp. 110, 126.

²¹⁰ Peters, “Zinā,” 509-10.

²¹¹ Ibid., 109.

²¹² Ibid., 110.

more ancient precedents. *Siḥāq*, on the other hand, merits only the *ḥadd* of a hundred stripes – the determining factor, apparently, being the lack of penetration (*iqāb*) involved in the act.²¹³

Sariqa, too, is different with the Shī‘a, mainly in that “[t]he Shī‘ī is inflict imprisonment for the third offence and death for the fourth.”²¹⁴ Finally, we might note that Shī‘ī *fuqahā*’ find the admission of women’s testimony in cases of *zinā* to be permissible “if there is at least one male witness, testifying together with six women.”²¹⁵

The theories of Western scholars

Thus far we have briefly surveyed the overall Islamic legal understanding of crimes relating to illicit sexual activity and theft with three intentions in mind: 1) to gain a broad overview of how these crimes are identified and dealt with by various schools, 2) to determine which rulings appear to be Qur’ān-based and which were derived from other sources, and 3) to gain some insight into how, traditionally, the *ḥadd* of *rajm* is accounted for. As regards the third goal, it is not only Muslim jurists who have opined as to the origin and justification of the stoning penalty and its apparent ‘particularization’ of the Qur’ānic punishment of flogging. Some Western scholars have also ventured opinions on the question, although surprisingly few have done so in any detail.

Nöldeke and Schwally, for example, in their groundbreaking and well-famed *Geschichte des Qorāns*, are said by Burton to have “demonstrated the inauthenticity of the alleged stoning verse and hinted that it had been necessary to invent it to account for the stoning penalty.”²¹⁶ In addition, they are said to have suggested that the punishment “might have been introduced by the Prophet’s first successors,” that the reports of ‘Umar’s ‘missing verse’ represent “a claim to the divine origin of the so-called verse in an endeavor to establish the stoning penalty in the praxis,” and that their literary analysis of the supposed wording of that verse resulted in the opinion that it was “alien to the style and vocabulary of the Qur’ān.”²¹⁷ Finally, “[a]s to the origin of this penalty (i.e. stoning) they suggest imitation of Deut. 22:21-4.”²¹⁸

²¹³ Ibid.

²¹⁴ Heffening, “*Sariqa*,” 62.

²¹⁵ Peters, “*Zinā*,” 510.

²¹⁶ Burton, “*Origin*,” 25.

²¹⁷ Ibid. As to this last point, it represents as far as I know the only attempt to tackle the question in terms of literary analysis, although they seemed to have been satisfied to conclude it was not Qur’ānic

Juynboll contributed his opinion on the issue as well. Claiming, as does Schacht, that the cause behind the revelation of Q.24:4 was “‘Ā’isha’s celebrated adventure,”²¹⁹ he contends that the Prophet, having originally “commanded that those who had been found guilty of this misdemeanour should be put to death by stoning – a punishment which he had probably derived from Judaism,” proceeded to “mitigate” that punishment “out of affection for ‘Ā’isha.”²²⁰ R. Peters, on the other hand, is of the opinion that “[m]aking *zinā* a punishable offence was a means to enforce the uniform system of marriage introduced by Muḥammad.”²²¹ At any rate, Juynboll observes that “[m]any thought that the punishment of stoning to death was abrogated by the verses of Qur’ān xxiv.1-5,”²²² yet, like Burton, does not point out who these ‘many’ were.

Roberts also contributed a few points to the discussion, though his unfortunate turn-of-the-century anti-Muslim and anti-Arab prejudices are far from inconspicuous throughout his work.²²³ Nevertheless, he raises issues which must be considered, maintaining, for example, “that the Qorān both in its demand for a number of witnesses as well as for the punishment of false-witnesses to a certain extent follows the teaching of the Old Testament: and it is very probable that the prophet was acquainted with these Israelitic enactments.”²²⁴ He qualifies this, however, saying “too much must not be made of this agreement, since these enactments, being so natural, may be expected in any law-book.”²²⁵ Regarding the number of witnesses, he proposes comparison with Deut.17:6 – which rejects testimony based on one witness alone, and proposes two or three – while for the actual punishment: Deut.22:13ff., which prescribes the payment of a hundred shekels to the accused daughter’s father.²²⁶ Well and good that he advised “too much must

in nature. A further exploration of the wording of this verse, i.e. “the full-grown man and the full-grown woman, stone them absolutely (*al-shaykh wa’l-shaykha fa’rjumūhumā al-battata*)” or of that other purportedly divinely inspired utterance “the virgin with the virgin a hundred stripes and a year’s banishment, the *thayyib* with the *thayyib*, a hundred stripes and stoning (*al-bikr bi’l-bikr jald mi’a wa nafi sana, wa al-thayyib bi’l-thayyib jald mi’a wa’l-rajm*)” raises the possibility of a pre-Islamic history much like certain legal maxims, e.g. “*al-walad li-l-firash wa li’l-‘ahir al-hajar*” (infra, p.119).

²¹⁸ Ibid.

²¹⁹ Schacht, “Zinā’,” 1227. See supra, n.26.

²²⁰ Juynboll, “Adultery (Muslim),” 131.

²²¹ Peters, “Zinā’,” 509.

²²² Juynboll, loc. cit.

²²³ See e.g. *Social Laws*, pp. 1, 5-6, 90, 94.

²²⁴ Roberts, *Social Laws*, 35.

²²⁵ Ibid.

²²⁶ Ibid.

not be made of this agreement,” being that the Qur’ānic prescription, as we know, is for four witnesses and its punishment corporal, not pecuniary. He further emphasizes the disparity between Pentateuchal and Islamic legislation by considering “one noteworthy difference, namely, that whereas according to Muhammedan law, after the double swearing (i.e. *li’ān*)... the marriage should be dissolved, [whereas] Deut.22, 19 enacts:— “And she shall be his wife; he may not put her away all his days.”²²⁷ As regards the crucial issue of *iḥṣān*, he contends that “such distinctions... are also found in the Old Testament.”²²⁸ Remarkably, however, Roberts alone amongst Western scholars maintains the veracity of ‘Umar’s ‘missing verse,’ calling it “[a] verse by Muhammed, which is not found in the Qorān, but which we have good reason to accept as genuine....”²²⁹ He furthermore considers this ‘verse’ to be binding, as though it were the only *ḥadīth* upon which the *fuqahā’* relied.²³⁰ It is noteworthy that, on the one point that truly seems to have a Pentateuchal parallel, i.e. stoning, he claims a purely ‘Muhammedan’ origin and makes no attempt to forge a link with the Old Testament.

With a similar tendency to attribute Old Testament origins to Islamic law is Crone, who, for example, proposes that the “exegetical memory loss” she attributes both to the early *mufasssirūn* and *fuqahā’* has bearing on the ‘problem’²³¹ of ‘Umar’s ‘missing verse’ inasmuch as she recommends we “accommodate the evidence that the Muslims once accepted the Pentateuch as their scripture, or as one of them, which would allow us to explain why the lawyers took stories in which Muḥammad inflicts a Pentateuchal penalty on Jews to establish a *sunna* for Muslims.”²³² In a curious statement earlier in the same article, and in response to the claim of some scholars “that Qur’ānic legislation is likely to have been swamped by Jāhili practice

²²⁷ Ibid., 35-6.

²²⁸ Ibid., 36. He does not specify where, though is no doubt referring to Genesis 38. See *infra*, p.160, for a refutation of this, although it does seem the fundamentalist Karaite sect had a similar conception to Sunni *iḥṣān* (*infra*, p.148).

²²⁹ Ibid., 36.

²³⁰ Ibid., 36-7.

²³¹ For a brief outline of Crone’s “Two Legal Problems,” see Hallaq, *Formation*, xxiv. Note Hallaq’s response that “[t]he exegetical and other problems posed by Crone would indeed be serious and thus would require an explanation if we grant two interrelated assumptions, namely, that: 1) they are genuine problems; and 2) if they are, they constitute sufficient grounds to doubt the existence of continuity (i.e. with the Qur’ān).”

²³² Crone, “Two Legal Problems,” 18-19. “[I]t is not otherwise clear,” she continues, “why this ‘gossip’ (as Burton calls it) should have been endowed with legal significance, or why the lawyers assumed the Prophet also to have adopted other Pentateuchal law that happens not to contradict the Qur’ān.”

when the mass of Arab tribesmen joined the *umma*, and by non-Arab practice when they conquered the Middle East,” she contends that “there does not seem to be any resurgence of either Jāhili or Middle Eastern practice behind the adoption of the stoning penalty....”²³³ The footnote attached to this contention reads: “The stoning penalty reflects Pentateuchal doctrine, not Middle Eastern practice.”²³⁴ Apparently, according to Crone, this particular legal doctrine of the Pentateuch was wholly isolated not only from pre-Islamic Arabs, but from the entire Middle Eastern milieu, until the early Islamic *umma* adopted the Pentateuch as one of their scriptures, if not in fact their primary scripture. No proof is offered for this claim, by which she makes clear her contention that stoning was practiced by neither pre-Islamic Arabs nor any other Middle Eastern community, with the possible exception of Jewish communities in whose scriptures such measures are prescribed. Finally, Crone offers another possibility as to how stoning came to supplant the Qur’ān’s prescription of flogging based on an idea introduced by Burton, mainly that the exegetes responsible for the fabrication of *ḥadīth* regarding the Prophet’s stoning were *quṣṣāṣ* (story-tellers). She concludes from this that the *fuqahā* “ignored the flogging penalty... and it could well be that they took their cue from story-telling exegetes....”²³⁵

Not surprisingly, Schacht has expressed a few opinions on the issue of stoning as well. To begin with, he puts forward the notion that the Qur’ān’s warnings to avoid *zinā* came about “apparently under Jewish or Christian influence.”²³⁶ As for stoning, he remarks that “[o]ne decision of the Prophet is put in a pointed manner under the aegis of the Koran, although it does not occur there,”²³⁷ in reference to the *ḥadīth* we have quoted²³⁸ in which “[t]he Prophet is asked to give judgement according to the Koran, on a married woman and an unmarried man who have committed adultery....”²³⁹ His conclusion, based presumably upon the inclusion of exile in the Prophet’s sentence, is that this tradition “is obviously later than the Iraquian traditions on the problem of banishment.”²⁴⁰ As regards the famous ‘missing verse’ *ḥadīth*, however, he has this to say:

²³³ Crone, “Two Legal Problems,” 11.

²³⁴ Ibid., n.34.

²³⁵ Ibid., 14.

²³⁶ Schacht, “Zinā,” 1227.

²³⁷ Schacht, *Origins*, 53.

²³⁸ *Supra*, p.41.

²³⁹ Schacht, *Origins*, 53 n.4.

²⁴⁰ Ibid.

“It is improbable that this verse is genuine, the traditions relating to it and the mention of ‘Omar are clearly tendencious; the stories that the Prophet punished by stoning are also unworthy of credence. This punishment, which must have entered Islam quite early, certainly comes from Jewish law (Deut.xxii.22) as can still be seen in a *ḥadīth*.”²⁴¹

It is telling that in two consecutive sentences he both rejects several *ḥadīth*, then relies upon another to prove his point, for none of which he provides any evidence but his own opinion.²⁴² In closing his *Encyclopedia of Islam* article on *zinā*, Schacht casually informs us that “[i]n practice the place of the legal regulations was often taken by summary and usually secret action either by the authorities or by the relatives of the guilty woman; in this case drowning was a common form of punishment.”²⁴³ It is left to the reader to check his bibliography and discover that this observation is culled from Lane’s *Manner and Customs of the Modern Egyptians*, and has thus a far more localized probability of application than Schacht’s statement would indicate.²⁴⁴

Of additional note is Schacht’s oft-repeated assertion that thieves and adulterers were both flogged in Umayyad Damascus, and that stoning thus came about later than the Prophet while the Qur’ānic injunction for theft was simply ignored. He bases this on the observation attributed to John of Damascus in his *Disputatio Saraceni et Christiani*.²⁴⁵

“In that case your lawgivers will prove false and your books falsified, because they command that the adulterer and the thief be flogged, although they did the will of God, and the murderer to be killed, who should rather be honoured, because he (also) did the will of God.”²⁴⁶

²⁴¹ Schacht, “Zinā,” 1227. See also idem, *Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 15-16, where he claims: “The introduction of stoning to death as a punishment for unlawful intercourse, which does not occur in the Koran... is obviously taken from Mosaic law.”

²⁴² This is a pattern which seems all too familiar among certain (though not all) Orientalists: *ḥadīth* tend to be absurd fabrications unless they support the author’s argument.

²⁴³ Schacht, “Zinā,” 1227-8.

²⁴⁴ Ibid., 1228. The danger of Schacht’s unqualified remark that drowning was a common punishment for *zinā* lay, as far as this research was concerned, in the immediate temptation to propose a link with Hammurabi’s famed code, wherein the adulterous wife and her paramour were both drowned.

²⁴⁵ Schacht, *Origins*, 191 and n.5; and idem, *Introduction*, 18. The repercussions of such untested assumptions can often be far-reaching, especially considering the authority with which Schacht is regarded as an Islamic legal historian. See, for example, Ahmed Ali’s *Al-Qur’ān: A Contemporary Translation*, 113 n.2, where he states: “During the Umayyad Caliphate the punishment for theft was flogging,” adding no further reference.

²⁴⁶ Daniel J. Sahas, *John of Damascus on Islam: The ‘Heresy of the Ishmaelites’* (Leiden: E.J. Brill, 1972), 143 (M.P.G. XCVI: 1337A).

However, there are other explanations for these seemingly aberrant punishments. First of all, the word here translated as ‘adulterer’ is πόρνων, from πορνεία, which “originally meant ‘prostitution,’ ‘fornication,’ but came to be applied to unlawful sexual intercourse generally [and] was a wider term than μοιχεία....”²⁴⁷ This latter term is invariably translated as ‘adultery,’ and the fact that John of Damascus was aware of this distinction may be seen on the following folio (1337B), where he uses both terms in contradistinction:

“... the Saracen will say, ‘Here, God is co-operating with the fornicator and the adulterer (τῷ πορνῷ καὶ τῷ μοιχῷ).”

In other words, a better translation of the passage used by Schacht would be “that the *fornicator* and the thief be flogged...,” the first part of which, at least, is now in perfect conformity with the Qur’ān.²⁴⁸ As for the flogging of thieves, there could be a very simple and Islamic explanation if we allow for the possibility that *ta’zīr* was already in practice. Perhaps the punishment of theft in Umayyad Damascus fell under the jurisdiction of the *muhtasibs*, who, like other government figures, “had the sense to restrict themselves to substituting the discretionary penalty of the *ta’zīr*, fine or flogging, punishments laid down in the works of *fiqh*, for the seriously mutilating punishments of the Qur’ān..., such as cutting off the hand or stoning.”²⁴⁹ We have also seen that if a theft does not fulfill certain conditions, then *ta’zīr* is most often meted out as punishment. At any rate, there are certainly other explanations than the conclusions of Schacht that the *ḥudūd* were ignored in Umayyad Damascus.

There is no doubt that the Western scholar who pursued the question of the stoning *ḥadd* in Islam with the most purpose and vigor was Burton. At least four works of his have been dedicated to – or contain sections dedicated to – the *ḥadd* for

²⁴⁷ James Hope Moulton and George Milligan, *The Vocabulary of the Greek Testament: Illustrated from the Papyri and other Non-Literary Sources* (London: Hodder and Stoughton, 1914), 529.

²⁴⁸ See also Judith Evans Grubbs, *Law and Family in Late Antiquity: The Emperor Constantine's Marriage Legislation* (Oxford: Clarendon Press, 1995), 225; where the author notes: “Like Roman Law, [Basil of Caesarea] considered *moicheia* an offence involving a married woman; a married man's affair with an unmarried woman was *porneia* and merited a much lighter penalty than adultery, though it was more severely dealt with than *porneia* between two unmarried persons.” John of Damascus would no doubt have been familiar with the canons of the Bishop of Caesarea (ca.329-379 A.D.) and others, wherein the distinction between these two terms is clear. Why Daniel Sahas chose to translate πόρνων as ‘adulterer’ in this case is uncertain, perhaps he considered adultery and fornication as interchangeable, ignoring the legal distinction.

²⁴⁹ Linant de Bellefonds, “Kānūn,” *Et'*, iv.557.

zina,²⁵⁰ the end result being that his conclusions seem far less terse even if they are, at times, no less presumptuous than those cited above. The greater part of his overall theory revolves around the science of abrogation (*naskh*), which, as he conceived of it, was “the Muslim’s ingenious response to the stimulus of embarrassment.”²⁵¹ He has rightly surmised that abrogation lies at the heart of the Muslim explanation of the stoning *ḥadd*, and, drawing on the *Ta’wīl Mukhtalif al-Ḥadīth* of Ibn Qutayba, summarizes the Sunni position on *naskh* in the following manner:

“The Muslims were generally agreed that if it were possible for God in one age to send a Prophet with a particular revelation and that the test of men’s obedience to God or the defiance of His will was the extent to which they were prepared to accede to or ignore that Prophet’s demands that they defer to the revelation of which he was the instrument; and that God in a subsequent age then sent another Prophet with a different revelation but that the test of man’s obedience and disobedience remained the degree to which they paid heed to the fresh dispensation, then there was nothing absurd in the view that God may send to a single Prophet in the course of the development of a single dispensation laws at one stage which were abrogated and replaced at a somewhat later stage within the same dispensation.”²⁵²

Notwithstanding this traditional explanation, his view is that discussions of *naskh* were the result of “inter-school squabbles.”²⁵³

Burton’s overall theory is built on three *aḥādīth* found in Mālik’s *Muwatta’* which he perceives to be central to the Sunni justification of *rajm*. We have already seen two of them (‘Umar’s ‘missing verse,’ and the son with the employer’s wife) – the third reading as follows:

“Mālik related to me from Nafi’ that ‘Abdullah ibn ‘Umar said, ‘The Jews came to the Messenger of Allah, may Allah bless him and grant him peace, and mentioned to him that a man and woman from among them had committed adultery. The Messenger of Allah, may Allah bless him and grant him peace, asked them, “What do you find in the Torah about stoning?” They said, “We make their wrong action known and flog them.” ‘Abdullah ibn Salam [said], “You have lied! It is stoning for it, so bring the Torah!” They spread it out and one of them placed his hand over the verse of stoning. Then he read what was before and after it. ‘Abdullah ibn Salam told him to lift his hand. He lifted his hand and

²⁵⁰ We have already discussed some of the points made in “The Origin of the Islamic Penalty for Adultery” and “Law and Exegesis: The Penalty for Adultery in Islam,” see also John Burton, *The Collection of the Qur’ān* (Cambridge: UP, 1977), 70ff.; and idem, “The Meaning of Ihsan,” *Journal of Semitic Studies* 19 (1974): 47-75.

²⁵¹ John Burton, *The Sources of Islamic Law: Islamic theories of abrogation* (Edinburgh: UP, 1990), 4.

²⁵² Burton, “Origin,” 22.

²⁵³ Ibid.

there was the verse of stoning. They said, "He has spoken the truth, Muhammad. The verse of stoning is in it." So the Messenger of Allah, may Allah bless him and grant him peace, gave the order and they were stoned."²⁵⁴

A part of Burton's theory, then, is that this and the other *ahādīth* regarding *rajm* exhibit a "purely exegetical character,"²⁵⁵ the above account of the stoning of the Jews being "self-evidently modeled upon the passage... from Q V; the story's: 'The Jews came to Muhammad', being the perfect mirror-image of the Qur'ān's: 'should they come to you, and should you judge between them; 'God revealed the Torah; 'on the basis of the Torah Prophets who have submitted to God's Holy Will judge the Jews; 'whoso does not judge by what God has revealed are disbelievers.'"²⁵⁶ Regarding the passage wherein the man covers the "stoning verse" with his hand, Burton contends "[t]his inept ploy is merely the dramatization of the Qur'ān's frequent charge against the Jews of having concealed from the world the many verses of the Torah in which the coming of Muhammad had been foretold."²⁵⁷ He maintains, moreover, that due to the presence of very nearly the same versions of this particular report in early *sīra* books, "the spirit of the stories... with which the *tafsīr* is associated... concentrate on showing the embarrassment and discomfiture of the rabbis at the hands of the new prophet...." The allusion he draws here, of course, is to John 8:1-11.2, in which the Pharisees brought a woman "taken in adultery" to Jesus, and which ended in the famed line: "He that is without sin among you, let him first cast a stone at her."²⁵⁸ Burton concludes by saying: "This ready-made story could well have furnished the literary model for the *tafsīrs* which identified the stoning penalty."²⁵⁹

We have already discussed Burton's contention "that the story about the verse of stoning was put into circulation by Shāfi'ī scholars who did not accept that a *sunna* can abrogate a Qur'ānic revelation and were forced to find a source with higher authority for the lawfulness of stoning for fornication...."²⁶⁰ He further suggests that the purpose behind the several reports that the Prophet's successors

²⁵⁴ Mālik, *Al-Muwatta'*, 344 (41.1.1).

²⁵⁵ Burton, "Origin," 18.

²⁵⁶ *Ibid.*, 19.

²⁵⁷ *Ibid.*

²⁵⁸ Burton, "Law and Exegesis," 283.

²⁵⁹ *Ibid.*

²⁶⁰ Peters, "Zinā," 509.

stoned “was quite simply to resolve the problem of how far the penalty allegedly applied by Muhammad to Jews could be held in after times to be applicable to Muslims.”²⁶¹ All of this, in his estimation, eventually became codified to the point that “by the middle of the second century of Islam there was universal accord that Muhammad’s practice, and therefore that of Islamic law, was stoning.”²⁶²

If one were to summarize Burton’s overall theory on the stoning penalty, then, it might read as follows: 1) the Prophet never stoned; 2) reports that Muḥammad ever stoned Jews are fabricated *asbāb al-nuzūl* (causes of revelation) for Q.5:40-49; 3) the *fuqahā* were influenced by the work of *mufasssīrūn* and *quṣṣās*, absorbing their accounts of the situations lying behind certain revelations; 4) the exegetically born, Torah-based punishment of stoning was translated to Muslims via the exegetical tool of *takhsīs*, as illustrated in the *ḥadīth* concerning the son and his employer’s wife; and 5) ‘Umar’s missing verse is an invention of the Shāfi‘īs, who had to seek a higher source than *sunna* to justify the ‘particularization’ of a Qur’ānic *ḥukm*.

Crone summarizes Burton’s *Collection of the Qur’ān* thus:

“*Tafsīr* generated *sunna* for the lawyers: thus 5:42-49 generated stories about Muḥammad applying the stoning penalty in cases of adultery, and this *sunna* won legal recognition, its incompatibility with 24:2 (which specifies flogging) notwithstanding. The lawyers did not in Burton’s view pay any serious attention to the text itself until about 800, when they were confronted with Qur’ānic fundamentalists.”²⁶³

It is noteworthy that Burton never truly tackles the question of when and with whom the stoning penalty began, concerning himself only with how it became incorporated into the law.

A final voice raised in the ‘origin of the stoning penalty’ debate is that of Yasin Dutton, and mostly in refutation of Burton’s work. He begins by contesting Burton’s view of *naskh* as “one of a number of techniques invented by the *uṣūlīs* to explain ‘embarrassing’ contradictions in *fiqh* and justify their own particular position....,” suggesting instead that *naskh* is “the later systemization of a genuine, well-attested, phenomenon which was taken for granted by such as Mālik.”²⁶⁴ Taking this point further, he contends that Mālik’s inclusion of the ‘missing verse’ *ḥadīth* in

²⁶¹ Burton, “Origin,” 21.

²⁶² Ibid., 22.

²⁶³ Crone, “Two Legal Problems,” 13.

²⁶⁴ Dutton, *Origins*, 124-5.

the *Muwaṭṭa'* had nothing to do with the issue of *naskh*, but was a demonstration of *sunna*, and thus *'amal*, the true basis of Mālik's Medinan system.²⁶⁵ Furthermore, he proposes a different purpose behind the inclusion of the other stoning *aḥādīth* as well, arguing "these three elements – the *sunna* of the Prophet, the one-time stoning verse of the Qur'an and the judgement of the Torah – are not seen as three different possible alternatives for the source of the penalty (contrary to what Burton, for instance, has suggested), but, rather, as integral, even if not equally important, elements in a composite picture of 'What Has Come Down About Stoning' (the title of the chapter)."²⁶⁶ As a final point, in reference to Burton's claim that "Mālik gives 'three possible sources' for the stoning penalty and that he 'was not... too concerned about the source of the stoning penalty'... and 'made no attempt to resolve his materials,'" Dutton contends that such an argument "presupposes that not all three options can be 'right' at the same time and that only one (if any) is the true source, whereas in fact they are not necessarily mutually contradictory or irreconcilable (and certainly were not in Mālik's eyes)."²⁶⁷ In short, Dutton only approaches the issue of stoning so far as to clarify Mālik's position, not offering any additional theories of his own as to its origin and eventual codification.

A summary of Western scholarly discourse on the origin of the stoning penalty, then, would include the following claims and characteristics: 1) that the concerned *aḥādīth* are not genuine, by either the unsupported opinion of the author, or by the supported claim that they are exegetical fabrications; 2) there is a Jewish origin to the punishment of *rajm* and several related rulings; 3) 'Umar's 'missing verse' is an attempt to gain divine sanction for *rajm*; 4) the Prophet designed Qur'ānic rulings to specific purposes, e.g. to 'mitigate' stoning; 5) there is a link between the process of the canonization of the Qur'ān and the entry of stoning into Islamic law; 6) stoning – outside, perhaps, of the Jewish community – was not a pre-Islamic Middle Eastern practice; 7) the early *fuqahā'* 'ignored' the flogging *ḥukm*; 8)

²⁶⁵ Ibid., 123.

²⁶⁶ Ibid., 124. Parentheses are the author's.

²⁶⁷ Ibid., 216, n.20. Dr. Joseph Lowry, in reviewing this thesis, contributed the following comment regarding this debate: "Probably Burton and Dutton are both right. This illustrates the complexity of untangling early Islamic law. The abrogation narratives appear already in the earliest *tafsīrs* and seem therefore to involve an actual historical memory of some kind associated with the early history of the Qur'ān, but abrogation was clearly also an important tool of legal hermeneutics for precisely the reasons suggested by Burton."

stoning was not applied during Umayyad rule; 9) *naskh* as a concept owes its origin to 'inter-school squabbling;' and 10) the *fuqahā'* were influenced by *quṣṣās*.

It is clear from this brief review that a vital element is missing from the discourse. None of the scholars above have yet truly addressed the issue of when, where, and with whom the punishment of stoning *began*. Who was the first Muslim to stone adulterers? How did they do it? What tradition(s), if any, informed their actions? Furthermore, despite Crone's claim that stoning was neither a Middle Eastern nor pre-Islamic Arab practice, neither she nor any other Western scholar has so much as attempted to provide evidence for this assumption. In short, based on the suppositions of the above stoning-penalty discourse, it is obvious that an attempt to determine pre-Islamic regional practice regarding *zinā* would contribute a new dimension to the debate, a new series of factors which might have the power to confirm or contradict several of the arguments raised above.

Revisiting the questions of origins and influence

At this point we have reviewed not only the *aḥkām al-Qur'ān* related to *zinā* and *sariqa*, but also the successive layers of legislation the *fuqahā'* meticulously crafted around this core. To better understand some of the issues arising from this development, the Muslim justification for and opposition to the *ḥadd* of *rajm* and the theories of Western scholars about the punishment's origin and development have been examined. But the question remains: What is the provenance of the secondary (i.e. non-Qur'ānic) legislation? What generated the non-Qur'ānic sources of the *fuqahā'*? This question has already been answered to some extent in examples of jurists deriving rulings either from reports relating the *sunna* of the Prophet and other venerable predecessors, or, as in the case of the extension of the 'half-for-slaves' concept, analogical reasoning, or *qiyās*. The great majority of supplementary legislation, however, is evidently derived from *sunna*; and regardless of whether or not we accept the veracity of the *aḥādīth* relating this *sunna*, we must accept that neither the key figures who enacted it (i.e. the Prophet and certain venerated Companions and Caliphs) nor the *quṣṣās*, *mufasssīrūn*, or *fuqahā'* who may have fabricated it, were operating in a cultural or legal vacuum. In fact, there is more than enough evidence to infer that not only the territories of the expanded Islamic state in the first two centuries of Islam, but also the Arabia of the Prophet and immediate Successors were rich with legal traditions stretching far beyond extant written

records of history. This fact, combined with the profound reach of the ancient Arabian and early Islamic conception of *sunna*,²⁶⁸ makes it more than probable that – no matter the genesis of the concerned *ahādīth* – the key players involved in the enactment or fabrication of the portrayed legal material were bound in an environment overflowing with time-honored precedents. So what were they? What were the legal traditions that informed the makers of early Islamic law?

Spontaneous invention of the *fuqahā'* ruled out, the remaining possibilities are not many. The sources were either: 1) derived from the traditional laws of the *Hijāz* as they were either before, during, or after the rise of Islam, 2) derived from the surrounding territories either before (via Arab custom), during, or after the rise of Islam, 3) derived from the Prophet's *innovative* behavior (i.e. insofar that his actions were not based on *Hijāzī* tradition), 4) derived from the Prophet's *traditional* behavior (in which case the same as no. 1), 5) derived from no longer extant sections of the Qur'ān, or 6) various combinations of any or all of the above possibilities. Although the prospective juridical source materials for the creation of the *sharī'a* are thus quite vast and far-reaching, Orientalist and Islamicist scholarship has tended to focus, as we have already begun to see, on no.2, i.e. 'foreign influences'.²⁶⁹ In addition to this idea, however, an understanding of the precepts of Arab customary and *Hijāzī*²⁷⁰ practice, before and during the rise of Islam, is absolutely essential for an understanding of the materials at the disposal of Islam's early exemplars and legal formulators.

The next obvious question then, is what exactly do we mean by Arab customary or *Hijāzī* practice? Again, there are only so many possibilities: 1) the unadulterated legal customs of *Hijāzī* Arabs stretching back into the mists of the genesis of Arab peoples, 2) the legal customs of *Hijāzī* Arabs, but evolved over successive generations as environmental, social, economic etc. demands dictated, 3) an ancient Arab system but one including elements of 'foreign' legal systems incorporated over centuries of interaction with surrounding cultures, 4) a mostly borrowed or imposed 'foreign' legal system, 5) various combinations of the preceding four possibilities, or 6) a primitive system, with only the most basic

²⁶⁸ *Infra*, p.74.

²⁶⁹ There are, of course, exceptions such as Bergsträsser and Nallino who argued in favor of Arab custom as playing the crucial role in early development of the *sharī'a*.

²⁷⁰ Referring here to *Hijāzī* Arabs with the understanding that non-Arab societies may have co-existed with Arab societies in the *Hijāz*, but would be lumped under the category of 'foreign.'

rudiments of law. Again, despite the fact that a potentially vast body of legal material might have existed within the sphere of Arab customary practice, the greater weight of Orientalist and Islamicist scholarship has, to date, been behind nos. 4 and 6. In other words, in the eyes of most Western scholars who have treated the subject, pre-Islamic Arabs were either practically lawless, or practicing the laws of others. This is the notion of the ‘culturally impoverished Arab,’²⁷¹ itself likely an outgrowth of the colonial origins of the field of Oriental studies; and may be one of the greatest causes lying at the heart of our inadequate understanding of the cultural norms of pre-Islamic Arabia. Not surprisingly, little attempt has been made by supporters of this assumption to bolster it with hard evidence of any kind, much less to survey the astonishingly vast corpus of legal material that the Near East has provided both the archaeologist and the historian. Indeed, little evidence of any kind has been put forward in proposition of what the real nature of Arab customary law might have been. Some assumptions of this thesis therefore are that 1) Arab customary practice may have played a significant role in the formation of the *sharī‘a* around Qur’ānic principles, and 2) an understanding of the character of that customary practice may in part be achieved by exploring all such pre-Islamic Near Eastern legal materials as are extant.

Several studies have indeed been carried out regarding the origins of – and supposed ‘foreign’ influences on – early Islamic law. However, as has been noted, this was most often with the aim of proving that Islam’s early law makers ‘borrowed’ all such legal concepts as blossomed early on in the formation of the *sharī‘a* – having come from a culturally and legally impoverished Arabia. There is, of course, a traditional approach as well, and thus “[t]here are at present two main views on the origins of Muslim jurisprudence: that of the ‘classical’ (i.e. post-Shāfi‘ī) Muslim scholars, and that of the revisionist school of most modern Western scholarship associated in particular with the views of Goldziher and Schacht.”²⁷² As for the classical paradigm, Hallaq notes the patent illogicality of ‘foreign’ origins or influences from this perspective, for “[i]n this narrative, the Muslim Arabs were masters who stood in need of no foreign law and, what is more, none could impose on

²⁷¹ For a concise identification, overview, and refutation of this unfortunate notion, see Hallaq, *Formation*, xxiff.; idem, “The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law,” *Journal of the American Oriental Society* 110.1 (1990): 80f., passim.

²⁷² Dutton, *Origins*, 1.

them any such laws.”²⁷³ He further points out that early Muslims were in effect undertaking the restructuring of “what had been adulterated by other monotheists” by means of a new installation of divinely revealed law, and thus “it would have been absurd to expect a community embarking on such a Mission to derive its reformist inspiration from the very entities that it was supposed to reform.”²⁷⁴

It is the ‘revisionist school’ of Western scholarship, however, upon which we will now focus; some of its assumptions, as Dutton notes, are: 1) that “the vast majority of *ḥadīth*-material [is] apocryphal, having been back-projected as sayings of the Prophet only at a much later date,”²⁷⁵ 2) that this “alleged wholesale fabrication of *ḥadīth*” was designed to combat what the *fuqahā*’ perceived as “the godless, irreligious nature of the Islamic state at that time” and “the widely divergent and randomly derived local practice of the various legal schools of the time,” and 3) that “the word *sunna* referred variously to the consensus of opinion of the different local schools,” before gradually being subsumed under the concept of *sunna* of the Prophet.²⁷⁶ This is what Hallaq refers to as the “revisionist strand within the Orientalist camp... that has tended to discredit the traditionalist narrative altogether, confirming the general outlines of classical Orientalism and even going beyond these outlines, while adopting a highly skeptical approach to the Muslim sources.”²⁷⁷ It is, for the most part, this revisionist group which has taken up the issue of ‘foreign’ origins and influences, continuing a long tradition whose “contributors... have ranged over a wide spectrum, from those who affirmed a debt to Mosaic law to those who saw in Roman law the material which the emerging Sharī‘a was to appropriate,” and whose “estimation of the degree of this debt... varied from ‘systematic borrowing’ from Jewish and/or Roman law to more modest claims of indebtedness.”²⁷⁸ The assumptions of the revisionist position include, as we have seen, “that the Arabia of

²⁷³ Hallaq, *Formation*, xvi.

²⁷⁴ Ibid. Hallaq does not, however, shy away from pointing out the problems associated with the traditional model, mainly: 1) the tendency to “project backwards events and developments that could not have taken place during the periods assigned to them,” and 2) the notion that both the Qur’ān and *sunna* of the Prophet arose as “comprehensive, canonical and foundational” law sources immediately following the Prophet’s death (ibid., xviii).

²⁷⁵ For a concise overview of the classic revisionist view on *ḥadīth*, see Crone, *Provincial*, 33-4; where she argues “it is scarcely justified to presume *Ḥadīth* to be authentic until the contrary has been proved. And if authentic statements by the Prophet were utterly transformed by the scholars in the course of their work, then the presumption must surely be that no *Ḥadīth* is authentic.”

²⁷⁶ Dutton, *Origins*, 2. For an excellent description of the evolution of *sunna* in Islam, see Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: UP, 2005), 46ff., 69ff., 102ff.

²⁷⁷ Hallaq, *Formation*, xix.

²⁷⁸ Hallaq, “Use and Abuse,” 79.

the Prophet was a culturally impoverished region (and this remains the prevailing belief even today),” and thus, “that in the course of [the early Muslim’s] conquests and later expansion, they freely absorbed the cultural elements of the societies they conquered, including (but especially) the Byzantino-Roman, Sasanid, and Jewish civilizations.”²⁷⁹ However, as Hallaq rightly points out: “Except in a few cases, attempts to demonstrate genetic links with these cultures have proven futile, if only because Arabia has provided an equally, if not more, convincing source for much of the law that Islam derived.”²⁸⁰ Moreover, the underlying cause of this failure on the part of the revisionists to establish ‘foreign’ origins is “the intense concern... to view Islamic origins as replicating the cultural patterns and institutions deemed to have been the sources of Western civilization.”²⁸¹ This, as Hallaq points out, is in fact the very point of the entire origins debate, i.e. “to postulate Islam’s heavy indebtedness to Europe’s cultural predecessors.”²⁸² For that reason only the revisionist camp has argued that development of the *sharī‘a* to the heights it had reached by the death of al-Shāfi‘ī occurred “in simply too short a period, and so, only borrowing can explain the swift upsurge of a highly developed law and legal system.”²⁸³

We are familiar with two of the key players in the revisionist origins debate from the previous section, where their notions on the stoning penalty were reviewed: namely, Schacht (who, as we shall see, derives much from Goldziher) and Crone. We’ll begin, however, with Goldziher, whom Crone depicts as “a zealous adherent of the theory of Roman influence” suffering from weak arguments.²⁸⁴ In her words, “he postulated large-scale borrowing of Roman concepts on the basis of purely external similarity, disregarded the possibility of transmissions via Jewish law, and had only the most elementary knowledge of the legal system to which he attributed so crucial a role.”²⁸⁵ Setting aside Crone’s critique, Goldziher certainly seems to have been a

²⁷⁹ Hallaq, *Formation*, xxi.

²⁸⁰ Ibid.

²⁸¹ Ibid., xxx-xxxi.

²⁸² Ibid., xxxii.

²⁸³ Ibid., xxxiii. For a comprehensive argument against this revisionist standpoint, see Wael B. Hallaq, “The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse,” *UCLA Journal of Islamic and Near Eastern Law*, 2, 1, (2002-03): 1-31.

²⁸⁴ Crone, *Provincial*, 3.

²⁸⁵ Ibid. Her stance on Goldziher’s ‘zealous adherence’, “on the basis of purely external similarities” is somewhat telling considering not only her own uncompromising position on Jewish and provincial influence based on the same sort of ‘external similarities’ as Goldziher’s, but her repeated implications that Arabia was a cultural wasteland until after the early conquests. Furthermore, she does not hesitate to express her presumption that the only way to make sense of Goldziher’s pro-

great proponent of the idea of ‘loan translation,’ i.e. that theoretical process by which one culture ‘borrows’ an institution from another culture in shape, application, and scope, without borrowing the ‘foreign’ term for that institution. To illustrate, we have a rather extreme example from Schacht who, following in Goldziher’s footsteps, seems determined that the Arabic-Islamic *qiyās* (which, as we assume he believed, could not possibly have had its origin in culturally impoverished Arabia) must be ‘borrowed’ from the Greek *συμβάλλειν*, not directly, of course, but via the Rabbinic *heqqesh*. *Qiyās*, we must presume, having absolutely no etymological connection to either term, is a ‘loan translation,’ not once, but twice-over. Goldziher, also “on the basis of purely external similarities” concludes *fiqh* itself to be a ‘loan translation’ of the Latin *rerum divinarum atque humanarum notitia*; *fatwā* to be the Latin *responsa prudentium*; *ra’y* the Latin *opinio prudentium*, and many other examples.²⁸⁶

Schacht, as we have seen, is a proponent of Goldziher’s theories inasmuch as he supports the idea of borrowing from Hellenistic, Sāsānid, and Roman law and uses much the same methodology. Such ‘foreign elements’ as are found in Islamic law, he argues, have been assimilated so well they “hardly seem to reveal a trace of their foreign origin,”²⁸⁷ and are largely the result of “the continuation of legal and commercial practice in the territories conquered by the Saracens.”²⁸⁸ A prime example of Schacht’s backing of the Roman model can be found in his opinion regarding the origins of the Islamic legal conception of *ijmā’* (scholarly consensus):

“This concept corresponds to the *opinio prudentium* of Roman Law, the authority of which was stated by the Emperor Severus.... Goldziher has suggested an influence of Roman on Muhammedan law in this case.

Roman stance in light of his own cultural background is to assume such the result of “his standing in European society,” i.e. that he wished to disassociate himself from his Jewish heritage by being “an exponent of one of the most prestigious aspects of European civilization (i.e. Roman law)” (ibid., 102-6).

²⁸⁶ Crone, *Provincial*, 102-4. For her dismantling of Goldziher’s Roman paradigm, see Appendix 2 (pp.102-6). As regards Schacht and Goldziher’s etymology of *qiyās*, in his review of this thesis Dr. Joseph Lowry contends: “In fact, there is a strong likelihood of a connection between Arabic *qiyās* and Hebrew *hiqqīsh*. The latter term is from the root n-q-sh, and in Hebrew, the n becomes assimilated to the q in certain instances... which could make the root look like it is q-y-s in some permutations.” He then adds, however, that “[w]e still lack a proper comparative study of the use of the Hebrew term and the earliest grammatical and juristic usages of *qiyās*.”

²⁸⁷ Joseph Schacht, “Foreign Elements in Ancient Islamic Law,” *Journal of Comparative and International Law* 32 (1950): 10. Note the ‘cover-statement’ tactic in this argument, by which practically anything in Islamic law can be argued to have a foreign origin no matter how little resemblance is apparent.

²⁸⁸ Ibid.

This concept may well have been transmitted to the Arabs by the schools of rhetoric.”²⁸⁹

As regards this last point, it was by such schools of rhetoric (by which the Rabbis were also deeply influenced, Schacht informs us) that Roman law was introduced into the ancient Islamic law schools of Iraq despite the “historical impossibility” of direct influence.²⁹⁰

Schacht’s opinions are sometimes expressed, however, without even the semblance of support. For instance, his explicit stance on *qadhf* is that “this punishment, which was introduced by Koran xxiv.4, is purely Islamic.”²⁹¹ He gives not so much as a hint to the reasons behind this conclusion, though one might be tempted to believe it is somehow connected with his staunch insistence on “‘Ā’isha’s adventure” as the cause behind the revelation of Q.24. Again, in his *Encyclopedia of Islam* article on *li‘ān*, he claims both *qadhf* and *li‘ān* to be “primarily Muslim and [to] have no affinities in Arab paganism, in which an institution like the *li‘ān* had no place at all....”²⁹² Here, at least he offers an attempt at support: “The word *li‘ān*, which comes from the *Ḳur’ān*, is unknown to pre-Islamic poetry.”²⁹³

Schacht’s earlier work on origins, however, showed signs of advancing into different areas, as is especially apparent in his “From Babylonian to Islamic Law.” Here he points out that not only do certain types of contract show a continuity from Sumerian through to Persian Mesopotamia, but that only the much later Islamic model completely matches the Babylonian, indeed, the *shurūt* books “look just like the Babylonian documents.”²⁹⁴ He is careful to make the disclaimer, however, that a historical connection must first be drawn before the conceptual connection engendered by the title of the article be made.²⁹⁵ By way of drawing such a connection, therefore, he maintains that, although we don’t quite know the makeup

²⁸⁹ Schacht, *Origins*, 83. Note the Severian Dynasty is said to have been of Phoenician extraction, a fact which here fits well with Hallaq’s observations regarding recent scholarship on Roman law; mainly that the Near-Eastern influence on Roman law far outweighs that of the latter on the former (infra, p.71).

²⁹⁰ Schacht, “Foreign Elements,” 12, 13.

²⁹¹ Schacht, *Origins*, 285.

²⁹² Schacht, “Li‘ān,” 730.

²⁹³ Ibid. As we shall soon see, however, there is an impressive array of parallels to both *qadhf* and *li‘ān* in the pre-Islamic corpus of Near Eastern legal material.

²⁹⁴ Joseph Schacht, “From Babylonian to Islamic Law,” trans. A. van der Veen and K. Baelz, *Yearbook of Islamic and Middle Eastern Law* 1 (1994-1995): 31.

²⁹⁵ Ibid. We may note that this is a more logical stance than his later insistence on Roman to Islamic law despite the “historical impossibility” of direct influence.

of Medinan customary law, it certainly contained “non-Arab elements;” a proposition he attempts to support by pointing out that “the Arabs – when doing business with the inhabitants of the neighboring countries – had to abide by the commercial and legal customs of the latter.... And even if the people from Medina probably did not trade directly with Iraq, they definitely did so indirectly.”²⁹⁶

Of great significance for our study is his next observation, mainly that the greatest obstacle “is to bridge the difference in time between the latest late-Babylonian documents and the pre-Islamic customary law.”²⁹⁷ According to Schacht, this is less of a problem than it may appear due to an “element of continuity” which remained throughout the long history of such contracts, mainly “the Aramaic population.”²⁹⁸ Surprisingly, this article is relatively early (1927), and one can only wonder why Schacht never pursued the topic further, despite his closing plea that more research be made into the area of Babylonian “influence.”

The most outspoken critic of Schacht’s work on the question of origins is undoubtedly Crone,²⁹⁹ claiming as she does that his method was not only as poor as Goldziher’s, but that “[n]ot a single item of Goldziher’s and Schacht’s list of Roman elements in Islamic law has been proved, and several are demonstrably wrong.”³⁰⁰ Her overall critique includes the following points: 1) that in Schacht’s work there is “no sense that the Fertile Crescent played a role in this evolution: the transition from *antiquity* to the scholars’ Iraq is almost wholly lost in his work,” 2) that “[h]is work showed that the system had taken longer to develop than had so far been assumed, but not out of *what* it had developed,” 3) that, regarding his paradigm by which the *fuqahā*’ derived the *sharī’a* from the ‘popular and administrative practice’ of the Umayyads, he never bothered to check what the sources of that practice might have been, 4) that he never drew comparisons with Near Eastern legal systems, 5) that he “cited no papyri... displayed no interest in the Syriac lawbooks, and... made virtually no use of the massive secondary literature on late Roman and provincial law,” 6) that

²⁹⁶ Ibid., 32.

²⁹⁷ Ibid.

²⁹⁸ Ibid., 33.

²⁹⁹ Although Hallaq, too, makes several critical points, including: “His admission that such a developed law (i.e. as was found in Medina and Mecca) existed in the homeland of the conquerors had no bearing whatsoever on his determination to champion Iraq as the real cradle of Islamic law,” i.e. Schacht continually and without substantiation rejects the Hijāz as a significant contributor to Islamic law (*Formation*, xxii-xxiii).

³⁰⁰ Crone, *Provincial*, 7, 11.

he never substantiated the ideas presented in “From Babylonian to Islamic Law” through investigation of provincial law, and 7) that his theory of transmission via rhetors is, in short, unworkable.³⁰¹

Not surprisingly, the greater part of Crone’s critique is in support of her own origins agenda, which may be summarized in her words as follows:

“The tribal legacy of the invaders in conjunction with Jewish concepts provided the Muslims above all with the capacity to reshape, though Jewish law certainly and tribal law possibly contributed raw material too. What they reshaped was essentially provincial practice. This practice contained elements of Roman law in Syria and Egypt, just as it contained elements of Sasanid law in Iraq; and Roman law certainly, and Sasanid law probably, entered the Shari’a as a result. But substantially it was of ancient Near Eastern and Greek origin, or in other words it was the indigenous law of the Near East as it had developed after Alexander.”³⁰²

To this may be added an earlier passage:

“Provincial practice is not a label for something non-existent, insignificant, or unknown, but on the contrary for a well-documented set of practices shaped by many or most of the inhabitants of the Near East from the Nile to the Tigris, indeed even, it would seem, by the pre-Islamic Arabs themselves to some extent. The more we belittle the contribution of Roman law, the more we make a case for that of provincial law, not for that of Arabia.”³⁰³

According to her own estimation, then, Crone’s definition of provincial law – being the truly definitive origin of Islamic law – is that it contains elements of Jewish, tribal, Roman, Sasanid, Near Eastern, and Greek law, as “shaped by” the entirety of the Near Eastern population including, and only grudgingly, the Arabs themselves. It thus would seem that Crone’s definition of provincial law includes everything – everything, that is, that her arguments require it to be so long as it is neither explicitly Arab nor explicitly Roman. Remarkably, while nurturing an ever-expanding definition of provincial law which eventually includes even the possibility of an Arabic contribution, she yet denies that a case be made for Arabian law as a significant contributor to Islamic law; and again, though she builds a complex and convoluted case for the contribution of everything but Arabian legal traditions, she builds absolutely no case against Arabian legal traditions. In the end, Crone’s

³⁰¹ Ibid., 7-11.

³⁰² Ibid., 99.

³⁰³ Ibid., 92.

adherence to a vague definition of provincial law is no less zealous than that of Goldziher and Schacht to the Roman, and no more convincingly supported.

Crone is not without critics, however, and by far the most outspoken of them is Hallaq. In "The Use and Abuse of Evidence: The Question of Provincial and Roman influences on Early Islamic Law," he begins by noting that "Crone's almost dogmatic insistence on Syria (i.e. as the region through which provincial law came into Islamic law) stems from her reconstruction in *God's Caliph...*,"³⁰⁴ but more importantly that she habitually demonstrates an "intense hostility toward her subject."³⁰⁵ This, Hallaq points out, is the source behind her continual insistence on the cultural poverty of pre-and early Islamic Arabia, to the extent that "the backward Muslims needed the example of the Greeks to learn how to be charitable."³⁰⁶ The remainder of Hallaq's article is a step-by-step exposure and dismantling of the manipulation of evidence – and of objectives – not to mention the outright mistakes beleaguering Crone's thesis of provincial law; he concludes with the observation that, as mentioned above, she confuses the definition of provincial law to include what she appears to be arguing against. His final word, having alluded to the double standard inherent in Crone's criticism of Goldziher and Schacht, is a remark that her research offends "the most elementary principles of scientific thought."³⁰⁷

At this stage of our investigation into the revisionist discourse on the origins of Islamic law, the outlook can be said to be rather bleak, with really only two prominent voices so far raised in the debate and both of which seem to suffer from major and fundamental flaws. However, although Schacht and Crone may be seen to have alone treated the topic in depth, many others in the community of Orientalist and Islamicist scholars have broached the topic as befits their various areas of research. Certain trends can be gathered from these various approaches to the question of origins.

Firstly, time and again one encounters the notion, emanating from the majority of scholarship on origins, that pre- and early Islamic Arabia was a sort of cultural – and definitely legal – void. Being that no work has been dedicated to proving this, however, we must at this point consider it as an assumption. Certainly

³⁰⁴ Hallaq, "Use and Abuse," 79-80, n.2.

³⁰⁵ Ibid., 80 n.7. For a discussion of Crone's apparent prejudices, see 80f.

³⁰⁶ Ibid., 83.

³⁰⁷ Ibid., 91.

the case for non-Arabic sources of Islamic legal material has been argued, and sometimes with coherent support. However, being as no opposing evidence has been raised against a considerable pre-Islamic Arabic contribution (other than an unsubstantiated assumption of ‘cultural poverty’), we must assume this at least as likely as ‘foreign’ origins are.

Secondly, we have also seen a great many attempts to attribute Jewish origins to various aspects of Islamic law. Crone, for example, maintains that the *sharīʿa* is “provincial law recast with Jewish concepts at its backbone and numerous Jewish (and other foreign) elements in its substantive provisions.”³⁰⁸ She is certainly not the only proponent of a prominent Jewish role, however.³⁰⁹ Nevertheless, most of these claims are again assumptions, based on the same ‘evidence’ which Crone accused Goldziher and Schacht of abusing, namely “purely external similarities.” As we shall see in following sections, there may be other reasons behind these similarities than *de facto* borrowing on the part of early Muslims.

Yet another trend we have seen is a tendency to rely on ‘loan translation’ as a viable means by which ‘foreign’ elements may have entered Islamic law. As with the idea that ‘foreign’ elements were so quickly and completely integrated that they “hardly seem to reveal a trace of their foreign origin,” the concept of ‘loan translation’ is often used by scholars as a type of ‘cover statement,’ i.e. connections may be drawn based on similarity alone in one instance, and similarities dismissed in another due to an unrelated terminology. It is exactly this twist of logic that Hallaq illustrates at one point in his refutation of Crone’s *Roman, Provincial and Islamic Law*:

“We recall that one of the reasons for dismissing the institution of *ḥilf* as the progenitor of *walāʾ al-muwālāt* is that the two institutions have different names. The linguistic difference between *kitāba* and *paramonē*, however, is deemed by Crone to be unimportant because this time it obviously serves her purpose to do so.”³¹⁰

Moreover, a perusal of various Arabic terms in the *Encyclopedia of Islam* reveals time and again the Western scholarly agenda of attributing ‘foreign’ etymologies to Arabic terms; *kharāj* and *jizya* for example, are institutions said to have derived from

³⁰⁸ Crone, *Provincial*, 93.

³⁰⁹ For a lucid discussion of the history of the ‘Jewish influence’ discourse, see Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom During the Geonic Period* (Cambridge, Massachusetts: Harvard University Press, 2003), 1-7.

³¹⁰ Hallaq, “Use and Abuse,” 88.

respective Byzantine and Sāsānid traditions, and thus retain a connection etymologically.³¹¹ Hence the ‘cover statement’ aspect of ‘loan translation’: if the Arabic term resembles a ‘foreign’ term of a related meaning, its origin is fixed to that culture to which that ‘foreign’ term belongs, if the terms are dissimilar, then it is assumed to be a ‘loan translation.’ Any Islamic institution, therefore, which in any way resembles a ‘foreign’ institution, is liable to be attributed to a ‘foreign’ origin. So, too, may it be noted that scholars seem never to take into account the possibility of *multi-directional* loan translations – it is simply assumed *a priori* that the ‘foreign’ institution entered Arabic custom and vocabulary, not vice versa.

Regardless of whether legal concepts were flowing in either direction, it is certainly true that the regional legal and customary systems of the conquered territories continued to operate beneath early Muslim rule. Schacht in particular emphasizes this point, quoting al-Balādhurī’s *Kitāb Futūḥ al-Bulḍān* as follows:

“Abu Yusuf [d. 182] held that if there exists in a country an ancient, non-Arab normative custom (*sunna*) which Islam has neither changed nor abolished, and people complain to the Caliph that it causes them hardship, he is not entitled to change it; but Malik [d. 179] and Shafi’i [d. 204] held that he may change it even if it be ancient, because he ought to prohibit [in similar circumstances] every lawful normative custom which has been introduced by a Muslim, let alone those introduced by unbelievers.”³¹²

Coulson, too, points out “[t]he basic policy of the Umayyads, dictated by necessity, was the preservation of the existing administrative structure in the provinces,” and that “Umayyad practice thus naturally absorbed many concepts and institutions of foreign origin.”³¹³ Although undoubtedly true to some extent, this black-and-white portrait of Umayyad policy must not be seen as another blanket concept by which ‘foreign’ elements can be attributed to early Islamic law. For example, if it were to be proven that certain pre-Islamic Arabian cultures had contracted small *dhimmi*-like communities which paid a *jizya* for the right of self-adjudication, would it still be maintained that “[t]he legal status of non-Muslim subjects in Islam was modelled

³¹¹ Interestingly, it may be that in ancient Semitic cultures, foreign concepts may have been more likely to retain their original designation; e.g. as D. S. Margoliouth notes: “[I]t may be observed that, in speaking of dignitaries, biblical writers are ordinarily (not invariably) careful to give them their native titles... (“Language of the Old Testament,” *DOB*, iii.25).

³¹² Schacht, “Foreign Elements,” 10.

³¹³ Coulson, *History*, 27.

largely on the position of the non-citizen groups in the Eastern Roman Empire?"³¹⁴ And if it were somehow proven that the markets of pre-Islamic Mecca were overseen by an *'āmil al-sūq* (and there is no reason why this may not have been the case), would scholars still attribute the origins of the Islamic *muḥtasib* to the Byzantine *agoronomos*?³¹⁵ The assumption, as ever, is that such institutions were simply too advanced for Arabs of the interior, and thus, on the basis of continuity beneath Muslim rule, Coulson maintains: "Over the whole of the Umayyad period standards and norms of foreign law (Sasanian Persian as well as Roman law) gradually infiltrated into legal practice, so that Muslim jurisprudence in the mid-eighth century could take them for granted when conscious knowledge of their origin had been lost."³¹⁶ Crone, too, has put the historical reality of local continuity under Muslim rule to use, claiming of the Islamic institution of *kitāba* that "its continuance demonstrates that Arab manumitters did indeed pay attention to the legal practices of their non-Arab subjects."³¹⁷

It is easy to see a common theme to all this one-way 'borrowing,' and Hallaq summarizes it quite succinctly:

"The determination of the actual occurrence and the extent of borrowing are intimately related to the manner in which one conceives of the general levels of culture of those who borrow and those who lend. Once a culture is seen as 'sophisticated' it becomes incapable, in the mind of those who see it as such, of borrowing from another, 'primitive' culture; whereas 'desolate' cultures are *a priori* given to appropriating from more developed ones."³¹⁸

The problem, in other words, is an assumption of cultural superiority; pre- and early Islamic Arabs are seen by a great many scholars as inferior to the surrounding cultural entities of the day.

The study of Islamic origins is evidently plagued with problems; nor are the above examples all that need concern us. For example, as Hallaq points out, "[t]he fact that Muslims became familiar with the provincial legal tradition does not in itself constitute evidence of borrowing, and the value of any evidence based on this familiarity is further diminished, if not eliminated, when one gives full credit to the

³¹⁴ Ibid.

³¹⁵ Ibid., 28.

³¹⁶ Ibid. One must wonder, however, if three generations of a tradition-inspired oral culture is truly long enough to lose the memory of a 'foreign' legal heritage.

³¹⁷ Crone, *Provincial*, 93.

³¹⁸ Hallaq, "Use and Abuse," 80.

ingenious process of legal systematization and cultural synthesis that took place in the first two centuries of Islam.”³¹⁹ We are also confronted, as has been noted, with a dearth of first century sources, and matters do not become less complicated later on, for “[j]ust when the literary sources begin to surface around the middle of the first century, leading many scholars to think that the history of that period can now be reconstructed, a cloud of doubt is thrown on the historicity of these sources... they represent at best a genuine core that had undergone a process of later redactions and accretions.”³²⁰ Finally, it must simply be accepted that a similarity between two concepts in two different cultures, even if interactive neighbors, doesn’t alone amount to proof of borrowing. Roberts, in a somewhat outmoded style, may yet have said it best when he cautions:

“[I]t must not be thought that mere resemblance is in every case a proof of borrowing. There may be strong presumption; but that is all that can be said. There are many customs which are common to all Eastern nations, and cannot be traced to the code of any particular people; while other customs again obtain among most primitive people, whether East or West, as, for instance, that of retaliation.”³²¹

Roberts’ point is a valid one – especially considering that in turn-of-the-century Japan, for example, a husband who discovered his wife *in flagrante delicto* could kill her along with her paramour with legal impunity.³²² In a similar vein, it is known that in ancient Mexico adulterous women were stoned to death.³²³ Are we thus to draw the conclusion that these cultures were influenced by the *sharī‘a*? Such examples may be better relegated to that type of independent generation “due to the natural dictates of human experience;”³²⁴ how then are we to presume that certain Jewish-Islamic parallels are not the result of the same phenomenon? Yet scholars continue to attribute similarities to borrowing, Morand arguing the Roman origin of the Islamic institution of *waqf*, while Perikhanian just as vigorously argues its Persian origin,³²⁵ neither allowing for the possibility of an Arabian heritage.

³¹⁹ Ibid., 90.

³²⁰ Hallaq, *Formation*, xii. For a full discussion of the problems inherent in the process of redaction, see also Hoyland, *Seeing Islam*, 32-49.

³²¹ Roberts, *Social Laws*, 2.

³²² J.A. MacCulloch, “Adultery (Primitive and Savage Peoples),” *ERE*, i.124.

³²³ Ibid., 123.

³²⁴ Rev. C.H.W. Johns, *The Relations between the Laws of Babylonia and the Laws of the Hebrew Peoples* (London: Oxford University Press, 1912), 53.

³²⁵ Crone, *Provincial*, 4 and n.36.

Yet not all have blindly backed the assumption of ‘the culturally impoverished Arab,’ nor pursued the issues of origins and influence so one-sidedly. Hoyland, for example, writing on origins and borrowing, cautions “[b]efore such judgements can be made, greater consideration would have to be accorded to the ways in which information was transmitted and to the effects of a shared physical and cultural environment.”³²⁶ A few scholars indeed seem to have operated beneath a similar comprehension of the complexity of the issue, while many simply favored an Arab customary origin from the start. Motzki is a prime example, having first constricted the arena and period in which ‘borrowings’ from ‘foreign’ sources might have occurred; he warns “we know nothing about the dissemination and substance of the laws in the Arabian Peninsula in the sixth and seventh centuries – or about pre-Islamic law in Mecca.”³²⁷ Hallaq, too, is a proponent of the Arabian Peninsula, noting:

“Thus far, it has not seriously occurred to modern Western scholars that the solution to the problem might lie in the Ḥijāz, where Islam began. [...] Modern legal scholarship has thus far left the thesis of Ḥijāzī origins lamentably unexplored.”³²⁸

For Coulson, despite his Roman attributions, that Arab customary law played a significant role in the formation of the *sharīʿa* seems never to have been a cause for doubt. In his view, the arrival of Qurʾānic law “superseded tribal custom in various respects,”³²⁹ though he doesn’t seem to accept the possibility of a strong body of pre-existing ethics, seeing the Prophet as ‘forming the standard.’ The extent of the persistence of traditional law, however, is implied to be quite significant: “In short, the Qurʾānic regulations modify in certain particulars rather than supplant entirely the existing customary law.”³³⁰ Indeed, when the Qurʾān is silent on a certain topic, we may assume what we find in the *sharīʿa* is customary law, as “Qurʾānic precepts

³²⁶ Hoyland, *Seeing Islam*, 34. See also n.8, where he cites the warnings against the concept of borrowing issued by Wansbrough and Calder, and also makes the following disclaimer: “I am not denying that there was influence and borrowing, but rather doubting that enough groundwork has been done as yet to allow determination of its nature.”

³²⁷ Harald Motzki, *The Origins of Islamic Jurisprudence: Meccan Fiqh Before the Classical Schools*, trans. Marion H. Katz (Leiden: Brill, 2002), xv.

³²⁸ Hallaq, *Formation*, xxvi.

³²⁹ Coulson, *History*, 11.

³³⁰ *Ibid.*, 15.

form little more than the preamble to an Islamic code of behaviour for which succeeding generations supplied the operative parts.”³³¹

The probability of Arab customary law playing so prominent a part in the formation of Islamic law begs the question we have already raised: What was Arab customary law? The possibility that it contained significant ‘foreign elements’ certainly exists, as Schacht pointed out. Doubtless the influence of Roman and “eastern elements” are to be found in Medinan law incorporated via foreign trade regulations and diffused in Arab markets, which were “suitable for spreading commercial custom.”³³² But do similarities between Roman and Islamic law necessitate the interpretation that the latter borrowed from the former? That a scholar would assume so automatically may be a warning sign of a predilection for cultural superiority, for indeed other possibilities have become more than evident. Hallaq, disparaging the “cardinal tenet, which amounts to no more than an ideological doctrine” by which Orientalists *a priori* rule out the Ḥijāz in favor of Europe’s cultural predecessors, laments:

“What is even more blatant is the complete dismissal of the very likely possibility that Roman and provincial law are themselves no more than the distillate of what Rome adopted of the Semitic cultural forms prevalent in the Fertile Crescent, mainly Syria (Bilād al-Shām). These Semitic forms, intrinsic to the Arabs of both the North and South, constituted much of what later came to be Roman law, appropriated in typical fashion by the imperial state as its own.”³³³

The implications of this observation are staggering: not only may the similarities between Islamic and Roman law be due less to ‘borrowing’ than to a common Semitic ancestry, but the possibility exists that a potentially large part of that ancestry may have been Arabic, due to the interaction of Arab peoples with all the surrounding regions of the Peninsula. At any rate, it certainly casts Schacht’s claim that *ijmā’* is the Roman *opinio prudentium* promulgated by the Emperor Severus – himself a Phoenician and founder of the Law School of Beirut – in a new light.³³⁴

³³¹ Ibid., 19-20.

³³² Schacht, “From Babylonian,” 32.

³³³ Hallaq, *Formation*, xxxi. See especially n.32, for a brief overview of the history of Semitic-Roman cultural and legal contribution, exemplified particularly by the Law School of Beirut whose most prominent members (Papinian and Ulpian, both of Levantine origin) were acknowledged by Justinian to have formed the very foundation of later Roman law.

³³⁴ This is not to say, however, that the processes of influence and borrowing may not be even more complicated than from Roman to Semitic or Semitic to Roman. Consider that ethnomusicologists studying modern West African music note a marked influence of more recent Caribbean styles, while

It is this concept of a shared cultural and legal foundation that is the most exciting prospect in the field of Islamic origins. In fact, it can be said to alter the entire paradigm: away from the less culturally and historically realistic perception of 'borrowing' and towards a much more sensible model in which the emphasis lies on *inheritance* and *ancestry*. If one were to reconsider Schacht's observation that only the Islamic *shurūf* match certain Babylonian documents exactly, is it still necessary to postulate a point at which pre-Islamic Arabs 'borrowed' the idea (e.g. from the Aramaic population), later to bequeath it to early Islam? Or is it possible that the ideas were formulated in a common Semitic milieu from which both cultures sprang, maintained not only by an immensely powerful adherence to custom and tradition, but by constant interaction amongst the Semitic peoples who share so much in the way of culture, language, and belief?

Pre-Islamic Arabia, as is now well known, was never, in any stage of recorded history, isolated from surrounding civilizations. The only obstacle in the path of a proposed connection between ancient Mesopotamian and Islamic law, then, is that of time. Schacht, as we have seen, did not find chronology to be a problem due to that regional factor of continuity engendered by the Aramaic population; but why not the Arabs themselves? Moreover, if it seems preposterous to believe that the legal activities of Semitic peoples two-thousand years before the emergence of Islamic law may in any way be related to the *sharī'a*, consider the extent to which ancient Greco-Roman law is preserved in the civil codes of many Western societies today, much less the persistence of far more ancient Mesopotamian traditions such as astrology. To this may be added a linguistic connection between Semitic languages which far exceeds that which may be found, e.g., between English and Greek.

Yet, with the exception of Schacht's brief "from Babylonian to Islamic Law" and Crone's confusing attempts to define provincial law, no scholarly energy has been expended towards the many startling possibilities held out by a common Semitic core in Islamic law, as transmitted via ancient Arab custom. Roberts at one point makes the following observation:

"We must... find out in what forms these customs existed among the Arabs of pre-Islamic times. For Muhammed appeared as a social reformer no less than as the founder of a religion. And so the direction

acknowledging the historical West African roots of Caribbean music. The back-and-forth flow of ideas is perhaps more complicated than can ever truly be traced with any degree of certitude.

which his reforms took was naturally determined by the character of the practices which obtained in Arabia at the time of his appearance.”³³⁵

Schacht, too, makes a sort of plea at the end of “From Babylonian to Islamic Law,” concluding with:

“[T]he assumption of the influence of Babylonian on Islamic law is quite likely. I would be particularly grateful for the finding of new facts that could help to ascertain it.”³³⁶

Taken together, these two quotes constitute a petition – one which, if answered, may be instrumental in fulfilling the challenge posed by Hallaq when, having reviewed and deconstructed both the revisionist Orientalist and traditional Muslim accounts of the origins of Islamic law, he concludes:

“But doctrine is no substitute for scholarship. Nor is religious narrative. Will there be a third, paradigmatic account?”³³⁷

It is the exploration of just such a new paradigm that this thesis, armed with the measuring stick of *zinā* and *sariqa*-related *ḥadd* penalties, hopes to carry out.

³³⁵ Roberts, *Social Laws*, 2.

³³⁶ Schacht, “From Babylonian,” 33.

³³⁷ Hallaq, *Formation*, xxxiii.

II. Arab Customary Law and the Ancient Near Eastern Legal Milieu

The ancient Arabic concept of sunna

As noted above, the role played by pre-Islamic Arabic customary law in the early formation of the *shariʿa* must have been quite significant. Coulson pointed out that, when the Qurʾān was silent on a topic, customary law was at hand to fill in the gap, and thus “the *status quo* [was] tacitly ratified unless it [was] expressly emended.”³³⁸ The implications of this are considerable in our search for the origins of the *ḥadd* penalties of stoning and hand-amputation, and justify a survey of pre-Islamic precedents or parallels of these punishments in earlier Arab law, or that of surrounding cultures which may have influenced Arab law at any point throughout its history. But central to the idea of a carry-over into Islam of more ancient laws across centuries is the ancient Arabic concept of *sunna*, which we will now address in more detail.

When describing the appearance of the genre of *Awāʿil* literature at the end of the 4th century, H.F. Rosenthal notes the author of the first monograph on the subject “succeeds in clearly underscoring the view of Muslim historians that every important and good invention dates back to the pre-Islamic and early Islamic period while subsequent ages as a rule produced insignificant and undesirable inventions.”³³⁹ This idea that ‘old ways are best’ seems to be the extension into Islam of a far-older cultural instinct, for indeed, as Hoyland remarks, “tribal law was customary law, determined by ancient practice [and] is therefore inherently conservative....”³⁴⁰ The key concept once again is *sunna*, which Hoyland illustrates well through the words of the famed pre-Islamic poet Labīd, who “once spoke of a leader from his own kin group as ‘one of a tribe whose forefathers laid down for them a *sunna*, and every folk has a *sunna* and its *imām*’.” He then explains:

“*Sunna* here refers to the customary practice of the tribe, validated by tradition and the deeds of the ancestors. The *imām* is the tribal hero whose actions enshrine and articulate the law, that is, a precedent and an example.”³⁴¹

³³⁸ Coulson, *History*, 19.

³³⁹ F. Rosenthal, “Awāʿil,” *EI*², i.759.

³⁴⁰ Robert G. Hoyland, *Arabia and the Arabs: From the Bronze Age to the coming of Islam* (London and New York: Routledge, 2001), 121.

³⁴¹ *Ibid.*

Furthermore, the ancient pedigree of the concept of *sunna* itself helps to illustrate one of the main assumptions of this thesis, mainly that similarities between Islam and more ancient traditions or cultures may more likely be the result of a common source than of direct borrowing or influence. Take for example the occurrence in the Old Testament of the word וְשִׁנַּנְתָּם (*wə-shinantām*) with the meaning ‘and thou shalt teach them,’ which D.S. Margoliouth links to “Arab. *sanna* ‘to prescribe,’ whence ‘the sunnah;’”³⁴² or the Hebrew *h^alākā* which M.M. Bravmann suggests as a parallel of the Arabic *sīra*, contending: “The real meaning of the terms *h^alākā* and *sīrah* is: ‘the procedure (or: manner of proceeding, or: acting) with respect to a certain matter’ (or: ‘the course of action, or: the steps, taken with respect to a matter’).”³⁴³ It would be easy, from the perspective of ‘cultural superiority’ evinced in the arguments of certain Orientalists as shown earlier, to claim that the concept of *sunna* / *sīra*³⁴⁴ has been borrowed from the ancient Hebrew tradition somewhere along the line of pre-Islamic Arab history, probably via later Jewish tradition in the *Hijāz*. But then what would one make of the Old South Arabic occurrence of the root *ś-n-n*, which in verbal form may “be defined as ‘constituit’ and also ‘imposuit, jussit (etc.)’, i.e., ‘to impose (a law) on someone, to establish (a law) for someone,’”³⁴⁵ as Bravmann has also shown us? Clearly, that the idea of *sunna* was inherited by the *Hijāzīs* from their South Arabian ancestors makes more sense than their ‘borrowing’ it from neighboring Jewish tribes or settlements. Indeed, and as Bravmann further clarifies through an illustration of the phrase *maḍat sunnatun* and its accompanying sense of ‘binding’, “we may assume that the appearance of this concept in North-Arabia as well as in South-Arabia reflects a single conceptual development based on

³⁴² Margoliouth, “Language,” 29, (n.† cont. from p.28). The reference is to Deut.6:7. Note that he is here suggesting the ancient (pre Old Testament) *Arabic* origin of the *Hebrew* term, not vice versa. Dr. Joseph Lowry’s comments on this thesis have provided another possibility: “The word in question in Deut. 6:7 is very possibly an alternate form of a verb derived from sh-n-y, which is cognate with Mishna and would mean ‘to teach.’ There is a parallel in Deut. 11:19 that uses *limmed*, which does mean to teach. If we read *shinnen* as derived from sh-n-n rather than from sh-n-y in Deut. 6:7, then the meaning of ‘teach’ is clearly figurative and secondary, since the primary meaning of the word (as in its other Arabic cognate) is ‘to sharpen.’ However, it is possible that Mishnah and *sunna* are very distantly cognate.”

³⁴³ M.M. Bravmann, *The Spiritual Background of Early Islam: Studies in Ancient Arab Concepts* (Leiden: E.J. Brill, 1972), 137.

³⁴⁴ Bravmann, arguing against Schacht, insists that in early Islam *sunna* and *sīra* were interchangeable synonyms which only later developed distinct meanings (ibid., 127, 130), or were originally “two different aspects of the same idea” (ibid., 169).

³⁴⁵ Ibid., 157-9.

a single (or identical) ethnic background.”³⁴⁶ Furthermore, it is perfectly conceivable to push this ‘single ethnic background’ back far enough to include the ancient Hebrews; the linguistic evidence more than ample to prove that both the ancient Arabs and Hebrews share a common ancestry. Thus the concept of *sunna* / *sīra* can most logically be seen as a core Semitic concept, common to several Semitic cultures,³⁴⁷ and maintained across the centuries by various branches as they drifted away from their common ancestral group.

Whatever its origin, it is clear from the sources that *sunna* with the Arabs was not only a pre-Islamic, but a quite ancient notion,³⁴⁸ which can be defined as “a way or manner of acting, whether good or bad, hence (dis)approved custom or norm of previous generations, *al-awwalūn*...,”³⁴⁹ or “procedure established by an early authority and thus approved for the practice of later generations.”³⁵⁰ We learn also that “the term *sunnatu man maḍā*, or *sunnatu l-maḍī*... must be considered as a survival of an ancient Arab idea, the idea of the ‘norm (practice) established by the one who has gone’, i.e., by an individual personality of the past, sometimes known and definite (as in the instance of the Prophet), sometimes unknown, and hence merely symbolic,”³⁵¹ and that this phrase “should be considered the prototype of certain phrases current in Muslim legal parlance.”³⁵² In other words, both the pre-Islamic and Islamic conceptions of *sunna* involved the justification of a rule or set of

³⁴⁶ Ibid., 150.

³⁴⁷ Note even the potential for this concept among the ancient Abyssinians, as in the *Sīrat Rasūl Allāh* of Ibn Ishāq: “... *faqāla [n-Naḡāṣīyū]: Yā ma’sara l-Ḥabaṣati ... kayfa ra’aytum sīratī fikum; qālū: ḥayra sīratin*,” with Bravmann translating the Negus’ words as: “What do you think concerning my practice [as ruler and judge] with respect to you?” (ibid., 135).

³⁴⁸ We have seen above the occurrence of the term in the *Mu’allaqa* of Labīd b. Abī Rabī’a, quoted also by Bravmann, who translates the relevant section as “(they belong) to a group of people to whom their fathers have ‘ordained’ (or: ‘prescribed’, or: ‘established’, or: ‘instituted’); for every people (or: tribe) has its ‘practice (especially assigned to it)’ and its ‘rule (or model)’” (Bravmann, *Spiritual Background*, 165). Interestingly, another clue as to the overwhelmingly ancient and Semitic nature of *sunna* may be found in the institution of the *kāhin* (diviner, soothsayer) whose role “as in Assyria and Babylonia” included not only divination, but who “especially in Arabia, combined various functions and acted as a guardian of institutions in a nomadic society which lacked the focal points necessary to fix and safeguard them” (T. Fahd, “Fa’l,” *Et*²). Was the *kāhin* the guardian and transmitter of *sunan* in nomadic, pre-Islamic Arabia?

³⁴⁹ G.H.A. Juynboll, “Sunna,” *Et*², with reference to Bravmann, who notes that a *sunnah* “may be judged by someone, especially by a person outside that specific tribal community, as ‘wrongful’ (*sunnatu ḡawrin*)” (Bravmann, *Spiritual Background*, 166).

³⁵⁰ Ibid., 133.

³⁵¹ Ibid., 163. Note also p.142, where Bravmann points out the connection of this phrase with the notion of “legally *binding*.” As for the attribution to a past individual personality, see also ibid., 131, 148, 154; and note Rosenthal’s remark that “Muslim customs... were justified by ascribing their first use to the great religious leaders of the past...” (Rosenthal, “Awā’il,” 758).

³⁵² Ibid., 164. See also Hallaq, *Origins*, 46ff.

rules through their ascription to an honorable ancestor, and this system translated directly from Arab customary practice into Islamic law.

There may yet exist some intriguing reminders of this ancient idea of *sunna* from non-Islamic legal sources as well, one notable example being the so-called *Syro-Roman Law-Book*, whose origins appear to stretch back to the 5th century A.D. and whose transmitted text, at least in its Arabic recension, is replete with several references to the *sunan* of key figures in the Christian legal milieu of Byzantine Syria (mainly the emperors Constantine, Theodosius, and Leo).³⁵³ It is possible, of course, that the use of the term here is an innovation of the translator-copyist (the original work most likely having been composed in Greek or Syriac), but it still provides evidence as to the presence of the concept of *sunna* – whether it was called that or not – among Arabic or Aramaic speaking Christians of North Arabia before Islam.³⁵⁴ Indeed a remarkable picture of a pre-Islamic conception of *sunna* emerges from the Lawbook’s introduction, a section of which reads:

“For we have known that whoever wanted to fabricate for himself or for his country a *sunna* only emulated the *sunna* of Moses and copied it and all that preceded [that] *sunna*, for indeed he imitated the people of Israel who acted according to the *sunan* of God, because there was never before Moses a book or a script for any nation, nay, the book of Moses and his *sunna*, which he took from God (‘*azza wa jalla*), is earlier than the entirety of the rulings of the Greeks and the Romans and others. And being that it was earlier than all the rulings of the Greeks and others, it is correct to say that they imitated its example and desired to make for themselves and their followers *sunan*. And as for

³⁵³ We read in the colophon, for example: “(Thus) are completed the rulings of the believing, victorious kings, renowned for the soundness of their faith, they being Constantine the Chosen and Theodosius and Leon, who put down the good *sunan* (*sannū al-sunan al-ḥusnā*) and the praiseworthy *ḥudūd*, and they are (of) 130 chapters” (Drs. Karl Georg Bruns and Eduard Sachau, eds., *Syrisch-Römisches Rechtsbuch aus dem Fünften Jahrhundert* (Leipzig: F.A. Brockhaus, 1880), iv.94, lns. 22-4, translation from the Arabic is mine). We read also of the divine origins of the 1st *sunna* (ibid., iv.68, ln. 11), that the angels and the people learned it (loc. cit., ln. 12), that it’s mentioned in the first book of the Torah (loc. cit., lns. 13-14), that it spread far and wide (iv.69, lns. 6-7), that Jesus became the new *sunna* (loc. cit., ln. 10), that the Roman rulers inherited this *sunna* (loc. cit., lns. 11-12), and that the *sunna* of the Church is a gift from God (loc. cit., ln. 13). See also ibid., iv.80, lns. 5ff., where some of the “excellent *sunan*” of Leon are singled out, including “and he de-authorized the judges and rulers on Sunday, and ordered that they not administer any of their *ḥudūd* (*wa amarahum a-lā yuqimūna shay’an min ḥudūdihim*).”

³⁵⁴ The presence of other terms familiar to Islamic law in the Arabic recension of the Lawbook, such as *kharāj*, *dīwān*; and terms pertinent to this thesis such as *ḥudūd*, *zina* and *qadhf*, certainly raises some interesting possibilities as to their origin and the origin of the book itself. It may point either to 1) the pre-Islamic existence of these exact Arabic terms in Byzantine Syria, or 2) the translator-copyist’s rendering of his copy’s original Greek / Syriac text into the current, Islam-influenced Arabic of his day, or 3) that the Lawbook simply isn’t pre-Islamic at all. A comparison of the concerned terms as they occur in each of the recensions might go some distance in addressing this issue, and is a worthwhile future project.

now, the *sunan* have been annulled by the coming of our Lord the Christ and the *sunna* of all nations has become one *sunna* laid down by the Kings who believe in Him, through what they confirm of His wisdom and His guidance. And the first to do that was the blessed Constantine the Great, beloved of God, exalted be He.”³⁵⁵

Islamic sources, too, make mention of non-Arab pre-Islamic *sunan*; those of Ibrāhīm and Ismā‘īl being especially prominent.³⁵⁶

And as for the absorption of these older *sunan* into Islam, no stronger vehicle could possibly be found than the *sunna* of the Prophet himself, which al-Shāṭibī (d.790/1388) considered not only as connected to previous *sunan*, but to in fact be an *extension* of them.³⁵⁷ Indeed, the “administrative-judicial acts of the Prophet (or... institutions established by the Prophet) which have been adopted by the Muslims (or by the Caliphs)” – as Bravmann defines the *sunna* of the Prophet³⁵⁸ – can in fact be considered a re-creation of pre-Islamic *sunan*. In Bravmann’s estimation:

“We have, of course, to admit that certain practices and procedures ascribed to the Prophet may be based on older (or also foreign) usages. However, even usages of that type may, quite rightly, have been considered by the early Muslims as belonging to the ‘*Sunnah* of the Prophet’, that is: as instituted by him, inasmuch as the Prophet may have practiced these usages in the framework of a specific situation or under particular conditions so that they became invested with a novel character.”³⁵⁹

And even more promising for the aims of this thesis is that, as R.B. Serjeant claims:

“The Prophet Muḥammad was an arbiter in this continuity of tradition [the ancient *sunan*] and the theocracy he founded succeeded many others.... In fact, so far as regarding Muḥammad as bent upon a policy of innovation, one has to conceive of him as born into a society

³⁵⁵ Ibid., 69 (Arabic text), lns. 13-21.

³⁵⁶ See, for example, the section of *Ṣaḥīḥ Muslim* in *Kitāb al-‘Ilm* entitled “*itbā’ sunan al-yahūd wa’l-naṣārā*,” (as referenced in Abī al-Fataḥ Muḥammad b. ‘Abd al-Karīm al-Shahrastānī, *Al-Milal wa’l-Niḥal*, ed. Muḥammad b. Farīd (Cairo: al-Maktabat al-Tawfiqiyya, n.d.), 30f. and n.5); or al-Shahrastānī’s own attribution of the ‘triple divorce’ to the *sunna* of Ismā‘īl (ibid., 233), and of certain purification rituals to the *sunna* of Ibrāhīm (ibid., 236). Al-Shāṭibī, writing in the late 8th century H., makes note of the continued persistence of the “*sharī’a* of Ibrāhīm” as a mixture of other *sharī’a*’s with that of Muḥammad, indeed, that Muḥammad’s *sharī’a* and that of Ibrāhīm are one and the same (Ibrāhīm b. Mūsā b. Muḥammad al-Shāṭibī, *Al-Muwāfiqāt fī Uṣūl al-Sharī’a*, eds. Dr. Muḥammad al-Iskandranī and ‘Adnān Darwīsh (Beirut: Dar al-Kutub al-‘Arabī, 2002), 245, 255.

³⁵⁷ Ibid., 245. He cites Q.22:78 and Q.3:67 as his proof.

³⁵⁸ Bravmann, *Spiritual Background*, 140.

³⁵⁹ Ibid., 175.

regulated by a continuous series of sunnahs stretching from the remote past into the Islam of his day....”³⁶⁰

Lastly, it is related of the Prophet himself that he said, as regards specifically the punishment of stoning: “God is greatest! So am I the first to revive one of God’s *sunnas*.”³⁶¹

However, as several scholars have pointed out, this ancient Arab conception of *sunna* was to undergo a transformation leading eventually, and quite naturally, to the primacy of the Prophet’s *sunna* and its seeming absorption of other *sunan* from before and after the Prophet’s lifetime.³⁶² Whatever the case as to when this transformation was complete, it is evident that the ancient concept (as opposed to the Prophetic) nevertheless persisted through the end of the Umayyad and perhaps even the early Abbasid periods. It is said, for example, that the ancient *sunna* played a part in the arbitration (*taḥkīm*) of the battle of Šiffin (37 / 657), in conjunction with the Qur’ān, as “*al-sunna al-‘adila al-djāmi‘a gḥayr al-mufarriḳa*... the just *sunna* that unites rather than disperses.”³⁶³ The Christian monk John bar Penkaye, writing c.687 A.D. in north-western Mesopotamia wrote that the Arabs, due to the teachings of Muḥammad, “held to the worship of the one God in accordance with the customs of ancient law.”³⁶⁴ Indeed, ‘Umar b. ‘Abd al-‘Azīz (the 8th Umayyad Caliph, d.101/720) “was allegedly the first to single out the *sunna* of the Prophet among the *sunnas* of the others,”³⁶⁵ and as for the persistence of ancient non-Islamic *sunan* into Abbasid times, we have al-Balādhurī’s reference in his *Futūḥ al-Buldān*:

³⁶⁰ R.B. Serjeant, “Sunnah, Qur’ān, ‘Urf,” in *Law and the Islamic World: Past and Present*, eds. Christopher Tolland and Jakob Skovgaard-Petersen (Copenhagen: The Royal Danish Academy of Sciences and Letters, 1995), 33f.

³⁶¹ As transmitted in the *tafsīr* of Muqātil b. Sulaymān in reference to the stoning of the two Jews of Khaybar, and cited by Burton (“Law and Exegesis,” 276).

³⁶² Coulson, for example, envisages a three-step process for the evolution of the meaning of *sunna*: first, as local custom or traditional practice (during the 1st century H.); second, during the development of the early schools of law, as the generally accepted doctrine of these schools; and third, as the *sunna* of the Prophet exclusively, from al-Shāfi‘ī (d.204/820) onwards (Coulson, *History*, 240). Schacht, on the other hand, contends that: 1) the custom of *sunna* first rejected Islam as an innovation, then absorbed it, then “reasserted itself” as a central concept of Islamic law; 2) the first Islamic *sunan* were political more than legal, i.e. they “referred to the policy and administration of the Caliph;” and 3) the *sunna* of the Prophet then gained ascendancy, “providing a doctrinal link between the ‘sunna of Abu Bakr and ‘Umar’ and the Koran” (Schacht, *Introduction*, 17-18). Schacht also contends elsewhere that *sunna* at times meant “the general custom” or “the normative usage of the community” (as did Margoliouth, both cited in Bravmann, *Spiritual Background*, 151 and n.1), as well as the doctrine of a school (cited and contend by Bravmann, *ibid.*, 131).

³⁶³ Juynboll, “Sunna,” *Et*.²

³⁶⁴ As cited in Hoyland, *Seeing Islam*, 196.

³⁶⁵ Juynboll, *loc. cit.*

“Abū Yūsuf (d.182/798) said: If there was in the lands an ancient, foreign *sunna* which Islam had neither changed nor annulled, and the people complained to the *imām* for what it caused them of harm, then it's not within his rights to change it. But Mālik (d.179/795) and al-Shāfi'ī (d.204/820) said: He changes it, even if it's ancient, because he should disallow (in similar circumstances) any lawful *sunna* made by a Muslim (*kull sunna jā'iza sannahā aḥad min al-muslimīn*), much less what the *ahl al-kufr* made.”³⁶⁶

Note here the use of the verb *sanna*, signifying, as discussed earlier, the attribution of *sunan* to (prominent) past individuals, as opposed to communities. In fact, the wording of this passage is such that one could easily imagine the three great legal figures to be referring, for example, to the *sunan* put down by Constantine, Theodosius, and Leo in the *Syro-Roman Law-Book*.

What is most important for our purposes, however, is that not only did the ancient concept of *sunna* persist through early Islam, but many of the *sunan* themselves, i.e. the ancient customs and laws, not only persisted but found their way into the *sharī'a*.³⁶⁷ Al-Shāfi'ī lists several such *jāhili aḥkām* endorsed by Islam in his *Muwāfiqāt*, in a section entitled '*Ilm al-'Arab*. They include, for example, limited partnerships, *diyya* (blood-money), the ruling for hermaphrodites, the *qasāma* (a collective, compurgative oath), and “others mentioned by the '*ulamā'*.”³⁶⁸ Bravmann notes Islam's confirmation of the ancient Arab practice of “*al-ḡizyatu 'an yadin*,” and of *bay'a*, or giving homage.³⁶⁹ He also posits the pre-Islamic Arabic origins of the vital concepts of '*ilm* and *ra'y* in Islamic law, indicating the possibility of a far more complex legal environment in pre-Islamic Arabia than has been suspected by most scholars.³⁷⁰ Al-'Askarī (d.395/1005), in his *al-Awā'il*, mentions many such examples, such as “the first *khul'* (divorce at the wife's insistence) there ever was, which was then endorsed by Islam....”³⁷¹ However, of much more immediate concern to this thesis is his relating the alleged first hand-amputation for theft and the first stoning

³⁶⁶ Abī al-Ḥasan al-Balādhurī, *Futūḥ al-Buldān* (Beirut: Dār al-Kutub al-'Ilmiyya, 1991), 435, translation mine. This is the passage quoted by Schacht (supra, p.67) to illustrate the “principle of the continuation of pre-Islamic legal institutions under Islam....”

³⁶⁷ As Serjeant maintains: “...the notion of a break, a line separating the Jāhiliyyah from Islam is to be abandoned” (“Sunnah, Qur'ān, 'Urf,” 33), and Juynboll notes that “various pre-Islamic *sunnas* were accepted into Islam with or without modification” (Juynboll, “Sunna,” *Et'2*).

³⁶⁸ al-Shāfi'ī, *Al-Muwāfiqāt*, 245.

³⁶⁹ Bravmann, *Spiritual Background*, chaps. iv and v, respectively. The latter, he argues, is inherited from the South Semitic civilizations.

³⁷⁰ Ibid., 177ff., and esp. 185.

³⁷¹ Abū Hilāl al-Ḥasan b. 'Abd Allāh b. Sahal al-'Askarī, *Al-Awā'il* (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), 49-50.

for adultery, both in the Jāhiliyya, and both of which will soon be dealt with in depth.³⁷² Finally, and also vital to this research, is the brief section near the end of the second volume of al-Shahrastānī's *al-Milal wa'l-Niḥal* entitled "*sunan al-'arab allatī aqarraḥā al-islām wa ba'd 'ādātihim*," i.e., "Arab *sunan* confirmed by Islam and some of their customs."³⁷³ This section not only includes references to pre-Islamic hand-amputation and the crucifixion of highway robbers (to be dealt with more fully in their appropriate place), but the following passage:

"Muḥammad b. al-Sā'ib al-Kalbī said: The Arabs in their *jāhiliyya* used to forbid things which the Qur'ān (later) revealed the prohibition of. They used never to marry their mothers or their daughters, nor their maternal or paternal aunts."³⁷⁴

The point being that certain ancient Arab *sunan* were confirmed by the Qur'ān and thus came into the corpus of Islamic law, while others may have been modified or annulled.

The path from ancient Arab to Islamic law seems clear enough, and the vehicle is *sunna*; but how, one might ask, can we ever hope to trace these *sunan* to their origins, taking into account the oral nature of their transmission and the passage of centuries? Could an ancient Semitic concept originating in the time of the ancient Babylonians, for example, have been transmitted intact orally across the centuries to the Hijāzī Arabs on the eve of Islam? Hoyland, while describing the debate over the authenticity of pre-Islamic poetry, remarks that "recent studies have demonstrated how pre-literate peoples can effectively preserve their traditions over the course of centuries, and this has constrained the discussion to the issue of minor contamination rather than that of major fabrication,"³⁷⁵ and *In Seeing Islam as Others Saw It*, he approaches the topic of orality in more depth, touching upon the co-existence of oral and written traditions in the Middle East of late Antiquity and early Islam; "the circulation of anecdotes across boundaries of time, space and culture;" and the role of orality in the early Islamic sphere, especially that of the story-tellers.³⁷⁶

Significantly, he claims that "perhaps the most blatant sign of oral activity in early Islam, as well as in the Judaism of that time, is the very terminology of cultural life,

³⁷² *Infra.*, pp.181 and 194.

³⁷³ al-Shahrastānī, *Al-Milal wa'l-Niḥal*, ii.232ff.

³⁷⁴ *Ibid.*, 232. Al-Kalbī's example may seem less of a given once we've surveyed the laws of the neighboring Sāsānid's, where incestuous marriages seem to have not only been legal, but encouraged.

³⁷⁵ Hoyland, *Arabia and the Arabs*, 212.

³⁷⁶ Hoyland, *Seeing Islam*, 40-4.

which makes heavy use of words to do with saying, speaking, reciting, repeating and so on.”³⁷⁷

In the legal sphere, and taking into account Hoyland’s observations on the dual presence of oral and written traditions – sometimes as regards even the same work (he cites the example of Mālik’s *Muwattaʿ*)³⁷⁸ – and the terminology of orality as it appears in the cultural life of the Jewish and early Islamic communities, it comes as no surprise the importance of the *maxim* in the transmission of legal material, a popular example being “*al-walad li’l-firāsh wa li’l-‘āhir al-ḥajar*,” or “the child belongs to the marriage bed, and to the adulterer / adulteress (or whore / whoremonger), the stone.”³⁷⁹ The mnemonic device of reducing more complicated legal concepts to easily-memorized rhythmic or rhyming phrases is more than merely a teaching device, but a means by which the legal traditions of orally-focused societies can no doubt attain astounding longevity. It is also a most ancient device, and Reuven Yaron, commenting on the style of the ancient Mesopotamian Laws of Eshnunna, remarks that it “seems to reflect mnemotechnic needs, the desire to facilitate memorizing....”³⁸⁰ So, with an eye to Islamic legal maxims, and the possible pre-Islamic origin of some of them,³⁸¹ we may see here the means by which pre-Islamic *sunan*, whatever their origin, may have survived relatively if not perfectly intact up to their absorption by the *sharīʿa*.

Additionally, this seems to indicate that by no means should a writing system be considered pre-requisite to a complex legal system. The first written records of Sumerian law, for example, appear in a well-advanced stage of development. Sumerian legal tradition, therefore, had obviously been preserved orally through all of its previous complex stages so that when law finally began to find written expression it not only was obviously well-developed, but no doubt maintained – as did the Laws of Eshnunna at a later date – the stylistics of an oral tradition. There is no reason to suspect the pre-Islamic Arabs to be any less capable than the pre-literate Sumerians, whether nomadic or settled, and the preservation of ancient regional legal matter via the Arab *sunan* seems more a likelihood than a mere possibility.

³⁷⁷ Ibid., 43.

³⁷⁸ Ibid., 41.

³⁷⁹ I’ve chosen a literal translation at this point, several Islamic sources regarding the second half of the maxim as meaning “and the adulterer gets nothing,” as will be treated in coming sections.

³⁸⁰ Reuven Yaron, *The Laws of Eshnunna* (Leiden: E.J. Brill, 1988), 87.

³⁸¹ *Infra*, p.180.

But of what use is this information to the question of ‘origins’ if the pre-Islamic Arabs were, as many of the above mentioned Orientalists intimate, isolated from, ignorant of, and / or resistant to the ‘superior’ cultures which surrounded them? The next aim of this thesis is thus to look back through the sources and discover just what cultures and civilizations may have had the opportunity to influence, or even be influenced by, Ancient Arab custom; not to mention how – and how likely – this was to have occurred. And, as we shall see, even preliminary research into ancient Arabia proves false the assumption that pre-Islamic Arabs – whether nomadic, settled or otherwise – were isolated from or ignorant of neighboring cultures and civilizations. In fact, the evidence is overwhelming that Arabia was very much involved in the political, economic, cultural, religious, and even legal developments in the region from the very dawn of recorded history.

*The ancient Near Eastern cultural milieu*³⁸²

The high level of integration of Near Eastern cultural entities in ancient times is evident from literary and archaeological sources, and one simply cannot treat them as isolated groups evolving independently. The picture is of course extraordinarily complex,³⁸³ but a few examples might suffice to give a general idea. We know, for example, that: 1) the Old Testament shows the far-ranging regional interaction of the ancient Hebrews, their relations with Egypt, Babylon, and Assyria throughout their political existence, and their maintaining links with all the various Aramaic groups;³⁸⁴ 2) Arabs appear in the sources as early as the mid 10th century B.C., soon followed by the rise of tribal kingdoms in the North and civilized polities in the South;³⁸⁵ 3) there is ample testimony that the Arabs interacted with surrounding

³⁸² The extremely complex historical picture of the role of the Arabs in the Middle East from ancient times through late antiquity is certainly enough to fill several volumes, and several have already been written. See, for example, Hoyland’s *Arabia and the Arabs* as cited above, and Jan Retsö, *The Arabs in Antiquity: their History from the Assyrians to the Umayyads* (London; New York: Routledge Curzon, 2003). The goal of this section, therefore, is simply to briefly illustrate the connection of the Arabs with surrounding cultures in the region throughout history and to underscore the potential for exchange of legal material – whether through ‘borrowing’ or ‘influence’ or inheritance – at any point from the dawn of history through to early Islam.

³⁸³ See Hallaq, “Use and Abuse,” 81, 83; and Hoyland, *Seeing Islam*, 32. For an excellent, simplified chart of all the regional civilizations starting from 1100B.C through 700A.D., see Hoyland, *Arabia and the Arabs*, 84. As for chronological tables and an excellent summary of the Babylonian civilizations, see G.R. Driver and John C. Miles, *The Babylonian Laws* (Oxford: Clarendon Press, 1952), i.xxxiv-xxvi, 1-4.

³⁸⁴ Morris Jastrow, “Races of the Old Testament,” *DOB*, extra vol.72-3, 79.

³⁸⁵ Hoyland, *Arabia and the Arabs*, 18.

Near Eastern civilizations long before Rome appeared on the scene;³⁸⁶ 4) literary evidence proves the interaction of the South Arabian and Mediterranean spheres, the South Arabian civilizations' continuous relations with the Arab tribes of the North, and their complex ties with the Byzantines, Ethiopians, and Persians;³⁸⁷ 5) Bedouin Arabia was a "mission field" for Irano-Semitic religions;³⁸⁸ 6) the Northern Arabs fell within the cultural sphere of influence of the Mediterranean and Mesopotamian empires throughout recorded history, while Southern Arabs fell within that of Semitic polities of the Yemen;³⁸⁹ 7) the Arabs were at the center of the great Byzantine-Sāsānid conflict on both sides, and these 'Big Powers' courted not only the North, South, and Central Arabs, but the Syrians and Ethiopians as well;³⁹⁰ 8) interaction among cultural entities of Late Antiquity intensified with the coming of Islam, while religious identities and allegiances became extremely complicated,³⁹¹ and 9) early Islam can be seen as a "social experiment" set against "the great traditions of ancient civilization."³⁹² All of these points serve to illustrate the generally interactive nature of the region into which Islam was born.

Opportunities for the exchange of ideas between Arabs and their ancient neighbors may have indeed been more concentrated at certain points in history, with the mass importation of Arab slaves to Assur in the 7th century B.C. for example;³⁹³ or at certain places where 'cultural cross-pollination' was more naturally to occur: the 'melting-pot' polities of Ḥatra, whose "religious life... [was] a wonderfully eclectic mix of Mesopotamian, Syrian, Arab and Greco-Roman elements;"³⁹⁴ and

³⁸⁶ Hallaq, "Use and Abuse," 82.

³⁸⁷ Hoyland, *Arabia and the Arabs*, 39, 48, 54-7.

³⁸⁸ Marshall G.S. Hodgson, *The Venture of Islam* (Chicago: UP, 1974), i.178.

³⁸⁹ Hoyland, *Arabia and the Arabs*, 231.

³⁹⁰ Ibid., 100-1; Hoyland, *Seeing Islam*, 13-14; and for a brief overview and background of the 'Super-Power conflict', see *Arabia and the Arabs*, 234. The importance played by this conflict in generating an environment of cultural interaction between the Arabs and the Romano-Hellenic and Iranian spheres cannot be overstated, there being evidence, for example, that the imperial powers may have used Arabs to resettle devastated areas (ibid., 237) or that they "bribed" the Arab buffer states, i.e. the Ghassānids and Lakhmids, into being (ibid., 238). Furthermore, as Hodgson has pointed out, "certain evolutions in the pre-Islamic Roman and Sāsānian empires, in whose territories the Islamicate civilization developed, were decisive under Islam also (Hodgson, *Venture*, i.195). Indeed, that "religion and politics became ever more closely related" during the prolonged conflict, and moreover "religion pervaded not only political life, but almost every aspect of existence" led Hoyland to conclude that "Islam did not, initially at least, 'seal the end of Late Antiquity,' but rather continued many of its salient features" (Hoyland, *Seeing Islam*, 14-15, and n.13).

³⁹¹ Hoyland, *Seeing Islam*, 11, 20.

³⁹² Hodgson, *Venture*, i.196.

³⁹³ Hoyland, *Arabia and the Arabs*, 61.

³⁹⁴ Ibid., 69f.

Ḥīra, as border-capital of the Lakhmid state and possibly a surviving pocket of Babylonian culture;³⁹⁵ not to mention Dedan, where a Minean colony ensured the continued intermingling of North and South Arabian sentiments.³⁹⁶ This mixing was to be intensified under Islam, especially in the *amṣār*, “where one was exposed to contact with men of very diverse origin, creed and status;”³⁹⁷ keeping in mind that Kūfa, for example, grew into existence but a few miles from ancient Lakhmid Ḥīra.

Of course, the region had undeniably been a ‘melting-pot’ of cultures long before the Arabs appeared in the sources. Driver and Miles, commenting on the ancient Sumerians and Babylonians, remark:

“The two races became intermingled and each has left its mark on the language and culture of the other... the principle legacy of the Sumerians to the Babylonians was their cuneiform system of writing; their language, also, like legal and ecclesiastical Latin, survived in the legal terminology and religious literature of the Babylonians.”³⁹⁸

And as for Arabia, it was also a melting pot of artistic influences:

“Hence the art and architecture of Arabia exhibits much regional diversity. East Arabia was greatly affected by Mesopotamian and later by Iranian ideas, and Hellenism had an impact in the northeast. South Arabia initially cultivated its own local forms, but became progressively more influenced by Hellenistic and Roman art, and North Arabia was of course bound to feel the pull of the great empires of the Middle East that often sought to bring it into their orbit.”³⁹⁹

As with art, so with life; attending the hunting expedition of the South Arabian Ili‘azz Yalut in the 3rd century A.D., for example, were “two Palmyrenes, two Chaldaeans and two Indians.”⁴⁰⁰ Finally, continual northerly migrations had a melting-pot effect as well, with wave after wave of South Arabian tribes ‘Arabicising’ the North Arabian civilizations.⁴⁰¹

A spiritual melting-pot was also known, especially under the Sāsānid institution of maintaining independent religious communities, each with “their own schools, law courts, places of worship, religious hierarchy and so on;”⁴⁰² a system which continued under Islamic rule, “such communities being designated ‘people of

³⁹⁵ Ibid., 241.

³⁹⁶ Ibid., 141.

³⁹⁷ Hoyland, *Seeing Islam*, 11; and *Arabia and the Arabs*, 245.

³⁹⁸ Driver and Miles, *The Babylonian Laws*, i.2.

³⁹⁹ Hoyland, *Arabia and the Arabs*, 167-8.

⁴⁰⁰ Ibid., 94-6.

⁴⁰¹ Ibid., 236

⁴⁰² Hoyland, *Seeing Islam*, 18.

the Book (*ahl al-kitāb*) and being expected to live by laws deriving from their own scriptures.”⁴⁰³ Thus, at the time of the conquests, the Muslims found an Iraq “deeply imbued with the spirit of Hellenistic civilization and at the same time contain[ing] great centres of Talmudic learning;”⁴⁰⁴ and this reality of mixing and blending was to continue right through early Islam and beyond. Hoyland notes:

“Jews and Christians were frequently the tutors of Muslim children and aides of Muslim rulers. Converts, especially among the literary elite, must have introduced something of their native traditions into their newly adopted religion, and those who re-converted must have brought back some knowledge of the latter to their former religion. Moreover, it is evident that books circulated across confessional lines. This is certainly the case in the ninth century and after, when translation into Arabic was common – thus the polymath Ibn Qutayba (d.889) can cite Persian, Byzantine and Indian works, as well as the Gospels and Torah; but it is also to some extent true of the [formative] period [i.e. the first 150 years of Islam].”⁴⁰⁵

Of course, it is important to keep in mind that apparent similarities between regional groups may have been the result of forces other than cultural intermingling, for as Hoyland points out, “since there were... common factors shaping the lives of the people of the seventh and eighth-century Middle East, there are also likely to have been common features in their literatures.”⁴⁰⁶ There is no reason the same could not be said for law; Hodgson raising a suitable example in the forbidding of pork, where “Bedouin and Jewish feeling seem to have converged.”⁴⁰⁷ Early Arab Muslims forbade pork more likely due to the fact that “domesticated pig was never suited to pastoralism and probably always had peasant associations,”⁴⁰⁸ than due to cultural influence. Such laws, seemingly drawn from socio-environmental conditions, would logically also experience a greater continuity over stretches of time, as well as across cultures and linguistic groups. The similarities between ancient Middle Eastern laws may therefore be due as much to shared environment as any presumed cultural influence; and the fact that Islam was born into surroundings similar to those of the

⁴⁰³ Ibid., 15.

⁴⁰⁴ Schacht, “Foreign Elements,” 13.

⁴⁰⁵ Hoyland, *Seeing Islam*, 32-3.

⁴⁰⁶ Ibid., 34.

⁴⁰⁷ Hodgson, *Venture*, i.180.

⁴⁰⁸ Ibid., n.24. He continues to say that such cases “will not be satisfactorily elucidated till we are able to see how probably diverse motives converged and were reinforced by continuing circumstances; circumstances which can include ethnic pride, but cannot include any inherent racial sentiment, too often invoked by scholars at present.”

South Arabians, Syrians, and Mesopotamians, lends support to the supposition that Hījāzī laws may have had much more in common with the laws of these regional civilizations than with those of ancient Italy or Greece.

However as this may be, Western Orientalists, as we have seen above, most often attribute similarities between Islamic and 'foreign' laws to 'influence' or 'borrowing.' Schacht, for example, names the four legal systems he believes may have possibly influenced Islamic law: 1) the Sāsānid, 2) the Roman-Byzantine and Roman-Provincial, 3) the canon law of the Eastern Church, and 4) the Talmudic; with Judaism and Christianity the major influences on "cult and ritual," and the Byzantines and Sāsānids the same for political and fiscal areas.⁴⁰⁹ One notes immediately the lack of Ethiopian, North or South Arabian, or ancient Near Eastern sources, though at the bottom of the same page he mentions the survival of "Arab legal and commercial practices," thus admitting a fifth source. However, Patricia Crone notes that "Goldziher and Becker had both regarded the Arab façade of Islamic civilization as deceptive, and Becker in particular insisted that the real origins of this civilization lay in the cultural traditions of the Fertile Crescent."⁴¹⁰ This last observation attributed to Becker truly seems to make the most sense, considering the integrated history of the region, though the "deceptive" Arab "façade" may echo more Crone's estimation, and loses strength in face of the potential, as we have discussed previously, for ancient cultural traditions of the Fertile Crescent conducted into Islam via Arab sunan. Indeed, Hallaq makes a similar point in his critique of Crone's *Roman, Provincial and Islamic Law*. He first reminds us of her assessment of the institution of *paramonê* in the Middle East, and that it "was first attested as early as the second millennium B.C. in Babylonia and that it took until the fourth century B.C. before it surfaced in Greek law, and still another five or six centuries to make an appearance in Roman law...." He then concludes:

"Crone never associates this law with the Semitic peoples who were the preponderant inhabitants of the area. If the institution of *paramonê* was present in the Near East long before Greek rule, and if the institution of slavery in the pre-Islamic Near East was characteristically Semitic... then one must be reluctant, when similarities urge the notion of cultural influences, to claim borrowing from non-Semitic sources."⁴¹¹

⁴⁰⁹ Schacht, "Foreign Elements," 10.

⁴¹⁰ Crone, *Provincial*, 7.

⁴¹¹ Hallaq, "Use and Abuse," 91.

A basic assumption of this thesis, therefore, based on these observations, is that any perceived similarity between an article of Islamic law and that of any other legal system appearing throughout the Middle East of Late Antiquity, is more likely the result of a *common Semitic source* – no matter if the similarity occurs in Greco-Roman law – and may thus be more a matter of inheritance than one of ‘borrowing’ or ‘influence.’

But who were these Semites? Where did they come from, what were their cultural characteristics, and what was their connection – if any – to the Ḥijāzī Arabs on the eve of Islam? A brief investigation into these questions uncovered some of the following pertinent opinions and observations: 1) Semites are by far the most prominent people in the Old Testament;⁴¹² 2) the original Semitic homeland is the interior of the Arabian peninsula;⁴¹³ 3) they comprise the Babylonians and Assyrians, the Arabs and Hebrews, the Aramaeans, Moabites, Ammonites, Phoenicians, Canaanites, and Amorites;⁴¹⁴ 4) “in the fourth millennium B.C. Semites predominated in the northern and Sumerians in the southern half of Babylonia;”⁴¹⁵ 5) the Babylonians, Canaanites, and Israelites all drew from a common Arabian stock of tribal customs;⁴¹⁶ and 6) in Late Antiquity, Ḥatra maintained its Semitic identity under the Persians, as did Syria in the face of encroaching Hellenism.⁴¹⁷ Thus we

⁴¹² Jastrow, “Races,” 72.

⁴¹³ Ibid. That this is “unanimously agreed,” see D.S. Margoliouth, “Arabia,” *DOB* i.134. He is also of the belief that those who became known as ‘Arabs’ are that peninsula’s autochthonous population, whose successive migrations produced various civilizations.

⁴¹⁴ Jastrow, “Races,” 72-7.

⁴¹⁵ Driver and Miles, *The Babylonian Laws*, i.1; see also i.6, n.7 for a brief linguistic history of Semitic (Old Akkadian) vs. Indo-European (Sumerian) in ancient Iraq.

⁴¹⁶ W.H. Bennett, “Crimes and Punishments (Hebrew),” *ERE*, iv.283. Examples of such customs could easily occupy several pages, but by way of illustration one might consider: 1) as regards the Arabic institution of *kihāna*, “[t]he word itself, both in terms of the conceptual aspect (*kihāna*) and the pragmatic aspect (*kahāna*) is a legacy, through its root at least, from the earliest Semitic antiquity (T. Fahad, “Kihāna,” *EI*²); 2) as regards the Arabic concept of *kaffāra*, though argued by some to be ‘borrowed’ from the Hebrew *kappāra*, it has equivalents also in the Syriac *kefar*, Assyrian *kapāru* and *kuppuru*, and furthermore: “Such beliefs were widespread among ancient Semitic peoples. In Babylonian ritual, purification and atonement are obtained through blood sacrifice..., the same means were used to obtain expiation in the levitical system. The Mineo-Sabians confessed their sins publicly and atoned for them by offering a bleeding victim” (J. Chelhod, “Kaffāra,” *EI*²); and 3) as regards pre-Islamic Arabian inheritance laws and types of marriage, W. Robertson Smith notes that similar laws exist “in other Semitic countries” as evidenced by Mosaic Law and “the famous Syro-Roman law-book” (W. Robertson Smith, *Kinship and Marriage in Early Arabia* (Oosterhooft, Netherlands: Anthropological Publications, 1966), 66, n.2.

⁴¹⁷ Hallaq, “Use and Abuse,” 82. Hallaq further observes that “despite the Hellenic imprint that was left on the society of the Fertile Crescent, the distinctive Semitic character of this society was never lost, a fact that constantly impresses itself on the historians of this period” (ibid., 83).

learn something of the origin, composition, cultural stock, and perseverance of the Semites.

As far as individual Semitic groups, the Arabs (said by some to have their origins in Southern Arabia and to have comprised such ancient sub-groups as the Edomites, Amalekites, and Midianites),⁴¹⁸ are known to have played an important role with surrounding civilizations throughout their recorded history.⁴¹⁹ Remarkably, some very important points to the undertakings of this thesis have surfaced regarding just how significant that role was. F. Hommel describes the “Arab dynasty” of Babylon (c.1884-1580 B.C.), which included none other than the famous Hammurabi (c.1772-1717 B.C.), and set itself up in Babylon, establishing the city’s political importance for the first time.⁴²⁰ And even more important are the linguistic analyses of D.S. Margoliouth, who proposes that ancient Canaanitish is a “daughter” language of Arabic (in fact, he calls it a “vulgar dialect of Arabic”), and that Hebrew is the Israelitish dialect of Canaanitish.⁴²¹ The probability, as he maintains, is that Arabic is the source language; and the significance of this should it be true, is immediately apparent when considering Arabic-Islamic ‘borrowing’ from the Hebrew based on lexical or morphological commonalities: the Arabic term may by far be the older of the two.

As for the Babylonians who shared a long geographic border with Arabia, they were said to be a mix of Sumerians (an Indo-European culture) and Semites, the Semitic Babylonians being close relatives to the Hebrews, Aramaeans, and Arabs.⁴²² Of course, as before mentioned, the political history of Babylon seems to begin with the arrival of an “Arab dynasty;” Hommel conjecturing that its sixth king,

⁴¹⁸ Jastrow, “Races,” 74, 75.

⁴¹⁹ For a brief overview of ancient Arabs’ importance, demography, early mentions in the sources, as well as some of the problems involved in over-generalizing Arab cultures, see Hoyland, *Arabia and the Arabs*, 1-10.

⁴²⁰ F. Hommel, “Babylonia,” *DOB*, i.223, 226.

⁴²¹ Margoliouth, “Language,” 25,26. He further contends that the Canaanites must have come from a land where a *classical* language was spoken and written, and that this classical language must have flourished before the 15th century B.C. (ibid., 26-7) This ties in with theories of a codified Arabic syntax as can be determined from Jāhili poetry, “at least 2,000 years before that poetry was composed,” leading him to conjecture the “vanished schools” of early Arabia (ibid., 27). Whatever the case may be, he puts together a strong linguistic argument for the “priority of Arabic,” citing that more than half of known Canaanitish vocabulary is derived from Arabic, that Arabic retains an older sense than Hebrew, that many pre-Islamic Jewish works contain ‘Arabisms’, and that S. Arabian vocabulary items can also be found in Canaanitish (ibid., 27-31). Hoyland, too, speaks of an “Old Arabic” which was “widely spoken” and is the ancestor of classical Arabic, positing a N. Arabian origin (*Arabia and the Arabs*, 201-3).

⁴²² Hommel, “Babylonia,” 214-15.

Hammurabi, was in fact the real founder of Babylon, achieving this in part due to his extending control over Syria, known at that time as ‘the Land of Martu,’ or ‘the Western Land.’⁴²³ Driver and Miles, however, attribute this first Babylonian dynasty to the arrival of the Amorites (Bab. *palû Amurrû*), a Western Semitic group originating from the Syro-Arabian desert; and before their arrival, as we have seen, Babylonia was a mix of Sumerian and Semite, the Semites consisting of two branches, Eastern and Western, this Eastern branch also having originated in the Arabian desert.⁴²⁴ However, as the sources reveal, “[a]ll, whether Sumerian or Semite, ultimately succumbed to the steady pressure and rising power of the advancing Amorites whose principal center was fixed at Babylon; there they founded a dynasty of eleven kings whose power lasted for almost three hundred years....”⁴²⁵

A marked characteristic of ancient Mesopotamian civilization is its near obsession with legal matters and law-making, and this was a sentiment far predating the arrival of Hammurabi or his dynasty, for it had long been “an axiom of royal prudence that, if a king paid no heed to justice, his subjects would rebel and his kingdom be laid waste, his destiny be reversed and misfortune follow close upon him.”⁴²⁶ Thus we see the codes and reforms of Urukagina of Lagaš (c.2800 B.C.), Sargon of Accad (c.2751-2696 B.C.), Ur-Engur (c.2450-2207 B.C.), Lipit-Ištar of Isin (c.2217-2207), and Sin-Iddinam of Isin (c.2125-2120 B.C.); not to mention the old collection of Bilalama, the king of Ešnunna (c.2268 – 2259 B.C.). Many legal documents on clay tablets have also been discovered – in mixed Sumerian and Accadian – that predate even these. Hammurabi both continued and expanded upon this tradition, but Babylon fell into decline after the last Amorite king, leaving us with no law collections, and “[i]ndeed, the legal records remain scanty till the great efflorescence of literary and legal texts, which include fragments of a collection of laws, under the Neo-Babylonian empire which was founded by Nabû-kudur-ušur, the

⁴²³ Ibid., 226-227. Hommel further suggests this “hegemony of Babylonia over the Western land” led to the establishment of Babylonian as the ‘lingua-franca’ of West Asia for some centuries.

⁴²⁴ Driver and Miles, *The Babylonian Laws*, 2 and n.4, 3. As for the Sumerians: “Their culture lasted as a living force well into the period of the first Babylonian dynasty founded by Amorites..., but generally gave away before the progressive civilization brought into the country by that powerful dynasty.” See also Alfred Haldar, *Who were the Amorites?* (Leiden: E.J. Brill, 1971), 6-28, for a discussion of Amorite origins in the self-same ‘Land of Martu’ later conquered by Hammurabi.

⁴²⁵ Driver and Miles, *The Babylonian Laws*, 3.

⁴²⁶ Ibid., 5.

Biblical Nebuchadrezzar (604-562 B.C.), and came to an end with Nabû-na'îd, who was called by the Greeks Nabonidus (555-538 B.C.)”⁴²⁷

As for the Hebrews, we have already seen it postulated that – at least linguistically – they are the inheritors of an older, Arabic ‘classical’ civilization, and so it’s no surprise to hear scholars such as Morris Jastrow place their distant origin in the “Semitic hordes...pouring out of the steppes of Arabia, and proceeding in the direction of the Euphrates Valley....”⁴²⁸ However, he sees them as slowly migrating North along the Euphrates, then West into Syria and Palestine over the centuries, absorbing Babylonian culture along the way; then postulates the *Aramaic* origin of both the Hebrews and Babylonians.⁴²⁹ Whatever the case, the Hebrews at first were indistinguishable from other Semitic groups, and indeed seem to have remained in contact with the Babylonian-Assyrians, and even more strongly so with “the Moabites, Ammonites, Edomites, Ishmaelites (or Arabs), Phoenicians, and other subdivisions of the great Aramaean branch....”⁴³⁰ even after their conquest of Canaan. It’s no wonder, then, that W.H. Bennett sees original Israeli law as a combination of tribal law with Babylonian and Canaanite influences.⁴³¹

As for the Aramaeans, we have already seen that at least in Jastrow’s estimation, “[t]he Aramaean branch of the Semites... assumes large dimensions.”⁴³² Their import as far as our purposes, however, lies more in the language they bequeathed later generations of dwellers in the region. We have also seen how Schacht circumvented the issue of elapsed centuries between Babylonian and Islamic law by pointing out the one element of continuity present throughout: “the Aramaic population,”⁴³³ by which we can assume he means speakers of Aramaic. Hodgson outlines the evolution of this Semitic language’s importance thus:

“It became the language (especially in the Fertile Crescent) first of the merchants and of city life generally; from there it came to be used by the clerks at the courts (if not in the temples) – and at last even among the peasantry. Other languages continued for some centuries as local

⁴²⁷ Ibid., 4.

⁴²⁸ Jastrow, “Races,” 73.

⁴²⁹ Ibid.

⁴³⁰ Ibid.

⁴³¹ Bennett, “Crimes and Punishments (Hebrew),” 283.

⁴³² Jastrow, “Races,” 73. He continues: “Besides the Babylonians and Assyrians and Hebrews, it includes the Semites who settled in Syria as well as the groups of Moabites and Ammonites settled on the east side of the Jordan, while the Phoenicians settled on the Mediterranean coast constitute another Aramaean division or offshoot.”

⁴³³ Supra, p.63.

rural dialects (and as the medium of religion and science among the learned); but the more dominant elements of the Fertile Crescent and the nearby highlands were becoming, with one regional layman's language, substantially one diversified people, and shared many common expectations."⁴³⁴

And indeed, "[t]he first Arab merchant-kings had used Aramaic as their formal tongue."⁴³⁵

Lastly as regards the topic of Semites, a certain Semitic sensibility concerning adultery has been observed as "illustrated by a great variety of evidence, extending from the codified legislation of Hammurabi, king of Babylonia... to the unwritten, though no less authoritative, tribal laws of the present day."⁴³⁶

Commonalities seem to include: 1) the infidelity of the man is "only tardily recognized as blameworthy" if at all, and 2) a woman in cases of adultery or illegal fornication is more or less equated to property.⁴³⁷ Other commonalities will reveal themselves as we survey the ancient codes.

Arab interaction with other Semitic groups

Evidence of the historical interaction of Arabs and Babylonians can be found in a number of sources. In the Old Testament, for example, Isaiah prophesies the downfall of Babylon, and that "never again will the Arab pitch his tent there...."⁴³⁸ It is known also that contacts with Mesopotamian civilizations encouraged the development of the East Arabian civilizations of Dilmūn and Magān (modern day Bahrain and the Batinah Coast of Oman) – Babylonian influence felt particularly strongly in Dilmūn and the island of Ikaros (modern day Falaika).⁴³⁹ A considerable amount of archaeological and documentary evidence exists also for Neo-Babylonian and Arab interaction via Taymā' and Dedan, consisting largely of some fifteen documents in Neo-Babylonian (mostly commercial transactions) which mention either Arabs or Arab settlements in the vicinity of Babylon.⁴⁴⁰ Military campaigns

⁴³⁴ Hodgson, *Venture*, 111.

⁴³⁵ *Ibid.*, 153.

⁴³⁶ Stanley A. Cook, "Adultery (Semitic)," *ERE*, i.135.

⁴³⁷ *Ibid.*

⁴³⁸ As cited by Hoyland, *Arabia and the Arabs*, 8.

⁴³⁹ *Ibid.*, 10-11, 19. See also p.24 for evidence, in Hellenistic times, of Chaldaean exiles in the "deep Gulf;" p.141 for the presence of Babylonian deities in N. Arabia; p.198 for "Arabian diaspora communities" in Babylon and the use of cuneiform in ancient Falaika and Bahrain; and p.204 for 2nd millennium Akkadian texts from these same two islands.

⁴⁴⁰ See A. Livingstone, "Arabians in Babylonia / Babylonians in Arabia: Some Reflections à propos New and Old Evidence," in *L'Arabie Préislamique et son Environnement Historique et Culturel : Acts*

against Arabs can also be found in the sources, such as Sargon's conquests of Northern Syria, Elam, and North Arabia (c.3,500 B.C.);⁴⁴¹ the campaigns of "the younger Kings of Ur" in 'Sabu' and North Arabia;⁴⁴² and the war of Nebuchadnezzar II against "the Arabs of Kedar."⁴⁴³ However, the most famous of such expeditions is undoubtedly that of the Neo-Babylonian Nabonidus in the mid 6th century B.C., described by Nabonidus himself in his Harran inscriptions:

"I hied myself afar from my city of Babylon on the road to Tema', Dadanu [Dedan], Padakku [Fadak], Hibra [Khaybar], Iadihu [Yadi'?), and as far south as Iatribu [Yathrib, mod. Medina]; ten years I went about amongst them (and) to my city of Babylon I went not in."⁴⁴⁴

Remarkably, Nabonidus' army was known to contain many Jewish troops, and "[t]hese garrisons, [Gadd] suggests, were the origin of the Jewish colonies which are found in Taymā', al-'Ulā (Dedan), Fadak, Khaybar, and Tabūk at the rise of Islam."⁴⁴⁵ Note that Nabonidus also visited Yāthrib (some 350km S.S.E. of Taymā'), and there is no reason to suppose the Jewish tribes of the Prophet's Medina may not have boasted the same ancient ancestry. Lastly, militarily speaking, encounters between the Babylonians and the Arabs did not always consist of expeditions of the former against the latter, for the Qedarite Arabs are known, in the seventh century B.C., to have participated in a Babylonian rebellion against the Assyrians, a revolt which resulted in the above-mentioned mass-importation of Arab slaves to Assur.⁴⁴⁶

Other examples of Assyrian-Arab historical interaction are well documented in the sources, including Assyrian dominion over the E. Arabian civilizations of

du Colloque de Strasbourg 24-27 juin 1987, ed. T. Fahd (Leiden : E.J. Brill, 1989), 97-105; especially p.100f., where the author addresses the question of Arab settlements and their origins in Arabia and Mesopotamia, and n.5 for additional sources for pre-Islamic Arabians in Mesopotamia.

⁴⁴¹ Hommel, "Babylonia," 225.

⁴⁴² Ibid., 226. Hommel notes also that both Bahrain and Martu are regarded as enemy territory in the great astrological compendium known as the *Nūr Bel*.

⁴⁴³ Ibid., 229.

⁴⁴⁴ As rendered into English by C.J. Gadd and cited in Frederick Victor Winnett and W.L. Reed, *Ancient Records from North Arabia* (Toronto: UP, 1970), 91. See also Hoyland, *Arabia and the Arabs*, 62, for scholarly conjecture as to the reasons for this expedition in which Nabonidus "vanquished the king of Dedan, slew the ruler of Tayma and erected a palace for himself in the latter oasis." See also the article by G. Vajda who, noting the confusion of several ancient Mesopotamian rulers under the single name Nebuchadnezzar (Ar. Bukht-Naṣṣar) in Arabic sources, suggests the supposed expedition of a Nebuchadnezzar against the Arabs, "to which Qur'ān xxxi, 11ff. would refer," might be instead "a memory of Nabonidus's settlement at Taymā'... combined with that of Arab infiltrations into the region of the Euphrates" (G. Vajda, "Bukht-Naṣ[s]ar," *EI*²).

⁴⁴⁵ Winnett and Reed, *Ancient Records*, 91.

⁴⁴⁶ Hoyland, *Arabia and the Arabs*, 61.

Dilmūn, Meluhha, and Magan;⁴⁴⁷ and in the ninth century B.C. we find the first reference in the Assyrian annals to North-Eastern Arabs “in an inscription dated 853 BC of the Assyrian king Shalmaneser III, who records a victory over a coalition of Syrian and Palestinian leaders, alongside of whom fought a certain ‘Gindibu the Arab’ with a thousand camels....”⁴⁴⁸ After this we find more frequent mention of Arabs in Assyrian sources, an apparent side-effect of the increasing importance of the S. Arabian trade in aromatics, culminating in the Assyrian expansion into West Arabia for control over the trade routes.⁴⁴⁹ Remarkably, both Tilgath-Pileser III (744-727 B.C.) and Sargon II (721-705 B.C.) seem to have enacted “a policy of integrating nomad groups into the imperial system in border regions,” which was “important for maintaining peace and security in those areas and for providing a reserve of military manpower.”⁴⁵⁰ Thus we see, well over a millennium before the Sāsānid-Byzantine conflict, a precedent for the creation of Arab ‘buffer-states’ by Great Powers of the region, providing rich opportunities for ‘cross-cultural pollination.’

It is not surprising, then, with so many centuries of interaction that the Arabs appear to have preserved a great variety of ancient Mesopotamian legacies.⁴⁵¹ A brief sampling, as follows, should impart some idea of their scope. Etymological examples abound; for instance the seeming preservation, via Aramaic, of the Akkadian *guṣṣu* (mortar) in modern Iraqi Arabic;⁴⁵² or several instances of shared Babylonian and

⁴⁴⁷ Ibid., 18-19.

⁴⁴⁸ Ibid., 59. See also Margoliouth, “Arabia,” 133, for a brief list of Assyrian campaigns in Arabia.

⁴⁴⁹ Hoyland, *Arabia and the Arabs*, 59-60. See also F. Hommel, “Assyria,” *DOB*, i.187: “In the year 715 Sargon [II] undertook a campaign into the interior of North Arabia ‘against the remote Arabians of the Desert, of whom the wise and learned know nothing.’ The tribes of Thamūd, Ibādīd, Marsīman... and Khayappa... were conquered, and partially settled in Samaria. Thereupon Pir’u (c.f. פִּרְאֻס Jos 10¹³, scarcely equivalent to Pharaoh) of Musur (the territory called Ma’in-Muzrān of the South Arabian inscriptions, in the north of the peninsula of Sinai?), queen Samsi of Arabi (a part of North Arabia), and the Sabaean Ita’amar... ‘Kings of the sea-coast and the desert,’ brought rich presents, among which were ‘sweet-smelling spices of the mountains’ (frankincense), gold, precious stones, horses, and camels.” As for “Pir’u of Musur,” this seems more likely a reference to ‘Pharaoh (Ancient Egyptian *per-aa*) of Miṣr (as Egypt is called even in the Qur’ān, e.g. Q.12:21, 99 and Q.43:51).

⁴⁵⁰ Hoyland, *Arabia and the Arabs*, 61. He continues: “Certain chiefs would be selected for official appointments, usually with titles and remuneration attached. For example one ‘Idibi’ilu the Arab’ was assigned to the ‘wardenship of the entrance to Egypt’, implying duties of supervision and checking. [...] Nomads were sometimes settled in frontier areas, as was done by Sargon on the Palestine-Sinai border, both for security and to undertake the transport of goods between Assyria and Egypt. Both rulers also made attempts to bring more tribes into the imperial orbit....”

⁴⁵¹ It should be noted here that, regardless of Schacht’s request (*supra*, p.73), little research seems to have been aimed specifically in this direction, though it is a very promising field worthy of exploration and harboring great potential to yield insight into the pre-Islamic cultural environment of Arabia.

⁴⁵² J.B. Segal, “Aramaic Legal Texts from Hatra,” *Journal of Jewish Studies* 33, nos. 1-2 (1982): 113.

Arabic animal names;⁴⁵³ or the preservation not only of the Akkadian *šamashshammu* ('sesame,' Ar. *simsim*), but its otherworldly associations as well.⁴⁵⁴ As far as place names, the ruined city of Babylon itself (some 54 miles S. of Baghdad) persisted at least into the fourth / tenth century as a small village named Bābil about which Muslim historians had a great deal to say.⁴⁵⁵ Its sister city of Borsippa has also come down to us as Burs or Birs, along with the ancient city's associated fame as a center of the textile industry.⁴⁵⁶

In the area of weights and measurements, we read of the Mesopotamian origin of the weight system in Muḥammad's Arabia,⁴⁵⁷ the possible preservation of old Akkadian *ma-na* (a small dry measure) as Persian *manā*,⁴⁵⁸ and the origin of Ar. *qadah* ('cup,' a dry measure) in the Babylonian ideogram for shekel, which "has not only the pronunciation of *šiklu*... but also *ḫuddu*..."⁴⁵⁹ As for other sciences, we find the Arabs as inheritors of Babylonian astronomy, with Babylonian derived stations of the zodiac and many shared star names;⁴⁶⁰ the likelihood that Arabic algebra was the continuation of an Assyrian mathematical tradition;⁴⁶¹ and that the science of *iqfīm* and the "configuration of the earth" (*sūrat al-ard*) has its roots in an ancient Babylonian tradition.⁴⁶²

⁴⁵³ Hommel, "Babylonia," 214. Such names as Babylonian *inzu* (goat), *imēru* (ass), *kalbu* (dog), *pīru* (elephant), and *āribu* (raven) are listed by Hommel and have obvious Arabic counterparts ('*anz(a)*, *himār*, *kalb*, *fil*, and *ghurāb*, respectively). However, he suggests the Arab origin of Akk. *gammalu* (camel) and *buṛīmu* (wild ass).

⁴⁵⁴ A. Dietrich, "Simsim," *EI*².

⁴⁵⁵ G. Awad, "Bābil," *EI*².

⁴⁵⁶ E. Herzfeld, "Birs," *EI*². Note that "Balādhurī... speaks of the 'Adjamāt Burs (Assyr. *agammē*), the land around the marshy lakes of Burs which were taken possession of by 'Alī."

⁴⁵⁷ E. Ashtor, "Makāyil," *EI*², vi.118.

⁴⁵⁸ *Ibid.*, 120. C.f. occurrences of *ma-na* in the code of Hammurabi as a measure of silver (Robert Francis Harper, *The Code of Hammurabi, King of Babylon about 2250 B.C.* (Chicago: UP, 1904), 19 (§24), 31 (§59), 39 (§114), *passim*).

⁴⁵⁹ Hommel, "Babylonia," 219.

⁴⁶⁰ *Ibid.*, 217-18.

⁴⁶¹ J. Vernet, "Al-Kh^wārazmī," *EI*². The author notes "[t]he term *djabr* may derive, according to Gandz, from Assyrian *gabru*; this etymology may be feasible, since, in the hundred or so mathematical tablets going back to the second millennium B.C., there appear algebraic problems parallel to those put forward by al-Kh^wārazmī and which, according to Bruins... show that the Assyrians knew the six model equations... used by the Muslim scholar. However, from the strictly historical view, there is the problem that the word is not attested in any intervening language, such as Greek, and it is difficult to hold that it could have survived solely in Aramaic till the time of al-Kh^wārazmī." Vernet then proposes the origin of *al-jabr* from medical terminology. However, considering Schacht's proposition that complex types of Babylonian contracts may have been preserved via the Aramaic population, there seems little reason to think the same may not hold true for complex mathematical equations.

⁴⁶² A. Miquel, "Iqfīm," *EI*².

In the religious field there exist many indications of the Arab worship of ancient Mesopotamian and Babylonian deities,⁴⁶³ as well as the continuation of such ancient principles as represented by Ar. *ṣadaqa* ('right') in Bab. *sattuku* (Sumer. *sa-dug*), "the prescribed daily sacrifice."⁴⁶⁴ All this, not to mention the Arabic preservation to this day of Babylonian months, the Babylonian literary precedents of dictionaries, poetical commentaries (in which rare words were explained), lists, and legal commentaries, etc.⁴⁶⁵

Finally, and most importantly for the goals of this thesis, we find the continuity of ancient Mesopotamian legal traditions as exemplified by: 1) those contracts of which Schacht claimed the Islamic *shurūṭ* books "look just like the Babylonian documents;"⁴⁶⁶ 2) the institution of *paramonê* and the rules regarding bequests;⁴⁶⁷ 3) the rights of the slave-girl *umm walad* on the death of her master;⁴⁶⁸ 4) the institution of *walā'*;⁴⁶⁹ 5) the legally prescribed veiling of married women and concubines in public;⁴⁷⁰ and 6) the professed moral aims of legislation as found in the epilogue of Hammurabi's code:

"...that the strong might not oppress the weak, and that they should give justice to the orphan and the widow...."⁴⁷¹

⁴⁶³ T. Fahd, "Nuṣub," *El* 2. Note also that Assyrian Adummatu (modern al-Jawf) was the "seat of a series of North Arabian queens" who may also have been high priestesses of "the cult of Ishtar-Atarsamain [which] enjoyed tremendous prestige and popularity in North Arabia at that time" (Winnett and Reed, *Ancient Records*, 71-2).

⁴⁶⁴ Hommel, "Babylonia," 216. Note that he's suggesting the Arabic origin of the words.

⁴⁶⁵ *Ibid.*, 217, 222.

⁴⁶⁶ Schacht, "From Babylonian," 31.

⁴⁶⁷ Crone, *Provincial*, 93. Note her observation that "[t]o some extent law in Arabia would thus appear to have been Near Eastern law, or an archaic version thereof;" and on p.96: "Indeed would it not be odd if developments internal to the Muslim community had simply happened to issue in much the same rules regarding bequests as those which had prevailed throughout the Near East for over a thousand years?"

⁴⁶⁸ *Ibid.*, 87. Crone maintains that "Romans, Muslims and Nestorians alike all owe [this], in the last resort, to Hammurabi."

⁴⁶⁹ Crone (*ibid.*, 64, n.1) argues against the Akkadian origin of *walā'* proposed by von Soden on the basis of his comparison being "in fact between the *muškēnum* and the freedman of the modern bedouin" rather than "the *mawālī* of early Islam [who] were bound to their individual manumitters in the manner of the freedmen of Rome." Nevertheless, von Soden has quite probably demonstrated a link between the Babylonian *muškēnum* and the modern Bedouin freedman. One might argue that the traditional Semitic practice (as represented by the Babylonian-Bedouin) might have been slightly altered in early Islam to more closely resemble the Roman model, the Bedouin here functioning, as in many other instances, outside the *sharī'a*.

⁴⁷⁰ As found in the Middle Assyrian laws (MAL 40) and cited by J.J. Finkelstein, "Sex Offenses in Sumerian Laws," *Journal of the American Oriental Society* 86, no. 4 (1966): 363. Note that the same was prohibited to prostitutes.

⁴⁷¹ Harper, *Code*, 99. C.f. for example Q.93:9.

However, the possibility should once again be noted that – as regards shared traditions – the Arabs may well have been the contributors rather than the ‘borrowers,’ or at least have inherited from a single, common source. The ‘Arab diaspora communities’ in Babylon mentioned by Hoyland might have been in a position to influence their host nation, all the more so when one considers the evidence that an Arabian background may have carried status in the Neo-Babylonian Empire.⁴⁷² We have already seen suggestions of an ancient Arabic “source language” which may be responsible for shared words and concepts. Just as important, as we have seen Hommel put forward, is that the Babylonian ‘King List’ begins with an ‘Arab dynasty.’ Considering, if this be true, that Hammurabi was of this dynasty, certain key questions about the nature of his law code might find an answer. It has been noted, for example, that the code of Hammurabi does not seem to have borrowed material from the Laws of Eshnunna or any other previous law codes.⁴⁷³ Reuven Yaron adds to this, saying “it is likely that Hammurabi and his jurists will have introduced numerous amendments and reforms; that is to say that the law of Babylon itself may have undergone significant change within a short period of time.”⁴⁷⁴ He notes by way of example that “the LE do not know the principle of talion, which has the offender suffer bodily harm identical to that which he has caused,”⁴⁷⁵ whereas the CH has many examples and “[i]t is even possible that talion may have been introduced by Hammurabi himself. On the whole it is this view which seems preferable.”⁴⁷⁶ The *lex talionis*, as we shall see, is a strong and enduring Semitic tradition whose precepts are very much present in Islamic law as well. Is it possible that the absence of borrowing from previous laws and the seeming introduction of strong Semitic elements in Hammurabi’s Code point to an Arab (or

⁴⁷² A. Livingstone (“Arabians in Babylonia,” 99) notes: “Although of course Arabians formed a small minority in relation to other ethnic groups, they owned land, occupied at least one specifically Arabian city or settlement, conducted business and trade, maintained links with Arabian towns such as Taima, and participated generally in the Babylonian society. That their Arabian background enjoyed a certain amount of prestige could perhaps be inferred from the use of the South Arabian script on cylinder seals.”

⁴⁷³ Driver and Miles, *The Babylonian Laws*, 10-11. They note that only incomplete copies of previous laws were known, thus “[c]onsequently little emphasis can be laid on obvious omissions [in the Laws of Eshnunna], such as the absence of all references to homicide, incest, and adultery....” They then proceed to list other subjects as occur in the CH but not the LE, noting also that the CH is well-ordered while previous codes were not, a fact arguing against direct borrowing in their opinion. See also Yaron, *Eshnunna*, 11.

⁴⁷⁴ *Ibid.*, 21.

⁴⁷⁵ *Ibid.*, 262.

⁴⁷⁶ *Ibid.*, 263.

at least West-Semitic) king introducing precepts of Arabic or Amoritic tribal law? Could the similarities between Hammurabi's Code and the Islamic *sharī'a* have less to do with 'borrowing' or 'influence' than with a common inheritance from the deserts West of Mesopotamia? A clue pointing in this direction, seemingly overlooked by all who have addressed this question, may be found in the prologue to Hammurabi's code. Hammurabi, boasting of his many accomplishments, describes himself as "[he] who provided large sacrifices for the Temple of Fifty; who seizes the enemy; the favorite of the exalted god (oracle); *who put into execution the laws of Aleppo...*"⁴⁷⁷ Considering the location of Aleppo in the North of the ancient 'Land of Martu' to which Hammurabi, as an Amorite, would have traced his ancestry or, at any rate, conquered at some point and added to his domain, this "put[ting] into execution the laws of Aleppo" might shed some light on the uniqueness of the Code and the role that Western Semitic or Arabian legal traditions may have played in it. In any case, the potential for a common Semitic source shared by both Arab and Babylonian is very strong.

Formerly, we discussed the propositions of several Orientalists that much of Islamic law was 'borrowed' from Hebrew or Judaic legal tradition, and there is certainly no denying the possibility of Jewish influence, especially in light of the many similarities one finds between the two traditions. We have also seen that Jewish colonies in Arabia may go back to the garrisons of Nabonidus in the mid-sixth century B.C. in Taymā', possibly Khaybar and Yathrib as well,⁴⁷⁸ and at any rate were well-established by the Prophet's time. Hodgson writes that Jewish Arab tribes "shared the same culture as the other Arabs..." and were originally Aramaic-speakers from Syria or Palestine, also maintaining that many were Arab converts.⁴⁷⁹

However, we have also read claims of the Arabian ancestry of the ancient Hebrews and Margoliouth's theory as to the classical Arabic origin of the Hebrew tongue. He arrived at this conclusion via the linguistic method known as 'the true principle':

⁴⁷⁷ Harper, *Code*, 7. Italics are mine.

⁴⁷⁸ Supra, p.93. See also Margoliouth ("Arabia," 134) where he writes that "Jewish colonies also existed in [Arabia] long before the time of the Prophet Mohammed; in the 3rd and 4th cent. A.D. they would seem to have been favored by the Persians in opposition to the Christian communities which had the support of the W. empire" (he cites Glaser's, *Die Abyssiner in Arabien*).

⁴⁷⁹ Hodgson, *Venture*, 172 and n.21. The adoption of Judaism, he notes, presupposes the presence of Jewish law in the community.

“...the same as that applied by M. Pictet to the Indo-European languages, and which employs the assumption... that, where kindred nations which have separated call objects or institutions by the same names, and there are no signs of these names having been borrowed independently they must have possessed the names and the objects, etc., before they parted. A comparison therefore of the Hebrew and Arabic names for a variety of things should give us something like a correct idea of the state of Arabian society when the Canaanites first migrated northward.”⁴⁸⁰

By means of this method he concludes, in typical turn-of-the-century fashion, that this nation must “have attained as high a level of development as any Oriental State uninfluenced by Europe has reached,” and, in more detail, that its society was “organized on the basis of the family” (which was polygamic), and that “the treble system of naming in use in Arabia would seem to have existed,” “the castes of freemen and slaves were already distinct,” people lived in villages or towns “with streets and squares, defended by walls,” and had the same cereals, pot-herbs, fruits, domesticated animals, agricultural methods, trades, arithmetic, calculation of days, astronomical observations, writing, alphabet, and “certain styles of elegant composition.” Even more importantly, he concludes:

“Religion had already taken shape: men could distinguish between the sacred and the profane, they had a pilgrimage, and learned various ceremonies, including, probably, genuflexions and prostrations. The prophetic profession seems to have existed in a variety of forms. Custom had already to some extent become stereotyped in the form of law.”⁴⁸¹

Should the above be true, then, similarities between Arabic or early Islamic tradition and the Jewish tradition, should they occur in any of the above areas of family, slavery, agriculture, astronomy, etc., may just as equally be the result of a common heritage as of later influence; and, as the above quote makes clear, the same would hold true for commonalities of religion and law.

Whatever the case, there is no doubting that Islamic tradition contains many seemingly Judaic features, and, legally speaking, there is even some evidence that the Torah persisted as a law-text into early Islam. We see, for example, in Q.5:42-9 what appears to be God’s reaffirmation of the Torah as a source of law, the associated

⁴⁸⁰ Margoliouth, “Language,” 26; keeping in mind, of course, that he considered Hebrew to be the Israelitish dialect of Canaanitish.

⁴⁸¹ Ibid.

asbāb al-nuzūl relating this to a case of adultery. At any rate, though opportunities for 'borrowing' and 'influence' may have abounded, we must always keep in mind the potential that commonalities may have arisen from a common source; as may have been demonstrated by the ostensible South Arabian origins of *sunna* and *sīra* despite their Hebrew parallels, the ancient Mesopotamian origin of *kaffāra*,⁴⁸² and certain shared marriage concepts which may have been common "before the separation of the Arabs and the Hebrews."⁴⁸³ The same, it should be noted, has also been suggested for similarities between Hammurabi's Code and the Pentateuch, i.e. that "parallels may be largely due to common dependences on the primitive tradition of Arabia."⁴⁸⁴

Of course, when considering the interaction of the Ḥijāzī Arabs with various cultural entities of the Near East before Islam, the most obvious place to begin would be with their closest brethren, the Northern, Southern, and Eastern Arabian civilizations and tribal groups. But first a few words on the pre-Islamic Arabian milieu in general might shed some light on the broad possibilities for interaction between them. First is the interplay between nomadic and settled groups, described by Jastrow at the turn of the past century as "[t]he sociological process which began thousands of years ago [and] is still going on at the present time, where nomadic groups, attracted by the opportunities of spoil, continue to skirt the regions of culture in the East, with the result that a certain proportion of them are permanently gained for the cause of civilization, and settle in cultural centres."⁴⁸⁵ This rather oversimplified view of the roving and raiding desert nomad appears to be the predominant image of the pre-Islamic Arab put forward by most Orientalists. However, as Livingstone has shown us, "a characterisation of Arabians in Mesopotamia in the 5th and 6th centuries B.C. simply as 'nomads' would be fallacious."⁴⁸⁶ The urbanization of Taymā', Dedan, and Yathrib, probably originally as regional centers for the exploitation of minerals, then later as "part of the nexus of trade routes,"⁴⁸⁷ has been demonstrated through ample archaeological and

⁴⁸² Chelhod writes: "We have... eliminated the notion that this is a borrowing from Hebrew in spite of the similarity of pure form" ("Kaffāra," *Et* ²).

⁴⁸³ Smith, *Kinship and Marriage*, 208.

⁴⁸⁴ Bennett, "Crimes and Punishments (Hebrew)," 283.

⁴⁸⁵ Jastrow, "Races," 73. He cites Lady Anne Blunt's *The Bedouin Tribes of the Euphrates*.

⁴⁸⁶ Livingstone, "Arabians in Babylonia," 97.

⁴⁸⁷ *Ibid.*, 101; citing the archaeological work of P.J. Parr.

documentary evidence. Perhaps Hoyland says it most succinctly, therefore, when he explains:

“There had always been two aspects to the term Arab. From Assyrian times onwards we hear not just of nomad Arabs, but also of settled Arabs, those who had chosen to make a life for themselves within the borders of civilization rather than outside them.”⁴⁸⁸

Furthermore, despite the probability that settled Arabs, “as urban societies... would have perceived a marked contrast between themselves and the peoples of the steppe,”⁴⁸⁹ there are indications that relations between the two were not always hostile. There may well have been, as Livingstone posits for Taymā’, “a relationship of protection between tribal and non-tribal elements [which] could be seen in the context of an urban / non-urban symbiosis.”⁴⁹⁰ Hoyland complements this idea, saying:

“The pastoral and farming peoples of a given area, whatever their degree of mobility, comprise complementary economic sectors of a single system; they are economically bound together, even if relations between them might often be tense.”⁴⁹¹

The importance of this, as regards the interplay of the nomadic and settled Arab at a cultural level, is that “despite the negative stereotypes in terms of which farmers and herders view each other, they share certain techniques, beliefs and kinship organizations,”⁴⁹² and to this we might add, in terms of pre-Islamic Arabia, certain *sunan*.

Understanding this interplay adds a new dimension to the importance of the mass nomadic migrations which the Arabian peninsula has seen time and again through the centuries. Not only may these have produced the various civilizations at their edges, as we have seen Margoliouth claim,⁴⁹³ but may have played a part in the conservation of the ‘Arabness’ of settled Arab communities.⁴⁹⁴ Nearly all these migrations started in the South and proceeded North, West, and East, as in the great migrations of the first and second centuries A.D. recorded by Muslim historians and

⁴⁸⁸ Hoyland, *Arabia and the Arabs*, 236. Most of those who settled, he maintains, “probably... became fully assimilated to the prevailing culture, but there are occasional hints that some still thought of themselves as Arabs.”

⁴⁸⁹ *Ibid.*, 69.

⁴⁹⁰ Livingstone, “Arabians in Babylonia,” 104.

⁴⁹¹ Hoyland, *Arabia and the Arabs*, 101.

⁴⁹² *Ibid.*

⁴⁹³ *Supra*, p. 88.

⁴⁹⁴ Hallaq, “Use and Abuse,” 81.

attested to by archaeological evidence.⁴⁹⁵ It was these migrating tribes which, in the latter half of the third century, began to form relations with the two regional 'superpowers,' while occupying parts of Iraq, Syria, and Oman, as well as Mecca and Yathrib. They had, before the migration, been under the sway of the Himyarite kings of South Arabia.⁴⁹⁶

An even more potent area for the interaction of various Arab groups, not only with each other, but with the entire ancient world, was that of trade, and indeed the aromatics trade put Arabia in contact with Mesopotamia and the Mediterranean at least from the first millennium onwards, whereas trade throughout Arabia is recorded as early as the third millennium.⁴⁹⁷ The Arabs have been called "the founders of commerce as it existed in the ancient world,"⁴⁹⁸ and not only is there proof of extensive trade through Arabia during the reign of Gudea in Babylon (c. 2,500 B.C. at the latest),⁴⁹⁹ but we know the Arabs plied the trade routes from Southern Babylon to the Persian Gulf,⁵⁰⁰ and there was a boom in the Egypt-India maritime trade under the Romans, not to mention the African-Indian trade via Mocha,⁵⁰¹ all of which put Arabia at the center of an international web of commerce and cross-cultural interaction. Within the peninsula, at least, we know that Arab markets were "suitable for spreading commercial custom," as Schacht has pointed out,⁵⁰² and Hoyland has drawn our attention to the great interactive potential not only of day-to-day local trade, but of "the grand markets staged at fixed times of the year in different parts of Arabia."⁵⁰³ These not only provided a forum by which various Arab groups might interact, but Arabs and Persians as well. Even more importantly we see the potential of such markets as sites for arbitration and the dealing out of justice, as at "the market of 'Ukaz in the highest part of Najd [where] there would be boasting competitions of the Arabs, settlement of blood-wits and truce negotiations."⁵⁰⁴

⁴⁹⁵ Hoyland, *Arabia and the Arabs*, 231ff.

⁴⁹⁶ Ibid., 234, 236.

⁴⁹⁷ Ibid., 104. Hoyland cites ancient sources which note the journey from Aqaba to Minaea was but 70 days (ibid., 105).

⁴⁹⁸ Margoliouth, "Arabia," 134, citing Sprenger.

⁴⁹⁹ Hommel, *Babylonia*, 225.

⁵⁰⁰ See Russ Versteeg, *Early Mesopotamian Law* (Durham: Carolina Academic Press, 2000), 166.

⁵⁰¹ Hoyland, *Arabia and the Arabs*, 44, 47. See Margoliouth, "Arabia," 131, for a description of the perils of the Red Sea trade and the names of ancient Red Sea ports.

⁵⁰² Schacht, "From Babylonian," 32.

⁵⁰³ Hoyland, *Arabia and the Arabs*, 109.

⁵⁰⁴ Ibid., 110. Here Hoyland is quoting the *Ta'rikh* of Ahmad b. Abi Ya'qub al-Ya'qubi.

But what do we know of the polities at the Northern, Southern, and Eastern extremes of the peninsula? Were they not, too, Arabs? As far as the North is concerned, Hoyland writes:

“Around the fringes of the Syrian desert were found a number of polities that have often been described as Arab both by Greco-Roman writers and modern scholars. There are, for instance, the Nabataeans of Petra, the Idumaeans of southern Palestine, the Ituraeans around Mount Lebanon, the Emesenes of the Orontes valley, the Abgarids of Edessa, the Praetavi of Sinjar (Pliny 5.86), the Characenes of lower Iraq and the inhabitants of Hatra and Palmyra.”⁵⁰⁵

He then warns us, however, that “[i]n general there is not enough evidence to confirm or refute their Arab character.” The picture in Late Antiquity may or may not have been different from that of Pliny’s day, but, as Hallaq points out, “when the Muslims occupied Syria, the local Arabs already formed the principle part of the population;”⁵⁰⁶ the Nabataeans for example long preserved “their Semitic rites, Arabic language, as well as their *traditional laws* and *ancestral customs*.”⁵⁰⁷ In fact, the Nabataeans especially are noted as having been quite legally advanced as is evident from the few documents which have come down to us, consisting in the main of highly legalistic tomb inscriptions.⁵⁰⁸

Such polities, as we have noted, were continually fed by successive waves of migration from the South, thus maintaining a degree of cultural continuity between the extreme ends of the peninsula.⁵⁰⁹ In addition to all this, Syrian Arab merchants were operating in Mecca and vice versa long before the rise of Islam,⁵¹⁰ and by the fourth century A.D. we find the first purely Arabic inscription in the North (although in Nabataean letters)⁵¹¹ We have also noted the ancestor of classical Arabic, Old Arabic, seems to have originated in North Arabia, perhaps as early as or earlier than

⁵⁰⁵ Hoyland, *Arabia and the Arabs*, 69.

⁵⁰⁶ “Use and Abuse,” 82.

⁵⁰⁷ *Ibid.*, 81; citing the findings of Dussaud in his *La Pénétration des arabes*, (italics are Hallaq’s). See also Hallaq, *Origins*, 8-19.

⁵⁰⁸ See John F. Healy, “Sources for the Study of Nabataean Law,” *New Arabian Studies* 1 (1993): 203-215.

⁵⁰⁹ Hallaq, “Use and Abuse,” 81f.

⁵¹⁰ *Ibid.*, 82.

⁵¹¹ Hoyland, *Arabia and the Arabs*, 236. The cursive Arabic script as we know it seems not to have developed until the sixth century A.D. (*ibid.*, 200, 241-2).

the fifth century B.C.⁵¹² The only question of North Arabia's 'Arabness,' then, is to what proportion it was in antiquity, having been dominant in Late Antiquity.

The Southern Arabs, as we have seen, were within the cultural sphere of the politics of Yemen, and these we know to have consisted of, at various times and in various regions, the Sabaeans, Qatabanians, and Hadramawtis (fl. c.800 B.C.-300 A.D.), the Minaeans (fl. c.500-100 B.C.), and the eventual unifying masters of all South Arabia, the Himyarites (c.100 B.C.-520 A.D.)⁵¹³ Linguistically speaking, the South Arabians were quite distinct from the Northern civilizations, their principle language groups "distinguished by the existence of three non-emphatic sibilants... and a definite article attached to the end of the word,"⁵¹⁴ and thus also quite distinct from speakers of 'Old Arabic.' However, their interaction with Arabic groups was strong, and their influence reached throughout the peninsula. It is known, for example, that the influential tribe of Kinda operated as deputies on behalf of the kings of Himyar, "maintaining order among the Arab tribes in that area," a status which eventually led to a virtual Central Arabian kingdom, with its capital at Qaryat Dhat Kahl (modern Qaryat al-Faw).⁵¹⁵ Eventually, the sway of the Himyarites reached such a point as resulted in their involvement in regional "superpower politics," which "was to intensify dramatically in the early sixth century when full-scale war broke out between Ethiopia and Himyar." This in turn brought such a series of events as resulted in a total Persian occupation of Yemen. South Arabia remained under Persian control until the early Muslims expanded outwards from Medina and Mecca.⁵¹⁶

Legally speaking, it should be noted that the Sabaeans in particular were known to have regulated their incense trade "with the utmost precision and severity,"⁵¹⁷ an indication that they possessed a highly developed legal acumen, at least commercially. It's no surprise, therefore, that "[t]exts containing 'ordres de police' give evidence... 'd'une haute perfection d'organization civile, et de

⁵¹² Ibid., 201. It is also evident that Nabataeans spoke a common form of Arabic in their day-to-day lives (see John F. Healy, "Were the Nabataeans Arabs?," *Aram* 1 (1989): 38-44).

⁵¹³ See Hoyland, *Arabia and the Arabs*, 36-57, for an excellent overall history of the region; and Margoliouth, "Arabia," 133, for short histories of the Minaeans and Sabaeans.

⁵¹⁴ Hoyland, *Arabia and the Arabs*, 200.

⁵¹⁵ Ibid., 49-50.

⁵¹⁶ Ibid., 51-7.

⁵¹⁷ Margoliouth, "Arabia," 134.

l'existence d'un code pénal chez les Sabéens."⁵¹⁸ One would certainly be curious to know how that penal code dealt with adultery and theft.

As regards the East Arabian civilizations, it must first be noted that we are relatively uninformed as to their nature simply due to a dearth of surviving texts either originating from or describing these entities; and what we do have tends to be 'foreign,' as the aforementioned Akkadian documents from Falaika and Bahrain.⁵¹⁹ However, we do know that upon ousting his Parthian predecessors, one of the first moves made by the Sāsānian founder Ardashīr (224-42 A.D.) was towards controlling Bahrain and Oman. Then, with the rise of conflict between the Persians and Byzantines, we hear of more direct Sāsānid rule via governors in Bahrain, Southeast Arabia, and Yemen.⁵²⁰ We know, too, that there was a considerable Christian presence in East Arabia,⁵²¹ as well as what appear to be indications of "the preservation of a tribal structure within an urban society."⁵²²

Arab interaction with non-Semitic groups

Hodgson was correct to use the term 'Irano-Semitic' in describing the Near Eastern cultural milieu both before and after Islam, being "concerned with how they developed as an inter-related complex of cumulative traditions... the Semitic and Iranian peoples [having] formed a *relative* cultural unity over against the Greek and Latin-speaking peoples."⁵²³ Iranian cultural influence, through its manifestations of Persian, Hellenized Seleucid, Parthian, and Sāsānid, was a dominant force in the Near East since at least the Persian assumption of control over Mesopotamia in the sixth century B.C., though it should be noted that Persian supremacy in no way contributed a break with ancient Semitic regional tradition. Schacht noted the apparent lack of influence of any pre-Sāsānid Persian civilization on the types of Islamic contract he traced from Babylonian law, and it is well-attested that the Persian kings (550-334 B.C.) allowed those they conquered to persist in their customs and traditions.⁵²⁴ This certainly held true of legal custom, as documentary

⁵¹⁸ M. Halévy, as cited in Margoliouth, "Arabia," 134.

⁵¹⁹ Hoyland, *Arabia and the Arabs*, 203-4.

⁵²⁰ *Ibid.*, 27ff.

⁵²¹ See *ibid.*, 30-2, for the archaeological and documentary evidence.

⁵²² Livingstone, "Arabians in Babylonia," 104.

⁵²³ Hodgson, *Venture*, 117, n.9 (italics are his).

⁵²⁴ Hoyland, *Arabia and the Arabs*, 19. Hoyland reports that "[t]heir two centuries or so of rule... were therefore remembered by their subjects and neighboring peoples as a time of tolerance and peace." See also Hommel, "Babylonia," 229.

evidence proves that time-honored legal procedures went ahead as normal not only during the first and fourth years of the reign of Cyrus the Great, but well into the reign of Cambyses;⁵²⁵ and indeed, Babylonian literature, religion, and culture is known to have persisted far into the Parthian era.⁵²⁶

As for interaction with Arabs – represented in hieroglyphs as a subject people on a statue of Darius intended for Egypt – we know that the inhabitants of the Syrian Desert and the Sinai assisted Cambyses during his Egyptian campaign in 525 B.C.,⁵²⁷ although we don't hear a great deal more in the sources until Sāsānian times, when Persian envoys first started courting the Himyarites and their client Arab tribes for aid in the struggle against Byzantium.⁵²⁸ We have already mentioned the rich opportunities for cultural interaction via commerce and the annual Arab trade fairs,⁵²⁹ as well as via the Arab border-state – in this case the Lakhmids – which the Persians nurtured into being and maintained. We have also seen the persistence of certain Sāsānian legacies under Islam, such as their institution of allowing independent religious communities a measure of self-government within their realm in return for the paying of tribute, a precursor to Islamic *jizya*, and we might add various and sundry other Persian survivals such as the continued use of old Persian systems of weights and measures in Islamic Iran,⁵³⁰ or the adoption of the Parthian *frasakh*, “a Persian measure of distance on a time basis,” into Arabic as the *farsakh*,⁵³¹ and certainly there is every reason to suspect some Persian influence in the area of law, a topic we will soon address in more detail.

Of course, the Near Eastern Irano-Semitic milieu played host to ‘foreign’ cultures as well, most notably those of Hellenic conquerors and colonizers followed by the Romans, the greatest force being of course represented by the Byzantines based in Constantinople and administering the Near Eastern Mediterranean lands

⁵²⁵ See Ellen Whitley Moore, *Neo-Babylonian Business and Administrative Documents* (Ann Arbor: University of Michigan Press, 1935), 124-5 (for the case of an individual accused of cattle theft in the reign of Cyrus), 132-3 (for an individual accused of stealing a sheep, also in the reign of Cyrus), and 158-61 (for a summons to present a fugitive in the reign of Cambyses).

⁵²⁶ Hoyland, *Arabia and the Arabs*, 230.

⁵²⁷ *Ibid.*, 20.

⁵²⁸ *Ibid.*, 50. See also C.E. Bosworth, “Iran and the Arabs Before Islam,” in *The Cambridge History of Iran, Volume 3(I): The Seleucid, Parthian and Sasanian Periods*, ed. Ehsan Yarshater, (New York: Cambridge University Press, 1983), 593-612, for an account of Cyrus the Great's satrapy of ‘Arabāyā, and Arab encounters with Darius, the Seleucids, and on into the Parthian and Sāsānian eras.

⁵²⁹ At the very least one might note the use of Persian *dirhams* in Arabia straight through into early Islam (see al-Balādhurī, *Futūḥ al-Buldān*, 453).

⁵³⁰ Ashtor, “Makāyil,” 119.

⁵³¹ W. Hinz, “Farsakh,” *EI*².

through to Egypt and beyond. Greek colonizers in Arabia are mentioned by ancient writers as early as the sixth century B.C., at least one of which may have been on the coast of the Ḥijāz,⁵³² and there was a strong Hellenic presence in Syria and the Mediterranean coastal regions since before Alexander and long after. Again we know that the Arabs interacted with the Byzantines in much the same way as they did with the Persians,⁵³³ with the nurturing and maintaining of an Arab buffer-state – the Ghassanids in this case – and active trading providing ample opportunities for cultural exchange in both directions, and at the very least we are left with a similar legacy in the area of weights and measures⁵³⁴ and the regional use of Roman *denarii*.⁵³⁵ As far as legal influence and borrowing, we have mentioned the apparent agenda of Goldziher and Schacht to ascribe aspects of Islamic law to Roman origins, and it certainly can't be denied that opportunities existed for Roman influence; considering, for example, Schacht's observation that Arab traders would have had to practice some foreign law. This would no doubt ensure the existence of some Roman elements in early Medinan law.⁵³⁶ More recent work has shown that "[c]ertainly there are many similarities between Roman and Nabataean tomb inscriptions from the legal point of view."⁵³⁷ Once again, from the perspective of Roman 'cultural superiority,' one would immediately assume this to be the influence of the former upon the latter. But then how would one account for the fact that "earlier documents attest the continuity of Nabataean law across the pre-Roman / post-Roman divide?"⁵³⁸ Whatever the case, whether or not the extent of pre-Islamic Roman influence can ever be established is almost beyond the point in light of the established fact that in newly conquered territories of early Islam, only "[c]ustoms

⁵³² Margoliouth, "Arabia," 134.

⁵³³ For an exhaustive treatise of Arab-Byzantine relations, see Irfan Shahid's magnificently researched series *Byzantium and the Arabs* (Washington D.C.: Dumbarton Oaks Research Library and Collection), in separate volumes for the fourth century (1984), fifth century (1989), and sixth century A.D. (1995); as well as his *Rome and the Arabs: a prolegomenon to the study of Byzantium and the Arabs* (1984), by the same publishers.

⁵³⁴ Ashtor, "Makāyil," 118. Under Umayyad rule, the Syrian *raṭl*, for example, was the same weight as the Roman pound, and indeed the Arabs are said to have established the Roman-Byzantine tradition in Syria, Egypt, and elsewhere after the conquests whereas the old Persian metrological tradition continued in the East (*ibid.*, 119).

⁵³⁵ al-Balādhurī, *Futūḥ al-Buldān*, 453.

⁵³⁶ Schacht, "From Babylonian," 32.

⁵³⁷ Healy, "Sources," 206-7. He continues: "Just as a copy of the Nabataean tomb inscription was lodged in a temple... so in the case of the Greek inscriptions a copy... was placed in a public registry."

⁵³⁸ *Ibid.*, 209.

contrary to the new faith were replaced.”⁵³⁹ The period within which ‘influence’ or ‘borrowing’ may have occurred thus extended for quite some time after the appearance of Islam.

The continuity of ancient traditions under Islam

In addition to the passage from al-Balādhurī on Abū Yūsuf and other early jurists,⁵⁴⁰ there are several other indications that ancient traditions continued under Islam; among them we find once again the writings of John bar Penkaye,⁵⁴¹ who reported that the Christians of his time were not only held in high regard by their new Muslim overlords, but that “[o]f each person they required only tribute... allowing him to remain in whatever faith he wished,” and that during the reign of Mu‘āwiya “[j]ustice flourished... and there was great peace in the regions under his control; he allowed everyone to live as they wanted.”⁵⁴² Perhaps Hodgson summarizes the attitude of the early Muslim conquerors best:

“They had left the internal life of the conquered Christian, Jewish, Mazdean, and Buddhist communities to proceed on its own, provided the supremacy was left to the Arabs. For the time being the prevailing culture continued to be Hellenistic, Sāsānian, or whatever else existed locally, while the Muslim Arabs themselves carried with them as much of the old Arabian culture as could survive transplanting.”⁵⁴³

We have already seen that early Islam’s practice of allowing non-Muslim subjects the right to live according to their own customs and laws seems a continuation of the Sāsānid institution of semi-independent religious communities.⁵⁴⁴ Not surprisingly, this tolerance is nowhere more noticeable than in the former Sāsānid territory itself, among the subjugated Zoroastrian community. In a comparative study of both pre- and post-conquest Zoroastrian legal texts, Bodil Hjerrild is able to conclude that 1) Zoroastrians were not persecuted under Arab rule, and 2) new legal texts, applicable to all within the community, continued to be

⁵³⁹ Hodgson, *Venture*, 206.

⁵⁴⁰ *Supra*, p. 67.

⁵⁴¹ *Supra*, p. 79.

⁵⁴² As cited in Hoyland, *Seeing Islam*, 196.

⁵⁴³ Hodgson, *Venture*, 227; earlier (206-7) he says: “What Arabian customs were already satisfactory were accepted – and with the conquests, the same applied to patterns of relation between rulers and ruled in the agrarian lands.” We have also seen Coulson’s comment that in early Islam customary law applied wherever the Qur’ān was silent on a topic (*supra*, p. 74). For a concise overview of the status of custom as a source of Islamic law, see Libson, *Jewish and Islamic Law*, 68-74.

⁵⁴⁴ Hoyland, *Seeing Islam*, 15. See also John Victor Tolan, ed., *Medieval Christian Perceptions of Islam: A Book of Essays* (New York, London: Garland Publishing, 1996), 6, where the author notes: “In general, it was in the Muslim’s own interest to maintain the conquered communities intact, insofar as they provided a stable economic base for the nascent Muslim empire....”

compiled into the tenth century A.D. at least; and no greater indication of the degree of this tolerance is to be found than the continuation – encouragement, even – of a practice which offends a very ancient Semitic principle and undoubtedly seemed abhorrent to Arab Muslims: the Zoroastrian custom of marriage within the forbidden degrees.⁵⁴⁵ In fact, post-conquest Zoroastrian law was even more vocal in encouraging father-daughter / brother-sister unions than it had been under the Sāsānids.⁵⁴⁶ Finally, as regards indications that such ancient traditions were allowed to continue under Islam, we have the question posed in the *Resolutions* of Jacob, Bishop of Edessa (wr. 684-88 A.D.):

“Is it appropriate to observe the law of the heretics?”⁵⁴⁷

It is known that when Islam first appeared to the world of Late Antiquity, many Christian writers considered it but another Judeo-Christian heresy, and so this question may well indicate that subject Christians not only continued to practice their own law, but had the option of submitting cases to arbitration outside their confessional community as well, i.e. to apply to the juridical system of the budding Islamic state. Should such be the case, the Bishop of Edessa’s *Resolutions* may offer an indication of the level of sophistication Islamic law had reached by the late seventh century.

Yet another trend which may have encouraged the continuity of non-Arab pre-Islamic custom and tradition is that “[t]he leaders of the Muslims were men who had long been used to the settled life; they were merchants who knew that the infrastructure of the conquered territories must be maintained.”⁵⁴⁸ The adoption of the administrative machinery prevailing in the conquered territories at the rise of

⁵⁴⁵ Bodil Hjerrild, *Studies in Zoroastrian Family Law: A Comparative Analysis* (Copenhagen: Museum Tusculanum Press, 2002), 14-15. The author writes: “[T]he [Zoroastrian] communities which continued to exist during the eighth, ninth, and tenth centuries were allowed to live and to worship as required by their religion. They were permitted to keep their own family law and arrange their succession according to the creed. Not even the custom of *x’etōdah* (marriage between near relations) was prohibited, although this particular custom must have seemed an unnatural sin in the eyes of the Muslims.” See pp. 10-11 for a description of the post-conquest legal texts.

⁵⁴⁶ *Ibid.*, 179ff.

⁵⁴⁷ As cited in Hoyland, *Seeing Islam*, 607.

⁵⁴⁸ Tolán, *Perceptions*, 6. Tolán also mentions that “[a]dministrative papyri from Egypt, which date from within a few years of the conquests, give evidence for the remarkable degree of bureaucratic continuity maintained during the transition from Byzantine to Arab rule.” He is referring, no doubt, to the Aphrodito papyri of the mid-Umayyad Egyptian governor Qurra b. Sharīk which, however, in this author’s opinion also exhibit very prominent Arab-Islamic innovations.

Islam seems to be a historical reality in both the Byzantine and Sāsānian spheres,⁵⁴⁹ though one must be careful not to judge it a “wholesale” adoption; for an in-depth examination of the sources will reveal that these structures were promptly and adeptly altered and refashioned according to the new Arab-Islamic ethic of their conquerors.⁵⁵⁰

Examples of the continuity of non-Islamic custom and tradition under Islam abound. We have seen the survival of the metrological systems of antiquity to which “the spread of Islam meant no abrupt break;”⁵⁵¹ as well as some legal continuity as regards marriage, contracts, etc., and the application of the rules of *jizya* to non-Muslim communities, including the Zoroastrians who had formerly imposed the same on those of other faiths.⁵⁵² In following sections we will see many more, including, by way of example, the antique distinction between open and furtive theft which can be found in several ancient law codes and is mirrored to some extent by the Islamic distinction between *sariqa* and *ghasb* or *nahb*.⁵⁵³

Of course, most crucial to this thesis is that Arabic custom and tradition continued under Islam as well, possessing, as Hodgson observes, “a considerable vigor,” and having been “carried and reinforced by a reconstituted tribal system, based on the garrison towns....”⁵⁵⁴ In the area of marriage, especially, we see many holdovers, with the Qur’ānic endorsement of one type of pre-Islamic marriage with modifications, as well as a continuation and broadening of the ancient Semitic forbidden degrees.⁵⁵⁵ We have also seen the survival, at least in Shī‘ī law, of the pre-

⁵⁴⁹ See Hjerrild, *Zoroastrian Family Law*, 14: “The Sasanians had demanded payment of land tax collectively of village or town, and the Arabs adopted this, as they adopted the Sasanian bureaucratic system.”

⁵⁵⁰ See for example, H.I. Bell, “The Administration of Egypt under the Umayyad Khalifs,” *Byzantinische Zeitschrift* XVIII (1928): 279-80, where the author first states that “new evidence of papyri has shown us in what wholesale measure they borrowed from Byzantium,” then qualifies this by adding that “[i]t shows also with what judgment they modified these borrowings so as to avoid at least the obvious faults of the old system.” He then proceeds to enumerate these faults and the Islamic solutions enacted (nearly immediately) by the new conquerors, and which include a major transformation from a decentralized system to one of “almost excessive centralization” and restructuring of the army – projects of such scope as to call into question the author’s own use of ‘wholesale borrowing.’

⁵⁵¹ Ashtor, “Makāyil,” 117.

⁵⁵² Hoyland, *Seeing Islam*, 15-18. This also apparently included the “Magians in al-Baḥrayn and coastal ‘Umān” (Morony, “Sāsānid,” *ET*²).

⁵⁵³ I owe this observation to the remarks of Dr. Hallaq on a previous (unpublished) paper.

⁵⁵⁴ Hodgson, *Venture*, 227. He also maintains that Arab traditions served better than Islam for “day-to-day social questions” (ibid., 229).

⁵⁵⁵ Ibid., 181.

Islamic institution of *mut'a* marriage,⁵⁵⁶ and indeed the Shī'a in particular have been noted as preserving certain pre-Islamic customs which never translated into – or were out-rightly rejected by – the Sunni *sharī'a*. Among them, as we have seen, is the Shī'ī conception of *iḥṣān*, its difference from the Sunni perhaps owing to an ancient regional perception going all the way back to the Laws of Eshnunna, placing virgins, widows, and divorcees in a single category as regards sexually-related crimes.⁵⁵⁷ As far as *mut'a* marriage, one possible explanation for its holdover in Shī'ī law is that many Zoroastrians, when they converted, “became followers of the 8th century Shi'ite movement which involved many ideas that made Islam more ‘Iranian’ and thereby more acceptable, inasmuch as it incorporated concepts known from Zoroastrianism.”⁵⁵⁸ *Mut'a* marriage, as we shall see, certainly has a precedent in Sāsānid Zoroastrian law.⁵⁵⁹

That ancient traditions continued under Islam, however, is but the reflection of a long-standing characteristic of the cultures of the Near East, for as we shall see shortly, the ancient Irano-Semitic milieu is practically a unified continuum in which ideas and practices have spanned, with little or no alteration whatsoever, incredible stretches of time.

The continuity of ancient traditions before Islam

“196. If a man has destroyed the eye of a free man, his own eye shall be destroyed. 197. If he has broken the bone of a free man, his bone shall be broken. [...] 200. If a man has knocked out the teeth of a man of the same rank, his own teeth shall be knocked out.” (The Code of Hammurabi)⁵⁶⁰

“If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.” (Exodus 21:23-25)⁵⁶¹

⁵⁵⁶ Supra, p.44.

⁵⁵⁷ See Yaron, *Eshnunna*, 278. The author writes: “Near Eastern laws known to us do not regard rape *per se*, of an unattached woman, as a capital delict. The typical ‘unattached’ woman is a girl who has not yet been betrothed (a ‘virgin’): it is she who is discussed in various collections of laws, but the same lenient attitude (or even more so) would apply also to a woman who had been attached, but no longer was so, i.e. the widower or divorcee.”

⁵⁵⁸ Hjerrild, *Zoroastrian Family Law*, 15. He continues by adding that “[t]he concept of a saviour at the end of time, for instance, has a parallel in the Zoroastrian *Saoshyant*.”

⁵⁵⁹ Infra, p.224.

⁵⁶⁰ Chilperic Edwards, *The Hammurabi Code and The Sinaitic Legislation with a Complete Translation of the Great Babylonian Inscription Discovered at Susa* (Port Washington, NY; London: Kennikat Press, 1971), 61-2.

⁵⁶¹ *The New Oxford Annotated Bible with the Apocrypha, Expanded Edition: Revised Standard Version*, eds. Herbert G. May and Bruce M. Metzger (New York: Oxford University Press, 1977) 94-5.

“And in it (i.e. in the Torah) we decreed for them a soul for a soul, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth; wounds are (a matter of) *qisās*. But whosoever makes of it a charity (*taṣaddaqa bihi*, i.e. abstains from his right of retaliation), then it is a *kaffāra* for him. And whosoever does not judge by what God has revealed, they indeed are unjust transgressors.” (Q.5:45)

The above excerpts at once demonstrate a remarkable occurrence: the continuity – in much the same wording and in much the same region of the world – of the legal precept of *talion* for well over two millennia.⁵⁶² This phenomenon has been noticed by those who make a study of ancient Mesopotamian civilization; VerSteeg summarizes their opinions on the matter thus:

“Assyriologists note that there was a great deal of consistency in the Mesopotamian cultural institutions across the centuries. Saggs makes this very point, concluding: ‘Despite development, decay, and changes in many details, especially as a result of successive waves of Semitic immigrants, Sumerian institutions were so well adapted to their milieu that in many aspects of life they remained as long as Babylonian civilization survived.’ Westbrook characterizes the Mesopotamians as having had ‘a common legal tradition which persisted... with no radical change... [that was] particularly noticeable in the academic tradition of the law codes.’ Thus, Westbrook concludes: ‘We may be confident therefore that throughout the gamut of sources from Old Sumerian to Neo-Babylonian, we are dealing with the same underlying laws....’ Similarly, Ellickson and Thorland remark: ‘Although published by rulers of distinct regimes in different centuries, these codes share numerous themes and provisions. These similarities suggest enduring commonalities in the customary law of Babylonia.’”⁵⁶³

The causes for this ancient legal continuum must be many and complex, involving, no doubt, environmental, demographical, linguistic, and even political considerations,⁵⁶⁴ and is an area richly deserving of further study. Additionally, one may note that ancient codes in particular were intended to last, presumably for

⁵⁶² Note in the Qur’ānic verse not only the continuity of the *lex talionis*, but its coupling with the ancient concepts engendered by *sadaqa* (supra, p.96) and *kaffāra* as well (supra, p.88), making Q.5:45 an exceptional example of regional continuity from ancient Mesopotamia through to Islam.

⁵⁶³ VerSteeg, *Mesopotamian Law*, 4-5 and nn.7-11.

⁵⁶⁴ As regards environment, Arabia especially has been assumed by scholars to be “stagnant within its desert barriers” (Smith, *Kinship and Marriage*, 208), its religions possessors of a “static nature... rooted in a desert environment” (Fahd, “Nuṣub,” *Et*²). Demographically and linguistically, we have already taken into consideration Schacht’s observation of the Aramaic population and Hodgson’s remarks on the importance of their language, not to mention the conservative nature of oral traditions and the preservative power of the maxim. Politically, it has been suggested that societies hold on even more tenaciously to their customs and traditions in the face of ‘foreign’ controlling powers, reaching even a fanatical conservatism (Souryal et al., “Hand Amputation,” 255f.) In that sense, the region’s tumultuous history may have heightened its conservatism, rather than accelerated change as one might expect.

eternity, and to be enforced by successive monarchs. A portion of the epilogue to Hammurabi's code reads:

"In the days that are yet to come, for all future time, may the king who is in the land observe the words of righteousness which I have written upon my monument! May he not alter the judgments of the land which I have pronounced, or the decisions of the country which I have rendered! May he not efface my statutes! If that man have wisdom, if he wish to give his land good government, let him give attention to the words which I have written upon my monument! And may this monument enlighten him as to procedure and administration, the judgments which I have pronounced, and the decisions which I have rendered for the land! And let him rightly rule his Black-Head people; let him pronounce judgments for them and render for them decisions! Let him root out the wicked and evildoer from his land! Let him promote the welfare of his people!"⁵⁶⁵

In the ancient codes we see a continuity of form as well, there being for example, "for each of the sections in LE (but one)... a correspondence in CH;"⁵⁶⁶ not to mention the tradition of attributing the codes to monarchs, or for monarchs, rather, to decree them. Thus we hear of Urukagina of Lagaš who "established the ordinances of former times;" Sargon of Accad the "king of justice, one that speaks justice;" Ur-Engur, who "according to the righteous laws of Šamash... made... justice to prevail;" Lipit Ištar of Isin who "established justice in the land of Šumer and Accad;" and Sin-Idinam of Isin who "restored the ordinances and laws of the Annunaki."⁵⁶⁷

The language, too, of these codes knows a remarkable continuity especially as concerns formulaic structure.⁵⁶⁸ Driver and Miles, comparing the Laws of Eshnunna with Hammurabi's code, write:

"The language of these Laws, which are very concisely drafted, is often echoed by that of Hammu-rabi's laws, and they contain a high proportion of technical or semi-technical terms which have the same sense in both collections."⁵⁶⁹

The authors, having given examples of these commonalities, then state:

"These and analogous resemblances in the linguistic usages of the two Laws reflect not merely a continuity of legal phraseology lasting over the centuries but also a considerable element of common law."⁵⁷⁰

⁵⁶⁵ Harper, *Code*, 101ff.

⁵⁶⁶ Yaron, *Eshnunna*, 172 and n.1.

⁵⁶⁷ As cited in Driver and Miles, *Babylonian Laws*, 5.

⁵⁶⁸ See also VerSteeg, *Mesopotamian Law*, 10ff., for a brief discussion entitled "Formulaic Patterns in Mesopotamian Legal Documents;" these also sharing a noticeable continuity through the ages.

⁵⁶⁹ Driver and Miles, *Babylonian Laws*, 8. See n.1 for a list of technical vocabulary shared by both.

⁵⁷⁰ *Ibid.*, 9.

Carrying this concept of common law a step further, the authors then write:

“When... the Old-Accadian Laws are compared on the one hand with the Laws of Hammu-rabi and on the other hand with the Sumerian and Middle-Assyrian Laws and perhaps also with those of the Hebrews, the conclusion that there was a common customary law throughout the fertile crescent seems irresistible; and this common law was to a considerable extent written law.”⁵⁷¹

And finally, a few pages on they claim:

“[T]he chief interest of the Old-Accadian Laws is that they, taken together with the Sumerian, Babylonian, and Assyrian Laws, prove the existence of a common Mesopotamian law in the third millennium B.C.; for the principles underlying them all are in a general sense the same.”⁵⁷²

As we have already proposed that commonalities between, for example, Arabic and Hebrew laws may more likely be the result of a common source than of any borrowing or influence of the one upon the other, it is tempting indeed to consider this ancient ‘common Mesopotamian law’ to be just that very source.

The ‘Common Source’

Al-Ṭabarī writes in his History:

“The people of the Torah claim that there is no mention of ‘Ād and Thamūd, nor of Hūd and Ṣāliḥ, in the Torah; but their repute among the Arabs of the Jāhiliyyah and of Islam was like the repute of Abraham and his people. Were it not for (my) dislike of making the book too long and getting off the subject, I would quote poetry by poets of the Jāhiliyyah which mentions some of what I have said about ‘Ād and Thamūd and their affairs.”⁵⁷³

This passage may well illustrate the two key concepts which no doubt underlie a great many of the commonalities between Islamic and Hebrew law, or indeed the whole corpus of ancient Semitic law: a common source followed by separate, and sometimes parallel, development. That the Arabs knew of Abraham and a great deal more of the Prophets found in the Old Testament, yet the Jews of al-Ṭabarī’s time were ignorant of or rejected additional prophetic figures from the Arabian sphere, may well be an indication that those latter figures themselves appeared in Arab tradition *after* the branching off of Arab and Hebrew from a common ‘parent’ culture

⁵⁷¹ Ibid.

⁵⁷² Ibid., 11.

⁵⁷³ Abū Ja‘far Muḥammad b. Jarīr al-Ṭabarī, *Tārīkh al-rusul wa’l-mulūk* vol.2: *Prophets and Patriarchs*, trans. William M. Brinner (Albany: State University of New York Press, 1987), 46.

which shared the Abrahamic tradition. These two branches may have continued thereafter, forever distinct and separated to varying degrees. And indeed we have reviewed Margoliouth's demonstration of the linguistic 'true principle,' whereby all linguistic commonalities between Arabic and Hebrew can be traced back to a theoretical common cultural source which had developed to the extent indicated by shared vocabulary before the two branches split from each other and continued to evolve different and distinct sub-cultures.⁵⁷⁴ Smith, too, believed that "the oldest type of lawful union of the sexes" originated in a time "before the separation of the Arabs and the Jews;"⁵⁷⁵ and even Crone, while arguing for the Jewish origins of the Islamic compurgative oath (*qasāma*), vaguely alludes to the possibility of a shared ancient origin for certain aspects of the institution,⁵⁷⁶ yet never once recognizes that her examples of 'borrowing' make much more sense within the framework of a common source with divergent development.⁵⁷⁷ The argument against borrowing here is quite simple. Besides many shared cultural institutions, Arabic and Hebrew share so many linguistic features and vocabulary as to be considered sister languages. Did the Arabs, then, borrow their entire language as well? Or did these languages, as

⁵⁷⁴ Supra, p.98.

⁵⁷⁵ Supra, n.483.

⁵⁷⁶ See Patricia Crone, "Jāhili and Jewish Law: The Qasāma," *Jerusalem Studies in Arabic and Islam* 4 (1984): 167, n.68, where she observes: "The similarity between the Biblical and Islamic institutions were recognized already by W. Robertson Smith... [who], however, took it that the pre-Islamic *qasāma* was used in the same way as the Deuteronomic institution, not that the Islamic *qasāma* was modelled on it;" and p.190, n.177, where, speaking of the institution of the "shifted oath" shared by both Islamic and Jewish law, she says: "Since the post-Mishnaic oath only appeared in or after the third century, there is no question of the Jewish and Muslim oaths having a common origin in tribal law." Somehow, however, she neglects to mention this possibility throughout the rest of the article.

⁵⁷⁷ Ibid., 167ff. She claims that "the lawyers took the Deuteronomic passage [Deut.21:1-9] as an account of their own compurgation and reshaped their own compurgation to fit the Pentateuchal mould. The Jāhiliyya supplied the name of the institution, the number of the oaths, and perhaps also the formula, though the Islamic formula is hardly uninfluenced by that of the Bible. For the rest the institution is of Biblical origin, and insofar as it is not Biblical, it is rabbinic." She then proceeds to provide what she considers to be examples of Ibāḍī borrowings from the Mishnah, as well as those of other Islamic sects and schools; the gaps in Mishnaic law which the Muslim jurists filled in; points on which various Muslim sects agree with various Mishnaic sources; the stories of the *qaṣṣāṣūn* (Arabic storytellers) in explanation of the origins of the *qasāma* (which somehow she considers definitive despite having rejected the whole of Islamic tradition as untrustworthy); and other such 'proofs.' This collection of tenuous and sometimes bizarre arguments, when placed side-by-side as she places them, indicates nothing less than a pan-Islamic conspiracy spanning centuries in which variant and opposing Islamic sects and schools 'borrowed' different aspects of different Jewish sources and rejected others to such an extent as to have contributed absolutely nothing and to have borrowed absolutely everything (except, as we have seen, the name, number of oaths, and formula itself!) And yet, should one re-read what she has recorded of commonalities between the various Jewish sources and Islamic schools from the simple perspective of a common source with divergent development, one can easily explain such as the natural result of concurrent development in greatly similar (and integrated) cultural milieus and physical and socio-historical environments. The need for complex and contradictory conspiracy theories drops away.

most linguists would agree, issue from a common source and develop their distinct natures after having branched off? And being that they obviously did so, why not the institutions which are framed in them as well? At this point all this may seem obvious, but less obvious is the identity and nature of this common source.

That the common source was Semitic seems beyond doubt, and the model of a common Semitic source for various sub-cultures and their distinct languages and institutions itself has many parallels; the commonalities, for example, in patriarchal family structure to be found in Roman and Sāsānid law, have been explained as resulting from a common *Indo-European* source.⁵⁷⁸ We have seen many examples pointing to the Semitic nature of our 'common source,' and may add to them yet another in the legal concept of 'to give a pledge,' engendered by the triliteral Semitic root *r-h-n* and occurring with the same legal significance not only in Arabic, but in Hebrew, Aramaic, Nabataean, and Sabaeen; and which "is still in common legal use in South Arabia to this day."⁵⁷⁹

Concerning Nabataean law, we might furthermore note that it has been observed to contain "echoes of legal formulary found in Neo-Babylonian and Neo-Assyrian documents and also in the Elephantine papyri," and that "Nabataean law owes much to the Aramaic and cuneiform traditions."⁵⁸⁰ Observations like these, in the framework of a common source with divergent development, make the conclusions of Driver and Miles discussed above look all the more tempting: perhaps this common Semitic source was, after all, an ancient Mesopotamian common law.

However, we have also heard it said that parallels between Babylonian and, for example, Hebrew law "may be largely due to common dependence on the primitive tradition of Arabia;" not to mention Margoliouth's linguistic model in which the common source is, after all, a 'classical' Arabic civilization; as well as claims that the origins of all Mesopotamian civilizations lie in the sweeping migrations of 'Semitic hordes' originating in the Arabian peninsula. Could it be, then, that this Semitic source responsible for so many commonalities – linguistic, legal, or otherwise – was more an ancient Arabian than an ancient Mesopotamian common law?

⁵⁷⁸ Hjerrild, *Zoroastrian Family Law*, 19. He's speaking specifically about the Roman institution of *manus* and the Sāsānian *sardārīh*.

⁵⁷⁹ Healy, "Sources," 207.

⁵⁸⁰ Ibid.

Whatever the case may be, and whatever the true nature of this common source, it is hoped that we have, by this point, demonstrated not only that pre-Islamic Arabs were equipped with the means of preserving tradition and custom over vast stretches of time via the ancient concept of *sunna*, but that they were actively engaged in the highly-integrated Irano-Semitic milieu throughout its recorded history; and that furthermore, this Irano-Semitic milieu itself demonstrates a remarkable continuity and integrity which continued straight through to early Islam, and was indeed heightened and further strengthened by the dynamic and unifying religion that arose from it. The causeways from the most ancient of Near Eastern traditions to Islamic law, and nearly everything which falls in between, are indeed wide open, and we hope to have at least justified a survey of extant pre-Islamic Near Eastern legal material in search of precedents and parallels for the Islamic *ḥudūd* of *zinā* and *sariqa* and the punishments of stoning and hand-amputation, a task to which this thesis will now dedicate itself.

III. Sexual Offense and Theft in Ancient Near Eastern Law

*A survey of ancient Mesopotamian law*⁵⁸¹

The legal materials surveyed for this section include: Urukagina's reforms (c.2,400 B.C.),⁵⁸² the code of Ur Namma (r.2112-2095 B.C.),⁵⁸³ the code of Lipit-Ishtar (r.1934-1924 B.C.),⁵⁸⁴ the laws of Eshnunna (c.1800 B.C.),⁵⁸⁵ the code of Hammurabi (c.1750 B.C.),⁵⁸⁶ the Old Hittite laws (c.1650-1500 B.C.),⁵⁸⁷ the Middle Assyrian laws (c.1076 B.C.),⁵⁸⁸ and various other epigraphs, tablets, and documents which will be detailed as they occur.

The character of these collections and some of the principles embodied by them are themselves precedents within the ancient Irano-Semitic milieu, and made the realization of something like the Islamic *shari'a* possible. The very concept of a divinely-revealed body of law, for instance, may have its origins in ancient Mesopotamia (if not even more remote Semitic-Arabian origins). Harper, describing the famed Susa monument on which Hammurabi's code is marked, observes:

⁵⁸¹ Although the aim of this thesis is to prove the likelihood that pre-Islamic Arabs practiced stoning for adultery and hand-amputation for theft, a survey of ancient legal material has yielded a great deal more as far as precedents in areas related to Islamic *zinā* and *sariqa* such as were discussed above, i.e. *iḥṣān*, graduated punishments for slaves, *qadhif*, *li'ān*, *ḥirāba*, issues of procedure, etc. As these precedents do much to strengthen the main argument, they will be noted in abbreviated form as we move from collection to collection. A full exploration and detailing of these many precedents is a worthy future project to which several volumes might be dedicated.

⁵⁸² A series of laws attributed to Urukagina of Lagash, as preserved through several second-hand accounts – no epigraphic examples of the code itself having yet been discovered. See Samuel Noah Kramer, *The Sumerians: Their History, Culture, and Character* (Chicago: University of Chicago Press, 1963), 322; VerSteeg, *Mesopotamian Law*, 18; and Driver and Miles, *The Babylonian Laws*, passim.

⁵⁸³ The oldest intact code of which three badly-damaged tablets survive. See Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor* (Atlanta, Georgia: Scholars Press, 1995), 17ff.; and VerSteeg, *Mesopotamian Law*, 19ff.

⁵⁸⁴ Some fifty laws promulgated by the 5th king of the 1st dynasty of Isin. See Roth, *Law Collections*, 28ff.; and VerSteeg, *Mesopotamian Law*, 24ff.

⁵⁸⁵ Attributed to Dadusha of the kingdom of Eshnunna, who was overthrown by Hammurabi, these are the first laws written in Akkadian, preserved nearly in their entirety as two large cuneiform tablets. See Yaron's introduction (*Eshnunna*); VerSteeg, *Mesopotamian Law*, 27ff., and Roth, *Law Collections*, 60ff.

⁵⁸⁶ With some 275-300 provisions preserved in over 50 tablets and stelae (the most famous being the black diorite stela of Susa), the CH represents by far the most complete and organized of the ancient Mesopotamian collections. See VerSteeg, *Mesopotamian Law*, 30ff.; Harper, *Code*, xiff.; Cook, "Adultery (Semitic)," 136; and Edwards, *The Hammurabi Code*, 28ff.

⁵⁸⁷ A well-developed series of collections from a 'Semiticized' Indo-European people whose empire filled most of Anatolia and part of Syria, and who invaded Mesopotamia in the 16th cent. B.C. See J.M. Powers Smith, *The Origin and History of Hebrew Law* (Chicago: UP, 1931), 254ff. and 270ff.

⁵⁸⁸ These provisions exhibit great complexity and detail, surviving on a number of tablets. See Smith, *Origin and History*, 223ff.

“On the obverse we have a bas-relief... exhibiting King Hammurabi receiving the laws from the Sun God, to which the story of Moses receiving the Ten Words from Yahweh corresponds.”⁵⁸⁹

The idea of Shamash as a law-providing god far outlasted Hammurabi’s time; we find, for example, in Parthian-era Hatra, not only laws being promulgated “at the council of the god,” but that the promulgators’ names incorporate that of the Sun God himself (“ŠMŠBRK the Steward” in Ibr.I and “ŠMŠHRYT” in Ibr.II).⁵⁹⁰ As we shall soon discuss, there was a strong Arab presence at Hatra at this time, and it should be further noted that certain Arab tribes are said to have worshipped a Sun God, Shams.⁵⁹¹ As far as Hammurabi himself, we may also note the precedent not only of such a king acting as the publisher and defender of divine law (cf. the Islamic ideal of *khilāfa*); but of the role of this ruler in the rendering of decisions, and his interaction with judges and legal authorities.⁵⁹²

The linguistic style of the ancient codes and what it suggests of a concurrent oral and written legal tradition has already been discussed, as has the seeming transfer of mnemotechnic methodology from ancient to Arab-Islamic legal tradition.⁵⁹³ Take for example section 49 of the laws of Eshnunna:

“If a man was seized in (possession of) a stolen slave, a stolen slave woman, – slave a slave (shall bring along) slave woman a slave woman shall bring (along).”

This, in transliterated Akkadian, reads:

“*šum-ma awilum i-na wardim šar-qí-im amtum ša-ri-iq-tim it-ta-aš-ba-at wardum wardam amtum amtam i-re-ed-de.*”⁵⁹⁴

⁵⁸⁹ Harper, *Code*, xi. In the epilogue to the code, in Hammurabi’s own words, we read: “By the command of Shamash, the great judge of heaven and earth, may I make righteousness to shine forth on the land” (ibid., 101).

⁵⁹⁰ Segal, “Aramaic Legal Texts,” 109-112. Note also that 1) a common form of punishment was to “be killed by the death of the god” (110, 112); 2) “the law is prescribed by certain officers, among them one or more with the title of *qaššiša*” (115, cf. Ar. *qissīs*, ‘priest’); 3) Ibr.II contains two references to *byt ’lh*, ‘the house of the god’ (111-12, cf. Ar. *bayt allāh*, a title of the Ka’ba); and 4) another regulation from Hatra (H281) “opens with an invocation to the divine Triad, and at the end of the document the penalty of stoning is declared to have been revealed by the supernatural agency of a dream (or dreamer)” (115), presumably at the prompting of a deity.

⁵⁹¹ James Bennett Pritchard, *The Ancient Near East* (Princeton: UP, 1958), 61.

⁵⁹² See VerSteeg, *Mesopotamian Law*, 54-5, for a discussion of the king’s rendering decisions in cases of adultery. This can be seen as a forerunner to the long-standing interplay between *siyāsa* and *sharī’a* in Islam.

⁵⁹³ *Supra*, p.82.

⁵⁹⁴ Yaron, *Eshnunna*, 72-3. Yaron notes, as we now quote in full: “The style of a considerable number of sections in the LE seems to reflect mnemotechnic needs, the desire to facilitate memorizing. They flow smoothly, and can be chanted, and committed to memory without much difficulty” (ibid., 87f.) Driver and Miles maintain that the “chaotic lack of order” in the LE is due to their being for

Now compare this with a few obviously mnemonic phrases found in Islamic legal tradition, such as “*al-shaykh wa’l-shaykha fa’rjumūhumā al-battata*,” or “*al-bikr bi’l-bikr jald mi’a wa nafi sana, wa al-thayyib bi’l-thayyib jald mi’a wa’l-rajm*,” or “*al-walad li’l-firāsh wa li’l-‘āhir al-ḥajar*.”⁵⁹⁵ It would seem the tradition of the legal maxim in Islam has, at the very least, some very ancient predecessors. Furthermore, a closer look at Eshnunna 49 will also reveal a few surprises as far as technical vocabulary; mainly the root *š-r-q* in the form of *šar-qí-im* / *ša-ri-iq-tim*, ‘stolen’ (cf. Ar. *saraqa*, ‘to steal’) and *amtum* / *amtam* / *amtim*, ‘slave woman’ (cf. Ar. *ama(t)*, ‘slave girl’). Other fascinating linguistic parallels crop up in the sources, such as Akk. *dīnu*, ‘case,’ or *danītu*, ‘(law)code’ (cf. Heb. *dīn*, ‘law,’ and Ar. *dīn*, ‘creed, religion’), the most relevant of which will be noted below.

Finally, we have mentioned the importance of the principle of *talion* in certain ancient law collections as well as in the *sharī‘a*,⁵⁹⁶ and may here add that this principle of retaliation knows a greater application than merely ‘an eye for an eye.’ In the Middle Assyrian laws (MAL55), for example, we find that the father of a virgin who has been raped prior to her betrothal has the option of *talion* upon the rapist’s wife.⁵⁹⁷

Stoning and zinā-related precedents

Stoning in the Near East has an ancient pedigree. In fact, we find it twice prescribed in what is “[a]mong the earliest writings that purport to have had legal significance in Mesopotamia;” the reforms of Urukagina.⁵⁹⁸ VerSteeg remarks:

“scholastic purposes” as were some Sumerian laws, and were thus written on clay tablets and not stone. They also maintain that “the presumption... is that the Babylonian draftsman did not have the Accadian text in any form before him while drawing up his laws, but that both were ultimately derived from or based on a common source such as the written laws of the adjoining city-states” (*The Babylonian Laws*, 10-11). It is this author’s opinion, however, that, considering Yaron’s observation above, the lack of order in the LE may more likely be the result of having been written down from a scribe’s memory, not copied from other tablets. This might help to explain the strange ordering, in loosely related categories, with the occasional ‘random’ law making its appearance as it occurred to the scribe. Written and oral traditions, as we have seen, can and often do co-exist.

⁵⁹⁵ The implications of this as regards the supposed “stoning verse” will be further discussed in the concluding chapter.

⁵⁹⁶ Supra, p. 111. See CH 196-201 (Harper, *Code*, 72-5).

⁵⁹⁷ Finkelstein implies this is nothing but a bit of Assyrian “calculated frightfulness,” but does so clearly to support his theory that sex crimes in ancient societies were never truly and seriously punished (“Sex Offenses,” 357). The fact is, however, the idea is perfectly congruent with the ancient and fundamental principle of *talion* found throughout the collections, combined with the principle that such crimes were an affront to the father / husband, not to the woman who more or less had no legal identity.

⁵⁹⁸ VerSteeg, *Mesopotamian Law*, 18.

“Curiously, Urukagina’s Reforms provide what may be the only prohibition on polyandry in the ancient Near East. According to Edwin Good, Urukagina ‘says that women used to take two husbands, but if they do it now, they are stoned.’”⁵⁹⁹

And indeed we read elsewhere that women who attempted to take more than one husband (as apparently they had legally done in the days before the reforms) were, by Urukagina’s decree, stoned with special missiles upon which were inscribed an account of their intent.⁶⁰⁰ Remarkably, this constitutes not only a most ancient precedent prescribing stoning for a type of illegal union, but the entire scenario by which the practice of polyandry was declared forbidden and its practitioners punished by stoning was to be replayed some three thousand years later in early Islam. Smith has shown us that polyandry existed among the Arabs before Islam,⁶⁰¹ a practice which was equated by the new Muslims to *zina*, and was thus to receive the appropriate punishment.

Furthermore, we find that stoning – also by special missiles inscribed with the criminal’s intent – was decreed by Urukagina for the captured thief; the recovered goods were to be hung at the main gate of the city for reclamation by the rightful owners.⁶⁰² Once again we find this to be a precedent for ancient Near Eastern law, not only in that it provides us with the first example of the theft-adultery link so evident throughout legal traditions,⁶⁰³ but we see a similar scenario played out in Hatra during the Parthian era. Segal observes:

“Certainly Hatra was notorious in Mesopotamia for its penalty of stoning for theft – even for an object of little worth – as we learn from the *Book of the Laws of Countries* attributed to a member of the School of Bardaisan of Edessa at the end of the 2nd century A.D.”⁶⁰⁴

One of the epigraphic decrees discovered by Dr. Jabir Ibrahim at Hatra (Ibr.I) dates from “the month KNWN of (the year) 463,” i.e. “December A.D. 151 – January

⁵⁹⁹ Ibid., 19 n.25. He cites: “Good, *Capital Punishment*, 19 Stan. L. Rev. 947, 961 (1967) (footnote omitted).”

⁶⁰⁰ Kramer, *The Sumerians*, 322.

⁶⁰¹ *Infra*, p.186.

⁶⁰² Kramer, *loc. cit.*

⁶⁰³ This characteristic of ancient law, by which the two crimes seem to share an unspoken relationship by their written juxtaposition, similar treatment, or, in this case, identical punishment, will be treated more fully in the conclusion.

⁶⁰⁴ Segal, “Aramaic Legal Texts,” 115. He cites R. Degen, ‘A Note on the Law of Hatra,’ *Instituto Orientale di Napoli. Annali (AION)* xxxvii, 1977, 486-90.

152”⁶⁰⁵ and rules “that anyone who will steal inside this store and inside the outer wall, if he is a man of the community he shall be killed by the death of the god, and if he is a foreigner he shall be stoned.”⁶⁰⁶ The magnitude of this text as regards this thesis derives from two points. First is simply the similarity between the transliterated Aramaic and Arabic that immediately strikes the reader. The punishment clause, beginning with ‘if,’ reads:

6 “... ’yngbr’
7 hwgwy’lqtylbmwt’ry
8 ’lh’w’yngbr’hwby’
9 lrgym”

This nearly looks like a form of colloquial Arabic if rendered into Arabic script:

"اين جبرا هو جويلا لقتيل بموت اري اله او اين جبرا هو بريلا لرجيم."

At any rate, here may well be the earliest epigraphic evidence we have referring to the act of stoning – *lrgym*, ‘he shall be stoned’ (cf. Ar. *rajīm*, ‘stoned’) – using the same *r-j-m* root employed by Muslim ‘*ulama*’ in their discussions of the *ḥudūd*. The second point of import to this thesis is that – even though originating in second century Hatra – this text is firmly linked to the Arab inhabitants of that ancient polity. The full opening of the decree reads:

“In the month KNWN of (the year) 463 at the counsel of the god there agreed ŠMŠBRK the Steward and the Hatrenes, old and young, and ‘RBY, all of them, and all who dwell in Hatra, and thus they decreed....”⁶⁰⁷

Segal notes that the “‘*Arabaye* are the section of the population of Hatra called elsewhere ‘RB...,” and later describes them as “visitors to Hatra and those who dwell there, perhaps resident aliens.”⁶⁰⁸ Keeping in mind Hodgson’s observation that “[t]he first Arab merchant-kings had used Aramaic as their formal tongue;”⁶⁰⁹ one might consider the above precedents of stoning to be a perfect illustration of Schacht’s “element of continuity;” mainly, the transfer into Islam of an ancient Mesopotamian custom – stoning as a form of punishment – via “the Aramaic population.” At the

⁶⁰⁵ Segal, “Aramaic Legal Texts,” 110, ln.1. Note the name of the month, yet another ancient Semitic legacy surviving in the Arabic of Syria, Lebanon, Jordan, and Iraq (*kānūn al-awwal*, *kānūn al-thānī*, ‘December, January’).

⁶⁰⁶ Ibid., lns.5-9. We also learn from Segal’s article that in another epigraph (H281) “the penalty for taking a building tool from the temple of Bar Marayn is... stoning; here there is no special provision for the nationality of the offenders” (ibid., 114-15).

⁶⁰⁷ Ibid., 110, lns.1-4.

⁶⁰⁸ Ibid., 110, 115.

⁶⁰⁹ Supra, p.92.

very least these examples can be said to illustrate a certain Irano-Semitic sensibility which has bridged millennia, whatever the means.

As for other precedents related to the Islamic conception of *zinā*, nearly all ancient Mesopotamian societies considered adultery a capital crime, and several had provisions dealing with discovery *in flagrante delicto*, rape, the deflowering of slave girls, sodomy, and bestiality; not to mention similar conceptions to Islamic *iḥṣān*, the forbidden degrees, and gradated punishments based on social position. Legal material relating to more procedural custom is commonplace as well, with seeming precedents as regards witnesses, oaths, and punishment for slander throughout many sources.

Besides Urukagina's reforms, the notion that adultery is a capital crime is supported by 1) Ur-Namma, where the defloration of another man's virgin wife received an unspecified death (§6), as did a wife who initiated an adulterous relation (§7);⁶¹⁰ 2) Eshnunna, where the wife received an unspecified death, though the fate of the paramour is unclear (§28);⁶¹¹ 3) Hammurabi, where both the wife and paramour were killed in a way usually interpreted as drowning, i.e. bound and cast into the river (§129), and the wife of a captive man who deserted her husband's house for that of another man, despite the husband's having provided sufficient maintenance, received the same drowning punishment (§133);⁶¹² 4) the Old Hittite laws, where a man who committed adultery with his (living) brother's wife received an unspecified death (§195), and a man who blatantly and excessively frequented 'foreign' women while in Hittite territory also received an unspecified death (§191);⁶¹³ 5) the Middle Assyrian laws, where both wife and paramour received an unspecified death having committed adultery in the paramour's house (part I, §13);⁶¹⁴ and 6) certain Babylonian law reports, where an unfaithful wife was cast to her death from a

⁶¹⁰ The paramour in §7 was released. Roth, *Law Collections*, 17-20; VerSteeg, *Mesopotamian Law*, 20ff., 119.

⁶¹¹ Yaron, *Eshnunna*, 63, 59, 278-85; Roth, *Law Collections*, 60, 63-4; VerSteeg, *Mesopotamian Law*, 119. Yaron notes: "Specific modes of execution are not laid down in the L.E." (ibid., 258-9), and also proposes, as regards §28, that it was the paramour who was killed while the wife was left to the husband's discretion (285).

⁶¹² If the captive husband hadn't provided enough maintenance, the deserting wife was considered blameless (§134). Edwards, *The Hammurabi Code*, 28, 46-7; C.H.W. Johns, *Babylonian and Assyrian Laws, Contracts, and Letters* (Union, New Jersey: The Lawbook Exchange, 1999), 53-4; VerSteeg, *Mesopotamian Law*, 60 n.74, 119; Harper, *Code*, 44-7.

⁶¹³ As long as he visited such women discreetly, or in foreign lands, there was no punishment (§200A). Smith, *Origin and History*, 271-4, 277-9.

⁶¹⁴ Whereas if at a hostelry or on a highway they were to be dealt with at the husband's discretion (part I, §14). Ibid., 225-28.

tower.⁶¹⁵ Punishments, then, included not only stoning with specially inscribed missiles, but drowning⁶¹⁶ and precipitation, and even death by the stake, the sword, or “the iron dagger.”⁶¹⁷

As far as shared etymology relating to *zinā*, a few instances may be of note, such as Akk. *na-a-a-ak-tum* ‘whore’ and *ha-ri-im-tum* ‘prostitute’⁶¹⁸ (cf. Ar. *nāka* ‘to have sexual intercourse with’ and *ḥarīm* ‘harem; woman, wife’); or Akk. *naqābu* ‘to deflower, rape’ and *nāku* ‘to have illicit sexual intercourse, to fornicate’⁶¹⁹ (cf. Ar. *naqaba* ‘to pierce, breach’ and *nāka* as before). Intriguingly, Hammurabi §155 – dealing with a man’s committing adultery with his son’s already-consummated bride – contains the phrase “*i-na zu-ni-ša it-ta-ti-il-ma*,” which Harper translates as: “and if he (the father) afterward lie in her bosom;”⁶²⁰ *zūnu* being defined in his glossary as “side, bosom.” The same or similar phrases occur in §§156-8, and, being as they all denote an illegal sexual act one must wonder: could these phrases utilizing Akkadian *zūnu* be etymologically related to the form and meaning of Arabic *zinā* and related forms? Furthermore, earlier in Hammurabi’s code we read:

“§128. If a man take a wife and do not arrange with her the (proper) contracts, that woman is not a (legal) wife.”⁶²¹

“That woman is not a (legal) wife,” in transliterated Akkadian, reads: “*la iš-ku-un zinništum ši-i u-ul aš-ša-at*,” with, according to Harper’s glossary, *Aššatu* meaning

⁶¹⁵ T.G. Pinches, “Crimes and Punishments (Assyro-Babylonian),” *ERE*, iv.259 (the author notes she may also have been sold into slavery); Martha T. Roth, “‘She will die by the Iron Dagger.’ Adultery and Neo-Babylonian Marriage,” *Journal of the Economic and Social History of the Orient* 31 (1988): 201; Johns, *Babylonian and Assyrian Laws*, 117-18 (the author notes “being thrown from a high place, temple, tower or pillar is named”).

⁶¹⁶ Johns (ibid., 54) translates Hammurabi §129 as “they shall be *strangled* and cast into the water” (italics mine), whereas others usually read more similarly to Harper’s “they shall bind them and throw them into the water” (*Code*, 45). Strangling, as we shall see, has its place in Judaic law; Johns’ translation, if correct, might be considered a precedent.

⁶¹⁷ Roth, “Iron Dagger,” 197. She notes that ‘stake’ may refer to impaling, or to a peg driven into the mouth or eye, and see 199ff. for her interpretation of death by the ‘iron dagger.’ Johns notes: “In the later contracts death was still the penalty for a wife’s adultery, but the penalty had ceased to be drowning only. The adulteress might be put to the sword” (*Babylonian and Assyrian Laws*, 118). With these latter punishments we may have yet another example of the Shī’a as preservers of ancient Mesopotamian custom; as we have seen, with the Shī’a “the *ḳādī* has the choice between execution with a sword, by stoning, by throwing the offender from a [high] wall or by burning him” (supra, p.45). Finally, it should be noted that some non-capital punishments are recorded as well, namely slavery (Pinches, loc. cit.), humiliation, and physical mutilation (Roth, “Iron Dagger,” 196).

⁶¹⁸ Finkelstein, “Sex Offenses,” 362.

⁶¹⁹ Roth, “Iron Dagger,” 192.

⁶²⁰ Harper, *Code*, 54-5. Note that §194 uses a different word meaning ‘breast’ (*tulê-ša* ‘her breast’). Is it possible that *zūnu* carried connotations in addition to that attributed to it by Harper?

⁶²¹ Harper, *Code*, 44-5.

‘wife, woman’ and *z(s)inništu* meaning ‘woman’.⁶²² Could it be, however, that the code is here – as Harper’s translation suggests – focusing on the legality of the union, and thus imbuing *zinništum* with the connotation of an *illegal* wife? It is tempting to posit an etymological relationship between Ar. *zinā* and Akk. *zūnu* or *zinništu*, the Arabic, perhaps, having originally referred to any illegitimate relation with a woman, and thus perpetuating a very ancient Mesopotamian sense.

Whatever the case, Hammurabi §128 also brings us to another ancient precedent. Considering that it directly precedes §129 (the drowning punishment for adultery), while defining that which distinguishes a legal from an illegal wife, it is clear that Hammurabi’s code is here clarifying exactly what sort of woman is liable to the drowning punishment, i.e. that she be properly and legally married at the time of her infraction. This bears some resemblance to the discussions, over two millennia later, among Islamic jurists as to what constitutes *iḥṣān*, and which included, as we have seen, that the accused be married by a valid contract.⁶²³ Indeed the laws of Eshnunna illustrate the same principle, i.e. that the action is only considered adultery if the woman in an *aššatum*, or legally married wife (§§27-8), and that the *aššatum* is liable to the death-penalty for adultery. Yaron translates:

“If a man took a man’s daughter without asking her father and? / or? her mother:–

i) and also (subsequently) did not fix marriage feast [*ki-ra-ām*] and? / or? contract for her father and? / or? mother,– should she (even) dwell in his house the days of one year, (she is) not ‘a wife’ [*aššat*].

ii) If he (subsequently) fixed contract and? / or? marriage feast for her father and? / or? mother and took her, (she is) ‘a wife.’ The day in the lap of a man she will be seized, (one) shall die, shall not live.”⁶²⁴

Roth, comparing Eshnunna with certain Neo-Babylonian contracts, writes:

“The Laws of Eshnunna took pains to define an *aššatu* precisely in order to determine who is liable to the death penalty for sexual misconduct. So too in the NB marriage agreements, the clause which provides for the death of the adulterous woman reinforces the husband’s statement “She will be my *aššatu*” and her family’s consent to the proposal. As an *aššatu* she is entitled to the rights and benefits of a ‘wife,’ and assumes the corresponding obligations. Perhaps the most

⁶²² Cf. Pahlāvi *zan* ‘woman, wife,’ and *zanīh* ‘marriage’ in the *Mādigān ī Hazār Dādistān* (Anahit Perikhanian, ed. and trans., *The Book of a Thousand Judgements: A Sasanian Law-Book*, trans. from Russian by Nina Garsoïan (Costa Mesa, California; New York: Mazda Publishers and Bibliotheca Persica, 1997), (=MHD), 406.

⁶²³ Supra, p.16. See Driver and Miles, *The Babylonian Laws*, 8, where the authors note this distinction between *zinništum* and *aššatum* goes back at least to the laws of Eshnunna.

⁶²⁴ Yaron, *Eshnunna*, 58-9, 283.

important of these is sexual fidelity, and by failing to fulfill that obligation she risks her life.”⁶²⁵

Additionally, Finkelstein takes note of “the relatively lenient view taken in Mesopotamia of sexual ‘misconduct’ by and with unmarried women,”⁶²⁶ and we have seen this corroborated in Yaron’s observation that “Near Eastern laws... do not regard rape *per se*, of an unattached woman, as a capital delict,” after which he provides a definition of “unattached” corresponding closely to the Shī‘ī definition of *ghayr muḥṣan*.⁶²⁷ One more similarity to the Shī‘ī conception of *iḥṣān*: in Hammurabi §§133-4 the wife, if the husband was captured and left no maintenance for her in his absence, is considered blameless should she leave his house for another man’s. This in some ways resembles Shī‘ī *iḥṣān* where the *muḥṣan* is one “who is in a position lawfully to have sexual intercourse and whose partner is actually available and not e.g. imprisoned or absent on a journey.”⁶²⁸ Although Hammurabi’s captured husband is more an issue of maintenance than sexual availability, there is still a common factor in the wife’s infidelity viewed from the perspective of her husband’s ability to be physically present in the house.

As concerns *flagrans delictum*, we find more than a few provisions in ancient Mesopotamian law; in fact, the understanding that the perpetrators are ‘caught in the act’ is simply assumed by the laws of Eshnunna (§§12, 13, 28) which employ the verb *naṣbutum* ‘to be seized, caught.’⁶²⁹ Roth, having noted that in certain Neo-Babylonian marriage contracts containing adultery clauses, “the protasis of the clause... explicitly assumes discovery *in flagrante delicto*,” then notes the same to be true of Hammurabi, Eshnunna, and the Middle Assyrian laws.⁶³⁰ It is certainly true that Hammurabi’s code employs the same verb as Eshnunna, translated by Harper as to be ‘taken’ (in lying with another man),⁶³¹ and we have seen that the sentence is death. However, it is the Old Hittite laws (§§196-7) and Middle Assyrian laws (part I, §15) which allow the discovering husband to kill both parties on the spot.⁶³² It is

⁶²⁵ Roth, “Iron Dagger,” 206.

⁶²⁶ Finkelstein, “Sex Offenses,” 367.

⁶²⁷ Supra, n.557.

⁶²⁸ Supra, p.45.

⁶²⁹ Yaron, *Eshnunna*, 259-60.

⁶³⁰ Roth, “Iron Dagger,” 194 and n.19.

⁶³¹ Harper, *Code*, 45.

⁶³² Smith, *Origin and History*, 225-8, 271-4, 277-9; Finkelstein, “Sex Offenses,” 371. In the Old Hittite laws, the husband may also lead them to the king for execution, or pardon his wife and brand the paramour’s head. As for the Middle Assyrian laws, the husband may also bring them before the

perhaps telling that in Hammurabi's code occurs the famed clause in §129, concerning a case where the wife has been "taken in lying with another man," and states: "If the husband of the woman would save his wife, or if the king would save his male servant (he may)."⁶³³ This is usually understood to mean that the king, should the discovering husband pardon his wife, would likely pardon the paramour as well. Should this be the case, we may be witnessing the same concern expressed by Islamic jurists when they took care to recognize "that a man [might] invite another man to enter his house in order to do something, then kill him due to some ill will in his heart, and say, lying, 'I found him with my wife.'"⁶³⁴

The law codes also provide us with precedents regarding rape provisions, some of which provide the death penalty to the perpetrator (Ur-Namma §6,⁶³⁵ Eshnunna §26,⁶³⁶ Hammurabi §130⁶³⁷), while the Middle Assyrian laws provide not only *talion* upon the wife of the ravisher, but that he must marry his victim with no recourse to divorce, or pay compensation to the father if he doesn't agree to the match.⁶³⁸ Besides capital punishment for the ravisher and a lack of punishment for the victim, another precedent for Islamic law can be found in the ancient Mesopotamian's attention to the circumstances in which an alleged rape occurred. Finkelstein observes:

"MAL 55 offers the most extensive catalogue of locales and circumstances: in town or out in the country; at nighttime in the public streets; in the town granary; during the town festival. What is the purpose of such a list of specifications? The answer leaves no room for doubt; these circumstances are meant to indicate that there could be no *a priori* presumption of rape on the part of the man or of consent on the part of the girl."⁶³⁹

Mālik, as we have seen, required circumstantial evidence for a pregnant woman claiming rape as the cause.

king, who might grant the husband's discretion as regards 1) execution of both wife and paramour, 2) the cutting off of the wife's nose and the castration and facial disfigurement of her paramour, or 3) acquittal for them both.

⁶³³ Harper, *Code*, 45.

⁶³⁴ *Supra*, p.20.

⁶³⁵ VerSteege, *Mesopotamian Law*, 21.

⁶³⁶ Yaron, *Eshnunna*, 58-9, 87.

⁶³⁷ Harper, *Code*, 44-5.

⁶³⁸ Yaron, *Eshnunna*, 278-9; Finkelstein, "Sex Offenses," 357.

⁶³⁹ *Ibid.*, 362. Another example can be found in Hammurabi §130; the victim must have cried out in a loud voice during the assault or else be deemed complicitous (Yaron, *Eshnunna*, 280 n.95).

Laws punishing sodomy and bestiality, too, find precedents in ancient Mesopotamia, with the Middle Assyrian laws prescribing castration for the homosexual act (part I, §20) and the Old Hittite laws introducing a host of punishments for different types of bestiality covering ox, cow, pig, or dog (§§187, 199, the penalty was death) as well as horse and mule (§200A, there was no punishment, but the perpetrator was forbidden to become a priest or to physically approach the king).⁶⁴⁰

Interestingly, Yaron notes “the LE, just like LI and LU, do not deal with incest, a topic considered in some later collections.”⁶⁴¹ As for the later collections, we have seen Hammurabi §155, which forbids a man to lie with his son’s consummated bride (and which was punished with his being bound and cast into the water), to which we might add §154 (expulsion for the man who lies with his daughter), §156 (1/2 *mana* of silver to the son’s *un*-consummated bride (i.e. betrothed) if the father lies with her, after which she must choose between father and son), §157 (a man and his mother are burned if they lie together after the father’s death), and §158 (a man is “cut off from his father’s house” for lying with his father’s chief wife who has born children).⁶⁴² Considering that the laws named by Yaron as not containing incest provisions are Sumerian, and those which do are Semitic (with the exception of the Hittites), it is possible this indicates the forbidden degrees were a much more Semitic concern than an Indo-European one; the later Sāsānid Zoroastrian laws certainly illustrate this, with their encouraging of marriages within the forbidden degrees. Further considering the Arabian origins of the Semitic peoples whose laws contain punishments for incest; it may be true that Islamic law’s treatment of forbidden degrees is the continuation of a much more ancient Semitic legacy.⁶⁴³

Yet another conceptual precedent can be found in certain of the ancient laws, mainly that which is engendered by the Qur’ānic decree of lesser punishment for

⁶⁴⁰ Smith, *Origin and History*, 225-8, 271-4, 277-9.

⁶⁴¹ Yaron, *Eshnunna*, 278. See n.90 where he lists such laws as do consider the forbidden degrees, including CH154-8; HL189, 190; and Old Testament Lev.18:6ff., 20:11ff., and Deut.27:20, 22f.

⁶⁴² Harper, *Code*, 54-5.

⁶⁴³ Such laws in Islam are mostly based on Q.4:22-3; but note the section of Q.4:22 translated by Ahmed Ali as “What happened in the past is now past. It was lewd and abhorrent, and only the way of evil” (Ali, *al-Qur’ān*, 76). This certainly seems to indicate the Arabs had fallen away from the ancient Semitic model by Muḥammad’s time (perhaps due to Persian-Zoroastrian influence?) The Qur’ān here seems beseeching in its call to abandon incestuous ways, presenting a list of forbidden liaisons, all of which are well-represented in ancient codes.

slaves than for the free-born – what we might consider gradated punishments based on social status. Much has been said about the social divisions expressed in the code of Hammurabi, summarized thus by Harper:

“Society in the time of Hammurabi consisted legally of the following classes: 1) the *awilum*, 2) the *muškēnum*, and 3) the *wardum-amtum*, and their rights and privileges were clearly defined. The first, *awilum*, included the house-holders, property owners, the wealthy and upper classes. [...] The second, *muškēnum*, has been variously translated, *pauper*, *poor man*, *serf*, *retainer*, etc. The etymology of the word goes to show that the *muškēnum* was poor. He could, however, hold property and slaves. He was free. He held a position half-way between the *awilum*, upper class man, and the *wardum-amtum* slave. I have used the term *freeman*. The third class, *wardum-amtum*, consisted of male and female slaves.”⁶⁴⁴

The implications of these divisions are to be found not only in the laws of *talion*, which “refer to a freeman injuring a person of his own rank; but a freeman committing the same offence against a man of inferior rank got off by paying a fine,”⁶⁴⁵ but also in laws regarding theft: Hammurabi §8, where an *awilum* was to compensate thirtyfold what he stole from a temple or palace of ox, sheep, ass, pig, or boat; while a *muškēnum* was to pay tenfold.⁶⁴⁶ In the Old Hittite laws (§§93-7), the slave paid half the damages paid by a freeman.⁶⁴⁷ Generally speaking, it would seem that the lower one was on the social scale, the lighter one’s punishment was; higher social status entailed greater responsibility and harsher penalties.

As for considerations of procedure, the question of witnesses to sexual offences can be found in some of the codes, and even more significantly, what is to happen should the accuser *not* bring forth witnesses. VerSteeg summarizes:

“Hammurabi’s Laws make clear the importance of having eyewitnesses for legal proceedings. Oaths are used to establish truth. The River Ordeal is used to make decisions for certain serious crimes. If an accuser fails to prove his allegations, several laws impose on the accuser the same punishment that the charge itself carries.”⁶⁴⁸

Regarding oaths, an excellent precedent illustrating some of the principles engendered by Islamic *li‘ān* can be found in “an oath denying adultery recorded in the

⁶⁴⁴ Harper, *Code*, xii. See also Yaron, *Eshnunna*, 132-54, for an account of what scholars have said about the *awilum* and *muškēnum*; 161-5 for the *wardum* and *amtum*.

⁶⁴⁵ Pinches, “Crimes and Punishments,” 259.

⁶⁴⁶ Edwards, *The Hammurabi Code*, 28-32. The thief without the means to pay compensation was killed.

⁶⁴⁷ Smith, *Origin and History*, 254ff.

⁶⁴⁸ VerSteeg, *Mesopotamian Law*, 39.

Neo-Sumerian document ITT 5 6948,” which reads: “PN swore that no one other than PN₂ (presumably her husband) has lain with her.”⁶⁴⁹ Cook summarizes:

“The Babylonian procedure in cases where absolute proof was not at hand is characteristic. In all ordinary cases the wife could take an oath and swear her innocence, and was allowed to return (or was sent?) to her (father’s) house; but ‘if the finger had been pointed at her on account of another,’ and she is obviously the subject of scandal, she must undergo ordeal by water.”⁶⁵⁰

This is a reference to Hammurabi’s code:

“§131. If a man accuse his wife and she has not been taken in lying with another man, she will take an oath in the name of god and she shall return to her house.

§132. If the finger have been pointed at the wife of a man because of another man, and she have not been taken in lying with another man, for her husband’s sake she shall throw herself into the river.”⁶⁵¹

Note the resemblance of §131 to Q.24:6-9 as regards “an oath in the name of god.”⁶⁵²

As for §132, however, it is believed by Assyriologists to constitute an ordeal by water, an idea supported by the laws of Ur-Namma (§14), where the accused wife was thrown into the river, the accuser paying up to 20 shekels of silver if she survived; and the Middle Assyrian laws (part I, §22), in which a suspected rapist may be subjected to the river.⁶⁵³

A final precedent from the ancient Mesopotamian codes as regards sexual offence is a consideration of false accusation and slander, several elements of which resemble Islamic regulations for *qadhf*. Finkelstein supplies the following summary:

“Accusations, especially when they are unsubstantiated, are a popular topos in the ‘code’ since they serve so well to exemplify the ‘lawgiver’s’ zealous concern for strict justice: ‘You shall do to him exactly as he plotted to do to his brother’ [Deut.19:19f.] The unsubstantiated accusation of sexual misconduct becomes therefore a standard permutation in those groups of rules relating to sexual conduct, as, e.g., LH 131-2 and MAL 17-18, all concerning married women, and MAL 19, accusation of homosexuality against a man....”⁶⁵⁴

⁶⁴⁹ See Roth, “Iron Dagger,” 194-5 n.20, for full citation.

⁶⁵⁰ Cook, “Adultery (Semitic),” 136.

⁶⁵¹ Harper, *Code*, 45, 47.

⁶⁵² Other oath-taking precedents occur in the Middle Assyrian laws (part I, §22), where a suspected paramour would swear to the husband that either he didn’t know she was married, or that he didn’t sleep with her; whereas the wife, in trying to establish her innocence, might swear that the suspect had forced her (in which case the paramour was subjected to the river ordeal).

⁶⁵³ Smith, *Origin and History*, 225-8.

⁶⁵⁴ Finkelstein, “Sex Offenses,” 367.

An unsubstantiated accusation of sexual offence is itself the very definition of *qadhif*, and that it should appear so prominently in the codes and carry such a resemblance to what was to become accepted in the *shari'a* is proof once again of a remarkable legal continuity in the region. Lipit-Ishtar (§33) requires the payment of 10 shekels for the unfounded accusation of a virgin daughter.⁶⁵⁵ Hammurabi, on the other hand, states:

“§127. If a man point the finger at a priestess or the wife of another and cannot justify it, they shall drag that man before the judges and they shall brand his forehead.”⁶⁵⁶

Thus we are provided with the first precedent of corporal punishment for slander; and even closer to the Islamic model are the Middle Assyrian laws (part I, §§18-19), in which, should a man in a heated argument accuse his companion's wife of adultery, he was to be punished not only with a month's service to the king, mutilation, and the payment of a talent of lead, but with forty blows (part I, §19). Should he, in similar circumstances, accuse his companion of sodomy, the punishments were the same but with *fifty blows*.⁶⁵⁷ Add to this Finkelstein's proposal that “[t]he ‘throwing down (*nādu*) of the offender’ in front of the judges [Hammurabi §127] is elliptical for flogging, as Driver and Miles also understood the phrase,”⁶⁵⁸ and we have some very grounded precedents for the flogging of the *qādhif* indeed.

Finally, it should be noted, as in the above quote from Deuteronomy,⁶⁵⁹ and as VerSteeg has noted, “several laws impose on the accuser the same punishment that the charge itself carries.” Thus we have Lipit-Ishtar §17, where “a person who unsuccessfully brings a false or unsubstantiated claim against another must ‘bear the penalty of the matter for which he made the accusation,’”⁶⁶⁰ and Hammurabi §13, where an accuser, if he cannot produce witnesses even after a six-month postponement of the trial, “shall himself bear the penalty imposed in that case.”⁶⁶¹ This idea, as we shall see, is a very enduring principle in ancient codes in general, and carries weighty implications should one consider, for example, that both the

⁶⁵⁵ VerSteeg, *Mesopotamian Law*, 26, 140. We have seen that the accuser in Ur-Namma pays 20 shekels of silver if the accused wife survives the river ordeal. Note Finkelstein's translation of Ur fragment U. 7739 (§10): “If a man has accused the wife of a *man* of fornication, and the river (-ordeal) has cleared her, the man who accused her shall pay 1/3 mina of silver (“Sex Offenses,” 369-70).

⁶⁵⁶ Harper, *Code*, 44-5.

⁶⁵⁷ Smith, *Origin and History*, 225-8. A man who simply accused another man's wife and brought no witness was bound and cast in the river (part I, §17).

⁶⁵⁸ Finkelstein, “Sex Offenses,” 371 n.48. He cites *Babylonian Laws*, 212f.

⁶⁵⁹ *Supra*, p. 130.

⁶⁶⁰ VerSteeg, *Mesopotamian Law*, 25.

⁶⁶¹ Harper, *Code*, 15.

punishments of the *zānī* and the *qādhif*, according to the Qur'ān, are flogging; they are thus seemingly in synch with this ancient principle. According to the Sunni *sharī'a*, however, the *muḥṣan zānī* is to be stoned; the *qādhif* of the *muḥṣan zānī* still to be flogged. One would think that the *qādhif* of the *muḥṣan zānī* would also be stoned, as that would be the punishment of the accused were the accusation proven.

Whatever the case, those ancient Mesopotamian legal materials which have come down to us have provided an extraordinary number of legal precedents parallel to laws found in the Islamic *sharī'a*, running nearly the full gamut of rulings regarding *zinā*. Furthermore, due to the methods we have discussed, by means of which Arabs may have preserved for long centuries a core set of custom and tradition – whether derived from a source common to their Semitic relatives, or the product of the ‘influence’ of their neighbors in the Irano-Semitic milieu – there is every reason to accept the possibility that these ancient parallels are more than a coincidence. The same is true, as we shall next discover, of laws regarding *sariqa*.

*Hand-amputation and sariqa-related precedents*⁶⁶²

Remarkably enough, the ancient Mesopotamian legal corpus also provides us with our earliest precedents for hand-amputation as a punishment for theft. In Harper's translation of Hammurabi we read:

“§253. If a man hire a man to oversee his farm and furnish him the seed-grain and intrust him with oxen and contract with him to cultivate the field, and that man steal either the seed or the crop and it be found in his possession, they shall cut off his fingers.”⁶⁶³

Most other scholars, however, such as Johns, translate this slightly differently:

“§253. If a man has set another over his field, hired him, allotted him tools, and intrusted him with oxen for cultivating the field and provided harnesses for them, and if that man has appropriated the seed or provender, and they have been found in his possession, his hands shall be cut off.”⁶⁶⁴

⁶⁶² The ancient codes were rich with legislation for theft-related crime – far beyond the scope of this thesis to deal with adequately. Therefore, only such precedents as are immediately relevant will be discussed. Other related areas, such as the buying and selling of stolen property (Eshn. §40, and Hamm. §§7, 9-12); theft of sacred objects or from sacred places (Hamm. §6, MAL part I, §1, Old Hittite §126, and Ibr. II (Hatra)); looting (Hamm. §25); harboring fugitive slaves (Eshn. §49, Hamm. §§16, 19); kidnapping (Hamm. §14); and loss / negligence (Hamm. §263); will be treated only as they pertain to the topic at hand.

⁶⁶³ Harper, *Code*, 89.

⁶⁶⁴ Johns, *Babylonian and Assyrian Laws*, 65.

Whether hands or fingers (the Akkadian here is *rit-tê-šu*), a precedent was set in Hammurabi's code for mutilation of the hand for a type of theft. Not only that, but the clause which describes both crime and punishment (i.e. beginning with "and that man steal" / "and if that man has appropriated") reads as follows in transliterated Akkadian:

*"šum-ma a-wi-lum šu-u ŠE.ZIR u lu ŠA.GAL iš-ri-iḫ-ma i-na ga-ti-šu
it-ta-aš-ba-at rittê-šu i-na-ak-ki-su."*⁶⁶⁵

Thus we have not only the precedent of mutilation of the hand, but it is coupled with practically the same verb employed by the Qur'ān and subsequently Islamic jurists, here in the form: *iš-ri-iḫ-ma*. And indeed, as Bernard Jackson notes:

"CH 253, 255, and 265 all use the verb *šaraqu*. Of these, the first and second deal with misappropriation of seed and fodder by a hired agricultural worker, the third with misappropriation of cattle and sheep by a shepherd."⁶⁶⁶

If we add to this the Middle Assyrian laws (part II, §§4-21) where, in addition to other penalties, land or cattle-theft was punished by amputation of the thief's finger,⁶⁶⁷ we certainly have some strong precedents for the *ḥadd* of *sariqa* as prescribed by the Qur'ān, in strikingly similar wording. Even the obscurity of whether hands or fingers were to be cut off seems to have resurfaced in Islamic law, Ibn Rushd noting, as we have seen, that "[o]ne group said that only the fingers are to be severed."⁶⁶⁸

However, hand-mutilation as a punishment enjoyed a wider application than mere theft in Hammurabi's code. In §195, the son who strikes his father has his fingers / hands cut off, as does the faulty surgeon who causes his wounded patient's death (or destroys a patient's eye) with a bronze lancet (§218), and the brander who brands a slave un-sellable without the owner's consent (§226).⁶⁶⁹ In fact, mutilation in general crops up quite frequently in the code,⁶⁷⁰ Pinches summarizing as follows:

"This penalty was not uncommon and in some cases roughly indicated the crime by destroying that which was regarded as the offending

⁶⁶⁵ Harper, *Code*, 88.

⁶⁶⁶ Bernard S. Jackson, *Theft in Early Jewish Law* (Oxford: Clarendon Press, 1972), 17. Cf. Ar. *saraqa*.

⁶⁶⁷ Smith, *Origin and History*, 223-4, 239-42.

⁶⁶⁸ *Supra*, n.103.

⁶⁶⁹ Harper, *Code*, 72-3, 78-9, 80-1.

⁶⁷⁰ Note, however, that the laws of Eshnunna "do not provide for any corporal punishment other than the death penalty. There are no cases of mutilation, such as occur in the CH, nor is there anything comparable to the compound punishments particularly frequent in the MAL" (Yaron, *Eshnunna*, 262).

member. Thus, if the son of a chamberlain (palace-favourite) or of a public woman denied his foster-parents, his tongue, the organ with which the denial was made, was cut out (§ 92). In the case of an adopted son learning who his real father was, despising in consequence his foster-parents, who had brought him up, and returning to his father's house, the punishment was loss of an eye (§ 93). A nurse substituting, without the knowledge of the father and mother, another child for one who had died whilst in her care, was punished by the cutting off of her breasts, thus ensuring, as in most punishments of this nature, that the offence should not occur again (§ 194). A son striking his father was punished by the loss of a hand—the limb with which the offence had been committed (§ 195). A slave striking a freeman's son received the same punishment as a slave denying his master, namely, the loss of an ear—probably as a mark that he was a criminal, and a warning that he was untrustworthy (§§ 205, 282).⁶⁷¹

Other scholars have noticed this principle of destroying 'the offending member' as well. Johns, having discussed the purely retaliatory nature of the mutilations in Hammurabi §§196, 197, and 200, remarks:

"But the hands cut off mark the sin of the hands in striking a father, in unlawful surgery, or in branding. The eye torn out was the punishing of unlawful curiosity. The ear cut off marked the sin of hearing and obedience. The tongue was cut out for the ingratitude evidenced in speech."⁶⁷²

Finally, Pinches underscores the importance of this principle for this thesis by tying it to the punishment of hand-amputation for theft in Hammurabi:

"... if a man hired to do the work of a farm stole the wheat and the vegetables, and these things were found in his hands, his hands were cut off (§ 253). Here again, we seem to have an instance of vengeance against the offending members; for he who, instead of working for the benefit of his employer, used his hands to rob him, was accounted worthy of this mutilation."⁶⁷³

A remarkable attestation of the scope and continuity of this principle in the ancient world can be found in the New Testament, Matt.5:27-30:

"You have heard that it was said, 'Do not commit adultery.' But I tell you that anyone who looks at a woman lustfully has already committed adultery with her in his heart. If your right eye causes you to sin, gouge it out and throw it away. It is better for you to lose one part of your body than for your whole body to be thrown into hell. And if your right hand causes you to sin, cut it off and throw it away. It is better for you

⁶⁷¹ Pinches, "Crimes and Punishments," 259.

⁶⁷² Johns, *Babylonian and Assyrian Laws*, 97.

⁶⁷³ Pinches, "Crimes and Punishments," 260.

to lose one part of your body than for your whole body to go into hell.”⁶⁷⁴

At least as far as a punishment for theft, this ancient principle appears to have survived into Islam.

That theft is to be punished corporally has even more precedents in ancient Mesopotamian codes. We have seen, for instance that thieves were to be stoned to death not only by Urukagina’s reforms in the third millennium B.C., but in second-century A.D. Hatra. The laws of Eshnunna (§§12, 13) also call for death,⁶⁷⁵ as do those of Hammurabi (§§6-10, 14, 21);⁶⁷⁶ whereas the ears and nose of a stealing slave were to be cut off by the Old Hittite laws (§§94-5)⁶⁷⁷ and the Middle Assyrian laws (part I, §§3-5, a thieving wife’s ears and nose were also cut).⁶⁷⁸ On the other hand, several laws call for pecuniary measures. Yaron has noted the uniform nature of such sanctions in the laws of Eshnunna, most of which require silver (from 10-60 shekels) as determined by the verb *šaqaalum* ‘to weigh out,’ though some penalties are paid in kind (§§6, 12, 13, 34/55, 40, 49, 50).⁶⁷⁹ We have also seen the thirtyfold / tenfold restitution demanded of the *awilum* / *muškēnum* in Hammurabi §8, to which we might add the tenfold restitution of a thieving shepherd (§265), the five shekels demanded for a watering-machine stolen from the field (§259), and the three shekels for a watering-bucket or harrow (§260).⁶⁸⁰ That the Old Hittites had a complex set of laws governing theft is reflected in a variety of sanctions imposed on the thief, including twelve shekels of silver (§93, the thieving slave paid half that), special damages rated according to the object’s worth (§§108-10, 119-49), and anything from two to fifteenfold restitution (§§57-86, 91-2, 94-5).⁶⁸¹ The Assyrians, too, had a

⁶⁷⁴ *The Holy Bible: New International Version* (Grand Rapids, Michigan: Zondervan Bible Publishers, 1980), 471. Interestingly, we have here yet another curious theft-adultery link: the juxtaposition of adultery with hand-amputation. Is the phrasing of this passage reflective, perhaps, of the common legal milieu of the ancient Near East, from which people were accustomed to hearing crimes of theft and adultery and their punishments juxtaposed? There is some evidence, as we shall see, for the application of hand-amputation for theft in pre-Islamic Christian Syria (*infra*, p.217).

⁶⁷⁵ Yaron, *Eshnunna*, 47, 51, 73, 268-75.

⁶⁷⁶ Harper, *Code*, 12-15, 16-17.

⁶⁷⁷ Smith, *Origin and History*, 254ff.

⁶⁷⁸ *Ibid.*, 223-4, 239-42.

⁶⁷⁹ Yaron, *Eshnunna*, 257.

⁶⁸⁰ Harper, *Code*, 88-91.

⁶⁸¹ Smith, *Origin and History*, 254ff.

complicated set of regulations, parts of which demanded from one to threefold restitution (part I, §§3-4, 8-21).⁶⁸²

Yaron has studied the main types of sanctions for theft in the ancient codes, and concluded that the pecuniary sanctions of Eshnunna, Lipit-Ishtar (§9), and the Old Testament are more mild and show more restraint than Hammurabi, the Old Hittites, and Middle Assyrians, with their combinations of pecuniary punishments, mutilation, and death.⁶⁸³ Perhaps this can be seen as a forerunner to the concerns of early Islamic jurists, some of whom understood hand-amputation to be “a substitute for compensation,” whereas others, such as ‘Umar b. al-Khaṭṭāb are said “to have condemned the thief to return double the value” in addition to the *ḥadd*.⁶⁸⁴

A remarkable precedent was also set as regards the conditions of the theft, particularly the distinction between its having been ‘open’ or ‘furtive.’ Yaron’s translation of Eshnunna §§12-13 reads:

“A man [*awīlum*], who will be seized in the field of a subject [*muškēnim*], in the crop, in broad daylight, 10 shekels silver shall weigh out. (He) who will be seized at night in the crop—he shall die, shall not live.

“A man, who will be seized in the house of a subject, in the house, in broad daylight, 10 shekels silver shall weigh out. (He) who will be seized at night in the house—he shall die, shall not live.”⁶⁸⁵

This distinction between nighttime and daytime burglary is mirrored not only in the Islamic distinction between *sariqa*, *ḥirāba*, and *ghaṣb* or *naḥb*, but in juridical discourse as to what constitutes a *ḥirz*. Mālik, as we have seen, argued that night time renders certain places (such as a mosque or the Ka‘ba itself) into a *ḥirz*, thus entailing application of the *ḥadd* to a convicted thief.⁶⁸⁶ That burglary is distinguished from other types of theft is itself a certain kind of precedent for the *ḥirz*, with Lipit Ishtar (§9), as in Eshnunna (§12), requiring damages of ten silver shekels from the thief seized in another man’s orchard; and Hammurabi requiring not only death or status-based retribution for theft from a temple or palace (§§6, 8), but creating a new category of ‘house-breaking’:

⁶⁸² Ibid., 223-4, 239-42.

⁶⁸³ Yaron, *Eshnunna*, 269.

⁶⁸⁴ Supra, p.28.

⁶⁸⁵ Yaron, *Eshnunna*, 50, 51. Brackets are mine.

⁶⁸⁶ Supra, n.119.

“§21. If a man make a breach in a house, they shall put him to death in front of that breach and they shall thrust him therein.”⁶⁸⁷

Finally, as regards conditions of theft, yet another precedent was set in the Middle Assyrian laws (part II, §5), where the minimum value of a stolen object for which punishment might be incurred was set at five manas of lead⁶⁸⁸ – the conceptual equivalent, some sixteen centuries earlier, of Islamic *niṣāb*.

In terms of precedents for Islamic theft-case procedure, certain Neo-Babylonian documents have left us a remarkable picture which sheds some light on the sophistication of the ancient tradition and its resemblance to the Islamic. In an “accusation pending trial” dating from “the 15th day, the 3rd year of Nergal-shar-uṣur, King of Babylon” against “Ina-ṣil-Ishtar, slave of Iddina-Marduk, son of Êteru,” we read that: 1) if a witness establishes a) the place from which the theft took place (the “storage place of barley” of the Bêlit of Erech), b) that the stolen barley was placed therein by “Nabû-ushabshi, son of Nabû-zêr-ukîn,” c) that the accused “opened it and took (from it), barley as much as he took;” then 2) Nabû-ushabshi, who first placed the barley, will swear “by the gods” that he did so; and 3) the accused will then give the Bêlit of Erech “as much as he (Nabû-ushabshi) placed therein.” However: “If a witness does not establish (anything) against him, Ina-ṣil-Ishtar is cleared.”⁶⁸⁹ This remarkable document shows us that, in cases of theft in the Neo-Babylonian Empire, 1) a witness had to confirm all of a) the storage place from whence the goods were taken (the Islamic *ḥirz*), b) the identity of who originally placed it therein, and c) that the accused removed the amount of goods claimed by the original placer; 2) the original placer swears an oath that the storage place contained the amount of goods he claimed it did;⁶⁹⁰ and 3) the accused must then replace the entire amount, though is cleared of charge if no witness is brought against him. This corresponds closely to Islamic procedure in which the witness must identify not only the appropriated property (*māl*) but the safe-place in which it was stored (*ḥirz*), as well as the identity

⁶⁸⁷ Harper, *Code*, 16-17. Note that the Hittites and Assyrians also had laws relating to theft specifically from a house, temple, or granary.

⁶⁸⁸ Smith, *Origin and History*, 223-4, 239-42.

⁶⁸⁹ Moore, *Neo-Babylonian*, 74, 75.

⁶⁹⁰ Cf. Hammurabi §120: “If a man store his grain in bins in the house of another and an accident happen to the granary, or the owner of the house open a bin and take grain or he raise a dispute about (or deny) the amount of grain which was stored in his house, the owner of the grain shall declare his grain in the presence of god, and the owner of the house shall double the amount of the grain which he took and restore it to the owner of the grain” (Harper, *Code*, 40, 41).

of the thief; the crime, as we have seen, being established only by confession or testimony.⁶⁹¹ In Hammurabi's code, too, witnesses were essential – in fact a matter of life and death – as any transaction made without witnesses or contracts incurred the death penalty (§7), and witnesses were required to identify stolen goods as well as their sale, the alleged victim or purchaser put to death if unable to produce them (§§9-11).⁶⁹²

Yet another example of the continuity and cohesiveness of legal traditions in the Near East is the Qur'ān's distinction between *sariqa* and *hirāba*, a precedent for which can be found in Hammurabi's code. In describing the same distinction as it occurs in Pentateuchal sources, Jackson notes the following:

“Evidence from other ancient systems supports the proposition that the distinction between theft and robbery was, in its original form, a distinction between misappropriation by a community member, and raiding by an outside group. In the Code of Hammurabi the verbs *šaraqu* and *habatu* are used. The former... implies secrecy. The latter denotes plundering and brigandage. The two offences are regulated in separate groups of provisions within the Code.”⁶⁹³

The first of the *habatu* rulings reads:

“§22. If a man practice brigandage and be captured, that man shall be put to death.”

And in transliterated Akkadian:

“§22. *šum-ma a-wi-lum hu-ub-tam ih-bu-ut-ma it-ta-aš-ba-at a-wi-lum šu-u id-da-ak*”⁶⁹⁴

Harper lists the relevant terms in his glossary as *habātu* ‘to rob, plunder, destroy,’ and *habbatu* ‘brigand.’

Although the resemblance between these terms and Arabic *hirāba* is not as strong as, for example, *šaraqu* and *saraqa*, it must be remembered that the Arabic term derives from the Qur'ān's usage, in Q.5:33, of *hāraba* / *yuḥāribu* with the meaning of ‘to make war upon:’

⁶⁹¹ The same is illustrated by a case of cattle theft dated “the 8th day of Marchesvan, the 1st year of [C]yrus, King of the Lands,” in which a claim identifying a) the *māl* (“2 grown cows which with a star are marked”), b) the *hīrz* (“the stables of the large cattle of the Bêlit of Erech”), and c) the thief's identity (Gimillu, son of Innin-shum-ibni), was raised to “[the] administrator of Êanna... and a chief official of the King, an appointed officer of Êanna...” (Moore, *Neo-Babylonian*, 124, 125).

⁶⁹² Harper, *Code*, 12-15.

⁶⁹³ Jackson, *Theft*, 11.

⁶⁹⁴ Harper, *Code*, 18, 19.

“The punishment of those who wage war [*yuhāribūna*] against God and His messenger and endeavor to spread corruption in the land, is that they be killed....”⁶⁹⁵

What is interesting here is that the early Islamic jurists associated Q.5:33 with brigandage or highway-robbery at all, there being no indication whatsoever in the text itself as to this type of outside-the-community violent theft, as it came to be understood. The conventional explanation derives from a tradition relating the *asbāb al-nuzūl* for Q.5:33f., in which the people of a certain tribe committed certain brigand-like offences against the Prophet (mainly apostacizing from Islam, killing his shepherds, and running off with his camels).⁶⁹⁶ However, as Jackson has pointed out:

“An important feature of the *ḥabatu* provision is that it imposes responsibility upon the local authorities if the offender is not caught. In the *ṣaraqu* provisions no such civic responsibility is mentioned. This in itself suggests that the *ḥabatu* is a more serious offence than robbery in its developed sense, the art of theft committed openly and with force.”⁶⁹⁷

This assumption of government responsibility seems to reflect that, as do other ancient codes distinguishing between theft and brigandage,⁶⁹⁸ Hammurabi considers the act of *ḥabatu* as occurring outside the community, i.e., within the sphere of war (in Islamic terminology: the *dār al-ḥarb*).

Considering all of the above, could it be that the Qur’ān – revealed as it was in an environment where raiding and brigandage appear to have been common occurrences – embraced this ancient conception, thus utilizing the phrase *alladhīna yuhāribūna* ‘those who wage war?’ This concept of ‘outside the community,’ in conjunction with the prescribed punishments of *ḥirāba* (all of which, as we shall see, have precedents in the ancient world), would have been familiar to the early Qur’ān commentators and jurists. They may therefore have instinctually understood Q.5:33f. as a reference to brigandage.

This survey of ancient Mesopotamian legal material, to sum up, has provided us with a rich selection of legal precedents for various rulings and principles in

⁶⁹⁵ Compare here again the wording of Hammurabi’s code: “If a man practice brigandage and be captured, that man shall be put to death.”

⁶⁹⁶ See, for example, Muqātil b. Sulaymān, *al-khams mi’at āyah*, 110ff.

⁶⁹⁷ Jackson, *Theft*, 11 n.4. He’s referring to §23, where the victim, in case the brigand is not captured, submits a sworn, itemized statement of his losses to the appropriate government officials and is compensated; and §24, in which the government compensates loss of life at the hands of an uncaptured brigand with a *mana* of silver (Harper, *Code*, 18, 19).

⁶⁹⁸ Specifically Pentateuchal law (*infra*, p.168ff.).

Islamic law; most importantly examples of stoning for sexual misconduct and amputation of the hand for theft. That these punishments of the ancient Irano-Semitic milieu may have been inherited by the nascent *sharī'a* or somehow influenced it is supported by a host of other parallels which – gathered *en masse* – provides evidence that the ancient Near East possessed an integrated continuum of common laws, of which Islamic law represents the latter stage of development. Such parallels and precedents include: 1) occurrences of stoning as a punishment firmly linked to an ancient Arab community and employing the same '*r-j-m*' verb; 2) adultery as a capital crime in at least nine separate provisions from six different codes, not to mention several reports and contracts; 3) the potential for an ancient etymology linking *zinā* to Akkadian 'illegal marriage;' 4) stipulations resembling Islamic *iḥṣān*, 5) provisions for *flagrans delictum* in most codes and several contracts; 6) provisions for cases of rape in most codes, not to mention a similar treatment of circumstances; 7) punishments – mostly capital – for sodomy and bestiality; 8) laws forbidding incest; 9) gradated punishments whereby a lower status receives a lighter sentence; 10) the necessity of witnesses in criminal trials; 11) the use of oaths similar to Islamic *li'ān*; 12) *qadhīf*-like provisions in most codes with corporal punishments, including flogging; 13) hand-amputation for theft linked with Akk. *šaraqū*; 14) a wide application of hand-mutilation (and mutilation in general) based on 'the offending member' principle; 15) corporal and/or pecuniary punishments for theft in all the codes; 16) forerunners to Islamic considerations of *ḥirz* and *niṣāb*; 17) similar responsibilities of witnesses in identifying thief, *māl*, and *ḥirz*; and 18) a distinction related to that of *sariqa* and *ḥirāba* with capital punishment for the latter. In other words, most of the major Islamic rulings related to *zinā* and *sariqa* have, at some point or other in ancient Mesopotamia been practiced in similar form. That this has never been pointed out by Orientalists is remarkable, though perhaps telling of an agenda to attribute the corpus of Islamic legal material to Judaic or Greco-Roman sources. It is to these, then, that our attention will turn next.

A survey of pre-Islamic Judaic law

First, and considering 1) the likely Arabian or Mesopotamian origins of the ancient Hebrews; 2) their continued presence, through all stages of legal development, within the Irano-Semitic cultural milieu; and 3) the resemblance of their cultural and legal system to those of the ancient Mesopotamians, it would be perfectly natural to have included Judaic law in the preceding survey of ancient Mesopotamian legal materials. Indeed, had it not been for the insistence of certain scholars in attributing the major traits of Islamic law to Judaic law, it would have been so included. However, due to this insistence, it has become necessary to treat Judaic law separately, in order to compare and contrast it with the laws of its sister civilizations, while keeping in mind that it is part of the same long-standing cultural and legal milieu. It is especially noteworthy that nearly the entire corpus of ancient Mesopotamian legal material – quite possibly the well-font from which both Judaic and Islamic systems sprang, if indeed all three are not common inheritors of something more ancient – has been ignored by those arguing Judaic origins.

Beginning with a mention of the historical interaction between Arabs and Jews, we have already noted the garrison-colonies in Tayma, Dedan, Khaybar, etc. – the result of Nabonidus' campaigning in Arabia. To this we may add appearances of the Arabs in Israelite annals far predating Nabonidus, such as mentions of the Arab kings of Solomon's time (c.970-931 B.C.);⁶⁹⁹ and also epigraphic and Talmudic evidence of an ancient Jewish community in Northwest Arabia.⁷⁰⁰ Even more important are several historical accounts of Judaism in South Arabia, which appears to have resulted in a "revolution in the religious outlook of the ruling elite"⁷⁰¹ as evidenced by changes in fourth century A.D. inscriptions, and culminating in the kingship of Yūsuf, Dhū Nuwās (c.523 A.D.)⁷⁰² Finally, we know from Islamic sources and traditions that the Jewish presence in the Prophet's Arabia was quite strong, and this is seemingly confirmed by Christian Armenian authors writing from the very start of the Arab conquests who play upon the supportive role of Jews in the Muslim

⁶⁹⁹ Hoyland, *Arabia and the Arabs*, 59-60. The reference is in 2 Chron.9:14; "...all the kings of Arabia and the governors of the land brought gold and silver to Solomon" (NIV, 471), and immediately follows the account of the visit of the Queen of Sheba (ancient Sabaea) to Solomon's court. Hoyland notes that references to Arabs (usually as subjugated enemies) appear more frequently in the OT after this.

⁷⁰⁰ Hoyland, *Arabia and the Arabs*, 146.

⁷⁰¹ Ibid., 147.

⁷⁰² Ibid., 52-3.

expansion.⁷⁰³ The Monophysite bishop Sebeos (wr. c.660 A.D.) attributes Muslim success to Arab unity and Jewish support, with the eighth century Lewond elaborating on this theme, and the early tenth century Thomas Arcruni claiming – as did Sebeos before him – that the Jews had invited the “Ishmaelites” to “share their inheritance.”⁷⁰⁴ Finally, writing at the cusp of the twelfth and thirteenth centuries, Mxit‘ar of Ani made this interesting claim:

“Now Mahmet made his legislation from the old laws and the gospel, but changed by willing inventiveness what he liked, as laid down by himself and not taken from someone else, whatever he legislated for his people.”⁷⁰⁵

The similarities between Islamic and Mosaic law may thus have provided fuel for conjecture of ‘borrowing’ at least as early as the thirteenth century.

But what is the nature of this legal system to which Islamic law is thought to owe so much? First of all, we have seen that some historians have traced the ancient Hebrews as having migrated from Arabia, through Mesopotamia and into the land of Canaan. Not surprisingly, the similarities between the Israelitic codes and those of the ancient Mesopotamians are many, not the least of which is the idea of a divinely-revealed code in the first place. W.H. Bennett summarizes:

“The inclusion of secular laws in the Torah indicates that all crime was regarded as sin against God, and that the administration of justice rested on Divine authority. This is an axiom of all religions as to the ideal State; but it was more emphasized in ancient times than it is now, because religion and the State were more intimately associated. Hammurabi, for instance, receives his laws from the sun-god, Shamash. Ezk 20²⁵ is a striking illustration of the way in which the actual legal system of Israel was regarded as a Divine institution; even iniquitous laws are imposed by God as a punishment: ‘Moreover also I gave them statutes that were not good, and judgments wherein they should not live.’”⁷⁰⁶

⁷⁰³ Jewish and Samaritan support of the early Muslim conquerors appears to be a result of Heraclius’ edict forcing the conversion of Jews throughout the Byzantine empire (634 A.D.); Jews apparently acted as spies and guides as well as joining in rebellions, and it has been noted that Abū Bakr re-established the Samaritan Council in 639 A.D. (Tolan, *Perceptions*, 11-12).

⁷⁰⁴ Robert W. Thomson, “Muhammad and the Origin of Islam in Armenian Literary Tradition,” in *Armenian Studies: In Memoriam Haig Berberian*, ed. Dickran Kouymjian (Lisbon: Calouste Gulbenkian Foundation, 1986), 831-2.

⁷⁰⁵ *Ibid.*, 851.

⁷⁰⁶ Bennett, “Crimes and Punishments (Hebrew),” 282.

The course of this survey will reveal a great deal more in the way of parallels, and it is not surprising, as we have noted, that Hebraic law is often included within the Mesopotamian corpus.

Additionally, some scholars have noted what they believe to be Hellenistic influences in Jewish law. Jackson, in a discussion of raiding bands in the post-biblical period, remarks on the occurrence of “the Greek noun ληστής, which found its way into Hebrew as *listis*,”⁷⁰⁷ and furthermore, that the Hebrew conception of thief versus brigand resulted from an influence of Greek κλέπτειν on the Hebrew *ganav*, ‘thief.’⁷⁰⁸ We may note also that Schacht thought the Jews of Iraq to have been influenced by Hellenic-style rhetoric.⁷⁰⁹

Whatever their origins and influences, the ancient Hebrew laws which concern us exist in several codes, best summarized by W.R.F. Browning:

“The OT legislation on criminal justice is contained in four codes of different dates, of which the earliest is the book of the Covenant in Exod. 20:22-23:33 and the latest the Priestly Code, whose prescriptions are scattered through Exod. (12&13; 25-31 and 35-40), Lev. (1-16), and Num. (1-10). In between are the Deuteronomic Code (Deut. 12-18), and the Holiness Code (Lev. 17-26), which is included within the Priestly corpus.”⁷¹⁰

As for the Covenant Code, it is “generally agreed to represent the earliest period of Israelite law, and often thought to have been compiled (from materials some of which, at least, were earlier) in the early monarchy;”⁷¹¹ and one author describes the Deuteronomic Code thus:

“The basic theme of Deuteronomy, meaning ‘the second law’, is the renewal of the covenant. Here the legal tradition of the Book of Exodus (for example the Decalogue or the Covenant Code) is not just repeated; it is reinterpreted in contemporary terms, so that the premises and demands of the covenant were brought near to every worshipping Israelite.”⁷¹²

⁷⁰⁷ Jackson, *Theft*, 33. Note also that “Arabic *liṣṣ*... must have appeared in the language during the Byzantine period, presumably via Syriac *leṣṭā*, whilst there exists the form *listīs*, closer to the Greek original ληστής, in Mishnaic Hebrew and Palestine Jewish Aramaic” (C.E. Bosworth, “Liṣṣ,” *EF*, v. 767, citations omitted).

⁷⁰⁸ Jackson, *Theft*, 20.

⁷⁰⁹ Schacht, “Foreign Elements,” 13.

⁷¹⁰ W.R.F. Browning, *Oxford Dictionary of the Bible* (New York: Oxford University Press, 1996), 81.

⁷¹¹ Jackson, *Theft*, 41.

⁷¹² RSV, 214.

This corpus of law, of course, was to undergo other transformative processes, not only in the subsequent Holiness and Priestly Codes, but in the post-biblical environment, leading to the formation of the Talmud – illustrative of “the life and thought of the Jewish communities in Palestine and Babylon.”⁷¹³

Jackson notes the “anti-traditional penalties”⁷¹⁴ of this period, and this, no doubt, is the result of the “abolition of Jewish power to pronounce or inflict capital punishment [which] occurred, according to the Jewish sources, forty years before the destruction of the Temple (i.e. in the year A.D. 30).”⁷¹⁵ It was a question of jurisdiction,⁷¹⁶ and any Jewish infliction of capital punishment in this period – such as the death of Stephen in Acts 7:58 – may well be examples of “the Jews... taking the law into their own hands during the absence of the Roman governor.”⁷¹⁷ Furthermore, there are some scholars who doubt that, at least as regards adultery, the capital punishment was ever inflicted at all, during or after the biblical period.⁷¹⁸

With or without capital jurisdiction, Jewish law was a long-standing feature in the legal landscape of the Irano-Semitic milieu, and its parallels to Islamic law are many and significant. Besides the many relevant examples this survey will explore, we also find a parallel to Islamic *ta'zīr* (wherein administered stripes are never to

⁷¹³ Hoyland, *Seeing Islam*, 238. He cites Neusner's *A History of the Jews in Babylon*.

⁷¹⁴ Jackson, *Theft*, 199-202.

⁷¹⁵ I. Abrahams, “Adultery (Jewish),” *ERE*, i.130, citations omitted.

⁷¹⁶ Jackson sees this as the underlying cause for the lack of Jewish legislation for brigandage, “the reason being that it was within Roman jurisdiction” (*Theft*, 73); and also for “the minimum liability of the robber,” i.e., the simple repayment of the stolen property's worth, which “seems to lie in the desire of the Tannaim to avoid Roman jurisdiction wherever possible” (*ibid.*, 186, 188).

⁷¹⁷ Browning, *Dictionary*, 355. See also p.81, where Browning remarks: “Whether the Jewish authorities had the right under the Romans to inflict capital punishment is debated. It is denied in John 18:31, supported by a saying in the Mishnah... and Stephen was brought before ‘the council’ and stoned. If Jews did have such a right, then – because Jesus was undoubtedly executed by the Roman method of crucifixion – it is argued that Jesus was accused of inciting to rebellion against Rome.” Note that, should this latter argument be the case, we have a provincial Roman precedent for the punishment of crucifixion for rebellion. In addition to this, see Grubbs, *Law and Family*, 243 n.148; where the author notes: “The stoning in John 8:1-11 was illegal; the Jews did not have the right to pass death sentences without Roman permission (John 18:31).”

⁷¹⁸ J. Poucher remarks: “It has been seriously doubted whether the extreme penalty was executed, Lightfoot failing to find the record of a single instance, except of a priest's daughter who was burnt according to the order, but she was unmarried” (“Crimes and Punishments,” *DOB*, i.521). W.P. Paterson has also made this observation, noting “there is no evidence that the capital penalty was actually inflicted in historical times,” supplying evidence that the punishment consisted only of divorce. Later, he notes: “Nor do the historical records of the pre-Christian period supply any evidence of the operation of the law in the exaction of the death-penalty. On the contrary, the prophetic writings imply that there was widespread guilt and widespread immunity” (“Marriage,” *DOB*, iii.273). Crone considers both the *qasāma* and the punishment of stoning to be Mosaic law acknowledged by the rabbis as being “no longer in force” (“Qasāma,” 180).

exceed thirty-nine),⁷¹⁹ a limited parallel to Islamic *diya* (blood-money),⁷²⁰ and parallels to the prohibition of alcohol;⁷²¹ all this in addition to several others proposed by Orientalists.⁷²² Such parallels, as we have seen, have led some of these Orientalists to conclude that practically all Islamic concepts, legal or otherwise, were 'borrowed' from Jewish tradition.

Above, we mentioned Mxit'ar of Anis and his polemical accusation that "Mahmet made his legislation from the old laws and the gospel," and may also note that nearly six hundred years earlier, at the very dawn of Islamic expansion itself, the Coptic patriarch under 'Amr b. al-'As is purported to have written to 'Amr, saying:

"...the law (Pentateuch) is one and the same and it is accepted by us Christians and by you Hagarenes (Mahgroyê), and by the Jews and Samaritans...."⁷²³

Burton has underscored what he interprets to be God's reaffirmation of the Torah as a source of law – at least in the case of adultery – in Q.5:42-9,⁷²⁴ and Crone presents

⁷¹⁹ Herbert Loewe, "Crimes and Punishments (Jewish)," *ERE*, iv.289. See also Jackson, *Theft*, 201, for Talmudic support via R. Eliezer b. Jacob's confirmation that "even without any pentateuchal (authority for their rulings) Beth din may administer flogging and (death) penalties; not, however, for the purpose of transgressing the word of the Torah but in order to make a fence for the Torah;" and 201-2, where Jackson remarks: "...there is evidence that second commonwealth judges had some discretion in the penalties they imposed, but there is no positive indication that this discretion was in fact used to impose stronger penalties for theft. This is not to say, however, that it was not."

⁷²⁰ Bennett, "Crimes and Punishments (Hebrew)," 283.

⁷²¹ Poucher, "Crimes and Punishments," 521: "Drunkenness [is] a vice which, in view of its consequences, may be regarded as a crime (Is 28^{1,3,7} 56¹², Ezk 23⁴² RV). Religious abstinence from strong drink was viewed in the same light as refraining from unclean meats.... Teetotalism was required of a Nazirite, Jg 13⁴, and commended, Jer 35¹⁹."

⁷²² Harald Motzki ("The Muṣannaf of 'Abd al-Razzaq al-San'ānī as a Source of Authentic Aḥādīth of the First Century A.H.," *Journal of Near Eastern Studies* 50 (January 1991): 19), suggests that the maxim '*al-walad li'l-firāsh*' must be traced from pre-Islamic times; then he proceeds to find a reference to it in the *Awā'il* literature and a purported Jewish parallel (citing Crone's *Provincial*, p.11), then finally quits as the project involves "too much speculation." However, Crone's attribution of the maxim to Jewish law is tenuous at best (infra, n.733). Note that she also attributes to Jewish law all of: 1) adultery as an impediment to marriage, 2) rules regarding theft, 3) *al-aḥkām al-khamsa*, 4) aspects of reason, custom, written / unwritten law, *maṣlaḥa*, and *istiṣhāb*, 5) the collective oath, and 8) dietary laws (*Provincial*, 3 n.24). Elsewhere she argues against the Byzantine *agoronomos* as progenitor of the Islamic *muḥtaṣib*, claiming that "the *muḥtaṣib* tells us more about the relationship between the Arab conquerors and Judaism than it does about that between Greek, Roman and Islamic law" (pp.107-8); as well as arguing that "the rule that slaves mutilated by their masters must be freed is Jewish, not Roman," citing Exodus 21:26f., and the Babylonian Talmud, *Kiddishin*, fols. 24b-25a, (p.87).

⁷²³ N.A. Newman, ed. and trans., *The Early Christian-Muslim Dialogue: a Collection of Documents from the First Three Islamic Centuries, 632-900 A.D.* (Hatfield, Pennsylvania: Interdisciplinary Biblical Research Institute, 1993), 24. See also Crone, "Qasāma," 179; where, referring to her *Hagarism*, she notes; "Syriac sources describe the Torah as the (apparently only) scripture of the Arabs in 644, and testify to the presence of both Torah, Koran and *Sūrat al-baqara* (as a separate book) by 720 at the latest."

⁷²⁴ Supra, n.256.

us with excerpts from the works of Islamic story-tellers explaining a continuity of use of the *qasāma* from Moses through to the Prophet, in yet another attempt to prove ‘borrowing’ from the Jewish tradition.⁷²⁵

Indeed, Torrey, in his book *The Jewish Foundation of Islam*, argues that the very term ‘Islam’ itself is nothing but a loan-translation directly ‘borrowed’ from Judaic tradition, “just as the story of Abraham and the offering of Ismael (with Ismael substituted for Isaac) has its origin in Jewish tradition.”⁷²⁶ Schacht mentions that “[i]nfluences of Talmudic on ancient Islamic law... have often been pointed out and are easy to account for; the spirit of both systems, too, is similar;”⁷²⁷ and Crone, as we have seen, proposes that not only did Muḥammad “confirm” Mosaic law, but that the Arabs used the Torah as their scripture, and that “Islamic law... is overwhelmingly of foreign origin, one of the most important sources being Jewish, not Jāhili law.”⁷²⁸ Indeed, she claims that “the structural similarity between Jewish and Islamic law is obvious to the naked eye” and that “it does not take much knowledge of Jewish law to see its influence in the most diverse provisions of Islamic law.”⁷²⁹ This last statement is particularly telling, for she subsequently raises the following examples: 1) adultery as an impediment to marriage⁷³⁰ (as in Q.24:3), never noting that the rule imposed by Lev.21:7 regulates those whom *priests* may marry, and is also much more likely a prohibition against prostitutes than against adulteresses;⁷³¹ 2) ‘*al-walad li’l-firāsh*,’⁷³² citing references in the Babylonian

⁷²⁵ Crone, “Qasāma,” 173-5.

⁷²⁶ As summarized by Bravmann, *Spiritual Background*, 14-15; who refutes this notion, maintaining that “the original sense of the term as a designation for the religion of Muḥammad is ‘defiance of death, self-sacrifice (for the sake of God and his prophet)’ or ‘readiness for defiance of death’” (ibid., 8).

⁷²⁷ Schacht, “Foreign Elements,” 10, footnote omitted (he cites Bousquet and Bergsträsser).

⁷²⁸ Crone, “Qasāma,” 155, 176. Regarding early Islamic scholars, she says: “They found their law in the Pentateuch, [and] saw Muḥammad as a Pentateuchal revivalist...” (ibid., 178). Later, she makes the claim that the non-Kūfan schools of law ‘borrowed’ Pentateuchal law, then reshaped it by the Talmud (192), but how can this make any sense? First the jurists copied the original Old Testament legislation, and then they separately copied the reforms of the rabbis, with which they went back and modified the first ‘borrowing’? Crone’s obvious intent here is to rule out any contribution on the part of the early Arab Muslims, and indeed it is exactly this claim which she makes on p.196, where she underscores that there was absolutely no intellectual input on their behalf whatsoever.

⁷²⁹ Crone, *Provincial*, 2-3.

⁷³⁰ Ibid., 3 n.24, 11.

⁷³¹ The only other reference to adultery as an impediment to marriage is implied in Num.5ff, wherein, if the wife fails the ordeal – i.e., is ‘proven’ an adulteress – she is divorced from her husband and forbidden to marry the paramour. As for this law being meant only to regulate priestly conduct, Dr. Joseph Lowry has offered the following caution in his review: “Much Biblical law concerns priests, but was then expanded to apply to the community as a whole during the exile after the destruction of the second temple, so this point is not necessarily probative.”

Talmud which, even when taken out of context (as indeed they must be to relate to the Arabic maxim), only peripherally touch upon the same concerns;⁷³³ and 3) theft, claiming that Schacht was incorrect to attribute the Islamic rulings to Roman *furtum* when they are in fact Jewish.⁷³⁴

As regards this last point especially, the evidence is simply contrary. Jewish law approaches theft from two perspectives: 1) *ganav*, 'furtive, secretive theft,' for which the punishment is pecuniary; and 2) *gazal*, 'open theft, robbery, brigandage,' for which no punishments are prescribed (the crime falling within the sphere of war). How can this be considered the source of Islamic rulings on theft, especially in light of Hammurabi's Code, which, as we have seen, approaches the crime from: 1) *šaraqū* (significantly closer to Arabic *sariqa* than Hebrew *ganav*), among whose punishments we find, as in Islam, hand-amputation; and 2) *ḥabatu* (again, much closer to Arabic *ḥirāba* than Hebrew *gaza*), which, as in Islam, is punished by death? The case for Hammurabi is much stronger. Yet, there are similarities shared by all three traditions: the distinction between open and furtive, for instance, and harsher punishment for the former. How can these be accounted for? Once again, the only model that truly makes sense of these similarities – and differences – is that of a

⁷³² Crone, loc. cit.

⁷³³ First of all, Crone cites the *Sotah* tractate of the Babylonian Talmud, fols. 27b and 37a (*Provincial*, 11 n.107), as parallels to 'al-walad li'l-firāsh.' A review of 27b turns up nothing related to the Arabic maxim, though it does contain a *mishnah* referring to the ordeal of the bitter waters as described in Num.5:11-31, and which makes clear that the wife is forbidden to both husband – who divorces her – and paramour – who cannot marry her. Proceeding to folio 37a, one is even more perplexed – there being nothing whatsoever related to adultery or the legitimacy of children. However, 37b contains the commentary R. Judah b. Nahmani, which alludes to "one who has immoral intercourse, and begets a son who goes to live among heathens and worships idols; cursed be the father and mother of this man since they were the cause of his sinning (*The Soncino Babylonian Talmud* [book online], ed. Rabbi Dr. I. Epstein (London: Soncino Press, 1935-48, accessed 15 July 2005), *Come and Hear: An Educational Forum for the Examination of Religious Truth and Religious Tolerance*; available from <http://www.come-and-hear.com/talmud/index.html>; Internet), still hardly resembling in any way the Arabic maxim. However, in folio 27a, we find the following: "But the legal decision is: Let a man marry the daughter of a woman of ill-repute rather than a woman of ill-repute; because R. Tahlifa, the son of the West [i.e., the Palestinian], recited in the presence of R. Abbahu, If a woman is an adulteress, her children are legitimate since the majority of the acts of cohabitation are ascribed to the husband." This is still a bit of a stretch, however, as it is the single opinion of a single authority (hardly the equivalent of a maxim), and refers to a different topic altogether, i.e., "Let a man marry the daughter of a woman of ill-repute," etc.; whereas Uri Rubin has shown us that, although also concerned with the legitimacy of children born to an adulteress, "the basic function of the *firāsh* maxim should be comprehended against the background of *di'wa* [the pre-and early Islamic practice of laying claim to children born of slave-girl prostitutes]" (Uri Rubin, "'Al-Walad li-l-Firāsh: on the Islamic Campaign against Zinā'," *Studia Islamica* 78 (1993): 17). One is left to wonder, then, when Crone claims a Jewish parallel to the Arabic maxim, what precisely is she referring to?

⁷³⁴ Crone, *Provincial*, 11 n.108. She cites Jackson, *Theft*, 126ff., where he discusses what is very much indeed a parallel to Islamic *niṣāb* (infra, p.167). This, however, as we shall soon see, is practically the only resemblance between theft in the Jewish and Islamic traditions.

common source with divergent development in a continuous and integrated cultural milieu. Nor do we need assume that the oldest culture, in this case Hammurabi's Babylonia, is the progenitor. The true source may be shared by all three, and thus more ancient than any one inheritor.

Finally, before beginning our survey, it should be noted that some scholars have posited influences on Islamic law by the 'fundamentalist' Jewish sect known as the Karaites. Indeed, this sect is known to have rejected rabbinic law, attempted "to restore the death penalty to its ancient position," reverted to the biblical laws of *talion*, and reinstituted the punishment of stoning for adultery. They also had an understanding of who was liable to stoning for adultery which, like the Sunni conception of *iḥṣān*, included the divorcée and the widow (though also the betrothed girl before her marriage as per Deut.22:20, 30).⁷³⁵ However, due to the fact that the founder of this sect, 'Anan ben David, was not only a contemporary of Abū Ḥanīfa, but was said to have spent time in prison with him, we may assume that any such resemblances between the laws of the Muslims and Karaites may equally as likely be the influence of the former on the latter.

Whatever the case of origins and influences, a brief consideration of the Decalogue of the old Covenant Code is sufficient to impress upon the scholar that selfsame continuity and sensibility regarding our chosen topics as can be found in Islamic law:

"You shall not commit adultery.
You shall not steal.
You shall not give false testimony against your neighbor."⁷³⁶

Here is not only a fine illustration of the theft-adultery link, but an indication that the issues engendered by the Islamic *ḥudūd* for *zinā*, *sariqa*, and *qadhāf* are all well-represented in Judaic law.

Stoning and zinā-related parallels

Earlier we discussed the opinion of several Orientalists that the punishment of stoning was derived by early Muslims from the Torah, and indeed, by far the closest parallels to the penalty in Islam are to be found in Judaic law, specifically

⁷³⁵ Salo Wittmayer Baron, *A Social and Religious History of the Jews* (New York: Columbia University Press, 1952-1967) v.240.

⁷³⁶ Exodus 20:14-16 (NIV, 81); also repeated in Deuteronomy 5:18-20 (ibid., 193).

within the Deuteronomic Code, 22:13-30.⁷³⁷ This section dealing with marriage violations begins with a parallel of Islamic *qadhī* by which the groom accuses his new bride of not being a virgin, then lays down the appropriate course of action should his charge prove false. The next section, however, sets down what is to be done should the accused's father be unable to clear her name:

Deut.22:20-1: "If, however, the charge is true and no proof of the girl's virginity can be found, ²¹she shall be brought to the door of her father's house and there the men of the town shall stone her to death. She has done a disgraceful thing in Israel by being promiscuous while still in her father's house. You must purge the evil from among you."⁷³⁸

The Code next deals with the punishment for adultery:

Deut.22:22: "If a man is found sleeping with another man's wife, both the man who slept with her and the woman must die. You must purge the evil from Israel."⁷³⁹

And finally we read:

Deut.22:23-4: "If a man happens to meet in a town a virgin pledged to be married and he sleeps with her, ²⁴you shall take both of them to the gate of that town and stone them to death – the girl because she was in a town and did not scream for help, and the man because he violated another man's wife. You must purge the evil from among you."⁷⁴⁰

The Code continues with penalties for rape.

Sandwiched between two related crimes punished by stoning, one might assume that the crime of adultery as expressed in Deut.22:22 incurs the same penalty.⁷⁴¹ This assumption is further supported by the rather wide range of applications of stoning in Judaic law. Bennett notes that, among the ancient Hebrews, "[s]toning seems to have been the most usual mode of capital punishment"⁷⁴², and Poucher expands on this, saying:

⁷³⁷ Of course this does not entail that they were 'borrowed,' as maintained by Juynboll (supra, p.47), Crone (supra p.49; and also "Qasāma," 197), and Schacht (supra, p.50).

⁷³⁸ NIV, 210.

⁷³⁹ Ibid.

⁷⁴⁰ Ibid.

⁷⁴¹ This seems not to have been the case in the post-biblical period, however (infra, p.156). It should also here be noted that in Leviticus, too, we find not only a prohibition of adultery (Lev.18:20), but a law prescribing capital punishment (Lev.20:10): "If a man commits adultery with another man's wife – with the wife of his neighbor – both the adulterer and the adulteress must be put to death" (NIV, 127). Note that this section (Lev.20:1ff.) begins with the phrase "The Lord said to Moses, 'Say to the Israelites...'" – the laws themselves thus expressed (as in the Qur'ān) by the voice of the Divine.

⁷⁴² Bennett, "Crimes and Punishments (Hebrew)," 281.

"Stoning was the ordinary formal and legal mode of inflicting punishment in the earlier history of the children of Israel, and was in vogue before the departure from Egypt (Ex 8²⁶). Even beasts might be the victims, evidently as a spectacular example (Ex 19¹³ 21^{28,29,32}). Stoning was the penalty for taking 'the accursed thing' (Jos 7²⁵); for adultery and unchastity, the death sentence being pronounced in Lv 20¹⁰, and the means of carrying it out stated in Dt 22^{21,24}, Jn 8^{5,7}; for blasphemy (Lv 24¹⁰⁻²⁴)...; for divination (Lv 20^{6,27}), idolatry (Dt 13¹⁰), dishonour to parents (Dt 21²¹), prophesying falsely (Dt 13^{5,10}), and Sabbath-breaking (Ex 31¹⁴ 35², Nu 15^{35,36}). Doubtless other capital crimes would thus be punished, and the city of Jerusalem was so threatened as if it were an individual culprit (Ezk 16⁴⁰)."⁷⁴³

The same extensive range of stoning penalties was true of post-biblical times, though with some differences as can be seen in Loewe's summary:

"The various crimes for which the penalty was death are enumerated in Mishn. *Sanh.* vii.-xi. Lapidation is the punishment for eighteen offenses – including incest, sodomy, bestiality, blasphemy, idolatry, the giving of one's children to Molech, necromancy, sorcery, Sabbath-breaking, the cursing of parents, criminal intercourse with a betrothed virgin, the inviting of others to idolatry, the perverting of a whole city, the practice of magic, and for the stubborn and rebellious son."⁷⁴⁴

What is most remarkable for this study, however, is the way in which these laws are worded. We have seen above that the punishment prescribed in Deut. 22:21 for the betrothed girl unable to prove her virginity is that "she shall be brought to the door of her father's house and there the men of the town shall stone her to death."

The King James Version, in this case slightly more faithful to the Hebrew text, reads:

"Then they shall bring out the damsel to the door of her father's house, and the men of her city shall stone her with stones that she die...."⁷⁴⁵

The transliterated Hebrew text itself reads:

"*w^ahowtsiy'uw 'et- hana`'raah 'el- petach beeyt- 'aabiyhaa uwcqaaluwhaa 'ansheey iyraah baa'abaaniym waameetaah*"⁷⁴⁶

Amazingly, although in this case the verb-root meaning 'to stone' is *caqal*,⁷⁴⁷ we have in the phrase "*uwcqaaluwhaa... baa'abaaniym waameetaah*" an exact parallel of

⁷⁴³ Poucher, "Crimes and Punishments," 527.

⁷⁴⁴ Loewe, "Crimes and Punishments (Jewish)," 289.

⁷⁴⁵ *Holy Bible: King James Version* (Cleveland: World Publishing Company, n.d.), 140.

⁷⁴⁶ *Transliterated Hebrew Old Testament* [book online], accessed 25 July 2005, *The Bible Centre*; available from <http://www.biblecentre.net/ot/tot/main.htm>; Internet, (Deut. 22:21).

⁷⁴⁷ "Caqal," *The Old Testament Hebrew Lexicon* [book online], eds. Brown, Driver, Briggs and Gesenius, accessed 25 July 2005, *Crosswalk.com: Bible Study Tools*; available from [http://www.biblestudytools.net/Lexicons/Hebrew/hebrew.cgi?search=5619&version=kjv&type=str](http://www.biblestudytools.net/Lexicons/Hebrew/hebrew.cgi?search=5619&version=kjv&type=str;);

the phrase utilized by Muslim *fuqahā*, i.e., “*al-rajm bi’l-ḥijārah ḥatā al-mawt*.”⁷⁴⁸ Furthermore, what follows this punishment by way of justification is the phrase “*liznowt beeyt ‘aabiyyah*,”⁷⁴⁹ translated in the King James Version “to play the whore in her father’s house,”⁷⁵⁰ and in the New International Version “by being promiscuous while still in her father’s house.”⁷⁵¹ The verb-root in question, *zanah*, has an obvious etymological relationship with Arabic *zanā*. A review of its eighty-three occurrences in the Old Testament, however, reveals that *zanah* is overwhelmingly linked to the act and meaning of prostitution, not to adultery or fornication – to which, in fact, it is twice presented in contradistinction.⁷⁵² As for adultery, the Old Testament prefers the root *na’aph*,⁷⁵³ which makes its first appearance in the Decalogue (Ex.20:14): “*Lo’ tin’aap*,”⁷⁵⁴ the famed “Thou shalt not commit adultery” of the King James Version. Nevertheless, Deut.22:21 is a remarkable precedent of stoning for a *zinā*-related offense, incorporating not only the familiar phrasing of ‘to stone with stones until dead,’ (albeit with etymologically

Internet. See also Loewe, “Crimes and Punishments (Jewish),” 289, where the author notes: “There seems no reason to doubt that *ṣqilā*... in the Pentateuch mean[s] what is commonly known as stoning....” Indeed the verb-root appears in the OT some twenty times, usually with the meaning of ‘to stone (to death)’: twice in relation to adultery / fornication (Deut.22:21, 24); ten times as punishment for other crimes (Ex.21:28, 29, 32; Deut.13:10, 17:5; Jos.7:25; 1Kin.21:10, 13-15); twice as a means of killing in instances of rebellion (Ex.17:4; 1Sam.30:6); once in reference to the Egyptians (apparently as punishment for offending their religion, Ex.8:26); once for trespassing on the mount while God was residing there in communion with Moses (Ex.19:13); and four times meaning simply to cast or gather stones (2Sam.16:6, 13; Isa.5:2, 62:10).

⁷⁴⁸ Supra, n.37.

⁷⁴⁹ *THOT*, (Deut.22:21).

⁷⁵⁰ *KJV*, 140.

⁷⁵¹ *NIV*, 210.

⁷⁵² The *zanah*-root, for our purposes, appears seven times in relation to individual laws (Gen.38:24; Lev.19:29, 21:7, 9, 14; Deut.22:21, 23:18); the numerous remaining occurrences as mentions – at times allegorical – translated in the *KJV* as “an harlot / a whore,” “to play the harlot / whore,” “whoredom,” “to go a whoring after,” and “to commit whoredom;” and in the *NIV* as “prostitute / a woman defiled by prostitution,” “to be guilty of prostitution,” “to prostitute oneself,” “prostitution,” “to indulge in sexual immorality,” “to become promiscuous,” and “to be unfaithful.” OT Ezekiel contains no less than 19 occurrences of the related form *taznuwth*, used allegorically in relation to the misdeeds of Israel / Jerusalem and translated as “fornication / whoredom” in the *KJV*; “prostitution / promiscuity / lust / lavishing one’s favors” in the *NIV*. From this it is obvious that Heb. *zanah* has much more to do with prostitution than with adultery. Indeed, the latter has a term of its own based on the root *na’aph*, with which *zanah* is put into contradistinction in Isa.57:3: “*zera m’naa’eeep watizneh*” (*THOT*, Isa.57:3); “the seed of the adulterer and the whore” (*KJV*, 458), or “offspring of adulterers and prostitutes” (*NIV*, 796); and again in Hos.4:13: “*Al-keen tizneynaah b’nowteeykem w’kalowteeykem t’naa’apnaah*” (*THOT*, Hos.4:13); “therefore your daughters shall commit whoredom, and your spouses shall commit adultery,” (*KJV*, 5540; or “therefore your daughters turn to prostitution and your daughters-in-law to adultery” (*NIV*, 967).

⁷⁵³ This root appears four times in relation to OT regulations (Ex.20:14, Lev.20:10, Deut.5:18, Jer.3:8); and over twenty times in various mentions, allegorical or otherwise, translated in both the *KJV* and the *NIV* as “adultery / adulterer / adulteress.” See also Paterson, “Marriage,” 273, for written Hebrew forms.

⁷⁵⁴ *THOT*, (Ex.20:14).

non-related vocabulary), but also the root *zanah* in a meaning linked to Arabic *zanā*.

Other prescriptions for stoning utilizing the root *caqal* include: 1) Deut.22:24, which, as we have seen, prescribes stoning for the illegal union of a man and “a virgin pledged to be married” while in town; 2) Ex.21:28-9, 32, in which the goring ox (and perhaps his owner, too, in 21:29) is stoned; 3) Deut.13:10, where the one who tempts his fellows to worship other gods is stoned; 4) Deut.17:5, in which the worship of other gods itself is so punished;⁷⁵⁵ 5) Jos.7:25, where a thief who has stolen from the plunder is stoned (along with his sons, daughters, and livestock); and 6) 1Kin.21:10, 13-15, in which Naboth is stoned for blasphemy. Note that, with the exception of the goring ox, all of the above employ a phrase meaning ‘stoning with stones.’

Caqal, however, is only one of two roots employed by the Old Testament for the punishment of stoning. The other, much more familiar to the eyes of the Muslim *faqīh*, is *ragam*, and this obvious relative of Arabic *rajm* occurs no less than fifteen times in the Old Testament. With the exception of Ezekiel (16:40 and 23:47) however, in which Jerusalem and Samaria are likened to “women who commit adultery and shed blood” (Ezk.23:45),⁷⁵⁶ and are thus to be subjected to a mob which “will stone them and cut them down with their swords” (Ezk.23:47),⁷⁵⁷ none of the occurrences of *ragam* are in any way related to adultery or fornication. Unless, that is, one considers the acts of blasphemy, disobeying God’s commands, and rebellion against family authority as analogous to adultery. Such rulings as incorporate the root *ragam* for the punishment of stoning include: 1) Lev.20:2, for sacrificing children to Molech; 2) Lev.20:27, for sorcery; 3) Lev.24:14, 16, 23, for blasphemy; 4) Num.15:35-6, for gathering wood on the Sabbath; 5) Deut.21:21, for the rebellious son who disobeys his father and mother; and 6) Jos.7:25, for stealing from the

⁷⁵⁵ Note that worshipping other gods is analogous to adultery against God. This is demonstrated time and again by OT prophecies portraying Israel / Jerusalem as harlots or adulteresses, for which God sometimes has them stoned (as in Ezk.16:40, 23:47). This is intriguing in that it might indicate that stoning for adultery is a practice more ancient than its first appearance in the OT codes, as it had already at that point become allegorically (and legally) linked to a punishment for worshipping other gods. This possibility is further supported by the observation that Deut.21:15-21, 22:13-30 are “written in the casuistic (case-law) style of some laws in the Covenant Code (Ex.21.1-22.17...), [and] are apparently quoted from an older source, since they show no trace of Deuteronomic style” (RSV, 243 nn.13-30). From what ancient source, then, were these laws derived? We have already seen the stoning precedent of Urukagina’s reforms, not to mention several unspecified death penalties for adultery, so it is not unreasonable to suspect that stoning for adultery was a part of the ancient Near-Eastern common-law continuum from which these sections of the Deuteronomic Code took shape.

⁷⁵⁶ NIV, 914.

⁷⁵⁷ Ibid.

plunder – a sort of sacred theft, as plunder is considered “of the devoted things.”⁷⁵⁸ Interestingly, although employing a different root than *caqal*, we still see several instances of the phrase “stone them / him with stones;” including all of the above laws (with the exception of Lev.24:14,16) as well as various mentions (as in Num.14:10; 1Kin.12:18; and 2Chr.10:18, 24:21). Jos.7:25 in fact contains both versions of this phrase, confirming that *caqal* is equated to *ragamr*.

“*Wayirg^amuw 'otow kaal- Yisraa'eel 'eben Wayisr^apuw 'otaam baa'eesh Wayicq^aluw 'otaam baa'abaaniym,*”⁷⁵⁹

“And all Israel stoned him [i.e. Achan son of Zerah] with stones, and burned them [i.e. his sons, daughters, livestock, and possessions] with fire, after they had stoned them with stones.”⁷⁶⁰

In addition to all this, there are other parallels in Judaic law for the stoning punishment in Islam, especially as regards procedure and execution. Browning observes that “[e]xecutions took place outside cities, and it is prescribed in Deut.17:7 (corroborated by John 8:7) that a stoning should be initiated by the witness in the case.”⁷⁶¹ Poucher, too, notes that “[i]n an orderly proceeding the witness was to cast the first stone (Dt 17⁷, Jn 8⁷), and as the Rabbins say, on the chest; and if others were necessary to produce death, the bystanders hurled them.”⁷⁶² Not only does this confirm that a conviction of adultery in Judaic law might be accomplished through witnesses, but that witnesses were to initiate the stoning and not, at least initially, to hit the face.

Such procedural parallels to Islamic law, combined with the *zinā*-related stoning punishments of Deuteronomy and the multiple occurrences of etymologically linked words such as *zanah* and *ragam* throughout the Old Testament, certainly would make for a compelling ‘borrowing’ argument should one be content to limit oneself to outward similarities. However, as we shall soon demonstrate, Islamic law is quite different on a number of fundamental counts. This leads us once again to the model of common source with divergent development as the better explanation.

⁷⁵⁸ Jos.7:11 (NIV, 232).

⁷⁵⁹ *THOT*, (Jos.7:25).

⁷⁶⁰ *KJV*, 154.

⁷⁶¹ Browning, *Dictionary*, 81.

⁷⁶² Poucher, “Crimes and Punishments,” 527. See also Loewe, “Crimes and Punishments (Jewish),” 289; and A.E. Garvie, “Slander or Evil-Speaking,” *DOB*, iv.553, where the author notes: “When the charge involved a death sentence, the witness had to be the first in carrying it out (Dt 17⁷; cf. Ac 7⁵⁸).”

As regards *zinā* or sex-related crimes in general, the Old Testament Codes cover the full gamut of offenses represented in the ancient Mesopotamian codes we have seen. Interestingly, when sorting out the various Hebrew crimes and punishments, Bennett organizes them into six categories. The third is for “sexual offences,” under which he lists “*bestiality* (Ex 22¹⁹, Lv 18²⁸); *prostitution* (Lv 19²⁹); *incest* (Lv 18^{6ff}); [and] *sodomy* (Lv 18²²).”⁷⁶³ One notes the lack of adultery and rape, which, in fact are to be found in the following and fourth category, “offences against property: *adultery* (derivatives of זָנָה, *n’p*, Ex 20¹⁴); *kidnapping* (Ex 21¹⁶); *leaving pit uncovered, or otherwise causing damage through carelessness* (Ex 21²⁸⁻³⁶ 22⁶⁻¹⁵); *theft* (Ex 22¹⁻⁵); *usury* (Ex 22²⁵); *seduction or rape of daughter* (Ex 22^{16f}, Dt 22²³⁻²⁹).”⁷⁶⁴ By arranging adultery and rape along with kidnapping and theft under “offences against property,” Bennett is not only illustrating and maintaining an ancient and pervasive tradition, but he is providing us with an excellent clue as to the mystery of the theft-adultery link. This clue has been noticed by other scholars as well, and resides within the ancient definition of adultery itself, best summarized by Paterson:

“The biblical conception of adultery is often expressed by saying that, as in Roman law, a woman could violate only her own marriage, a man only that of another. In other words, an unchaste bride was guilty of adultery, an unchaste husband was guilty of it only if he sinned along with the bride of another. If in certain cases the law took cognizance of a husband’s licentiousness, it was because it involved infringement of property rights, and gave rise to a claim for damages (Ex 22¹⁶, Dt 22²⁹).”⁷⁶⁵

A married woman in the ancient world was, according to this understanding, the property of her husband and, in that sense, a theft-able object – the means being called ‘adultery,’ but still operating on the general principle of theft. Cook, writing on marriage, notes:

“[T]he prevailing type in the Semitic world is that wherein the woman follows the husband, who has paid a ‘bride-price’ (Arab. *mahr*, Heb. *mōhar*) to her kin, whereby he has compensated them for the loss of her services, and has acquired the right of possessing sons who shall belong to his tribe. By this act the man has practically acquired the exclusive

⁷⁶³ Bennett, “Crimes and Punishments (Hebrew),” 280.

⁷⁶⁴ Ibid.

⁷⁶⁵ Paterson, “Marriage,” 273. Browning, writing on the prescribed penalty of death for adultery in Deut. 22:22, notes: “The reference is not to any sort of extramarital sex but to that of a man having sex with a married woman, who is regarded as some other man’s chattel” (*Dictionary*, 7).

property-rights, and deprives the woman of disposing of her own person."⁷⁶⁶

Furthermore, this status as property extends to unmarried women as well, for as Cook further notes:

"Under the ordinary type of marriage, known as the *baal* or marriage of subjection, the Semitic woman, if unmarried, is entirely under the authority of her father; if betrothed or married, of her husband. It is necessary, therefore, to observe that, if adultery is primarily an infringement of the husband's rights, seduction is no less a matter for the father of the unbetrothed virgin."⁷⁶⁷

Understanding this ancient mindset is of great benefit in making sense of how the ancient codes deal with adultery. From this perspective it becomes very clear that a great deal of a woman's value in ancient Hebrew society revolved around her chastity, whether that of the virgin within the property considerations of her father, or that of the wife within the property considerations of her husband. It was the seducer / rapist who might impinge on the former; the adulterer on the latter. A woman's chastity and faithfulness was a precious possession, and if she was complicitous in its theft from the rightful owner, she was to pay with her life.

Obviously, this conception resulted in a rather one-sided application of adultery penalties. We have seen Paterson's observation that "an unchaste bride was guilty of adultery, an unchaste husband... only if he sinned along with the bride of another," and to this we might add Poucher's comment that "in the Isr[aelitic] as well as Rom[anic] law, the term was confined to illicit intercourse of a married or betrothed woman with any other man than her husband."⁷⁶⁸ Nor did this one-sided application change in the post-biblical period, as Abrahams notes:

"[T]he law continued to regard as adultery only the intercourse of a married woman with any man other than her husband. Thus a married man was not regarded as guilty of adultery unless he had intercourse with a *married* woman other than his wife. For in theory he might have several wives, and an unmarried woman with whom he had intercourse might become his wife. In fact, according to the Rabbinic law, such intercourse might be construed into a legal marriage."⁷⁶⁹

⁷⁶⁶ Cook, "Adultery (Semitic)," 135.

⁷⁶⁷ Ibid. The author cites Robertson Smith and Wellhausen.

⁷⁶⁸ "Crimes and Punishments (Hebrew)," 281-1.

⁷⁶⁹ Abrahams, "Adultery (Jewish)," 130.

It is noteworthy that the Qur'ān, through its wording in Q.24:2 of "*al-zānīya wa al-zānī*," is in direct opposition to this ancient concept. Both the adulterer and the adulteress, it is made clear, are to be punished equally – a principle taken up by the *fuqahā'* and very much in evidence throughout the regulations relating to *zinā*.

As for the punishments themselves in Judaic law, sexual offences did not always incur stoning, nor, in fact, were they always capital; although that certainly seems to have been the case in early Hebrew society. Unchastity, according to tradition (Gn.38:24), was originally punished by burning,⁷⁷⁰ a means of execution which survived into "[t]he Sinaitic law [which] directs that a priest's daughter shall be burned for fornication (Lv 21⁹); and that this shall be the form of punishment for incest with a wife's mother (Lv 20¹⁴)."⁷⁷¹ As for the unspecified punishment for adultery in Deut.22:22, despite its appearance between two related crimes punished by stoning, the post-biblical community interpreted it to mean strangling;⁷⁷² and indeed, once "the Jewish power to pronounce or inflict capital punishment" had been lost, "[t]he punishment for adultery was modified into the divorce of the woman, who lost all her rights under the marriage settlement; the man was scourged."⁷⁷³ Scourging, too, "was inflicted on a bondmaid overtaken in illegal intercourse (Lv

⁷⁷⁰ Paterson, "Marriage," 273. Poucher notes: "It has been surmised that in some cases where burning was inflicted as the punishment for unchastity, it meant branding on the forehead as a mark of shame. If, however, the extreme penalty is intended, it is represented as of pre-Mosaic authority, and was proposed for Tamar (Gn 38²⁴)" (Crimes and Punishments," 523).

⁷⁷¹ Ibid. See also Paterson, loc. cit.; Bennet, "Crimes and Punishments (Hebrew)," 281; Loewe, "Crimes and Punishments (Jewish)," 289 (the author notes burning for a priest's daughter "and for nine forms of incest – only, however, when committed during the life of the legal wife"); and the *SBT*, part I (*Zera'im*), tract.6 (*Terumoth*), chap.vii, 2nd *mishnah*, where the distinction is made between the daughter of a priest married to an Israelite (burning), one married to "those disqualified" from marrying into priesthood (strangling), and one married to any other man (burning). Loewe (loc. cit.) also notes: "[T]he provisions of the Mishna show a great alteration in the manner of the execution. In the case of burning (Mishn. *Sanh.* vii.2), the criminal was firmly fixed in pitch, up to his knees. A strong cloth, covered with a soft wrapping, was twisted round his neck, and its two ends were pulled by officials. The soft cloth was added to avoid unnecessary pain and in order to prevent death by strangulation. The criminal was thus forced to open his mouth, into which there was poured a stream of molten lead which instantly consumed his vitals, death being speedy and merciful. [...] R. Eliezer b. Šadoq, a *tanna* of the 1st cent., relates that once he saw the daughter of a priest who had committed unchastity (Lv 21⁹) bound in vine tendrils and burnt...."

⁷⁷² Paterson, "Marriage," 273; Loewe, loc. cit.; Abrahams, "Adultery (Jewish)," 130. The punishment is described in Mishna *Sanh.* xi.1. Such was also the case for the priest's daughter married to a "disqualified" man as in the previous note; and as we have seen, there may be a possible precedent for this punishment in Hammurabi's Code (*supra*, n.616).

⁷⁷³ Abrahams, "Adultery (Jewish)," 130. See also Grubbs, *Law and Family*, 243; and Poucher, "Crimes and Punishments," 521.

19²⁰),”⁷⁷⁴ and in these offenses punished by the whip we have a parallel of flogging for *zina* in Islam. Stripes were applied somewhat differently, however, under “[t]he Mosaic economy [which] ordained that an offender might be punished with stripes (Lv 19²⁰, Dt 22¹⁸), not exceeding forty (Dt 25³); and this limit was carefully observed.”⁷⁷⁵ However, although the method of administering the stripes was quite different in earlier periods (“the culprit lay on the ground while under castigation, in the presence of the judge, who during the infliction proclaimed the words in Dt 28^{58,59}, and concluded with those in Ps 78³⁸”), “[i]n later times an adult male was stripped to the waist and in a bending posture lashed to a pillar; a female received the stripes while sitting with head and shoulders bent forward...;”⁷⁷⁶ regulations quite similar to those of the *shari‘a*.⁷⁷⁷ Poucher supplies us with a final note on flogging, writing:

“It is a symbol of divine correction (Ps 89³²), and is regarded as a purifier (Pr 20³⁰). The Moslems have a proverb that the stick is from heaven, a blessing from God.”⁷⁷⁸

In Judaic law, too, we find what may be a possible precedent for the Islamic punishment of banishment, although, as Poucher notes, “[t]here was no provision in the Mosaic code for exile, unless it is to be understood that in some instances he who was cut off from the congregation was expelled from his country as well.”⁷⁷⁹ This ‘cutting off from the people’ was seen by the post-biblical community as a sort of excommunication for one day, seven days, or an indefinite period of time;⁷⁸⁰ though among the early Hebrews it seems “in at least seven cases, [the offender] was

⁷⁷⁴ Ibid., 527. See also p.522, where Poucher notes that “her enticer, besides paying the fines must make a trespass-offering (Lv 19²⁰⁻²²),” a fact also noted by Paterson (loc. cit.) Bennett observes that flogging was also inflicted “on her partner in the offense” (“Crimes and Punishments (Hebrew),” 281).

⁷⁷⁵ Poucher, “Crimes and Punishments,” 527. See also J. Strachan, “Scourge,” *DOB*, iv.419-20, who notes “[t]he Jewish method is fully described in the Mishna. The scourge consisted of three thongs of leather, and the offender received thirteen stripes on the bare breast and thirteen on each shoulder (*Makkoth* iii.12);” and Loewe, “Crimes and Punishments (Jewish),” 289, where the author mentions “in no case could the stripes exceed thirty-nine,” and that “[t]he Mishna (*Makkoth*) enumerates fifty transgressions punishable by flagellation. Maimonides... gives a far longer and more comprehensive catalogue.”

⁷⁷⁶ Poucher, “Crimes and Punishments,” 527.

⁷⁷⁷ *Supra*, p.23.

⁷⁷⁸ Poucher, loc. cit. Loewe notes: “A culprit who received stripes was *ipso facto* freed from excision... and recovered all those rights from which his crime might have debarred him (Mishn. *Sanh.* xiv15)” (“Crimes and Punishments (Jewish),” 289). So, too, in Islam, where the application of the *hadd* is seen as an expiation of the sin involved in the offence, clearing, as it were, the offender’s slate.

⁷⁷⁹ Poucher, “Crimes and Punishments,” 523.

⁷⁸⁰ Loewe, “Crimes and Punishments (Jewish),” 290.

unquestionably exposed to death (Lv 18²⁹ 20⁹⁻²¹).⁷⁸¹ There is at least one biblical suggestion that adulteresses in ancient Israel may have been so exposed to death (Ezk.16:30), but Bennett points out that, "as these chapters were written in Babylonia, the imagery may have been suggested by heathen practices."⁷⁸² So too with the cutting off of the nose and ears of the adulterer described in Ezk.23:25, Poucher noting "it appears that the usage was in vogue among the Babylonians,"⁷⁸³ as well as the possible Judaic punishment of drowning recorded by Jerome, whose roots might be traced back to Hammurabi's Code.⁷⁸⁴

As regards provisions for *flagrans delictum*, Paterson remarks that the early appearance of adultery as a capital offence in Hebrew tradition suggests that in earlier times the husband may have been entitled to slay both wife and paramour with impunity;⁷⁸⁵ and indeed "[i]t is in fact probable that a prosecution for adultery could only have been brought if there were actual eye-witnesses who had caught the couple *in flagrante delicto* (Num.5:13)."⁷⁸⁶

As for the crime of rape, the Deuteronomic Code makes the following distinctions after Deut.22:23-4 which, as we have seen, provides for "if a man happens to meet in a town a virgin pledged to be married and he sleeps with her."

Deut.22:25-7: "But if out in the country a man happens to meet a girl pledged to be married and rapes her, only the man who has done this shall die. ²⁶Do nothing to the girl; she has committed no sin deserving death. This case is like that of someone who attacks and murders his neighbor, ²⁷for the man found the girl out in the country, and though the betrothed girl screamed, there was no one to rescue her."⁷⁸⁷

Of first note is the familiar 'in a town / in the country' distinction, which we have seen already in the Middle Assyrian laws (§55) and Hammurabi's Code (§150),⁷⁸⁸

⁷⁸¹ Poucher, "Crimes and Punishments," 524. These included "filial irreverence, incest, and unclean connexions...." See Bennett, "Crimes and Punishments (Hebrew)," 281, for the author's explanation as to why 'cutting off from the people' seems to have replaced the death penalty in many cases.

⁷⁸² Ibid.

⁷⁸³ Poucher, "Crimes and Punishments," 525.

⁷⁸⁴ Ibid., 524.

⁷⁸⁵ Paterson, "Marriage," 273. The author writes: "At a certain stage of social evolution, adultery is commonly regarded as an injury which a husband is entitled to avenge by slaying the culprits; and when important powers of the family come to be taken over by the nation, it often happens that the death-penalty continues to be attached, at least in theory, to the capital sexual crime.... To this generalization of the sociologist the history of adultery among the Hebrews closely corresponds" (citation omitted).

⁷⁸⁶ Anthony Phillips, *Ancient Israel's Criminal Law: A New Approach to the Decalogue* (New York: Schocken Books, 1970), 118.

⁷⁸⁷ NIV, 210. See also Browning, *Dictionary*, 7, 81; Paterson, "Marriage," 273.

⁷⁸⁸ *Supra*, p.127 and n.639.

and which operates on the assumption that a girl forcibly assaulted in a town might cry for help and be heard, her silence being deemed complicitous. This, as we have seen, finds a parallel in Mālikī law.⁷⁸⁹ That the rapist in the country be killed and the girl remain blameless and unpunished also parallels the decisions of Muslim *fuqahā'*, but the regulations of Deut.22:28-9 are unique to Judaic (and Middle Assyrian) law:

Deut.22:28-9: "If a man happens to meet a virgin who is *not* pledged to be married and rapes her and they are discovered, ²⁹he shall pay the girl's father fifty shekels of silver. He must marry the girl, for he has violated her. He can never divorce her as long as he lives."⁷⁹⁰

Regarding sodomy and bestiality, Poucher notes that "[s]odomy was delicately but positively condemned in Gn 13¹³ 19^{5,7}, and regarded as an abomination (Lv 18²² 20¹³)," ⁷⁹¹ and that "[b]estiality [was] treated as a rank and mortal offence."⁷⁹² Both crimes receive an unspecified death penalty in Leviticus (20:13, 15, 16).⁷⁹³ In Leviticus, too, we find the prohibition of several types of incest, with the injunction that perpetrators "must be cut off from their people."⁷⁹⁴ This, as we have seen, was most likely a death sentence of some sort.

Finally, as regards sexual crimes and punishments, we might note the general prohibition of prostitution implied by Lev.19:29, and especially temple prostitution (Deut.23:17), even the earnings of which were forbidden entry to the tabernacle (Deut.23:18).⁷⁹⁵ Interestingly, Poucher notes that "from the term 'strange woman' in

⁷⁸⁹ Mālik, *Al-Muwaffa'*, 347 (41.4); among the circumstantial proofs Mālik requires of the rape victim to prevent her being stoned is her "crying out" at the time of the offence. See also Cook, "Adultery (Semitic)," 136.

⁷⁹⁰ *NIV*, 210. See *supra*, p.127; for the Middle Assyrian precedent. Poucher ("Crimes and Punishments," 522) interprets this regulation as dealing with "seduction" rather than rape: "Seduction consisted in the enticement of an un-betrothed virgin, for which restitution was to be made by subsequent marriage, unless the father interposed an obstacle, but then the usual dowry was exacted (Ex 22¹⁶). In Dt 22²⁸ it is stated that a fine of 50 shekels was required, and there is no hint of possible compromise. Seldon... states that the Sanhedrin added other mulcts, because this was so insignificant: one for the shame and dishonour; one for the loss of virginity and the vitiating of the body, and still another if force had been used; and some account was taken of the quality and station of the person injured..." (citations omitted). See also Bennett, "Crimes and Punishments (Hebrew)," 282.

⁷⁹¹ Poucher, *loc. cit.*

⁷⁹² *Ibid.*, 521. He continues: "The Talm. gives as a reason for slaughter of the beast, that all memory of the low transaction might be obliterated."

⁷⁹³ Although we have seen Loewe list them both among the crimes which incur stoning according to the Sanhedrin.

⁷⁹⁴ Lev.18:6-29, *NIV*, 125. Poucher ("Crimes and Punishments," 521) summarizes: "Carnal intercourse is treated as criminal when between a man and his mother, step-mother, half-sister, grand-daughter, step-sister, aunt, wife of an uncle, daughter-in-law, sister-in-law, step-daughter, step-grand-daughter (Lv 18¹⁶⁻¹⁸); or his mother-in-law (Dt 27^{20,23}). Mention of an own sister is omitted as too gross to consider." Cf. Q.4:22-3, *supra*, n.643.

⁷⁹⁵ See J.A. Selbie, "Sodomite," *DOB*, iv.559, for a discussion of the temple prostitutes, or *kēdēshīm*.

Pr 2¹⁶, [it would seem] that harlots were procured from foreigners;⁷⁹⁶ a fact which would shed some light on the 'foreign women' of Old Hittite laws §§191, 200A.⁷⁹⁷ The wording of Lev.19:29, "Do not prostitute thy daughter, to cause her to be a whore...",⁷⁹⁸ also finds a parallel in Q.24:33, "Do not compel your young women (*fatayātikum*) to prostitution (*al-bighā*)...";⁷⁹⁹ and we have already discussed the concept of previous adultery as an impediment to marriage (as in Q.24:3), although in Judaic law this seems to have pertained only to a prohibition on the adulteress marrying her paramour and the priest marrying a prostitute.

Conceptually speaking, the ancient Hebrews – although no concept parallel to *iḥṣān* is mentioned in the sources – seem at first to have considered widows in the category of those who deserve capital punishment for 'prostitution / whoredom' (Gn.38:24), as do the Sunni schools of law with *zinā*. Cook, however, notes that "[t]he charge against the widow in Gn 38, as the narrative shows, comes under the case of betrothed women,"⁸⁰⁰ Tamar having been promised to Judah's surviving son Shelah. This being the case, Judaic categories of women deserving death for illicit sexual activity appear to differ significantly from the Sunni, including, as they do, the betrothed virgin,⁸⁰¹ and with no real provision for the widow or divorcee.

Yet another seeming conceptual parallel is raised by Roberts, who sees the 'half-for-slaves' provision of the Qur'ān as comparable to Lev.19:20ff., and furthermore notes that the Mishna prescribes forty stripes for the slave.⁸⁰² Certainly, as Cook writes of this passage, "[w]hen the woman was of low standing, *e.g.* a slave, the death-sentence was not demanded."⁸⁰³ However, as the Kharijites purportedly raised to the early *fuqahā'* that the punishment of stoning cannot be halved, so too can the point be raised that forty stripes can hardly be considered half of the Judaic death-penalty. Furthermore, Poucher, writing on fines in Old Testament legislation, notes they "were permitted at the option of the injured party as a special privilege to

⁷⁹⁶ Poucher, "Crimes and Punishments," 521.

⁷⁹⁷ Supra, p.123.

⁷⁹⁸ K/V, 80.

⁷⁹⁹ The Qur'ānic verse, however, is commonly understood to mean 'slave-girls' due to the context of preceding verses.

⁸⁰⁰ Cook, "Adultery (Semitic)," 136.

⁸⁰¹ Cook (ibid.) notes: "It is intelligible that, in the former event [i.e., when the parents can't produce tokens of virginity] the girl is treated as an adulteress, since from the time that she was betrothed she is regarded *de facto* as a married woman." Of course, in Islam we have seen that *iḥṣān* is not imparted until the marriage has been consummated.

⁸⁰² Roberts, *Social Laws*, 39-40.

⁸⁰³ Cook, loc. cit.

freedmen (slaves being punished),”⁸⁰⁴ so the idea that slaves were to receive half the punishment of freemen clearly never surfaced in Judaic law, nor even was a lesser punishment guaranteed except in the case of the bondmaid of Lev.19:20ff.

Regarding procedural considerations, we have seen that Phillips, relying on the implications of Num.5:13, thought it probable cases of adultery could only be raised with eyewitnesses who had caught the couple in the act. A.E. Garvie also remarks that “[t]o avoid miscarriage of justice, the testimony of one person was not accepted as sufficient by the Jewish law (Nu 35³⁰, Dt 17⁶ 19⁵).”⁸⁰⁵ However, as we shall see in Deut.22:15ff., the accusing groom puts the onus on the bride’s father and mother to produce tokens of her virginity, i.e., she is guilty until proven innocent, a situation which simply never occurs in Islamic law.

Deut.22:13-19: “If a man takes a wife and, after lying with her, dislikes her and slanders her ¹⁴and gives her a bad name, saying, ‘I married this woman, but when I approached her, I did not find proof of her virginity,’ ¹⁵then the girl’s father and mother shall bring proof that she was a virgin to the town elders at the gate. ¹⁶The girl’s father will say to the elders, ‘I gave my daughter in marriage to this man, but he dislikes her. ¹⁷Now he has slandered her and said, “I did not find your daughter to be a virgin.” But here is the proof of my daughter’s virginity.’ Then her parents shall display the cloth before the elders of the town, ¹⁸and the elders shall take the man and punish him. ¹⁹They shall fine him a hundred shekels of silver and give them to the girl’s father, because this man has given an Israelite virgin a bad name. She shall continue to be his wife; he must not divorce her as long as he lives.”⁸⁰⁶

Despite the shifting of the onus onto the accused’s parents, there is yet a strong parallel to Islamic *qadh* here as far as the punishment. The phrase in Deut.22:18 “and the elders shall take the man and punish him,” or, in the *KJV*, “and the elders of that city shall take that man, and chastise him,”⁸⁰⁷ is commonly understood to mean that he be scourged. The *RSV*, in fact, reads: “Then the elders of that city shall take the man and whip him.”⁸⁰⁸

False accusation in general is treated in Deut.19:16-19. Cook ties this regulation to adultery, writing:

⁸⁰⁴ Poucher, “Crimes and Punishments,” 524.

⁸⁰⁵ Garvie, “Slander,” 553.

⁸⁰⁶ *NIV*, 209-10. See also Bennett, “Crimes and Punishments (Hebrew),” 282; Cook, “Adultery (Semitic),” 136; and Poucher, “Crimes and Punishments,” 522, 525, 527.

⁸⁰⁷ *KJV*, 140.

⁸⁰⁸ *RSV*, 243. Note that slanderers of priests’ daughters were to be strangled (Loewe, “Crimes and Punishments (Jewish),” 289).

“Mere suspicion of adultery is not enough, and terrible consequences may result from unsupported denunciation. Hebrew law required two witnesses, and (by an extension of the *talio*) the false accuser would bring upon himself the punishment his charge would have entailed upon another.”⁸⁰⁹

Whether or not such was ever applied in the case of adultery (we have seen that it was not in the case of the slandered bride – the slandering groom ought to have been stoned), Deut.19:16ff. certainly demonstrates the continuity of that same ancient concept we saw in Lipit-Ishtar §17 and Hammurabi §13,⁸¹⁰ reflected as well in the Qur’ānic injunctions regarding *qadhā* and *zinā*, which receive very nearly the same punishment.

Deut.19:16-19: “If a malicious witness takes the stand to accuse a man of a crime, ¹⁷the two men involved in the dispute must stand in the presence of the Lord before the priests and the judges who are in office at the time. ¹⁸The judges must make a thorough investigation, and if the witness proves to be a liar, giving false testimony against his brother, ¹⁹then do to him as he intended to do to his brother. You must purge the evil from among you.”⁸¹¹

Not surprisingly, the case of the accusing husband without witnesses is treated as well, this time in Num.5:11ff.; and true to ancient Hebrew Mesopotamian origins, it calls for trial by ordeal. Paterson summarizes it thus:

“(1) The trial takes place when a husband forms a suspicion, founded or unfounded, of his wife’s chastity (vv.¹²⁻¹⁴). (2) The procedure is that he brings his wife to the priest, along with a sacrificial gift of barley-meal (v.¹⁵); the priest sets her ‘before the Lord’ (v.¹⁶), loosens her hair (v.¹⁸), places in her hand the meal-offering (v.¹⁸), and stands before her holding an earthen vessel which contains a potion of holy water sprinkled with dust from the floor of the tabernacle (v.¹⁷). He then sets apart the potion to its judicial use—declaring that if she be innocent it will not injure her, if guilty it will cause her belly to swell and her thigh to shrink (v.²²). The woman having acquiesced with an ‘Amen,’ the priest writes down the curses, washes them off, adds the rinsings as a new ingredient to the potion (v.²³), and after some ritualistic observances gives her the water to drink (v.²⁶). (3) The issue is a judgment of condemnation or acquittal. If guilty, she is smitten with the threatened diseases (usually supposed to include dropsy... and is

⁸⁰⁹ Cook, loc. cit. See also Browning, Dictionary, 347; Garvie, “Slander,” 552f.; and Poucher, “Crimes and Punishments,” 526, who notes: “A false accuser was required to suffer the same penalty that he proposed against the accused (Dt 19¹⁹).”

⁸¹⁰ Supra, p.131.

⁸¹¹ *NIV*, 207.

shunned as accursed (v.²⁷); if innocent, she has the compensation of again becoming a mother (v.²⁸).⁸¹²

Although vastly different in form, we still have a parallel here for the Islamic oath-taking institution of *li'an*, in that the curse of God is invoked upon the woman if she be guilty. However, as we have seen with other aspects of Judaic law, this ordeal is one-sided – there being no real consequence for the man – unlike the Islamic institution, in which both parties call down God's curse upon themselves should they be lying.

Returning to the application of the capital penalty, we may note here the remarks of Lightfoot, who said:

"I do not remember that I have anywhere, in the Jewish Pandect, met with an example of a wife punished for adultery with death."⁸¹³

Indeed, it would seem that "[e]ven when a capital sentence had been pronounced and was about to be carried into execution, every chance of proving his innocence at the eleventh hour was accorded to the accused,"⁸¹⁴ and that the Rabbis appear to have succeeded in making the application of a capital punishment impossible. Baron, writing on the Karaites, notes that "they also greatly relaxed the rules of evidence wherewith rabbinic law had tried to hedge the conviction of criminals. A plea of guilty was now accepted as sufficient evidence for a death sentence."⁸¹⁵ It is Loewe who best summarizes this phenomenon:

"The infliction of death was surrounded by many preliminaries and obstacles. The law demanded not only the presence of two satisfactory eye-witnesses, whose testimony must support vigorous scrutiny... but also, before committing the crime, the accused must have received formal warning from the bystanders as to the consequences of his act.... No circumstantial evidence whatever was admissible, nor could the accused be convicted on his own confession. The stringency in examining and in challenging witnesses, the necessity of proving *hathra'ah*, the elaborate aids given to the accused—all tend to show that the infliction of capital punishment must have been practically impossible; and this seems to have been the precise aim which the Rabbis had in view."⁸¹⁶

⁸¹² Paterson, "Marriage," 273-4. See also Abrahams, "Adultery (Jewish)," 130, where the author explains how this ordeal fell out of use and was eventually denounced in the Talmud; Cook, "Adultery (Semitic)," 136, who lists the 'ordeal of the bitter waters' along with the Babylonian river ordeal and some ancient Arab practices; and Phillips, *Criminal Law*, 118.

⁸¹³ As cited in Paterson, "Marriage," 273.

⁸¹⁴ Loewe, "Crimes and Punishments (Jewish)," 288.

⁸¹⁵ Baron, *History*, 241.

⁸¹⁶ Loewe, loc. cit.

Whether or not this was a result of “the Jewish courts of justice [having] lost the power of inflicting capital and other punishments” and the continual restriction over time of “the jurisdiction of the Bêth Dîn,”⁸¹⁷ there is a remarkable similarity between this phenomenon and the process through which Muslim *fuqahā* developed more and more stringent witness requirements for accusations of *zinā*, nearly reaching such a point as to make application of the *ḥadd* impossible without confession. As regards this last point, note that the Rabbis ruled out confession-based convictions, a means which the Karaites attempted to re-institute.

As a final note on Judaic-Islamic parallels related to *zinā*, we have the famous incident described in the New Testament (John.8:3-11):

“[T]he teachers of the law and the Pharisees brought in a woman caught in adultery. They made her stand before the group ⁴and said to Jesus, ‘Teacher, this woman was caught in the act of adultery. ⁵In the Law Moses commands us to stone such women. Now what do you say?’ ⁶They were using this question as a trap, in order to have a basis for accusing him.”⁸¹⁸

Jesus replies with the famous adage:

“He that is without sin among you, let him first cast a stone at her.”⁸¹⁹

Although this might be construed as proof that stoning was still being applied in the post-biblical period, scholars such as Paterson are quick to point out that there were other interests at work:

“It is, however, to be remembered that Jesus was surrounded by enemies who laboured to entangle Him in His talk—esp. to bring him into collision with Moses; and the plot in this instance doubtless was to ‘put Him in the dilemma of either declaring for the revival of a practice which had already become obsolete, or of giving His sanction to the apparent infraction of the law which the substitution of divorce involved....”⁸²⁰

⁸¹⁷ Ibid.

⁸¹⁸ *N/V*, 1148.

⁸¹⁹ John.8:7, (*K/V*, NT.71)

⁸²⁰ Paterson, “Marriage,” 273 (citation omitted). See also Grubbs, *Law and Family*, 243 n.148; and Abrahams, “Adultery (Jewish),” 130, where the author notes that “the law of Moses does not prescribe stoning except where a betrothed virgin had intercourse with a man other than her affianced husband (Dt 22^{23,24}).” He then notes that the penalties in Lev.20:10 and Deut.22:22 were not specified, and that the law according to the Mishnah (*Sanh.* xi.1) was strangulation. Therefore: “The point of the incident in the Gospel of St. John was just the attempt to put Jesus into a dilemma, as the commentators point out.”

Remarkably, in referring to the *ḥadīth* in which the Jews ask the Prophet to adjudicate in an adultery case,⁸²¹ Burton notes what he considers to be a similarly polemical “embarrass the Jews” motif as can be found in John 8,⁸²² to which we might add the similarity of rabbis attempting to put the new prophet to the test over the confused issue of stoning. Whatever the reason is behind the remarkable similarity of these two traditions we may never know. However, at the very least they may indicate the issue of stoning for adultery remained a contentious one in the Jewish community through to the rise of Islam; indeed it appears to have continued as such among the early Muslims themselves.

Hand-amputation and sariqa-related parallels

In his discussion of the various punishments enjoined by Judaic law, Poucher writes:

“Mutilation was practiced, but not under direct sanction of the covenant law. The thumbs and great toes of Adonibezek were severed (Jg 1^{6,7}). The slayers of Ishbosheth (2 S 4¹²) lost their hands, but possibly after death.”⁸²³

Bennett also makes note of Adonibezek, and adds that “[m]utilation is mentioned in 2 Mac 7⁴, and blinding in the cases of Samson (Jg 16²¹) and Zedekiah (2 K 25⁷).”⁸²⁴

But it is left to Laurence Gomme to notice the occurrence in Deut.25:11ff. of “punishment by the loss of a hand....”⁸²⁵

Deut.25:11-12: “If two men are fighting and the wife of one of them comes to rescue her husband from his assailant, and she reaches out and seizes him by his private parts, you shall cut off her hand. Show her no pity.”⁸²⁶

Obviously another instance of *talion* against ‘the offending member,’ this is the only instance for which hand-amputation is legally prescribed by any Judaic legislation,

⁸²¹ Supra, p.52.

⁸²² Burton, “Origin,” 283. Crone, too, finds a ‘Jews testing the new prophet’ story as regards the *qasāma* (“Qasāma,” 175).

⁸²³ Poucher, “Crimes and Punishments,” 525. As regards the first instance, Adonibezek was a king of the Canaanites and / or Perizzites, defeated in battle by the army of Judah. His punishment supposedly was retribution for having inflicted the same on some 70 other kings. As for the second instance, David ordered both the hands and feet of the murderers cut off and their bodies hung – punishments we will address more fully in the section on *hirāba* parallels.

⁸²⁴ Bennett, “Crimes and Punishments (Hebrew),” 281.

⁸²⁵ Laurence Gomme, “Mutilations,” *ERE*, ix.63.

⁸²⁶ *NTV*, 212.

and is furthermore interpreted as a fine in the Talmud.⁸²⁷ Nowhere in the Judaic legislation is there so much as the suggestion of a tie between theft and mutilation.

On the contrary, though the crime of theft is thrice condemned in the Old Testament,⁸²⁸ it “involved the culprit, when convicted, in fines of varying grades...,”⁸²⁹ exemplified by Ex.22:1, where “[h]e who stole and then slew or sold a live ox had to restore fivefold; if it was a live sheep fourfold.”⁸³⁰ In Ex.22:4 we find a duplum penalty for stolen livestock found in the thief’s possession; Ex.22:5-6 deal with impingement on grazing rights and loss due to arson; Ex.22:7-13 with the loss / theft of goods / livestock given to a neighbor “for safekeeping,”⁸³¹ and Ex.22:14-15 with injury / loss of a borrowed animal. Note that Ex.22:16 then continues with: “If a man seduces a virgin who is not pledged to be married and sleeps with her...,”⁸³² a natural transition, as we have seen, in keeping with protection of the property rights of the father. As far as other theft-related punishments, we have seen the stoning and burning of Achan and his family and possessions for sacrilege, i.e., theft “of the devoted things,” although Jackson points out that after 70 A.D. and the destruction of the temple, there was some dispute as to the exact law for intentional sacrilege, revolving around the exact meaning of *be’azharah*. Some understood it to mean release with a warning, others maintaining that such a warning involved flagellation, and yet others that the thief should suffer ‘cutting off’ (meaning, of course, excommunication, not amputation).⁸³³

Ex.22:2-3, on the other hand, provides proof of the continuity of ancient Semitic traditions as well as a parallel of Islamic law by illustrating once again a distinction between daytime and nighttime theft and the victim’s right in the latter situation to immediate retaliation.

⁸²⁷ “Come and hear: *Then thou shalt cut off her hand*, means only a monetary fine” (*SBT*, part IV (*Seder Nezikin*), tract.1 (*Baba Kamma*), fol.28a.

⁸²⁸ Ex.20:15: “Thou shalt not steal” (*KJV*, 54); Lev.19:11: “Ye shall not steal...” (*ibid.*, 85); and Deut.5:19: “Neither shalt thou steal” (*ibid.*, 129).

⁸²⁹ Poucher, “Crimes and Punishments,” 522. Additionally, Ex.22:3 states that a thief unable to make restitution must himself be sold (as a slave).

⁸³⁰ *Ibid.*, 526. See also Bennett, “Crimes and Punishments (Hebrew),” 281-2; and Jackson, *Theft*, 130-1; where the author illustrates several Ancient Near Eastern and Dynastic Egyptian parallels for this precept, as well as the duplum penalty of Ex.22:4.

⁸³¹ The thief or guilty party must pay double.

⁸³² *NIV*, 83. The provision is basically the same as the rape provision of Deut.22:28-9.

⁸³³ Jackson, *Theft*, 170.

Ex.22:2-3: "If a thief is caught breaking in, and is struck so that he dies, the defender is not guilty of bloodshed; ³but if it happens after sunrise, he is guilty of bloodshed."⁸³⁴

Jackson offers some insight to this *in flagrante* killing, noting that "[a]s far as we can tell, the thief was only liable to be killed by the owner as a measure of self-help. If not killed on the spot, the death penalty was not available."⁸³⁵

A much more striking parallel exists, however, for the Islamic conception of the *niṣāb*. We have already mentioned Crone's insistence that the *sharī'a's* regulations concerning theft stem from Jewish law and not the Roman *furtum* as Schacht proposed, and it is Jackson's discussion of "the *shaveh perutah* rule" upon which she relies for this claim. Jackson notes that "[i]n some but not all of the property offences it was required that the property involved be worth at least a *perutah*," further positing that the origins of such a rule were no later than the second commonwealth period, and observing "[i]t is likely that the purpose of the requirement was to distinguish between the less and the more serious cases."⁸³⁶

Crone summarizes the parallels as follows:

"According to the rabbis, the finder of lost property worth one *peruta* or more must announce his find; the thief of property worth one *peruta* or more must be punished; and one *peruta* is also the minimal sum for which a woman can be engaged according to Hillel."⁸³⁷

These points are indeed strong parallels, but hardly enough to make the claim that Islamic laws of theft were mostly 'borrowed' from the Judaic corpus. After all, of

⁸³⁴ *NIV*, 83. Cf. LE §§12-13 (supra, p.136). See also Poucher, "Crimes and Punishments," 526, who ties the remaining section of Ex.22:3 – "A thief must certainly make restitution, but if he has nothing, he must be sold to pay for his theft" (*NIV*, 83) – to that which precedes it of burglary, saying: "Burglary doomed the culprit to unrequited death or to slavery;" and Jackson, *Theft*, 49ff., where the author argues that Ex.22:2 is not so much housebreaking as breaking into a sheepfold. He supports this by comparison with Lipit-Ishtar §11 and Hammurabi §21, 125; but later (p.154) puts forward that Ex.22:2 eventually came to be interpreted as housebreaking "with increasing urbanization," noting identical rules in LE §§12-13.

⁸³⁵ *Ibid.*, 156. He continues on to cite Philo's interpretation that the owner *should* slay the thief caught housebreaking, i.e., death is the thief's punishment, not the owner's right to self-help; and then quotes Josephus, who said: "He that killeth another man while engaged in burglary shall be innocent, even though the thief were yet but breaking through his walls" (pp.158-9, 161). As for the day and night distinction, note also Jacob's complaint to Laban in Gen.31:38-9: "I have been with you for twenty years now. Your sheep and goats have not miscarried, nor have I eaten rams from your flocks. ³⁹I did not bring you animals torn by wild beasts; I bore the loss myself. And you demanded payment from me for whatever was stolen by day or night" (*NIV*, 34-5).

⁸³⁶ Jackson, *Theft*, 126-8. Note in his discussion of the different views on how the rule was to be applied that they are mostly for theft from sacred places (pp.126ff.)

⁸³⁷ Crone, *Provincial*, 11 n.108. As for the last point concerning the minimal sum for a woman's engagement; cf. supra, p.30.

what use is pointing out the similarity of the one *perutah* rule and the 3, 10 dirhams, or ¼ dinar *niṣāb*, when the punishments inflicted should such conditions be met are not even within the same category? The Qur'ānic penalty of corporal mutilation of the hand finds no parallel in Judaic theft-law, which to the contrary concerns itself with various mulcts. And how does one explain the difference between the Medinan and the Kufan *niṣāb* / minimum dower if they were 'borrowed' from the same source? A strong conceptual parallel the *perutah* rule may be, but by no means ought it to be considered an origin. The five *manas* of lead minimum named in the Middle Assyrian laws is certainly every bit as much a parallel,⁸³⁸ and the three Semitic traditions taken together once again make a much more convincing argument for common source with divergent development.

From the perspective of procedure we again see both similarities and differences. Conviction for theft in Judaic law could be achieved, as in Islamic law, through eyewitnesses or confessions.⁸³⁹ It has also been noted that Judaic law demands certain evidentiary requirements for the establishment of theft, mainly the thief's sale, slaughter, or possession of the *corpus delicti*.⁸⁴⁰ Finally, a note can be made as regards the use of oaths, which is prescribed in Ex.22:10-12 for the neighbor with whom a man's livestock goes missing, dies, or is injured: "the issue between them will be settled by the taking of an oath before the Lord that the neighbor did not lay hands on the other person's property. The owner is to accept this, and no restitution is required."⁸⁴¹

From an etymological perspective, we have already noted that the Islamic terms *sariqa* and *ḥirāba* are much closer to Akkadian *šaraqū* and *ḥabātu* than Hebrew *ganav* and *gazel*, but the Hebrew terms still deserve a closer look. Jackson introduces them thus:

⁸³⁸ Supra, p.137.

⁸³⁹ Jackson, Theft, 28 n.1: "... conviction always involved, in tannaitic law, the presence of eyewitnesses...;" and p.196, where the author notes that the act of confession resulted in a reduced fine, quoting the Talmud: "If a man said 'I have stolen,' he must pay the value on his own admission, but he does not make double or fourfold or fivefold restitution" (citation omitted).

⁸⁴⁰ Ibid., 41ff. Jackson backs this assumption with Ex.21:16, wherein the kidnapper is put to death if he sells the victim or "still has him when he is caught" (NIV, 82); and also draws on Hammurabi (§§9-10, 253, 265) the Old Hittite laws (§73), Eshnunna (§49), and the Middle Assyrian laws (part I, §47). However, he then points out that not only Ulpian (of classical Roman law), but the Tswana and the Barotse of N. Zimbabwe have similar rules. This suggests that possession of the *corpus delicti* as evidence of theft may be more a matter of common sense than of mutual influence.

⁸⁴¹ NIV, 83. Cf. the Babylonian cases we've mentioned (supra, p.137 and n.690).

“There are two principle terms used in biblical literature to denote misappropriation of property: *ganav* and *gazal*. To the tannaitic rabbis (of the first and second centuries A.D.) they were clearly distinguished from one another. The *ganav* acted secretly, the *gazlan* openly.”⁸⁴²

In the ensuing discussion, Jackson raises the following points: 1) “In the early period of biblical history *gazal* was used primarily of a raid by an organized group,”⁸⁴³ 2) “The verb *ganav* is normally applied to the internal offender, usually an individual, not an organized band,”⁸⁴⁴ and 3) the term *gazal* gradually came to imply an individual, replacing *ganav*.⁸⁴⁵ He then concludes:

“Thus when we look at the legal sources, it is this latter case which is exclusively regulated. In the Covenant Code *ganav* is used [Ex.21.37; 22.1, 2, 3, 6]; in the Holiness Code [Lev.19.13. Also *ganav*, in its normal sense, in Lev.19.11] and Priestly Code [Lev.5.21, 23...], both quite late pentateuchal sources, we find *gazal*, in its later significance.”⁸⁴⁶

Jackson then supports the early distinction of *ganav* as “misappropriation by a community member,” and of *gazal* as “raiding by an outside group” by comparing them to Hammurabi’s *šaraqū* and *habatu* of the same distinction.⁸⁴⁷

Of great import to our observations of the phenomenon of ancient Near Eastern legal continuity is the appearance, in the Hatrene inscriptions discussed previously, of the term *lgnw* in the meaning “will steal.”⁸⁴⁸ The Aramaic employed by the Shamash-worshipping inhabitants of Hatra in the second century A.D. (note that this falls within the Tannaitic period) is thus very similar to that used by the Jewish community, as evident elsewhere in the inscriptions.⁸⁴⁹ This, in addition to the divine origin of the Hatrene laws, the repeated punishment of stoning, and the unspecified “death of the god” imposed upon those guilty of sacrilegious theft, are once again indications of a remarkable regional legal commonality. In fact, considering the known presence of Arabs in Hatra, the commonalities the inscriptions share with both the Hebrew and Arabic languages and traditions, and

⁸⁴² Jackson, *Theft*, 1. Note, as concerns housebreaking: “The Tannaim continued to treat theft from a house no differently than theft in general. The offender is usually described as a *ganav*” (ibid., 157).

⁸⁴³ Ibid., 6.

⁸⁴⁴ Ibid., 8.

⁸⁴⁵ Ibid., 8ff.

⁸⁴⁶ Ibid., 10–11 (author’s footnotes appear in brackets).

⁸⁴⁷ Ibid., 11.

⁸⁴⁸ Segal, “Aramaic Legal Texts,” 110.

⁸⁴⁹ Ibid., 111, ln.5, for example.

Schacht's 'element of continuity' as the Aramaic population, it is tempting indeed to see in Hatrene Aramaic something of the common source responsible for so many regional parallels.⁸⁵⁰

Returning to the distinction between *ganav* and *gazal*, we see that Jackson raises the following point:

"The tannaitic law of robbery (*gezeilah*) involves two important distinctions. First, robbery by a group – brigandage – was not the offence the Tannaim had in mind. That was not *gezeilah* but *listut*."⁸⁵¹

The *gezeilah* of the early biblical period, then, is the *listut* of the Tannaitic period (the etymological origin of the latter seemingly, as we have seen, the Greek ληστής); and as Jackson describes them, based on the ancient sources:

"They operated in groups, from country bases. Often they attacked travelers, and sometimes houses. They engaged not only in robbery, but also in kidnapping, and sometimes murder."⁸⁵²

Such acts, as previously discussed, placed the brigands outside the sphere of Judaic law, and into the sphere of war.⁸⁵³ Once again, this is a parallel to the Islamic treatment of brigandage in that – even though the crime is placed firmly within the sphere of law by the injunction of Q.5:33f. – the Islamic term, *ḥirāba*, betrays the ancient distinction by which such criminals operated within the sphere of war. This

⁸⁵⁰ Note that, in the current model of 'genetic subgrouping of the Semitic languages,' i.e., that proposed by Robert Hetzron "on the basis of shared morphological innovations" as opposed to the traditional model based on cultural and geographical considerations," Arabic is more closely related to Canaanite and Aramaic than to Southeast Semitic; all three, Arabic, Canaanite, and Aramaic, constitute, for Hetzron, Central Semitic" (Alice Faber, "Genetic Subgroupings of the Semitic Languages," in *The Semitic Languages*, ed. Robert Hetzron (London, New York: Routledge, 1997), 7; the reader will remember that Hebrew is a dialect of Canaanite along with Phoenician, Moabite, etc.) Could not the Central Semitic source-language and the culture that spoke it also be the progenitor of Arabic, Hebrew, and Aramaic legal norms?

⁸⁵¹ Jackson, *Theft*, 73. He continues: "Nowhere do we find the imposition of penalties for this offence in Jewish Law, the reason being that it was within Roman jurisdiction. Although we have ample information as to the nature of the activities engaged in by the brigands, we find no legal definition of the offence in Jewish Law." Note also that a distinction between an individual thief and a group of brigands – as well as their respective areas of operation within and without the community – is raised in Hos.7:1: "When I would have healed Israel, then the iniquity of Ephraim was discovered, and the wickedness of Samaria: for they commit falsehood; and the thief cometh in, and the troop of robbers spoileth without (*W'ganaab yaabow' paashaT g'duwd bachuwts*)" (*KJV*, 555; and *THOT*, Hos.7:1). *G'duwd* here means 'band, troop, marauding band, raiding band' (*OTHL*, "G@duwd").

⁸⁵² *Ibid.*, 33-4. He draws from the LXX, Apocrypha, Philo, Josephus, and tannaitic literature.

⁸⁵³ Jackson (*Theft*, 13) writes: "The penalties for raiding are not mentioned in biblical law. The offenders were outside the protection of the community, and could be dealt with without recourse to the law;" and on p.16: "The nature of the problem, and the attitude of the law, was clearly recognized long ago by Michaelis, who observed: 'With regards to foreign banditti, who attacked travelers, or made inroads into the land, there was no occasion for special laws; because against them the laws of war operated.' It is for this reason that we find no penalties in the legal corpora for *gazal* in its early sense."

may further be illustrated by a parable Jackson uses to illustrate what he believes is a polemical use of *listis*:

“The polemical usage of the term is seen also in a parable recounted by R. Meir. (6-Tos. Sanh. 9.7.) Of twin brothers one was a king and the other became a brigand. Ultimately, the latter was caught and crucified, whereupon the citizens thought it was the king who was being executed. The choice of ‘brigandage’ as the brother’s offence is by no means accidental. The brother was a twin, and it is reasonable to suppose that his opposition stemmed from a dispute to the throne. The context of the story is Roman, as shown by the reference to crucifixion.”⁸⁵⁴

Jackson’s conclusions may here be questioned on two counts: 1) considering the association of brigandage with war in the ancient sources as preserved by the Arabic term *ḥirāba*, it would seem natural rather than polemical to name such a rebellious claimant to the throne, whose actions might be interpreted as making war against the king, as *listis*; and 2) that the rebel-brigand brother was crucified upon being caught is by no means necessarily an indication of a Roman ‘context,’ as we shall see.

The above parable related by Jackson is, of course, a tremendous parallel to the Islamic punishment for *ḥirāba* which includes, as we have seen, crucifixion as well as hand and foot amputation, killing, or banishment, depending on the criminals exact actions or the *qāḍī*’s application of the law.⁸⁵⁵ There is, however, an even greater parallel in a passage we briefly mentioned earlier, that being the punishment of “the slayers of Ishbosheth” in 2 Sam.4:12.

2 Sam.4:12: “So David gave an order to his men, and they killed them. They cut off their hands and feet and hung the bodies by the pool in Hebron.”⁸⁵⁶

All of the corporal Qur’ānic punishments are here enacted at the order of David, i.e., “that they be killed, or crucified, or that their hands and feet be cut off from opposite sides... (Q.5:33),” in practically the same manner as might be ordered by a Shāfi‘ī *qāḍī* for a highwayman who has both robbed and killed.⁸⁵⁷ Even more remarkable is the biblical Hebrew “*Way^aqatstsuw ‘et- y^adeeyhem w^a‘et- ragleeyhem*” in comparison

⁸⁵⁴ Jackson, *Theft*, 35.

⁸⁵⁵ *Supra*, p.27.

⁸⁵⁶ *NIV*, 326. See also J.A. Selbie, “Hanging,” *DOB*, ii.298f. for a discussion of the conjectured meanings of ‘hanging’ in the several biblical passages in which it appears; and Deut.21:22f.: “If a man guilty of a capital offense is put to death and his body is hung on a tree,²³ you must not leave his body on the tree overnight. Be sure to bury him that same day, because anyone who is hung on a tree is under God’s curse” (*NIV*, 209).

⁸⁵⁷ *Supra*, p.32.

to the Qur'ān's "*aw tuqatt'a'a aydiyhim wa arjuluhum*." Finally, 'the slayers of Ishbosheth,' Baanah and Recab, were "leaders of raiding bands," who had "gone into the house [of Ishbosheth] while he was lying on the bed in his bedroom... [a]fter [which] they stabbed and killed him, [and] cut off his head"⁸⁵⁸ – actions placing them firmly within the category of *listim* as described by Jackson above. All of this taken together proves this ancient narrative a very compelling parallel to Islamic *hirāba* and its punishment. That the Tannaitic rabbis, however, knew nothing of a specific punishment for brigandage suggests that any link between the ancient Hebrew and Islamic punishments would be far more ancient than the Tannaitic period, or even that in which the Holiness and Priestly Codes were written; providing still further indications that the Arabic and Hebrew traditions evolved from a common, ancient stock.

We have seen, then, that Judaic and Islamic law are at times conceptually quite similar as regards regulations governing sexual and property offences, yet, at the same time, are rather different in detail. We noted, for example, the stoning of the accused, betrothed girl whose parents are unable to prove her chastity; stoning for the offence of infidelity certainly has a parallel in Islamic law, but the betrothed girl who has never had access to legal sexual intercourse would never be stoned in Islam, nor would the onus of evidence be placed on the accused's parents. We have also seen unspecified death penalties for adultery, which may likely have been stoning at some point, but were interpreted by later generations as strangling if not completely ignored and replaced with divorce. Both the virgin pledged to be married and her paramour were to be stoned, but again, such a category as "virgin pledged to be married" does not conform to either the Sunni or Shī'ī conception of *iḥṣān*, and thus she would never have been stoned by the *sharī'a*. We have seen stoning for incest, sodomy, and bestiality; but also for a host of crimes which never receive the penalty in Islam. Phrases meaning "stoning (to death) with stones" occur in many of these instances, and once even in conjunction with Hebrew *zanah* (Deut.22:21); but the root meaning 'to stone' in half of the legal material is *caqal*, *zanah* is universally understood to mean 'prostitution' or 'whoredom,' and the term used throughout for adultery is *na'aph*. Although *ragam* also occurs in the meaning 'to stone,' it never does so in conjunction with rulings related to sexual offence. We have seen that

⁸⁵⁸ NIV, 325.

eyewitnesses are required to establish that adultery has been committed, and that they are to hurl the first stones at an execution; the required number of witnesses, however, is only two, and conviction by means of confession seems not to have been practiced.⁸⁵⁹ The theft-adultery link is even more pronounced in Judaic than in Islamic law,⁸⁶⁰ yet the one-sided definition of adultery seemingly universal throughout the ancient codes (including the ancient Hebrew) is equalized by the Qur'ānic injunction that both female and male adulterers are to receive like punishment. We have encountered flogging among the penalties meted out to the adulterer, and specifically enjoined upon the unchaste bondmaid; but although the posture of the convicted when receiving the punishment may have been, at times, the same as in Islam, the number of stripes was never to exceed forty, the scourge itself was differently made, and the punishment once again widely applied for offences that do not incur such in Islam. So too have we met with the punishments of burning – whether by branding, swallowing molten lead, or wrapped in vine tendrils and set aflame – and strangling; neither of which appear in Islamic law at all, much less in connection to sexual offence (with the exception of the Shī'ī *qāḍī*'s choice of burning for sodomy). Nor does the 'cutting off from the people' enjoined for certain crimes in any real way resemble Islamic banishment. Judaic rape provisions, as do those of the Mālikī school, take into account the alleged victim's ability to cry out and be heard; and that the convicted rapist be killed and the victim unpunished also conforms to both traditions. However, that the un-pledged virgin be forced to marry her rapist upon her father's approval of the match simply finds no parallel in Islam. We have seen that both traditions discourage the compulsion of young women to prostitution; but the Judaic command refers to daughters, the Qur'ānic to slave-girls. The 'half-for-slaves' provision of the Qur'ān seems not to find a true parallel in Judaic law, but the flogging of the slanderer does, albeit with the addition of a hefty fine. As for the oath-taking procedure of *li'ān*, we have seen the vaguest of similarities with 'the ordeal of the bitter waters' – though the differences are far greater.

As far as theft-related crimes and punishments, differences in detail seem to once again balance out any conceptual parallels. We have seen, for example, ancient

⁸⁵⁹ In addition to what was discussed above, we might add that lack of reference to rabbis or other community leaders initiating the stoning (as per the Muslim *imām* in case of confession) may also indicate that confession was not accepted.

⁸⁶⁰ We may note here other pairings of these crimes in Jer.7:9, Hos.4:2, Job.24:14-15, and Ps.50:18.

narratives recounting punishments of mutilation, yet nowhere in the law codes do we find examples of such imposed for any theft-related crime. Hand-amputation is once enjoined in Deuteronomy, but for the wife who grabs her husband's assailant by the privates. We have, furthermore, seen that even this instance was later commuted to a fine in the Talmud; and indeed, fines and various restitutions make up the bulk of theft-related punishments in Judaic law. The conceptual equivalent of Islamic *niṣāb* is found in the '*shaveh perutah* rule;' but the same is true of the five *manas* of lead in the Middle Assyrian laws, and the details of the *niṣāb* are quite different from both. Procedural parallels regarding witnesses, confessions, and oaths, however, are quite strong; as is the distinction between theft and brigandage, perhaps the strongest parallel of all being found in David's execution of the murderers of Ishbosheth. The crime of brigandage itself, however, is neither treated nor even recognized by any of the Judaic codes.

Such a significant number of conceptual parallels proves that some relationship exists between the sexual offence and theft laws of the two traditions. But how can the 'borrowing' model account for the many significant differences? Considering that law is in part a linguistic enterprise, and that Arabic and Hebrew share a very obvious linguistic heritage, we might benefit by utilizing such models of genesis and development as employed by linguists. Charles Barber, introducing the concept of 'language families,' draws the following illustration:

"The process of change in a language often leads to divergent development. Imagine a language which is spoken only by the population of two small adjacent villages. In each village, the language will slowly change, but the changes will not be identical in the two villages, because conditions are slightly different. Hence the speech used in one of the villages may gradually diverge from that used in the other. If there is rivalry between the villages, they may even pride themselves on such divergences, as a mark of local patriotism. Within the single village, speech will remain fairly uniform, because the speakers are in constant contact, and so influence one another. The rate at which the speech of one village diverges from that of the other will depend partly on the degree of difference between their ways of life, and partly on the intensity of communication between them. If the villages are close together and have a good deal of inter-village contact, so that many members of one village are constantly talking with members of the other, then divergence will be kept small, because the speech of one community will be constantly influencing the speech of the other. But if communications are bad, and members from one

village seldom meet anybody from the other, then the rate of divergence may well be high.”⁸⁶¹

There is no reason the above model can't be applied to an ancient culture's customs and traditions, intertwined with language as they inevitably must be; and within such a context – though the reality was undoubtedly far more complex – we might make better sense of the similarities and differences between Judaic and Islamic law. The key to uncovering a language's familial relationships lies within its structural features and core vocabulary, rather than in a few lexical similarities; thus does English prove itself a Germanic rather than Romance language despite its abundance of Latin-derived vocabulary.⁸⁶² So too with legal traditions. Regarding Islamic and Judaic law, as Schacht noted, “the spirit of both systems, too, is similar;” and we have seen this spirit throughout the corpus of ancient Mesopotamian legal traditions as well. And just as English, German, and Latin trace back to a distant Indo-European ancestor, so too do Arabic, Hebrew, and Akkadian trace back to a distant Semitic one. Thus, the legal precedents and parallels we have illustrated can be seen as the structure and core vocabulary of a common Semitic customary law; an ancient tradition carried into Islam, not by ‘borrowing,’ but by virtue of its Arabian genesis.

A survey of pre-Islamic Arabian law

There is no question that the most important source for Islamic law must be Arab customary law, specifically that of the Ḥijāzī's;⁸⁶³ and despite the paucity of hard literary evidence in the form of law codes as we have for the ancient Mesopotamian and Judaic traditions, there is yet a great deal of evidence for this claim. Roberts points out the reforms of the Prophet must have been determined by the customs of his own time;⁸⁶⁴ Bravmann, that the Prophet's practices may “have roots in earlier practices,” and that his *sunna* “preserves its primitive, genuinely Arab tenor;”⁸⁶⁵ and Coulson, that Qur'anic law “superseded[ed] tribal custom in various respects,” later noting that “the legislation is by way of a supplement to, not a

⁸⁶¹ Charles Barber, *The English Language: A Historical Introduction*, Low Price Edition (Cambridge: UP, 1999), 50.

⁸⁶² *Ibid.*, 62.

⁸⁶³ See Crone, “Qasāma,” 153 and nn.3-4; for an overview of ‘accepted’ views on the contribution of Jāhili Arab to Islamic law.

⁸⁶⁴ Roberts, *Social Laws*, 3.

⁸⁶⁵ Bravmann, *Spiritual Background*, 129, 161.

substitute for, the existing customary law.”⁸⁶⁶ Furthermore, we have already seen several examples of pre-Islamic Arab customs which have survived into Islamic law;⁸⁶⁷ not to mention links between the *sharīʿa* and the North and South Arabian civilizations.⁸⁶⁸

Arabia, in fact, was remarkably integrated and remarkably Arabic at the dawning of Islam as some scholars note; Hallaq writing of the complex relations between the North and South;⁸⁶⁹ Hoyland stressing the unity of Arab custom⁸⁷⁰ and that – although the South Arabians originally distinguished themselves from the Arabs – all inhabitants of the peninsula were considered Arabs immediately upon the establishment of Islam.⁸⁷¹ Hodgson writes of the whole of pre-Islamic Arabia as a “single political complex,” in which “[t]he Arabs had their common sagas and common heroes, and their common standards of behaviour worthy of a Bedouin,”⁸⁷² not to mention Mecca’s position at the junction of the Syrian-Yemeni and Iraqi-Abyssinian trade routes, and its equidistance from and interaction with the three great political entities of the early seventh century.⁸⁷³ Indeed, it is Hodgson who says it best when, explaining the rapidity of the Arab conquests, he writes:

“It can even be suggested that – without its being planned so – many Syrian elements, and perhaps also Yemeni, cooperated readily enough with the Islamicized Meccans, with whom they had long been in trading relations; it is as if there was set up a Yemen-Mecca-Syria axis which

⁸⁶⁶ Coulson, *History*, 11, 17. See also Lippman, McConville, and Yerushalmi, *Criminal Law*, 125, where the authors write that Islamic criminal law is “grounded in the ideas and values of pre-Islamic society.”

⁸⁶⁷ In addition to those we have already mentioned, we might add: 1) retaliation (*qisās*) and some homicide regulations (Juynboll, “Crimes and Punishments (Muhammadan),” 291; Lippman, McConville, and Yerushalmi, *Criminal Law*, 77-8; Coulson, *History*, 18; Crone, “Qasāma,” 158 n.28); 2) laws of property (Schacht, “Foreign Elements,” 12, citing Nallino); 3) the concept of *ḥilf* (Hallaq, “Use and Abuse,” 90); 4) inheritance laws (Robert Brunschvig, “Un Système peu connu de succession Agnatique dans le droit Musulman,” in *Études d’islamologie* (Paris: G.-P. Maisonneuve et Larose, 1976), ii.54, *passim*; Smith, *Kinship and Marriage*, 66 n.2; Coulson, *History*, 15ff.); and, possibly, 5) such things of legal import as are listed in the *Awā’il* books, such as the forbidding of wine and the first *khulʿ*-divorce (al-ʿAskārī, *al-Awā’il*, 31-4, 49, etc.; F. Rosenthal, “Awā’il,” 758-9).

⁸⁶⁸ For N. Arabian, see also Healy, “Sources,” *passim*, and Bravmann, *Spiritual Background*, 150f.) For S. Arabian: *infra*, p.198; Brunschvig, “Système,” 61; Crone, “Qasāma,” 154 n. 11; and Bravmann, *Spiritual Background*, chap.v *passim* and, and 157ff.)

⁸⁶⁹ Hallaq, *Formation*, xxii; a much more detailed description may be found in the first chapter of his *Origins*.

⁸⁷⁰ Hoyland, *Arabia and the Arabs*, 156, 161.

⁸⁷¹ *Ibid.*, 229-30. See also *idem*, *Seeing Islam*, 556ff., for an excellent overview of Arab power-bases before Islam and how the early Muslims took them over, to the same extent perpetuating the Ghassānid-Lakhmid divide with ‘Alī as “King of the East” in Kūfa (Ḥīra), and Muʿawiya as “King of the West” at Damascus; and Hodgson, *Venture*, 199ff., for a brief chronology of the take-over of these power-bases.

⁸⁷² *Ibid.*, 154.

⁸⁷³ *Ibid.*, and 156.

was strong enough to dominate both Egypt and Iraq with its military and commercial power.”⁸⁷⁴

Such an immediate, far-reaching, and powerful unity as was achieved in Arabia can be seen as a mark of its socio-cultural coherence – implying a degree of legal coherence, as well.

As for the legal systems of the North and South Arabian civilizations, we have already broached the common factor of ‘divinely-inspired’ legislation, a characteristic which indeed ties the whole of Arabia with neighboring Near Eastern civilizations for the entirety of its early history.⁸⁷⁵ In the North, the Nabataeans are said to have been quite advanced legally. We know, for example, that 1) they kept copies of legal inscriptions in a temple registry (note once again the subsumption of law under religion),⁸⁷⁶ 2) laws were sometimes issued by popular assembly, 3) they implemented a system of fines for various infractions, 4) they practiced suing, 5) certain crimes incurred the punishment of banning or outlawry, and 6) according to Diodorus Siculus, death was imposed for certain crimes including the use of wine.⁸⁷⁷ As for the South, we know that, with the Sabaeans, “[u]ltimate authority rested in a legislative body of which the king was only one member, and edicts were regularly drafted in the name of the king plus a group of other functionaries.”⁸⁷⁸ We know, too, that 1) such councils based their decisions on a pre-existing set of regulations (hinting at the presence of a comprehensive legal system), 2) renowned arbiters were employed to settle conflicts, 3) such arbiters also “gave their verdict on awkward points of law,”⁸⁷⁹ and 4) outlawry was also practiced as in the North, specifically for infractions against one’s own kinship group.⁸⁸⁰ In the Hadramawt, priestesses are

⁸⁷⁴ Ibid., 204.

⁸⁷⁵ See also Hoyland, *Arabia and the Arabs*, 127f., for examples of oracular law; 140ff., for a listing of deities worshipped in the N., S., and E. of the peninsula (and which include Shamash – Hammurabi’s own law-giving god – at Palmyra and in East Arabia); 161, where the author interprets the stoning of thieves at Hatra as a departure from traditional punishments, citing as a cause its having been revealed by a “dreamer”; Healy, “Sources,” 206, for mentions of various deities (including Allat) in Nabataean tomb legislation; A.F.L Beeston, “A Sabaean Penal Law,” *Le Muséon* 64 (1951): 313, where we learn that S. Arabian death-sentences were passed not only by tribal assembly but by the divine decree of the god ‘Almaqah; and Hodgson, *Venture*, 182, who notes the *kāhin*’s dual role of arbitrator and intermediary with the divine.

⁸⁷⁶ Healy, “Sources,” 203.

⁸⁷⁷ Hoyland, *Arabia and the Arabs*, 70-1, 124-7.

⁸⁷⁸ Ibid., 120.

⁸⁷⁹ One such instance, recorded in Ibn Hishām’s *Sīra*, involves the famed case of the hermaphrodite’s inheritance – a legal difficulty discussed as well by the *fuqahā*’ (ibid., 123-4).

⁸⁸⁰ Ibid., 120-4.

said to have adjudicated in marital disputes;⁸⁸¹ and as regards infliction of the death-penalty, the Sabaeans are known by their inscriptions to have operated under a strict set of regulations governing who could pronounce such punishments, and defining 'sacred days' on which such sentences could not be carried out.⁸⁸² Yet, for all the similarities between North and South, and the many proofs of their continual and mutual influence, Schacht claims "[t]he legal institutions of South Arabia... hardly seem to have influenced those of the (Northern) Arabs."⁸⁸³

Mecca and Medina, it must be remembered, were located at the midway point between these complex, legally-minded civilizations, and it's no surprise, therefore, when Coulson distinguishes those polities from the "general picture of the primitive customary tribal law of Arabia in the sixth century...."⁸⁸⁴ He observes that Mecca must have had "a commercial law of sorts," and Medina, "elementary forms of land tenure."⁸⁸⁵ Furthermore:

"Public arbitrators were appointed and other officials were charged with the task of recovering compensation in cases of homicide or wounding. Yet in both these centres, just as among the Bedouin tribes, the sole basis of law lay in its recognition as established customary practice."⁸⁸⁶

What, then, was the nature of this customary practice? Bergsträsser has pointed out that Arab customary law in the time of the Prophet *cannot* have been primitive,⁸⁸⁷ and this seems to be the case despite what some may regard as the negative connotations of the term 'tribal law.' Indeed, that is first and foremost how this customary law must be described; and Coulson, writing on the topic, notes:

"[T]he tribe is conceived not merely as the group of its present representatives but as a historical entity embracing past, present, and future generations. And this notion, of course, is the basis of the recognition of a customary law. The tribe was bound by the body of

⁸⁸¹ Ibid., 161.

⁸⁸² Beeston, "Penal Law," 2-3, 6-7.

⁸⁸³ Schacht, *Introduction*, 9.

⁸⁸⁴ Coulson, *History*, 10.

⁸⁸⁵ Ibid.

⁸⁸⁶ Ibid. Note that Strabo, writing about the Nabataeans in the first quarter of the first century A.D., notes that, though settled, they still maintained "aspects of tribal egalitarianism" (Hoyland, *Arabia and the Arabs*, 71).

⁸⁸⁷ As cited in Schacht, "Foreign Elements," 12. Roberts quotes Prof. Fischer, who notes that nomadic Arabs are more civilized than commonly believed (Roberts, *Social Laws*, 3 n.2); but others, however, claim that, at least as regards punishment, the *lex talionis* was the only legal principle in pre-Islamic Arabia (Lippman, McConville, and Yerushalmi, *Criminal Law*, 77).

unwritten rules which had evolved along with the historical growth of the tribe itself as the manifestation of its spirit and character.”⁸⁸⁸

He also notes the existence of the *hakam* as an *ad hoc* arbitrator – the most popular choice for such being, of course, the *kāhin*, yet another indication of the intertwined functions of religion and law in the Near East. Despite this, however, Coulson maintains that there was no “official organization for the administration of the law” – enforcement being the responsibility of the injured party⁸⁸⁹ – and in this he is joined by Hoyland, who puts forward that, “[u]nlike a state, tribes have no specialized institutions of law and order, so a person’s life, honour and goods were protected by his relatives, who were obliged to assist him in trouble and to avenge or seek compensation for him if he was wronged.”⁸⁹⁰ Despite this, he goes on to point out the *lex talionis* and other “mechanisms,” as well as the complicated layers of responsibility within a tribe,⁸⁹¹ all of which point to the need for a fairly complex system of laws; and, as Coulson noted above, the source of any such legal material as a tribe might draw upon was “the body of unwritten rules which had evolved along with the historical growth of the tribe itself.” Such are characteristics which the reader might identify immediately with our previous discussion of the nature of *sunna*.

Stoning and zinā-related traditions

If stronger evidence for the stoning of adulterers by Hījāzī Arabs before Islam existed, it would not have been necessary to build the case that stoning is part of a larger Near Eastern Semitic common law from which pre-Islamic Arabs may have drawn their customs. Even so, the indications from Arabic sources that the stoning penalty was so employed far outweigh any suggestions that it wasn’t. In fact, we know of no Arab-Islamic sources whatsoever that claim stoning wasn’t utilized by Arabs to punish adultery before Islam. The Kharijites, to the contrary, are said to have claimed that *al-rajm* was in use at the very beginning of Islam (*fī ṣadr al-Islām*), specifically before the revelation of Q.24:2, circa 5 / 6 A.H. Should this have been the case, then the Prophet’s actions were no doubt informed by local Arab custom, whether such was influenced by more ancient Semitic custom or not.

⁸⁸⁸ Coulson, *History*, 9. He adds that “[n]either the *shaykh* nor any representative assembly had legislative power to interfere with this system” (ibid., 9-10).

⁸⁸⁹ Ibid., 10.

⁸⁹⁰ Hoyland, *Arabia and the Arabs*, 113.

⁸⁹¹ Ibid., 114.

A somewhat more solid case can be built from a study of the famed maxim: “*al-walad li’l-firāsh, wa li’l-‘āhir al-ḥajar*.” This dictum, as we have seen, if translated literally, means “the offspring (belongs) to the bed, and to the fornicator / adulterer / whoremonger (belongs) the stone.” This can obviously be taken as a direct reference to the stoning of the ‘*āhir* – a term synonymous with *al-zānī*.⁸⁹² Such being the case, the next step would simply be to prove a pre-Islamic Arab origin of the maxim, and we would at least have confirmation that an association between stoning and *zinā* existed in the body of Arabic custom before Islam. This has been done to a large extent by Uri Rubin in his article “‘Al-Walad li’l-Firāsh’: On the Islamic Campaign against Zinā’,” in which he shows – despite the maxim’s attribution to the Prophet – that it has a more ancient heritage:

“The *firāsh* utterance is actually a dictum, or a maxim. As such it falls under the category of the ‘*mathal*.’ It is actually included in lists of many other *amthāl* attributed to Muḥammad. However, in some *amthāl* compilations the maxim is recorded as a non-Prophetic saying, and it is actually implied in the sources that this *mathal* was not a novelty of Muḥammad. It is stated that the *firāsh* dictum was already known in Arabia since pre-Islamic times. The first to have uttered it is said to have been the famous *amthāl*-teller Aktham b. Ṣayfi.”⁸⁹³

Indeed, this attribution of the maxim to the pre-Islamic wisdom of Aktham b. Ṣayfi is noted elsewhere, mainly in the *Awā’il* literature.⁸⁹⁴ In Abū Hilāl al-‘Askarī’s *al-Awā’il*, we find the following entry:

“The first who judged ‘*al-walad li’l-firāsh*’ (was) Aktham b. Ḥanīfi:
And the Arabs held no one’s wisdom to be greater....”⁸⁹⁵

⁸⁹² Rubin notes in his study of the maxim that, although sometimes interpreted as a reference to *al-rajm*, “[m]ore common... is the interpretation of ‘*al-ḥajar*’ in the figurative sense, i.e., ‘nothing’” (“Al-Walad,” 5 n.4). He then cites several sources in which both interpretations may be found. We may furthermore note that, to our knowledge, not a single scholar has argued “*li’l-‘āhir al-ḥajar*” should be taken in *both* its figurative and literal senses. The seeming coincidence that “*al-ḥajar*” can mean both ‘nothing’ – representing the legal relationship of “*al-‘āhir*” to “*al-walad*” – or ‘the stone’ – representing the ‘*āhir*’s true reward: punishment by stoning, only serves to increase the value of the *mathal* by any culture’s standards of word play and wit. It is this author’s opinion, at any rate, that “*al-ḥajar*” is meant to mean both ‘nothing’ and ‘the stone,’ a more fitting testimony to the skills of the most famed proverb-maker of the Jāhili Arabs, to whom, as we shall see, the maxim is attributed.

⁸⁹³ Ibid., 7 (citations omitted). The author also dispels Schacht and Goldziher’s theory of the Roman origins of the maxim, and notes: “Motzki contended... the possibility that Muḥammad already followed the *firāsh* regulation...” (Ibid., 6); and indeed we have already mentioned Motzki’s aborted attempt to trace the maxim from pre-Islamic times.

⁸⁹⁴ Rubin notes this as well (p.7 n.12), citing al-‘Askarī and al-Suyūṭī. For more on the *Awā’il* literature, see Rosenthal, “*Awā’il*,” 758f.

⁸⁹⁵ al-‘Askarī, *al-Awā’il*, 49. The account then lists several other of his famous proverbs.

This falls within the second chapter entitled: “About what has come down to us (of reports) about the general folk of the Jāhiliya, (besides) the Arab Qurayshīs.”

Interestingly, the association of the maxim with stoning and adultery is further suggested by its placement immediately following an entry entitled: “The first who stoned for *zinā*.”⁸⁹⁶ Perhaps, at least from al-‘Askarī’s fourth-century perspective, “*wa li’l-‘āhir al ḥajar*” still held some connotation of stoning, and his attribution of the saying to a prominent pre-Islamic figure may represent the main current of thought on the topic in his day.

Of course, it is the preceding entry in al-‘Askarī’s *al-Awā’il* that ought to intrigue us the most, representing, as it does, the most outspoken claim of a pre-Islamic, Arab origin of the Islamic penalty of stoning. Before proceeding, however, it should of course be acknowledged that use of the *Awā’il* literature as a historical source is extremely problematic. It is not the aim of this thesis, therefore, in presenting this information, to claim it as evidence as such. Rather, the use of the material lies in that, once again, no arguments *against* the pre-Islamic practice of stoning or hand-amputation seem to have been made within Arab-Islamic tradition; such works as al-‘Askarī’s *al-Awā’il*, in fact, seem indicative of a common belief (at least in the fourth century A.H.) that such punishments were indeed pre-Islamic. The first section of al-‘Askarī’s entry reads:

“The first to stone for *zinā* was Rabī‘a b. Ḥidār al-Asadī: That is to say that a woman from among them [i.e., from the Banī Asad] fell in love with a man and employed – in order to elope with him – the deceptive delusion that she had died. Then some of her tribe ran into her, and, recognizing her, put the issue (of her deception) before Rabī‘a b. Ḥidār al-Asadī who ordered her lapidation; thus was she stoned. It is (furthermore) mentioned that she had feigned illness, then death, and thus was she carried to her tomb and buried. Then when the people dispersed, her paramour took pity on her, so unburied her and carried her off, but God only knows.”⁸⁹⁷

Although the details of this narrative are somewhat fanciful – indeed, al-‘Askarī continues on with several more stories illustrating womankind’s “trickery” and “clever schemes” – no real reason has yet been raised to doubt the authenticity of the *attribution*. That is to say, despite the doubtful quality of the *Awā’il* books as a

⁸⁹⁶ Ibid., 47.

⁸⁹⁷ Ibid. I am indebted to Professor Sherine Yehia El Ezabi of the Center for Arabic Study Abroad at the American University in Cairo for her review and correction of this translation.

historical source, no objection has been raised to the notion that such a person as Rabī'a b. Ḥidār al-Asadī did in fact exist in the Jāhiliya, and that he applied the penalty of stoning to the crime of adultery.⁸⁹⁸ Whatever the case, at the very least we might say that Arabic tradition indicates stoning was a punishment for the adulteress practiced by the pre-Islamic Banī Asad, i.e., north of the Ḥijāz, somewhere between the Najd and Bilād al-Shām.⁸⁹⁹

That pre-Islamic Arabs practiced stoning as a punishment for crimes other than adultery, however, is beyond any doubt as we have seen in the case of Hatra. The inscriptions prescribing stoning for theft from the city's sacred precincts date back to 151 / 152 A.D., and directly address the Arab population. Remarkably, this is but five years before the start of an Arab dynasty, "starting with the son of the chief Nasr, Lajash,"⁹⁰⁰ who ruled 156-167 A.D., continuing through Sanatruk I (167-190 A.D.), Abd Samia (190-200 A.D.), and ending with the defeat of Sanatruk II at the hands of the Sāsānian founder Ardašir and his son, Šapur I, in 240 / 241 A.D.⁹⁰¹ With an increase in the prestige of the Hatrene Arabs likely begun some years before the succession of this dynasty, it is even possible to hypothesize that the legislation in question was in fact brought forward or in some way influenced by the Arabic population, i.e., rather than acquiring the punishment of stoning at Hatra, Hatrene Arabs may have in fact introduced it. Whether or not this is the case, unfortunately, must remain in the realm of conjecture until further evidence should surface.

It is noteworthy, however, that stoning was also practiced as a (rather peculiar) punishment at the far southern extreme of the Arabian peninsula, some four hundred years earlier. Agarthicides of Cnidus, writing circa 200-131 B.C., explains the Sabaeen king, once invested with his rule, "is not able thenceforth to leave the palace. Otherwise he is stoned by everyone in accordance with an ancient oracle, and

⁸⁹⁸ See, for example, Al-Marzūqī's *al-Azmina wa'l-Amkina*, where Rabī'a b. Ḥidār is listed in the chapter entitled "About the judges (*hukkām*) of the Arabs in the Jāhiliya;" and where a line of poetry may be found in praise of his name, not to mention one of his more famous judgments (Al-Marzūqī, *al-Azmina wa'l-Amkina* (p.241) [book online], accessed 6 August 2005, *Al-Waraq*; available from <http://www.alwaraq.com>; Internet).

⁸⁹⁹ See Sayf al-Dīn al-Kātib, et al., *Aṭlas al-tārīkh al-qadīm* (Beirut: Dār al-Sharq al-'Arabī, 2004), 120, 136; for maps indicating the approximate territory of the tribe of Asad before Islam.

⁹⁰⁰ S.v. "Hathra," *Encyclopedia of the Orient* [encyclopedia online]; available from <http://encyclopedias.com/e.o/hathra.htm>; Internet; accessed 6 August 2005.

⁹⁰¹ Ibid.; and Rüdiger Schmitt, "Hatrâ," *Iranian World (CAIS at SOAS)* [article online]; available from <http://www.cais-soas.com/CAIS/Geography/hatra.htm>; Internet; accessed 6 August 2005.

thus his pre-eminence is deleterious.”⁹⁰² Note once again the oracular source of the punishment, even as occurs in the Hatrene inscriptions. These two divinely ordained injunctions of stoning, when combined with the divine revelation of the stoning punishments in Deuteronomy and the Prophet’s own reported speech: “Take from me! Take from me! God has made for them a way,”⁹⁰³ create a remarkable sequence it is difficult to ignore.

As regards the pre-Islamic Arab attitude towards *zinā*, a great deal of early Muslim sources seem to think it was not a crime at all during the Jāhiliya. This is, no doubt, something of an exaggeration born of the need of early Islamic littérateurs to distance themselves from their pagan past. Muqātil b. Sulaymān, for example, writes in explanation of God’s exhortations against *fāḥisha* in Q.7:33:

“And His utterance, praise be unto Him, in the *sūra* in which is mentioned The Heights [Q7:33] Say: Indeed, that which my Lord has forbidden are *fawāḥish*, meaning *zinā*, what is open of it, meaning in public, and what is concealed of it, meaning in secret. And that is because the pagan Arabs used to keep aloof of *zinā* publicly, but did not conceive of it as being harmful in secret.”⁹⁰⁴

Al-Ṭabarī, in his *tafsīr* of the same passage, also relates it to the practices of the pre-Islamic Arabs, claiming the *ahl al-jāhiliya* were given to walking about naked (that being “what is open of it”) as well as committing *zinā* (that being “what is hidden of it”).⁹⁰⁵

Western scholars have often – sometimes eagerly – accepted this supposed state of indifference to *zinā* as a sort of all-encompassing social condition common throughout pre-Islamic Arabia. Schacht writes: “To the pre-Islamic Arabs, *zinā*’ was not a sin but regarded in certain circumstances as an injury to the rights of property of a fellow-tribesman.”⁹⁰⁶ Peters, in a similar vein, remarks: “The Qur’ān disapproved of the promiscuity prevailing at that time in Arabia and forbade e.g. the prostitution of slave-girls by their masters (XXIV, 33).”⁹⁰⁷ Even Hodgson, describing the moral tone of the pre-Islamic Bedu, writes: “Even those who might prefer a different way of responding to life were dragged into the pattern by the voice of public opinion,

⁹⁰² As recorded by Photius, and cited in Hoyland, *Arabia and the Arabs*, 120.

⁹⁰³ Supra, p.43.

⁹⁰⁴ Muqātil b. Sulaymān, *al-khams mi’at āyah*, 213.

⁹⁰⁵ Al-Ṭabarī, *Jāmi’ al-Bayān fī Tafsīr al-Qur’ān*, (Bayrūt: Dār al-Ma’rifa, 1986-1987), viii.123.

⁹⁰⁶ Schacht, “Zinā,” 1227. Note here that Schacht’s explanation of property rights matches exactly the same precepts as may be derived from the Old Testament legislation.

⁹⁰⁷ Peters, “Zinā,” 509.

urging vengeance as the most practical means of justice, and praising transient delights of drink and sex...,” although he noted earlier that the moral injunctions of the Qur’ān – among which he mentions chastity – were not a departure from older Bedouin norms.⁹⁰⁸

Remarkably, among our ever-growing corpus of pre-Islamic Arabian epigraphic sources are several which combine the letters *z-n-y* at points within the text. Interestingly, many of these seem to be included as parts of individual names, though whether as an insult, or open acknowledgement of illegitimacy, etc., is not yet known.⁹⁰⁹ One such inscription appears, transliterated, as follows:

“wzn z’(g) wzfry
whmy zt f’l mrh hm”

Winnett and Reed translate this as:

“And Z’G and Zufay have committed adultery.
And this deed stinks worse than a stinking fart.”⁹¹⁰

Written in a Hijāzī style of Thamudic, this passage – if indeed it has been transcribed and translated correctly – would certainly indicate, at least for one irritated Hijāzī individual, *zina* was an act worthy of being called a sin.⁹¹¹

As a final note on *zina*-related inscriptions, Hoyland points out the wealth of material inscribed on the rocks of that region of “sandy desert spanning modern southeast Jordan and northwest Saudi Arabia... known as the Hisma.”⁹¹² Seemingly concurrent with Nabataean rule, some of these ancient epigraphers “boast[ed] of their sexual conquests;” and “many a young tribesman,” Hoyland tells us, “proclaims that ‘he loved (*wdd*) a beautiful girl’... or that ‘he was very love-sick (*sqm srr*) for a maiden and had joyous sex with her’....”⁹¹³

Even considering such epigraphic accounts and the Qur’ān’s repeated exhortations against *fāḥisha*, the extreme view expressed by W. Robertson Smith,

⁹⁰⁸ Hodgson, *Venture*, 163, 174.

⁹⁰⁹ See G. Lankester Harding, *An Index and Concordance of Pre-Islamic Arabian Names and Inscriptions* (Toronto: UP, 1971), s.v. “zny,” “tzny,” and “znyt”; for no less than 8 occurrences (7 Safaitic and 1 Minean).

⁹¹⁰ Winnett and Reed, *Ancient Records*, 110.

⁹¹¹ Winnett and Reed, however, note two other attempts at translation, favoring a right-to-left reading: “[A. Van de Branden] reads: (a) *whmy dtn ‘lm rh hm* (b) *wdn ds’ wd(n) fry*, ‘Et Hummy dū-Tinn a tracé (ceci), il voyage le soir, et il a dressé sa tente (ici). Et celui-ci est dū-Su’ et celui-là Farayy.’ – Jamme reads: *whmy dtf’l mrh hm* (2) *wdnd’ ‘wd fry*, ‘Wahmay, he of the clan of Taf’al, has exulted [for] Ham- (2) aw, he of the clan of Nadd, has protected Farīy from danger’ (ibid.)

⁹¹² Hoyland, *Arabia and the Arabs*, 65.

⁹¹³ Ibid., 65, 201 (citations omitted).

derogatory and unrealistic as all stereotypes must be, should certainly be discounted.

Writing on the pre-Islamic Bedouin, he says:

“Such men, intolerant of celibacy as all Arabs are, usually took refuge in what the prophet called *zinā*, ‘fornication.’...”⁹¹⁴

Smith’s objectionable conclusion is, however, derived from a certain other phenomenon which may very likely have occurred in pre-Islamic Arabia:

“Our whole evidence goes to shew that the prices asked for women in ancient Arabia under the name of *mahr* were often very high, and in the time of Mohammed, as among the Bedouins of the present day, there were many men who could not afford a wife.”⁹¹⁵

Among the proofs upon which Smith draws for this phenomenon are the words of Bishop Gregentius, who is credited with a law-book for the Ḥimyarite subjects under Abyssinian rule:

“Many... say, ‘I am poor and cannot have a wife.’”⁹¹⁶

As we shall next discuss, the above may have been a significant factor in the apparent widespread occurrence of ‘alternate’ styles of marriage in pre-Islamic Arabia, some of which undoubtedly fell within the early Muslim’s conception of *zinā*.⁹¹⁷

Hoyland, too, notices this “[d]iversity in marriage customs;”⁹¹⁸ as does Hodgson, who remarks “[w]e are not perfectly acquainted with marriage practices among the pre-Islamic pagan Arabs, but it is clear that they varied greatly.”⁹¹⁹

Among such practices the following have, nevertheless, been noted: 1) secret marriage (*nikāḥ al-sirr*), in which a woman and man “entered into a marriage relation without the regular public contract;”⁹²⁰ 2) group marriage (*nikāḥ al-rahḥ*), wherein “ten men at most had one woman to wife between them;”⁹²¹ 3) matriarchal or

⁹¹⁴ Smith, *Kinship and Marriage*, 151.

⁹¹⁵ Ibid.

⁹¹⁶ As cited in *ibid.*, 446; from Boissonade’s *Anecdota Graeca*.

⁹¹⁷ A similar trend may be observed in modern-day Cairo, where the exorbitant costs associated with wedding festivities and housing, etc., have driven many young people to a variety of types of ‘secret’ marriage, known collectively as “*zawāg ‘urfī*.”

⁹¹⁸ Hoyland, *Arabia and the Arabs*, 130ff.

⁹¹⁹ Hodgson, *Venture*, 181.

⁹²⁰ Smith, *Kinship and Marriage*, 84 n.1.

⁹²¹ ‘Abd al-Ghanī ‘Umar ‘Abd al-Ghanī, *Jarīmat al-Zinā: Dirāsah Muqāranah* (Tripoli, Libya: al-Munshā’at al-‘Ammā li’l-Nashr wa’l-Tawzī‘ wa’l-I’lān, 1985), 149-50; and Smith, *Kinship and Marriage*, 151, from which this paraphrase of al-Bukhārī was taken. Various other types and instances of polyandry have been noted. Hoyland, besides noting al-Bukhārī, confirms the practice in South Arabia via Strabo’s account that “[o]ne woman is also wife for all [the sons of the family], and he who

matrilocal marriages, “that type of marriage which corresponds to a law of mother-kinship... because it does not give the husband a legitimate offspring, i.e. an offspring that is reckoned to his own tribe and his rights of inheritance within it;”⁹²² 4) *mut‘a* marriage, the temporary marriage we have previously discussed;⁹²³ and 5) Smith’s “*ba‘al* marriage with male kinship,” which, “at the epoch of the Flight... was the universal rule.”⁹²⁴

Obviously, some of these marriage types fall within the Sunni conception of *zinā*, namely the polyandrous unions and *mut‘a*. Smith notes that “[e]xamples of polyandry, where the woman is free to admit any suitor, are generally represented by Moslem writers as fornication.”⁹²⁵ Indeed, his definition of pre-Islamic *zinā* is that it “was only a kind of Nair polyandry in which the number of the husbands was not defined.”⁹²⁶ Elsewhere, he notes that, as evident from Muslim tradition, “a woman who entertained a *mut‘a* husband would sink in social estimation and not be regarded as a proper wife at all,”⁹²⁷ and that “Islam condemns it (*mut‘a*) and makes it ‘the sister of harlotry.’”⁹²⁸

first enters the house before any other has intercourse with her, having first placed his staff before the door, for by custom each man must carry a staff; but she spends the night with the eldest. And therefore, all children are brothers” (*Arabia and the Arabs*, 130). He also notes “a south Arabian inscription that commemorates the building of a house by a woman with the aid of her two husbands...” (ibid., 131). Smith, on the other hand, claims “it appears possible to shew in a more direct manner, that in point of fact *ba‘al* polyandry must have prevailed in Arabia to a great extent, and indeed that at one time polyandry was no exceptional phenomenon, but the rule” (*Kinship and Marriage*, 158). He proceeds to prove this by means of the same Strabo quote, which he understands as proof of “a very exactly ordered marriage system” (158), as well as more from al-Bukhārī (160), lexical clues in the *Ḥamāsa* (161), a 14th-century relic of polyandry recorded by Ibn Baṭūṭa in Oman (165), and certain Nabataean and South Arabian inscriptions in which “a man is described as the son of two or three fathers” (316).

⁹²² Smith, *Kinship and Marriage*, 85. See also p.127 for his theory of how such traditional Arabian marriages were eventually supplanted by a patriarchal system; and Hodgson, *Venture*, 181 n.25, for “traces of matrilocal practices at Medina.”

⁹²³ Hoyland and Smith both cite a passage from the *History* of Ammianus Marcellinus, in which he describes the Saracens’ “mercenary wives, hired under a temporary contract” (Hoyland, *Arabia and the Arabs*, 131; Smith, *Kinship and Marriage*, 81). Smith also lists several other proofs that such was practiced in pre-Islamic Arabia (79ff., 85ff.), and notes that *mut‘a* marriages were “abolished with great difficulty, and only after much hesitation on the part of the prophet, if indeed that it is not the better tradition that they were not finally condemned till the time of ‘Omar” (82). That such was the case is further suggested by the Awā’il literature, in which ‘Umar is said to be the first to forbid *mut‘a* (although al-‘Askarī notes the *fuqahā* derived the forbidding of *mut‘a* from Qur’ān, Sunna, and *ijmā‘* (*al-Awā’il*, 112)); as well as its continued acceptance in Shī‘ī law.

⁹²⁴ Smith, *Kinship and Marriage*, 127.

⁹²⁵ Ibid., 165 n.1.

⁹²⁶ Ibid., 151.

⁹²⁷ Ibid., 127.

⁹²⁸ Ibid., 82. The quote is from the *Kitāb al-Aghānī*.

As we have also briefly noted, Islam condemns various types of incest in Q.4:19-23, with the telling phrase: “What happened in the past is now past: It was lewd and abhorrent, and only the way of evil.”⁹²⁹ Interestingly, however, al-Shahrastānī writes in the second volume of his *Al-Milal wa'l-Niḥal*, in a section devoted to the pre-Islamic Arabs, that “they used *not* to marry their mothers, nor their daughters, nor their maternal or paternal aunts.”⁹³⁰ They were not completely innocent of sex within the forbidden degrees, however, for, as he next records:

“The most vile of what they used to do was when a man had sex between two sisters, or took turns with his father’s women: and those who did this were called ‘*al-ḍayzan*’ (الضيزن). Aws b. Ḥajar al-Tamīmī, reviling some of the Banī Qays b. Tha‘laba, said: ‘Three of them take turns with their father’s women: one after the other: [al-Basīt!]

*And the Persian woman (al-fārisīya) is not forbidden to you
Each of you to his father a ḍayzan precedes
(So) fornicate (nīkū) merrily and walk about her shrine (qubbatihā)
The walk of the throng, their shields tucked under their arms.”*⁹³¹

This account meshes to a certain degree with Strabo’s, which we shall now reproduce as it appears in Smith’s *Kinship and Marriage in Early Arabia*:

“Brothers have precedence over children; the kingship, also and other offices of authority are filled by members of the stock (γένος) in order of seniority. All the kindred have their property in common, the eldest being lord; all have one wife and it is first come first served, the man who enters to her leaving at the door the stick which it is usual for every one to carry; but the night she spends with the eldest. Hence all are brothers of all (within the stock of συγγενεῖς); they have also conjugal intercourse with mothers; an adulterer is punished with death; and adulterer means a man of another stock.”⁹³²

This concept that adultery can only be committed by or with “a man of another stock” seems unique to Strabo’s account. However, as we shall note more fully in Sāsānid law, this, as well as the *ḍayzan* of al-Shahrastānī, is indicative of another phenomenon which may have influenced the matrimonial landscape of ancient Arabia: Persian marriage customs.

⁹²⁹ Q.4:22; Ali, *Al-Qur’ān: A Contemporary Translation*, 113.

⁹³⁰ al-Shahrastānī, *Al-Milal wa'l-Niḥal*, ii.232.

⁹³¹ Ibid.

⁹³² As reproduced by Smith, *Kinship and Marriage*, 158. The account continues with the story of a princess much loved by her fifteen brothers who – in order to escape their constant attentions – employs the trick of acquiring duplicates to their staves and leaving them outside her door.

Of note in al-Shahrastānī's account is not only the 'foreign' sounding word *al-ḡayzan*, but the reference to the *fārisīya* as well. Among the definitions of *al-ḡayzan* in the *Lisān al-'Arab* is "he who vies with his father for his wife;" after which the same line of poetry as above is quoted, with the following explanation:

"He's saying: they are like the Zoroastrians (*al-majūs*). The man from among them marries the wife of his father and the wife of his son."⁹³³

As we shall see in our brief examination of Sāsānian law, there is much evidence to support this remark. Hoyland, too, quotes a sort of sexual union recorded by al-Bukhārī, the main goal of which is to produce an heir for an infertile husband.

"A man of them would say to his wife, when she had just finished menstruating [so there would be no doubt over parentage]: 'Send to such a one and demand of him sexual intercourse to obtain offspring', and her husband would separate himself from her and not touch her until her pregnancy by that man became apparent. As soon as it was apparent, her husband would resume sexual relations with her if he wished."⁹³⁴

The resemblance of this passage to a type of marriage mentioned in the Sāsānid law-books is remarkable.

Despite the picture painted by these various types of *zinā*-related or incestuous relationships, however, it would be wrong to say that such offences went unpunished in pre-Islāmic Arabia. Besides what we have mentioned about stoning, there are indications of other punishments. Hoyland, expounding on the theme of love in pre-Islamic poetry, quotes from A.J. Arberry's translation of the famed *mu'allaqa* of Imrū' al-Qays:

"Many's the fair veiled lady, whose tent few would think of seeking, I've enjoyed sporting with at my leisure,
Slipping past packs of watchmen to reach her, with a whole tribe hankering after my blood,
eager every jack-man to slay me."⁹³⁵

Certainly, this suggests that the blood of a seducer was lawful to the kin of his victim among the Bedouin of pre-Islamic Arabia. Furthermore, there is some indication that a type of exile may have been enacted, being that "[b]anishment as part of the

⁹³³ S.v. "الضيزن" *Lisān al-'Arab* [dictionary online], accessed 6 August 2005, *Al-Waraq*, available from <http://www.alwaraq.com>; Internet.

⁹³⁴ Hoyland, *Arabia and the Arabs*, 131.

⁹³⁵ *Ibid.*, 214.

punishment for fornication is known to the ancient Iraqians as a current practice;⁹³⁶ and, as we have mentioned, outlawry seems to have been practiced in both the northern and southern civilizations. Hoyland notes:

“In South Arabia there... existed the threat of being placed under a ban. For more minor offences one might ‘rejoin the tribe’ after making an expiatory offering..., but in the case of major crimes one might be deprived of one’s civil liberties, that is, one would no longer be able to regard one’s life as protected by the king....”⁹³⁷

He next quotes from an inscription where such is decreed, and which contains the following lines:

“Whoever contravenes a proclamation of ban or an examination... let that men, who has [thereby] shown himself a transgressor, die, as is commanded, and his life is permissible. Whoever kills him need not fear death or examination in respect of the life of that man who has shown himself a transgressor.”⁹³⁸

A similar inscription is treated by A.F.L. Beeston, in which those who are proclaimed outlaws by Saba are to be killed when found and their property forfeit to the king. Such a punishment was brought about in stages, “which Sabaeen law required previous to the carrying out of the death penalty: first, a decision on the part of the tribal assembly, outlawing the offender; secondly, a juridical act stripping him of his privileges of civil protection; thirdly, a solemn announcement of this act, proclaimed in the chief temple of the area to which he belonged.”⁹³⁹ Beeston notes that this decree may come from “just that stage in the evolution of the administration of justice, at which the responsibility of punishing offenders was assumed by the central authority, instead of being left to the more haphazard methods of tribal justice in dealing with ‘outlaws.’”⁹⁴⁰ A similar transition may certainly have occurred in the polity of Lakhmid Iraq, and the fact that banishment was considered ‘current practice’ by the early Iraqi *fuqahā* may well indicate that seduction, rape, adultery, or other *zinā*-related crimes may have merited the penalty of outlawry before Islam.

Such would not have been the case with prostitution, however, there being some indication that the compulsion of slave-girls forbidden in Q.24:33 was directed

⁹³⁶ Schacht, *Origins*, 209.

⁹³⁷ Hoyland, *Arabia and the Arabs*, 125.

⁹³⁸ Ibid., 126. He cites the *Répertoire d'épigraphie sémitique*, #3878.

⁹³⁹ Beeston, “Penal Law,” 6.

⁹⁴⁰ Ibid., 7.

at a rather prevalent practice. Rubin, in fact, has shown us that the true message of the *firāsh* maxim is directed against the practice known as *di'wa*.

"Slave-girls used to practice prostitution and share their profits with their masters, who actually made them practice this trade. If they gave birth to a child, various individuals could lay claim to it as their offspring. This kind of claim was known as *di'wa*. If the *di'wa* was carried through, the claimed son assumed the *nasab* of this 'new' father."⁹⁴¹

This practice, however, is a far cry from Smith's claim that "[i]n Arabia and elsewhere in the Semitic world... unrestricted prostitution of married and unmarried women was practiced at the temples, and defended on the analogy of the license allowed herself by the unmarried mother-goddess."⁹⁴²

As for the crime of sodomy, there are some references in the early literature, notably certain *ahādīth*, and, as the *Encyclopedia of Islam* tells us:

"By the very fact of their existence, these *hadīths* show that, while probably not very common in Bedouin society, homosexuality was not totally unknown in Arabia of the pre-Islamic period. For proof of this one need look no further than the story of *Dhū Nuwās*, who was compelled to kill *Dhū Shanātir* in order to escape his advances. Proverbs of the form *alwaṭ min...* testify to the antiquity of the term and of the idea which it expresses...."⁹⁴³

No punishments for sodomy seem to have come down to us from pre-Islamic times. However, the penalties inflicted by early Islamic leaders certainly do not reflect any dictates of the Qur'ān, and may be telling of what came before.

"Abū Bakr condemned a homosexual to be buried beneath the débris of a wall, and prescribed burning alive as the penalty for all those guilty of such practices; in this respect he was followed by 'Abd Allāh b. al-Zubayr and Hishām b. 'Abd al-Malik. For his part, 'Alī b. Abī Ṭālib ordered the stoning of a *lūṭī* and had another thrown head-first from the top of a minaret; according to Ibn 'Abbās, this last punishment must be followed by stoning."⁹⁴⁴

Note that the punishments of precipitation, burning, and stoning exist in Shī'ī law as well, not to mention Babylonian and Judaic laws for unchastity.

Returning to a more conceptual level, we have noted previously the consideration in pre-Islamic Arabia by which *zinā* was, in Schacht's words,

⁹⁴¹ Rubin, "Al-Walad," 10 (citation omitted).

⁹⁴² Smith, *Kinship and Marriage*, 165 n.1.

⁹⁴³ Ed., "Liwaṭ," *EF*, v.776.

⁹⁴⁴ *Ibid.*, 777.

“regarded... as an injury to the rights of property of a fellow-tribesman.” This is a parallel of what may be derived from the Judaic legislation – indeed from all ancient Near Eastern codes – and has been noted as well by Hodgson, who remarks: “In some cases the man acquired the woman very nearly as property...;”⁹⁴⁵ and Smith, who credits this cultural attitude “in which marital rights are a matter of purchase” with the creation of “a doctrine of chastity inconsistent with the freedom of women to take and dismiss their partners.”⁹⁴⁶ At any rate, the theft-adultery link, so far as it occurs in Islamic law, may be attributable to the continuation of this ancient mindset from its ancient Semitic forbears.

Yet another pre-Islamic – and seemingly Semitic – conceptual holdover is that of punishment as a sort of purification. Juynboll notes:

“In ancient Arabia, crime was often regarded as impurity, and punishment as purification. In Muslim tradition also it is mentioned that a certain adulterer who desired to do penance for his sin said to the Prophet, *tahhimi* (‘purify me’), whereupon he was stoned to death.”⁹⁴⁷

Finally, from a procedural perspective, several pre-Islamic customs are of note. First of all, Crone points out several sources containing references to ‘trial by ordeal’ among modern Bedouin tribes in her article on the *qasāma*, at the end of which she mentions: “Ordeals by both fire and water also existed in pre-Islamic Arabia, though they appear to have been very different.”⁹⁴⁸ An ordeal by water in ancient Arabia is especially intriguing, considering what we have learned of Hammurabi’s code, and is certainly deserving of further investigation. A modern case of fire ordeal is reported by Musil, who “knew of a story of an adulteress who ‘cheated’ the fire and was put to death (for having cheated rather than for her adultery) when her lover confessed.”⁹⁴⁹ Should the case have been raised by her suspecting husband, then we have yet another example of the continuity of a certain Semitic sensibility – the ordeal of the suspected wife. For parallels of Islamic *li‘ān*, however, there are much closer traditions noted by Smith, who “has cited the Arabian story of Hind bint ‘Utba, whose husband sent her back to her father on suspicion of unchastity, and it appears that the case could not rest there, the

⁹⁴⁵ Hodgson, *Venture*, 181.

⁹⁴⁶ Smith, *Kinship and Marriage*, 127.

⁹⁴⁷ Juynboll, “Crimes and Punishments (Muhammadan),” 290.

⁹⁴⁸ Crone, “*Qasāma*,” 156-7 n.22.

⁹⁴⁹ *Ibid.*, 185 n.154. Crone cites Musil’s *Arabia Petraea*, iii.340.

treatment being clearly regarded as an insult, and from another incident it would seem that suspected wives could be conducted under ignominious circumstances to the Ka'ba and there swear seventy oaths."⁹⁵⁰

Another note should here be made regarding a suggestion that pre-Islamic Bedu – much like their Assyrian and Judaic predecessors – may have taken consideration of the circumstances surrounding individual sexual offences. Hoyland relates a Jāhili poem by al-Shanfara who, reminiscing on the outstanding qualities of his lost love, says:

“Afar from the voice of blame her tent stands for all to see,
when many a woman's tent is pitched in the place of scorn....”⁹⁵¹

We are reminded of the silence of an alleged rape victim as being deemed complicitous in Assyrian, Judaic, and Mālikī law; a woman's pitching her tent in plain view of the community must have placed her above suspicion of consorting with the type described in the *mu'allaqa* of Imrū' al-Qays.

A final remark on procedure: we may note Schacht's observation, when speaking of South Arabia's legal inscriptions, that “[o]n occasion... they enable us to establish or confirm the pre-Islamic character of certain institutions, such as the rule of two witnesses....”⁹⁵² The same rule is true, of course, for the Judaic legislation, and we may thus consider this another Semitic hallmark carried – though augmented to four witnesses in the case of *zina* – into Islamic law.

Hand-amputation and sariqa-related traditions

Several Western scholars have raised the (at times unsubstantiated) claim that not only was the punishment of hand-amputation absent from the corpus of pre-Islamic Arabian customary law, but that theft simply wasn't punished at all. Schacht writes: “There was no punishment for theft in pre-Islamic Arabia, and the mutilation of the culprit by cutting off his hand was introduced by the Koran.”⁹⁵³ In a similar vein are Heffening's comments that “[t]his (cutting) was an innovation of the Prophet's,” and that “[i]n pre-Islamic Arabia, theft from a fellow-tribesman or from a guest was alone considered despicable, but no punishment was prescribed for it, the

⁹⁵⁰ As summarized by Cook, “Adultery (Semitic),” 136. He follows this with a description of the ‘ordeal of the bitter waters’ in Num.5:11ff.

⁹⁵¹ Hoyland, *Arabia and the Arabs*, 215.

⁹⁵² Schacht, *Introduction*, 9.

⁹⁵³ Idem, “Foreign Elements,” 14; in n.27, however, he is willing to accept the possibility of a Byzantine origin for the penalty; a topic we shall touch upon later.

person had himself to see how he could regain his property.”⁹⁵⁴ Precisely the same points are made by Bosworth, who writes: “In general, the pre-Islamic Arabs did not recognize theft as a highly reprehensible crime, and it was not condemned unless the victim was a member of the kin-group or a *ḍjār* within it...; the injured party was normally left to secure redress himself and recover his property....”⁹⁵⁵ Note the observations that theft was only considered criminal if from a fellow tribesman or guest. This – in Bedu society – is akin to saying theft was criminal if committed *within* the community, the same as may be observed in any other ancient codes. What Heffening and Bosworth have, in effect, told us is that theft in ancient Arabia was considered criminal only insofar as it fit the ancient definition of theft. Obviously, as with Judaic law, theft outside the community would be within the realm of war, and we may here note the possible etymological connection between Hebrew *gaza* and Arabic *ghazw*, ‘raid, attack.’ Indeed, as Bosworth next notes, *ghazw* “was always regarded as perfectly legitimate.”⁹⁵⁶ One would, however, necessarily assume this to be the case so long as it were directed at another community – part and parcel of the definition of *ghazw* itself. Thus, to say that *ghazw* was “legitimate” to the party enacting it is something of a given, akin to saying an act of war is considered legitimate by the polity initiating it. In short, attempting to make the claim that theft in ancient Arabia went unpunished, Heffening and Bosworth have only underscored that the crime of theft in ancient Arabia fit precisely the ancient Semitic mold, distinguishing what happened within the community from what happened without, and leaving the latter to the dictates of war. However, in raising the point that *ghazw* was considered “legitimate,” Bosworth has also shed light on the seeming dearth of legislation for brigandage in some ancient sources. The communities from which such legal material evolved – as Old Testament and pre-Islamic Arabian literature can certainly attest – were often engaged in such activities themselves, and so could hardly condemn them and prescribe punishment. Such was left to the unwritten custom of war.

The claim that theft went unpunished thus appears to be unfounded, and, in fact, we shall see there is ample proof that pre-Islamic Arabs practiced hand-

⁹⁵⁴ Heffening, “Sariḳa,” 62. He, too, however, alleges possible pre-Islamic origins (Arab and Persian), which we shall soon discuss.

⁹⁵⁵ Bosworth, “Liṣṣ,” 767.

⁹⁵⁶ Ibid.

amputation. Indeed, we have seen that some other Semitic cultures did so, and will add that such appears to have been practiced within the Byzantine and Sāsānid territories. As far as pre-Islamic Arabia is concerned, evidence may be culled not only from Arab-Islamic tradition, but from archaeological research as well.

From within Muslim tradition, we may begin with a certain *ḥadīth* on the authority of ‘Ā’isha, which is found, among other places, in the *Bidāyat al-Mujtahid* of Ibn Rushd.

“A Makhzūmiyya woman used to borrow goods and then denied taking them. The Prophet (PBUH) ordered the amputation of her hand. Her family came to Usāma and talked to him about it. Usāma brought the matter up with the Prophet (PBUH), who said, “O Usāma, I do not expect you to interfere in the *ḥudūd* of Allāh.’ The Prophet then began addressing the people, saying, ‘Those before you were destroyed (for the reason) that if one of their élite committed theft they let him go, but when a person of low status stole something they cut off his hand. By Him in Whose hands is my soul, had it been Fāṭima, the daughter of Muḥammad, I would surely have cut her hand.’”⁹⁵⁷

Interestingly, not only does this tradition imply that former generations of Arabs had practiced hand-amputation for theft, but that they did so on a socially-graded basis. The “élite” (*al-sharīf*) were dismissed without corporal punishment, and those of “low status” (*al-ḍaʿīf*) suffered amputation. Much the same concept, we have seen, occurs in the ancient codes. In the *talion* laws of Hammurabi, for instance, we find punishments graded by the perpetrator’s status as *awīlum* or *muškenum*, the former being let off with a fine if convicted of injuring the latter, whose punishment – we must assume – always consisted of the appropriate mutilation.⁹⁵⁸ More relevant are the laws of theft where, although the *awīlum* was to pay more than the *muškenum*, the thief who had not the means to pay compensation was to be killed. The *sharīf*, in other words, paid a fine while the *ḍaʿīf* paid with his life.⁹⁵⁹ Similarly, the thief of Ex.22:3 was himself to be sold if unable to make restitution.

Most importantly, however, is the suggestion that hand-amputation was practiced for theft, and the same is true of the *Awāʿil* literature, which attributes the first cutting of the hand to a famed Jāhili *shaykh*.⁹⁶⁰

⁹⁵⁷ Ibn Rushd, *Bidāya*, 537.

⁹⁵⁸ *Supra*, p.129.

⁹⁵⁹ *Supra*, n.646.

⁹⁶⁰ See my disclaimer on the use of the *Awāʿil* literature as evidence, *supra*, p.181.

“The first to cut for theft was al-Walīd b. al-Mughīra: The Messenger of God, may the peace and blessings of God be upon him, cut in Islam, and the Qur’ān revealed it in His speech, exalted be He: ‘The male thief and the female thief: cut off their hands’ [*al-mā’ida* : 38]. And the Quraysh used to prescribe that as well.”⁹⁶¹

What follows this is a narrative in which we are told Abū Lahab and some accomplices from the tribe of Khuẓā’a robbed the Ka’ba of some of its treasures in order to procure drink and gifts for their revelries with two famed slave-girl songstresses. Al-‘Abbās b. ‘Abd al-Muṭallib, overhearing their drunken boasts of the theft, informed Abū Ṭālib, who straightaway raided the place of revelry. Remarkably, once the thieves were apprehended (some escaped), the hand of one of the Khuẓā’is was cut off, but Abū Lahab’s only punishment was to be shunned and treated harshly, due to his social standing (*wa tajāfū ‘an Abī Lahab li-sharafihī*). Certainly it is no accident that we see once again the graded punishment as in the *ḥadīth* of the Makhzūmīya, and one can only wonder if this account is by way of explanation of the Prophet’s reported speech, or if both in fact reflect a real social phenomenon of the Arab community before Islam. Of particular note in this account is that it involves the Qurayshis themselves, the punishment executed by their leaders in Mecca. Furthermore, the reader may note there is no reference to al-Walīd b. al-Mughīra in the narrative, and since it was Abū Ṭālib who was brought to break up the thieves’ revelry, we may assume it was he who administered the punishment. In short, what we have in the *Awā’il* of al-‘Askarī is *two* attributions of hand-amputation to the Qurayshis before Islam.; al-Walīd b. al-Mughīra having ordered the first, Abū Ṭālib for the Ka’ba theft.⁹⁶² Note, too, that this latter is a case of sacred theft.

⁹⁶¹ al-‘Askarī, *al-Awā’il*, 34.

⁹⁶² The narrative of the drunken thieves is tied to the statement: “And the Quraysh used to prescribe that (cutting) as well,” the initial heading naming al-Walīd b. al-Mughīra as the first to do so is self-contained and has no narrative. The same can be seen with the preceding entry: “The first to forbid wine in the Jāhiliya was al-Walīd b. al-Mughīra,” after which follows a story in which Qays b. ‘Āsim forbids wine to himself after harassing his own daughter and the wine seller. Note, too, on p.154, the entry: “The first to be born in Baṣra was ‘Abd al-Rahmān b. Abī Bakr,” which consists of nothing other than the heading. That two accounts of hand-amputation are meant by al-‘Askarī is fairly certain, a fact unnoticed by either Heffening (“Sariḳa,” 62; he cites Nöldeke and Schally and thus may not have reviewed the literature himself), or Roberts (*Social Laws*, 81 n.2). Of course, as Dr. Joseph Lowry notes in his review, “The story about Abū Lahab is very problematic for historical analysis. It is designed (a) to denounce someone who is denounced in the Qur’ān and (b) to demonstrate the injustice of Jāhili norms.” The purpose once again of relating these stories is only to point out that later Arab-Islamic tradition itself exhibited no hesitancy in ascribing a pre-Islamic origin to hand-amputation for theft.

Additionally, from our accounts within the Arab-Muslim tradition is a single line from the third section of the second volume of al-Shahrastānī's *al-Milal wa'l-Niḥal*, entitled: "Views of the Arabs in the Jāhiliya." Therein we find the heading "Their *sunan*, about which the Qur'an agreed with them, and a few of their customs,"⁹⁶³ and near the end of this section are the purity rituals of Abraham, of which we are told: "When Islam came it confirmed them as a *sunna* of the *sunan*." Next, we read:

"And they used to cut off the right hand of the thief if he stole" (*wa kānū yaqṭa'ūna yad al-sāriq al-yumnā idhā saraqā*).⁹⁶⁴

In short, al-Shahrastānī is saying exactly what this thesis has set out to prove: amputation of the hand for theft was among the pre-Islamic Arab *sunan* confirmed by the Qur'an.

Remarkably, this has some backing from the archaeological record of South Arabia, in what constitutes a rather extraordinary series of artifacts and clues bordering on the bizarre. A French archaeological expedition to the Yemen in 1979 discovered, at the site of an ancient mountain shrine, a stela on which was inscribed a tribal decree in the name of the god Ta'lab Riyām.⁹⁶⁵ The operative section of the decree, in Christian Robin's translation, reads:

"9 Celui pour qui il serait établi avec certitude qu'il a mené paître dans
10 ce territoire réservé, qu'il soit condamné au profit de Ta'-
11 lab et de la tribu à une amende de 50 monnaies-*blt* de (poids) exact,
12 ou bien que sa main soit gardée au milieu
13 du territoire réservé de Ta'lab. Ce décret a été (établi)
14 comme Ta'lab l'a prescrit dans sa consultation
15 oraculaire pour bien de leur tribu."⁹⁶⁶

Of immediate note is the crime: basically, an infringement of grazing rights; the punishment: a fifty *blt* fine or the obscure "que sa main soit gardée au milieu du territoire réservé de Ta'lab"; and the origin of the decree: Ta'lab himself via his oracle. A transliteration of the obscure hand reference reads: "*f-'w l-tmt 'n yd-hw b-wst mḥgr T'lb*," and it was not until Christian Robin acquired access to another document that the mystery at last was solved.

⁹⁶³ al-Shahrastānī, *Al-Milal wa'l-Niḥal*, ii.219, 232.

⁹⁶⁴ Ibid., 236.

⁹⁶⁵ Christian Robin, "L'Offrande d'une main en Arabie Préislamique : Essai d'interprétation," in *Mélanges Linguistiques offerts à Maxime Rodinson*, ed. Christian Robin (Paris : Librairie Orientaliste Paul Geuthner, 1985), 308.

⁹⁶⁶ Ibid., 309.

This second document is of bronze, and consists of:

“...une main droite, tronquée à hauteur du poignet. Les articulations des doigts sont bien marquées et les veines sont proéminentes. La facture est si réaliste que cette main pourrait avoir été faite à partir d’un moulage de la main du dédicant.”⁹⁶⁷

On the back of this amazingly life-like severed hand of bronze, in the same South Arabian characters as the stela, is the following inscription:

“1 *Whb T’lb* ibn
2 *Hsm’*, Yursamite, esclave
3 des banu Suḥaym, a dédié à leur pa-
4 tron Ta’lab Riyām cette main
5 droite dans Son mémorial *d-Qbrt*
6 dans la cité de *Zfr*, pour leur bien-être.”⁹⁶⁸

Having matched these two remarkable documents, Robin concludes:

“Nous faisons donc l’hypothèse que, dans le décret, « la remise de sa main » signifie la dédicace d’une image de la main du coupable. Quant à la main de bronze, ce serait une offrande consécutive à une transgression d’une nature comparable à celle évoquée dans le décret : et si le texte de la dédicace déclare que celle-ci a été accomplie « pour leur bien-être » (*l-wfy hmw*), ce n’est pas incompatible avec un acte de réparation.”⁹⁶⁹

The implications of this find are immediate to the goals of this thesis, for, as Robin next points out:

“Si l’interprétation que nous donnons de ces deux documents est acceptée, il existait en Arabie du Sud préislamique, aux premiers siècles de l’ère chrétienne, une pénalité consistant à offrir une image de sa main. Il est vraisemblable qu’à plus haute époque, ce n’était pas une image de la main du coupable qui était offerte mais la main elle-même, représentant symboliquement l’activité de l’individu.”⁹⁷⁰

Robin has thus proven that “[l]a pénalité dont le Coran frappe le voleur ne serait donc pas une innovation.”⁹⁷¹ However, as he rightly observes: “Mais elle ne vise pas le même délit : dans le Coran, c’est le vol qui est puni alors qu’en Arabie du Sud, c’était la violation de certains interdits.”⁹⁷²

Two points may be made in response to Robin’s remarkable article and the conclusions he drew therein. First, it must be noted that in the eyes of ancient

⁹⁶⁷ Ibid., 315.

⁹⁶⁸ Ibid., 316.

⁹⁶⁹ Ibid., 319.

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid., 320.

⁹⁷² Ibid.

Semitic peoples theft and infringement of grazing rights were not necessarily separate categories – they are both in effect injuries to the property rights of others. We have proof of this in the Covenant Code, Ex.22:5: “If a man grazes his livestock in a field or vineyard and lets them stray and they graze in another man’s field, he must make restitution from the best of his own field or vineyard;”⁹⁷³ a decree placed squarely in the middle of several others regulating theft of the conventional variety (Ex.22:1-15 all deal with injuries to property). The fact that the property in question belongs to the issuer of the decree, the god Ta’lab Riyâm, only serves to raise the additional parallel of hand-amputation as a *ḥaqq Allāh*.

Secondly, that the bronze represents a substitute for a severed hand does not necessarily imply that the culprit’s hand was not cut off; indeed, the life-like bronze may just as well have been cast from a severed limb as one attached. The point of the bronze cast may have been as additional penance, or for the sake of providing a permanent and inscribed token for display at the shrine. However, should the culprit’s hand have truly remained intact, we may have in this artifact confirmation of the class-based phenomenon evident in the Muslim traditions. The fifty *blṭ* demanded by the decree, or, for that matter, the amount of bronze necessary to cast a nineteen-by-eleven centimeter human hand,⁹⁷⁴ could not have been within the means of every pre-Islamic South Arabian.

Either way, thanks to these documents, there is every reason to believe that amputation of the hand for theft was practiced in pre-Islamic South Arabia. Furthermore, as Crone points out: “It is noteworthy that the majority of great lawyers in early Islam were Yemeni (by descent or *walā*): thus Shurayh, Sha‘bī, Ṭāwūs, Ibrāhīm al-Nakhā‘ī and Awzā‘ī.”⁹⁷⁵ The smooth transition of hand-amputation from Qur’ān to *sharī‘a* may thus have been ensured.

To our discussion of *sariqa*-related crime and punishment in pre-Islamic Arabia, a final point may be made as regards the punishment for brigandage. We have seen some scholars claim that theft went unpunished, and we have noted this apparently erroneous conclusion was likely reached by analogy or even confusion with the activity of *ghazw*. The dearth of such legislation for raiding and brigandage in Judaic law, and, seemingly, Jāhili Arab law, could well be due to the fact that it

⁹⁷³ NIV, 83.

⁹⁷⁴ Robin, “L’Offrande d’une main,” 315.

⁹⁷⁵ Crone, “Qasāma,” 181 n.140.

lay within the field of war, and that the nomadic lawmakers themselves were engaged in such practices. But what of the settled regions, the cities and civilizations? One would suspect that any polity of a certain level of sophistication would have legislated punishments for those who prey upon the travelers within their borders, or make inroads into the towns, or other such brigand-like mischief. It is no surprise, therefore, when, immediately following the account of hand amputation in the chapter of pre-Islamic *sunan* endorsed by the Qur'ān, al-Shahrastānī writes the following:

“The kings of the Yemen, and the kings of Ḥīra, used to crucify the man who committed highway robbery” (*wa kānat mulūk al-Yaman wa mulūk al-Ḥīra yuṣallibūna al-rajul idhā qaṭa‘a al-ṭarīq*).⁹⁷⁶

Should this be true, we have not only another ancient Arabian punishment confirmed by the Qur'ān and translated into the *sharī‘a*, but we have also another clue as to why the early *fuqahā’* linked Q.5:33f. – which employs the verb *yuḥāribūna* – with the crime of *qaṭ‘ al-ṭarīq*. The crucifixion prescribed by the Qur'ān as one of the punishments for those who waged war against God and His Prophet, was, in former times, imposed upon such brigands as harried the wayfarer.

By way of a brief summary, then, we might say that Arab-Islamic literary tradition – not to mention the archaeological record of Iraq and the Yemen – support the use of stoning and hand-amputation by pre-Islamic Arabs. We have seen the following: 1) claims that stoning was practiced for *zinā* in the Jāhiliyya and at the dawn of Islam; 2) a pre-Islamic maxim tying adultery to stoning; 3) epigraphic evidence and an ancient testimonial tying Arabs to the punishment of stoning for other crimes; 4) several claims that hand-amputation was practiced for theft by Jāhili Arabs and a *ḥadīth* suggesting the same; 5) archaeological evidence for the practice of theft-related hand-amputation in the Yemen; and 6) a claim that crucifixion was practiced for brigandage in the Yemen and at Ḥīra. In addition to all this, we have seen literary support for a pre-Islamic adherence to the forbidden degrees, capital punishment for adultery in Yemen, and *li‘ān*-like oath-taking; not to mention epigraphic evidence of the rule of two witnesses and the practice of outlawry and banishment, also from the Yemen.

⁹⁷⁶ al-Shahrastānī, *Al-Milal wa'l-Niḥal*, ii.219, 236.

In short, even from what scanty sources we have as regard our topic, pre-Islamic Arabia appears not only to have witnessed the punishments of stoning and hand-amputation, but to have harbored traditions parallel to several found in *zina* and *sariqa*-related Islamic legislation. If taken in conjunction with the abundance of precedents and parallels for such legislation we have uncovered in the ancient Mesopotamian and Judaic codes, it becomes more and more likely that the majority of the rulings which made their way into Islamic criminal law may have their origins in and around where Islam was born: Arabia and its Semitic neighbors. Nevertheless, opportunities for 'foreign influence' were still plentiful, and so it is in this direction we shall now turn.

Some notes on Roman Classical, Byzantine, Provincial, and Christian Canon Law

The problems with Goldziher and Schacht's model by which Islamic law was largely borrowed from Roman law are nowhere more evident than when applied to the Islamic punishments for adultery and theft. There are certainly similarities between the two systems in more than a few respects, and we shall discuss them briefly below. Nowhere, however, in the Romaic legislation is to be found the punishment of stoning for any crime; and nowhere – in such legislation as was produced before Islam – do we find the punishment of hand-amputation. In eighth century Byzantine law, however, we find quite a few applications of hand-amputation for theft-related and other crimes. If we were to operate by the same assumptions as Goldziher and Schacht, therefore, we would conclude that this 'innovation' of Islam in fact influenced Byzantine law which, previously, had no such punishment. In fact, this could be considered a very obvious case of Byzantine 'borrowing' of Islamic law. However, that is not the argument of this thesis, as will be seen shortly. First, a few remarks on the four Romaic systems surveyed – Classical, Byzantine, Provincial, and Christian Canonical – and the provisions they contain as concern adultery and theft.

Classical Roman law is generally seen as including such legislation as originated between 100 B.C. and 230 A.D.;⁹⁷⁷ the general definition of adultery as derived from this material has been summarized thus by Judith Evans Grubbs:

"Adultery, in Roman legal (and social) terms was extramarital sexual relations with or by married women; the term *stuprum* covered illicit sexual relations in general, including adultery and relations with a

⁹⁷⁷ Grubbs, *Law and Family*, 1.

widow or an unmarried girl or boy of respectable status. The relations of a man (married or single) with slaves, prostitutes, or others of low status were not subject to legal penalties. Those convicted of adultery or *stuprum* faced confiscation of part of their property and relegation to an island....⁹⁷⁸

The inherent inequality of this definition has been well-noted,⁹⁷⁹ and, as we have seen, seems typical of ancient legal systems. Under the Republic, it appears that some amount of self-help was permitted in cases of *flagrans delictum*;⁹⁸⁰ and proceedings for the crime were dealt with by the "*iudicium domesticum*, or family council, in which near relatives took part, with the head of the family as president in virtue of his *patria potestas*. This council could inflict what penalty it chose."⁹⁸¹ In fact, the crime was not to be handled by the state at all until the *Lex Julia de adulteriis coercendis* was introduced by Augustus in 18 A.D. Separate courts were established to deal with adultery,⁹⁸² and penalties were as follows:

"The law fined the adulteress in one half of her dowry and one third of her property. Both were interdicted fire and water, a punishment soon replaced by exile or deportation to an island. There is no ground for supposing that the death-penalty was sanctioned by the original terms of the *Lex Julia*.... Conviction entailed *infamia*..., and the condemned became incapable of giving evidence.... The adulteress could not marry again..., but she was not debarred from entering the condition of *concubinatus*...."⁹⁸³

As for theft, we may note that the Twelve Tables (established 450-1 B.C.) allowed for the immediate killing of the nocturnal thief, though this was to change later.⁹⁸⁴ Other aspects of Classical Roman theft-law will be discussed below.

Byzantine laws of sexual offence begin with Constantine (r.306-337 A.D.) and his condemnation of "many features of the traditional Roman marriage law and concubinage....," though this was later "considerably revised and relaxed under Justinian...."⁹⁸⁵ Justinian (r.527-565 A.D.) nevertheless seems to have confirmed

⁹⁷⁸ Ibid., 94 n.1. See also F.W. Hall, "Adultery (Roman)," *ERE*, i.134; for a Classical Roman definition.

⁹⁷⁹ Grubbs, *Law and Family*, 62; Hall, "Adultery (Roman)," 134.

⁹⁸⁰ Ibid.

⁹⁸¹ Ibid. See also J.A.C. Thomas, ed. and trans., *The Institutes of Justinian: Text, Translation, and Commentary* (Amsterdam, Oxford: North-Holland Publishing Company, 1975), 335.

⁹⁸² J.S. Reid, "Crimes and Punishments (Roman)," *ERE* iv.297; and Hall, loc. cit.

⁹⁸³ Hall, "Adultery (Roman)," 135; see also Thomas, *Institutes*, 331, 335f.

⁹⁸⁴ Reid, "Crimes and Punishments (Roman)," 297; see also Jackson, *Theft*, 160.

⁹⁸⁵ J.F. Haldon, *Byzantium in the Seventh Century: The Transformation of a Culture* (Cambridge: UP, 1990), 379.

Constantine's introduction of the death-penalty.⁹⁸⁶ This change to a capital penalty is attributed to Constantine's attempts to 'Christianize' Roman law, a trend that seems to have been much alive at the dawn of the Islamic age, when "religious sentiments in particular continued to acquire an increasing hold on Roman society."⁹⁸⁷ Later books of law show what can only be described as an increasing 'Semiticization,' and the *Ecloga*, published a hundred years after the birth of Islam, shows many important changes which appear to be the results of trends in criminal law concurrent with the rise of the new religion. Among other things, we note the replacing of capital punishment in many instances with "barbaric penalties,"⁹⁸⁸ and new forms of punishment such as death by the sword, nose-slitting, tongue or hand-cutting, blinding, etc.⁹⁸⁹

Adultery-related laws of the *Ecloga*, in addition to those discussed below, included: 1) adultery as grounds for divorce (at the man's, not the woman's, behest);⁹⁹⁰ 2) the barring of adulterers from enlisting in the army;⁹⁹¹ 3) a lack of recognition of 'cohabitation,' which was deemed a verbal marriage contract;⁹⁹² 4) the nose-slitting of adulterers, in addition to other penalties;⁹⁹³ 5) the nose-slitting of the rapist;⁹⁹⁴ and 6) capital punishment by the sword for a breach of the forbidden degrees.⁹⁹⁵ Many of these laws and punishments were to find confirmation in the later amendments known as the *Ecloga Privata Aucta*, also attributed to Leo III and Constantine V – though more likely later – which "[c]ontained modifications introduced from time to time by special edicts which were eventually incorporated in this revised manual of the *Ecloga*."⁹⁹⁶ Among the various punishments of this later text we find: 1) death by sword (and nose-slitting) for the outrage of a nun, a virgin, a chaste widow, a "woman under coverture," and the perpetrator's own betrothed;⁹⁹⁷

⁹⁸⁶ Thomas, *Institutes*, 336.

⁹⁸⁷ Edwin Hanson Freshfield, ed. and trans., *A Manual of Roman Law: The Ecloga, Published by the Emperors Leo III and Constantine V of Isauria at Constantinople, A.D. 726* (Cambridge: UP, 1926), 12.

⁹⁸⁸ *Ibid.*, 16.

⁹⁸⁹ *Ibid.*, 45-6.

⁹⁹⁰ *Ibid.*, 28, 78-9.

⁹⁹¹ *Ibid.*, 52-2, 126. Adulterers who had committed their crime while enlisted were dismissed (127-8).

⁹⁹² *Ibid.*, 19, 76.

⁹⁹³ *Ibid.*, 22, 109-10.

⁹⁹⁴ *Ibid.*, 111.

⁹⁹⁵ *Ibid.*

⁹⁹⁶ Edwin Hanson Freshfield, ed. and trans., *A Revised Manual of Roman Law Founded upon the Ecloga of Leo III and Constantine V, of Isauria: Ecloga Privata Aucta* (Cambridge: UP, 1927), 2.

⁹⁹⁷ *Ibid.*, 77, 84.

2) death by sword for adult perpetration of “unnatural offences;”⁹⁹⁸ 3) death by sword for parent-child or sibling-sibling incest, with all other types receiving nose-slitting;⁹⁹⁹ and 4) the emasculation of perpetrators of “abominable crime;”¹⁰⁰⁰ among other penalties and precepts which will be discussed below.

Regarding theft, the general rule according to the *Institutes* of Justinian seems to have been fourfold restitution for robbery with force, although the victim might avail himself of self-help.¹⁰⁰¹ Much later in the *Ecloga*, however, we see hand-amputation as a punishment for theft-related crimes, with the brigand to be “hung” immediately.¹⁰⁰² Later yet, in the *Ecloga Privata Aucta*, we find, among other punishments: 1) death by sword for sacrilegious theft;¹⁰⁰³ 2) flogging and exile for the same if motivated by poverty;¹⁰⁰⁴ 3) twofold restitution for the theft or harboring of a slave;¹⁰⁰⁵ 4) flogging for stealing arms in a camp or on the march;¹⁰⁰⁶ 5) and, in general, onefold restitution for the rich thief, with the poor man’s first offence punished with flogging and exile.¹⁰⁰⁷

For examples of Roman Provincial laws regarding sexual offences, we must rely on the much-noted *Syro-Roman Law-Book*, “which appears to have been written in Syria in the fifth century of our era, and contains many hints of customs divergent from Roman use which still lingered in these lands....”¹⁰⁰⁸ Among the laws of this compendium regarding adultery-related offence, we find: 1) §71, in which women are forbidden to slander their husbands of immorality; as are brothers each other; slaves their masters, other slaves, or freemen; and sons their fathers;¹⁰⁰⁹ and 2) §86, that a convicted adulteress might be divorced without regaining any of her *mahr*, ‘dowry.’¹⁰¹⁰

⁹⁹⁸ Ibid., 77.

⁹⁹⁹ Ibid., 78.

¹⁰⁰⁰ Ibid., 81. The nature of “abominable crime” is not known, but should it refer to the homosexual act, it may well represent a continuity of the ancient Assyrian custom (supra, n.640.)

¹⁰⁰¹ Thomas, *Institutes*, 268-9.

¹⁰⁰² Freshfield, *Ecloga*, 48, 107-8, 113.

¹⁰⁰³ Freshfield, *Ecloga Privata Aucta*, 82.

¹⁰⁰⁴ Ibid.

¹⁰⁰⁵ Ibid., 83.

¹⁰⁰⁶ Ibid.

¹⁰⁰⁷ Ibid.

¹⁰⁰⁸ Smith, *Kinship and Marriage*, 111.

¹⁰⁰⁹ Bruns and Sachau, *Rechtsbuch*, 100 (of the Arabic text). I have preferred, for obvious reasons, the Arabic manuscript, from which all translations in this paper were made, and to which all notes refer.

¹⁰¹⁰ Ibid., 87-8.

As for theft, “[a]ccording to the Syro-Roman lawbook, the following were all capital: (a) Theft by night or with a weapon... (b) Cattle theft... (c) House-breaking...”¹⁰¹¹ To these crimes and their punishments, we might add §30, in which the one harboring a slave is reduced to slavery and returned along with the missing slave to his master; and §39, which prescribes fourfold restitution for those who harbor the pilferings of a thief-relative.¹⁰¹²

A final note should be made concerning Eastern Canon law and its stance on sexual offence, summarized by Grubbs as follows:

“[Thirty-five of eighty-one canons from the Council of Elvira] concern marriage, sexuality or behavior of women; another four refer to grave sins, including sexual offences. Six of the twenty-five canons from Ancyra are directed explicitly at issues concerning marriage and sexuality; another two have been variously interpreted as prescribing penalties for bestiality or homosexuality. Only two of the twenty-two canons from Arles deal with issues of marriage or sex, but seven of the fifteen canons from Neocaesaria do, and an eighth refers more vaguely to sins which would include those of a sexual nature. Church leaders of this period clearly were concerned about the marital and sexual practices of their communities. Penalties, usually involving a period of penance and temporary excommunication, were solely ecclesiastical and had no force in secular law. The most serious sexual offence was adultery, particularly on the part of married women. At Elvira, the penalty for the gravest kinds of fornication, such as relapse into fornication by those who had already done penance once, or permanent abandonment of their husbands by women who ‘joined themselves’ to other men, was excommunication until the sinner was dying, sometimes with no hope of communion even then.”¹⁰¹³

Adultery

As mentioned earlier, however, Romaic law does contain a few parallels to Islamic law in the areas of adultery and theft. This is especially true of the later (post-Islamic) Byzantine *Ecloga* of which, we may note here, twenty-nine of fifty-three penal regulations relate to theft or sexual offence. Furthermore, of these fifty-three regulations, a total of thirteen require flogging (four of these calling for exile as well), eight require exile, an astounding eighteen call for mutilation (one each of

¹⁰¹¹ Jackson, *Theft*, 257 n.1. These are §§119, 122, and 123 of the Arabic text, respectively. See Bruns and Sachau, *Rechtsbuch*, 93.

¹⁰¹² Ibid., 20, 75.

¹⁰¹³ Grubbs, *Law and Family*, 74-5.

tongue-cutting, blinding, and emasculation; plus seven hand-amputations and eight nose-slittings), and two call for “hanging.”¹⁰¹⁴

As for earlier law, however, we have seen that the term *stuprum* “[c]overs illicit sexual relations in general,” and thus serves the same purpose as the word *zinā* in Islamic law.¹⁰¹⁵ Adultery, from at least Constantine onward, seems to have been a capital delict, evidently confirmed by Justinian,¹⁰¹⁶ and apparently continuing as such through the eighth century *Ecloga*.¹⁰¹⁷ Interestingly, the *Ecloga* contains an appendix entitled “Synopsis of the Mosaic Law” in which the Deuteronomic punishment of stoning appears,¹⁰¹⁸ but the punishment is nowhere to be seen among the regulations of the main text. One might conjecture as to whether the events of John 8:1-11 may have played a part in the lack of stoning in Romaic-Christian law materials. At any rate, we do see a parallel of the Qur’ānic injunction of flogging, though, as we came to expect in Judaic law, the differences are as significant as the similarities. A married man who commits adultery, we are told, is to receive twelve lashes and to pay a fine; an unmarried man to receive but six lashes.¹⁰¹⁹ We may also note that flogging was prescribed (the number of times unmentioned) for “a man with two wives;” the second wife, along with her children, was to be banished.¹⁰²⁰ We find the same punishments repeated in the *Ecloga Privata Aucta*, with the added note that twelve lashes for the married adulterer are to be administered whether he is rich or poor.¹⁰²¹ Additionally, we see that the perpetrator of “unnatural offences,” who would normally receive death by sword, is to be flogged and committed to a monastery if under fifteen years of age; whilst “a man who has carnal knowledge of his sister-in-law, her daughter, or other issue, shall be flogged and have his nose slit, and shall be sent into perpetual exile.” The woman, if willing, received the same

¹⁰¹⁴ Freshfield, *Ecloga*, 104-5.

¹⁰¹⁵ Certain of the Eastern Canonical Councils, such as Elvira, preferred the Greek term *μοιχεία* – usually used specifically to denote adultery, but used in this case, like *stuprum* and *zinā*, to designate “all sex outside marriage” (Grubbs, *Law and Family*, 75).

¹⁰¹⁶ See Grubbs, *Law and Family*, 94-6; Hall, “Adultery (Roman),” 135; Thomas, *Institutes*, 334, 336; W.M. Foley, “Adultery (Christian),” *ERE*, i.133. Many authors such as Foley note the capital penalties of Constantine and Constans “may or may not have been a mistaken zeal for Christian religion” (ibid.) According to Constantine, “[t]he paramour was to be beheaded if a freeman, and if a slave, burned to death...,” while Constans decreed against both guilty parties the penalty inflicted on patricides, viz. to be burned alive, or else drowned in a sack...” (Foley, loc. cit.)

¹⁰¹⁷ See Freshfield, *Ecloga*, 135 (§3).

¹⁰¹⁸ Ibid., 142ff.

¹⁰¹⁹ Ibid., 108 (§§19, 20).

¹⁰²⁰ Ibid., 111 (§35).

¹⁰²¹ Freshfield, *Ecloga Privata Aucta*, 79 (§22).

punishments, but without exile.¹⁰²² Thus, not only do we have a parallel of flogging and banishment for a sexual offence, but signs of a similar consideration of whether the woman should receive banishment as well – the same as was occurring among Muslim jurists at the time the *Ecloga Privata Aucta* was likely published.¹⁰²³

Flogging and nose-slitting were also imposed on the man / woman who had illicit intercourse with a mother and daughter / father and son;¹⁰²⁴ not to mention for an incestuous relation with a step-child.¹⁰²⁵ Interestingly, in case of seduction of a consenting virgin, we see an echo of Judaic law in that the parents, if consenting, may agree that they be married. If not, and the seducer is rich, he is to give the girl a pound of gold; if poor but landed, half his property; and if unpropertied, he is to be flogged, have his head shaved, and be exiled.¹⁰²⁶

Of even greater interest, however, are the first parallels we have seen to the Qur'ānic injunction of Q.4:15, which enjoins, upon women guilty of *fāhisha*, confinement “in the houses until death completely overtakes them or God makes for them a way.” The seventh canon of the Council of Toledo, held at the end of the fourth century A.D., in addressing the issue of adultery among the wives of the clergy, declares:

“[L]est by chance they have the licence of sinning more, their husbands are to receive this power, except for murder, of guarding them, of binding them in their own home, forcing them to fasts [that are] healthful, not lethal...”¹⁰²⁷

Finally, it has been noted that Justinian attempted to modify the *Lex Julia* by converting the punishment for an adulteress to confinement in a convent for life.¹⁰²⁸

The rapist appears to have received capital punishment throughout the full gamut of later Romaic law; not only in the *Institutes* of Justinian,¹⁰²⁹ but the *Syro-*

¹⁰²² Ibid., 78 (§17).

¹⁰²³ Supra, p.19 and n.55. Banishment was imposed on the adulteress in the *Lex Julia*, where, in addition to forfeiture of 1/3 of her property, she was exiled to an island (Thomas, *Institutes*, 336). Banishment from the parish was prescribed in certain canons (‘Abd al-Ghanī, *Jarīmat*, 140); and in the *Syro-Roman Law-Book*, we read: “Perpetrators of sins are punished by the measure of their sins; some of them by banishment to distant districts with nothing but the clothes on their backs, and some of them by killing” (Bruns and Sachau, *Rechtsbuch*, 93 (Ar.121)).

¹⁰²⁴ Freshfield, *Ecloga Privata Aucta*, 78 (§18).

¹⁰²⁵ Ibid., 84 (§61).

¹⁰²⁶ Ibid., 79 (§20).

¹⁰²⁷ Cited in Grubbs, *Law and Family*, 224. Other canons seem to have prescribed imprisonment in a monastery or covenant (‘Abd al-Ghanī, *Jarīmat*, 139, 140); and a decree of Theodosius I (r.379-395 A.D.) enjoins confinement in a brothel (Foley, “Adultery (Christian),” 133).

¹⁰²⁸ Ibid.

Roman Law-Book as well.¹⁰³⁰ The same is true for the homosexual act; receiving capital punishment not only in the *Institutes*,¹⁰³¹ but the *Syro-Roman Law-Book*,¹⁰³² the *Ecloga*, and the *Ecloga Privata Aucta* – the latter two works enjoining death by sword.¹⁰³³

On a more conceptual level, we find, in certain cases, parallels to the Islamic conception of *iḥṣān*. Marriage is the decisive element in establishing adultery as opposed to *stuprum*, the latter category including, as we have seen, “relations with a widow or an unmarried girl or boy of respectable status;” a distinction which seems modeled on the ancient tradition by which the unmarried and widowed are placed in separate categories from the married. Interestingly, however, the seventy-second canon of the Council of Illiberis (Elvira) in A.D. 305 reads: “A *widow* who commits *adultery* (sic) must undergo a penance of five years, and, if practicable, must marry her seducer.”¹⁰³⁴ In addition, the *Syro-Roman Law-Book* prescribes death “[i]f a man rapes a widowed woman and so violates her....”¹⁰³⁵ These regulations seem to indicate a shift away from the more ancient grouping of the widow with the unwed, and towards a conception which eventually materialized in the Sunni conception of *iḥṣān*.

That adultery be seen as an impediment to marriage also finds a parallel, this time in Justinian’s *Digest* (533 A.D.)¹⁰³⁶ Schacht also draws our attention to this “well-known feature of canon law,” making the rather complicated argument that adultery as impediment to marriage prevailed in the Ibāḍī sect due to its introduction into “ancient Iraqi traditions” by Christian converts to Islam.¹⁰³⁷ Strangely, he makes no mention of Q.24:3 (forbidding the marriage of a *zānī* with aught but a *zānīya* or polytheist), which, though later considered abrogated by Sunni ‘*ulamā*’,

¹⁰²⁹ Thomas, *Institutes*, 332.

¹⁰³⁰ Bruns and Sachau, *Rechtsbuch*, 83 (Ar.61).

¹⁰³¹ David F. Wright, “Homosexuality,” *Encyclopedia of Early Christianity*, i.543.

¹⁰³² Bruns and Sachau, *Rechtsbuch*, 93 (Ar.120).

¹⁰³³ Freshfield, *Ecloga*, 111-12 (§38); idem, *Ecloga Privata Aucta*, 77 (§11).

¹⁰³⁴ Foley, “Adultery (Christian),” 133; italics and parenthesis are his, and betray his confusion, understandingly, with the use of ‘adultery’ in conjunction with the actions of a widow. However, the occurrence of this passage from the Christian clergy of the 4th century, and the discourse among the *fuqahā*’ at least four centuries later, points to the possibility that a belief in previously married women meriting the same punishment as married women may have enjoyed some amount of circulation in the ancient world before Islam, leading both to this canon and the Sunni definition of *iḥṣān*.

¹⁰³⁵ Bruns and Sachau, *Rechtsbuch*, 83 (Ar.61).

¹⁰³⁶ Hall, “Adultery (Roman),” 135.

¹⁰³⁷ Schacht, “Foreign Elements,” 17.

may well have provided a basis for the doctrine of more literal-minded Kharijite sects.

As in Islam, we also see in Romaic law a consideration of the social status of the criminal. However, in Roman law we find that “[p]enalties inflicted on slaves were generally severer than those to which freemen were exposed.”¹⁰³⁸ On the other hand, Roman tradition provides our first parallel for the conditions a perpetrator must meet to be liable for punishment. The theft-law of Justinian’s *Institutes* considers the conditions of puberty and sanity,¹⁰³⁹ and we have seen that the perpetrator of “unnatural offences” does not receive the capital penalty if under fifteen.

With regard to procedure, witnesses were required for the prosecution of adultery across the spectrum of ancient legal works; in the Classical tradition “seven witnesses were needed for the valid *repudium* of a wife on the grounds of adultery,”¹⁰⁴⁰ while the *Syro-Roman Law-Book* allows a woman to divorce her husband only “if she establishes proof by two men or three” that her husband mistreated her in any of a number of ways, including practicing whoredom (*fujūr*) or bringing an adulteress into her house.¹⁰⁴¹ Additionally, in the *Ecloga* and *Ecloga Privata Aucta*, it is made clear that “[i]n criminal cases five witnesses shall attend before the court hearing the case.”¹⁰⁴²

That a lack of the required number of witnesses carried certain consequences is also made clear in some sources, and so we have several parallels for Islamic *qadhif*. In the *Institutes*, slander of sexual misconduct is included under the crime of contumely, and if convicted of it, the defendant was made *infamis*.¹⁰⁴³ The *Syro-Roman Law-Book* raises the issue of slander more than once, allowing the husband to accuse his wife of misconduct “if he is able to establish proof of it,” and so long as

¹⁰³⁸ S.v. “Servus,” in Adolph Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, 1968), 704. We have also seen, in the case of seduction of a consenting virgin, that the rich man got off with a fine while the poor man was flogged, tonsured, and exiled. The same sort of gradation is found in §§25, 50 (Freshfield, *Ecloga Privata Aucta*, 79, 83). See also Thomas, *Institutes*, 334-5, 336; for more example of gradated punishments.

¹⁰³⁹ *Ibid.*, 262, 267.

¹⁰⁴⁰ Grubbs, *Law and Family*, 94ff.

¹⁰⁴¹ Bruns and Sachau, *Rechtsbuch*, 88 (Ar.87).

¹⁰⁴² Freshfield, *Ecloga*, 98 (§13); *idem*, *Ecloga Privata Aucta*, 69. Note that it is not clear whether these were eyewitnesses to the event, or court witnesses.

¹⁰⁴³ Thomas, *Institutes*, 275ff. One punished with *infamia* was, among other things, “prohibited from acting for others or themselves participating in litigation...” (*ibid.*, 328). Hence we have a strong parallel for the Qur’ānic injunction concerning the *qādhif*: “Don’t ever again accept testimony from them” (Q.24:4).

the charge falls within two months of his having filed for divorce.¹⁰⁴⁴ Furthermore, we find in the *Law-Book* that ancient principle by which the false accuser receives the same punishment as the would-be accused.¹⁰⁴⁵ A Greek marriage contract found in Egypt and dating to 566-572 A.D. states that the husband is “not to affront or repudiate [his wife] except for misconduct, which must be proved by three or more credible free men...;”¹⁰⁴⁶ and both the *Ecloga* and *Ecloga Privata Aucta* continue the old tradition of punishing the slanderer with the punishment of the accused.¹⁰⁴⁷

A final note on *zina*-related parallels: the theft-adultery link is not only very apparent in the manner in which Roman legal material is arranged (note, for example, the *Ecloga*’s nine theft-related crimes and punishments followed immediately by its twenty sexual offences and punishments), but by the nature of some of the laws themselves. Grubbs provides a summary which may allow us the most insight into the theft-adultery link we have yet seen:

“In virtually all the societies where anthropologists have described the honour of the men of a family as dependent on the sexual purity of its women, there is a strong association between the physical domain of the home and the bodies of the women who inhabit it. To guard his woman from violation, whether by rape, seduction of virgins, or adultery with wives, a man must prevent the violation of his home by thieves, marauders, or lovers. Failure to maintain the boundaries of his home intact brings great dishonour upon a man, for it implies concomitant failure to preserve the chastity of his wife, daughters, and sisters. Constantine’s legislation carries the same implication. Responsibility for maintaining an unmarried woman’s virginity lies with her *parentes*, her (male) relatives, who are threatened with exile if they allow her to be abducted.”¹⁰⁴⁸

Additionally, J.A.C. Thomas, in his commentary on the *Institutes* of Justinian notes that “[i]n the time of Gaius..., the list of free persons capable of being stolen also included wives married *in manu*...”¹⁰⁴⁹ This ancient conception is preserved in the words of Paul in the first epistle to the Thessalonians, where “[t]he Apostle does not

¹⁰⁴⁴ Bruns and Sachau, *Rechtsbuch*, 84 (Ar.65).

¹⁰⁴⁵ *Ibid.*, 91, 92-3 (Ar.108, 114, 116).

¹⁰⁴⁶ H.I. Bell, ed., *Greek Papyri in the British Museum*, vol.5, 2nd ed. (Milano: Cisalpino-Goliardica, 1973), 140.

¹⁰⁴⁷ Freshfield, *Ecloga*, 110 (§27, the accuser’s nose is slit), 113 (§51); *idem*, *Ecloga Privata Aucta*, 80 (§25), 83 (§46). Additionally, the perjurer’s tongue was to be cut out (*Ecloga*: 106 (§2), *Ecloga Privata Aucta*: 76 (§2)).

¹⁰⁴⁸ Grubbs, *Law and Family*, 323-4.

¹⁰⁴⁹ Thomas, *Institutes*, 266. The *Institutes* of Gaius were written c.160 A.D. Thomas cites (G 3.199). *In* or *cum manu* is that type of marriage by which the wife passes from the father’s to the husband’s power, whereas in *sine manu mariti*, she stays subject to her birth family and the *pater familias*.

ignore our duty towards our neighbors. Adultery is sinful because it is a kind of theft....”¹⁰⁵⁰

Theft

Romaic theft-law has its fair share of parallels as well, especially the post-Islamic legislation of the *Ecloga* and its amendments. We find in the *Ecloga* a very similar spirit to that of the corpus of ancient Mesopotamian law we have studied, especially that principle by which the “offending member” is to be mutilated. Thus he who willfully murdered by the sword died by the sword. But if his victim did not die by the sword-strike, “the striker shall have his hands cut off because he was audacious enough to strike with a sword.”¹⁰⁵¹ The perjurer, as we have seen, had his tongue cut out; the perpetrator of “abominable crime” was emasculated. It is no surprise, therefore, to see that several theft-related crimes incurred the punishment of hand-amputation. Thus the third offence of cattle-theft merits hand-cutting; as does theft of a horse while in camp or on the march, and grave-robbing.¹⁰⁵² Even more interesting is the general formulation which follows the ruling for theft in camp or on the march:

“§11. Anyone who steals in any other place in the State shall, if he is a freeman and wealthy, for a first offence, and by way of making restitution to the person he has stolen from, pay the value of the thing stolen. If he is poor he shall be flogged and exiled. And for a second offence he shall have his hand cut off.”¹⁰⁵³

Once again we see the unequal application of hand-mutilation as expressed in the *ḥadīth* of the Makhzūmīya and implied by the stela of Ta’lab Riyām with its accompanying bronze hand. Nor was hand-amputation applied only to theft, but to the murderer who employed a stick, stone, or kicking; the forger of currency; the counterfeiter; and, as we have seen, the deliverer of a non-fatal sword-strike.¹⁰⁵⁴

An important parallel is to be found in the Romaic treatment of brigandage as well, the conception and definition of which closely resembles that of Islamic *ḥirāba*. In the *Syro-Roman Law-Book* we find the following:

¹⁰⁵⁰ Foley, “Adultery (Christian),” 132. He refers to 1 Thess.4:6.

¹⁰⁵¹ Freshfield, *Ecloga*, 113 (§46); idem, *Ecloga Privata Aucta*, 77 (§6).

¹⁰⁵² Idem, *Ecloga*, 107, 108 (§10, 13, 14); idem, *Ecloga Privata Aucta*, 78, 83 (§15, 43, 49). Note that grave-robbing is also punished with amputation according to most Muslim jurists (supra, p.120).

¹⁰⁵³ Idem, *Ecloga*, 107 (§11); idem, *Ecloga Privata Aucta*, 83 (§50).

¹⁰⁵⁴ Idem, *Ecloga*, 108, 113 (§18, 47); idem, *Ecloga Privata Aucta*, 83, 77 (§8, 44, 45).

“§122. Any people who cross over other than their own (land), and traverse a village or country and then drive off from them an animal, or a horse, or livestock, or people, then indeed our *sunna* orders their killing at once or their banishment to the ends of the earth, while their matter is consigned to the judge, that they be recompensed depending on the magnitude of their sin, or its smallness.”¹⁰⁵⁵

Not only is there a parallel in the killing or banishment of such brigands, but in the consignment of the matter to a judge, who must carefully weigh their crimes and devise the appropriate punishment until such a time as they are captured.¹⁰⁵⁶ Also, in both the *Ecloga* and the *Ecloga Privata Aucta* we read:

“§50. A brigand or anyone who waits in ambush and commits murder shall be hanged on the spot.”¹⁰⁵⁷

The various interpretations of ‘hanging’ as a penalty in the ancient world included impaling, hanging from a tree or cross, and other forms of punishment.¹⁰⁵⁸ It seems somewhat unlikely in the very Christianized *Ecloga* that crucifixion was the mode implied, but the fact that the punishment remains worded as ‘hanging’ may indicate that crucifixion or hanging from a tree was a long-standing regional practice for punishing the brigand. The culprit, at any rate, was yet to be executed in such a way as displayed his corpse.

Other noteworthy parallels crop up in the following areas: 1) the distinction between manifest and non-manifest,¹⁰⁵⁹ and between the daytime and nighttime thief;¹⁰⁶⁰ 2) the penalty of twofold compensation;¹⁰⁶¹ 3) conditions of the thief: that he be at least approaching puberty and sane,¹⁰⁶² and 4) conditions of the stolen object: that it be *mobilis, in commercio*, and taken ‘with intent to gain’ (*lucri faciendi causa*).¹⁰⁶³

¹⁰⁵⁵ Bruns and Sachau, *Rechtsbuch*, 93 (Ar.122).

¹⁰⁵⁶ *Supra*, p.32.

¹⁰⁵⁷ Freshfield, *Ecloga*, 113 (§50); *idem*, *Ecloga Privata Aucta*, 78 (§14).

¹⁰⁵⁸ *Supra*, n.856.

¹⁰⁵⁹ Thomas, *Institutes*, 258.

¹⁰⁶⁰ Bruns and Sachau, *Rechtsbuch*, 93 (Ar.119). The night-thief is killed, the day thief punished and fined.

¹⁰⁶¹ Thomas, *Institutes*, 259. For manifest theft, the punishment was fourfold restitution. In the *Ecloga*, a soldier thief was penalized twofold restitution and was dismissed from service (Freshfield, *Ecloga*, 129 (§49)). Schacht suggests that twofold restitution “became familiar to some Muslims through Christian converts and was taken over by them” (“Foreign Elements,” 15); and Heffening points out: “The Caliph ‘Umar is said always to have condemned the thief to return double the value,” then points us towards the *Institutes* of Justinian, 4, 1, 5 (“Sariqa,” 62).

¹⁰⁶² *Ibid.*, 267.

¹⁰⁶³ *Ibid.*, 264.

At this point, before reviewing the significance of these parallels, it would behoove us to return to the issue of hand-amputation in later Romaic law and the question of its origins. We have seen Schacht contend that “[t]here was no punishment for theft in pre-Islamic Arabia, and the mutilation of the culprit by cutting off his hand was introduced by the Koran.”¹⁰⁶⁴ Nevertheless, he footnotes this statement with the following observation:

“Mutilation as a punishment for coin-clippers and counterfeiters is advocated by spurious ‘traditions’ quoted in Balādhurī.... R.S. Lopez... has suggested a Byzantine origin. If this is correct, it would be a case of proposed adoption of a judicial practice which existed in the conquered territories.”¹⁰⁶⁵

We have seen, however, in post-Islamic Byzantine legislation, not only hand-amputation for the coin-forgery and counterfeiter, but for several types of common theft. How would Schacht have accounted for this? As noted before, were we to use the same methodology that he and Goldziher seem to have employed – that being the identifying of a similar tradition in two systems, and subsequent attribution of its origin to the system with the older record of this tradition – then we would conclude 8th century Byzantine law had ‘borrowed’ hand-amputation from early Islamic law. It is doubtful, however, that either Goldziher or Schacht would have been willing to make that assumption.¹⁰⁶⁶ The assumption, then, was that hand-amputation came into Islamic law either as an innovation or by adoption. And yet, the most likely answer to the puzzle was within Schacht’s grasp all along – within this very article by Lopez, no less – as we now hope to demonstrate.

First, by way of a brief summary of the article, we may note that Lopez explains and asserts all of the following: 1) the Visigoth laws ascribed to Chindaswinth (r.642-653 A.D.) and Receswinth (653-672 A.D.) prescribed the unprecedented penalty of hand-amputation for the “minor person who counterfeited royal documents and their seals” and “the slave who forged money;”¹⁰⁶⁷ 2) around the

¹⁰⁶⁴ Schacht, “Foreign Elements,” 14.

¹⁰⁶⁵ Ibid., n.27.

¹⁰⁶⁶ Interestingly, that Schacht knew of the *Ecloga* is certain due to its appearance in the article he cited by R.S. Lopez. Why he never mentions its decrees is not clear.

¹⁰⁶⁷ R.S. Lopez, “Byzantine Law in the Seventh Century and its Reception by the Germans and the Arabs,” *Byzantion* 16 (1942-3): 450. Lopez adds: “[A] third law [later] extended the penalty to all offenders, regardless of rank [and was] to be preceded by flogging and shaving – a degrading punishment which is found very often in later Byzantine law.” These are the only laws prescribing mutilation in the Visigoth code.

same time the Lombard King Rothari decreed hand-amputation “for two crimes only: any offence against the royal monopoly of coinage, and any forgery of charters;”¹⁰⁶⁸ 3) in Muslim tradition, when ‘Umar b. al-Khaṭṭāb asked what was to be done to one who had counterfeited the Caliphal seal, “[o]ne suggested the cutting off of a hand; but the opinion of other, more traditionalist advisors prevailed, and the forger was only flogged and imprisoned;”¹⁰⁶⁹ and 4) hand-amputation was prescribed in France by the ninth century Louis the Pious as well as Charles the Bald for money forgers, not to mention in England by the tenth century Aethelstan.¹⁰⁷⁰ In Lopez’s words:

“To sum up, the amputation of the hand for forgeries of coins, seals and public documents was introduced in two Germanic codes and into Arab legal practice at the time of Heraclius, or shortly after his death. In two other Barbaric codes, its introduction occurred when Byzantine influence was strong. The penalty was foreign to the national Germanic and Arabic customs; in the Barbaric states its enforcement was almost entirely confined to the special field of currency and public documents.”¹⁰⁷¹

Lopez proceeds to note that “[c]orporal mutilations were foreign to classic Roman law also,” but mentions its use in the late Empire in place of the death-penalty, and that “[a] law of Justinian implies practical toleration of hand-cutting as a customary penalty, although no corporal mutilations find a place in his own laws.”¹⁰⁷² He then explains:

“Thus cutting off of a hand was a popular punishment for forgers of coins, seals and public documents from the fifth century on in Byzantine territory. Justinian tolerated it without giving it official recognition. All the extant Byzantine law books have hand-cutting as the regular penalty,—but no extant law book is earlier than the late seventh century, and Heraclius, Rothari and Chindaswinth ruled in the first half of this century.”¹⁰⁷³

Finally, Lopez concludes:

“The fact that the same penalty was introduced in two Barbarian codes and into Arab legal practice just after the accession of Heraclius would suggest that Heraclius was the emperor who transformed the unwritten

¹⁰⁶⁸ Ibid., 451. There was no consideration of rank.

¹⁰⁶⁹ Ibid. Lopez paraphrases the account in al-Balādhurī’s *Futūḥ al-Buldān*, the same discredited by Schacht.

¹⁰⁷⁰ Ibid., 452-4.

¹⁰⁷¹ Ibid., 454.

¹⁰⁷² Ibid.

¹⁰⁷³ Ibid., 455.

custom into law, and that such a law had almost immediate reception in the West as well as in the East.”¹⁰⁷⁴

In short, hand-amputation only came into Islamic law because Heraclius decreed it, thus confirming an age-old unwritten regional custom and spreading its influence.

Yet, at least in respect to hand-amputation in Islamic law, Lopez seems to have overlooked the most important point, as surely as did Schacht. He asserts that hand-cutting for forgery and counterfeiting was an “unwritten custom” before working its way into later Roman law, yet never asks the question: whose unwritten custom was it? It was obviously not Roman, nor is there any indication it was Hellenic.¹⁰⁷⁵ We have seen the punishment of hand amputation before, however, in ancient Mesopotamian, Judaic, and Arabian tradition, and we shall soon see that it was very likely practiced in ancient and early Sāsānid Persia as well. Hand-amputation, in other words, was a punishment current in the ancient Irano-Semitic legal milieu, the same as no doubt continued in the form of local ‘unwritten’ custom under Byzantine rule. Arabia, furthermore, had been steeped in the traditions of this milieu for millenia. Rome, however, was a relative newcomer.

Now consider that most modern scholars “see Constantine as a radical innovator responsible for the introduction into the Roman legal system of fundamentally non-Roman concepts derived from Christian and ‘oriental’ sources.”¹⁰⁷⁶ We might also consider the *Syro-Roman Law-Book* and its lengthy introduction, describing the first *sunna*, how it was recorded in the Torah, spread through the land, and was superseded by the *sunna* of the Christ. The Law-Book then states:

“As for now, the *sunna* has become redundant with the coming of Christ and the *sunna* of all people is one *sunna* put down by believing kings through what they supported of its wisdom and guidance, and the first to do that was Constantine....”¹⁰⁷⁷

¹⁰⁷⁴ Ibid., 456.

¹⁰⁷⁵ See A.C. Pearson, “Crimes and Punishments (Greek),” *ERE* iv.276f.; and Douglas M. MacDowell, *The Law in Classical Athens* (Ithaca, New York: Cornell University Press, 1978), 148. Greek punishments included various grades of restitution, fines, and confinement in the stocks; the night-thief was to be killed. “Debasement of the coinage” also received death.

¹⁰⁷⁶ Grubbs, *Law and Family*, 1; see also Foley, “Adultery (Christian),” 133; and Hall, “Adultery (Roman),” 135. We have seen, for example, that he introduced the death penalty for adultery.

¹⁰⁷⁷ Bruns and Sachau, *Rechtsbuch*, 69.

The *Law-Book*, in fact, ascribes itself to Constantine, Theodosious, and Leo, “who prescribed the good *sunan* and the praiseworthy *hudūd*...”¹⁰⁷⁸ Once again we find ourselves asking: What were these *sunan*? What did the compilers of the Law-Book consider the *sunan* of Christ and where did they come from? What are the “Christian and ‘oriental’ sources” which so influenced Constantine?

A possible indication may lie in some of the ‘innovative’ penalties for wives who illegally repudiate their husbands. Grubbs notes:

“Already a constitution of 337, preserved under Constantine’s name but enacted after his death, allows an exception in the case of a soldier’s wife who has not been able to get directly in touch with her husband for four years or more and wishes to remarry. In such a case, the law says, the woman should be able to reclaim her dowry and marry again without fear of prosecution for adultery after she has notified her husband’s commander of her intentions.”¹⁰⁷⁹

The reader is instantly reminded of Hammurabi §§133ff.¹⁰⁸⁰

Furthermore, we may note that: 1) as Grubbs contends, “[i]n the East it appears that by and large people continued to follow their local laws and customs, which might be of much greater antiquity than those of the Romans,” and that “[m]ost inhabitants of eastern provinces were probably not even familiar with Roman law....”;¹⁰⁸¹ 2) Freshfield’s observation that despite a state of continual warfare, the word ‘Hagarenes’ never occurs in the *Ecloga*, and his argument against the *Ecloga*’s inclination to “Semitic Monotheism, Jewish or Moslem,” despite its appendix of Mosaic law and the eastern origins of the emperors who composed it;¹⁰⁸² and 3) Hallaq’s observations that a) several scholars have shown “the Near East had a far greater influence on Rome and Roman culture than the Roman Empire had on the Near East,” and b) “what came to be known as the Roman heritage of the Near East turns out, in many if not all respects, to be a heritage heavily indebted to the indigenous Semitic cultures of the ancient Near East, not to Greece or Rome.”¹⁰⁸³

And lastly, a quick review of the parallels for adultery and theft-related laws we have brought to light will show that once again we are faced with a conundrum;

¹⁰⁷⁸ Ibid., 68.

¹⁰⁷⁹ Grubbs, *Law and Family*, 232.

¹⁰⁸⁰ Supra, p.123 and n.612.

¹⁰⁸¹ Grubbs, *Law and Family*, 97-8.

¹⁰⁸² Freshfield, *Ecloga*, 13-14, 54. The point is that he believes there to be neither Muslim nor Jewish influence in the precepts of the *Ecloga*. This argument indirectly supports an indigenous, pre-Islamic Syrian source, though he does not argue this. His argument may be found at the end of this section.

¹⁰⁸³ Hallaq, *Formation*, xxxi n.32.

the same problem we faced in Judaic law. Mainly, the differences are every bit as significant as the parallels. We see the parallel of flogging for adultery, for instance, but it is only twelve or six lashes, and accompanied with a fine. We see the punishment of confinement, but it is most often in a convent or monastery. Hand amputation seems to have been practiced for common theft, but only for the second offence of a *poor* thief. Just as in Judaic law, few – if any – of the parallels are exact.

All of these observations point in the same direction; Heraclius' 'unwritten custom;' Constantine's 'oriental sources' and the *sunan* that he, Theodosius, and Leo "supported;" the observations of Grubbs, Freshfield, and Hallaq; and the puzzle of the inexact parallels; all of these point, once again, to the model of common source with divergent development. This is especially true of later Roman law which, if not influenced by Islam itself, seems to have been greatly influenced by the customary laws of the indigenous inhabitants of its eastern provinces, customary laws which were part of the greater Near Eastern body of common law from which Arab, and subsequently Islamic, tradition evolved. Perhaps Schacht says it best, albeit unknowingly, when, on the same page, he first remarks that "the difference between the spirit of Islamic law and the spirit of Roman law... is indeed striking," and then: "[a]s regards the relations between Roman and Islamic law, a number of parallels have been established which are too numerous and too striking to be coincidences."¹⁰⁸⁴ How does one account for such "striking" differences coupled with such "striking" parallels? The answer, of course, is that such parallels as exist grew forth from the same body of ancient Irano-Semitic common law, after which they developed differently within their separate traditions. It is this ancient body of tradition and custom which supplied capital punishment for adultery to both later Roman and Islamic law; and it was very likely this body of tradition which bequeathed both later Roman and Islamic law with the punishment of hand-amputation for theft.

A last consideration is to pinpoint where exactly these traditions emanated from. Where, for example, would a Roman emperor seeking to Christianize his law turn? Owing to the dearth of legislation in the New Testament, the first obvious place might be the canonical councils which had first begun at Illiberis in 305 A.D., a year before Constantine's accession. A quick review of those canons dealing with

¹⁰⁸⁴ Schacht, "Foreign Elements," 10.

adultery, however, shows them to prescribe penance and excommunication, not death.¹⁰⁸⁵ The only other logical place to look, therefore, would be to the customs and traditions of the communities where Christianity began. Judaic law and the customary laws of the indigenous peoples of Greater Syria, then, are most likely the “Christian and ‘oriental’” sources upon which Christianizing emperors may have drawn; or, at any rate, which represent such ‘unwritten custom’ as eventually crept into and superseded the classical legislation.

Remarkably, as we have seen, the population of Syria – certainly by the time of Heraclius, Chindaswinth, and Receswinth – was largely Arab. Is it not possible, therefore, to suggest that hand-amputation for theft or forgery entered later Roman law *and* Islamic law both from the common source of pre-Islamic Arabian tradition? Furthermore, considering the southern origins of the Northern Arabs, the continual replenishment of their southern customs via wave upon wave of northerly migrations, and the apparent fact that hand-amputation was indeed practiced in pre-Islamic South Arabia, there is no reason to doubt that Syrian Arabs could have practiced the penalty. At any rate, it is not likely that hand-cutting and other “barbaric punishments” found in the *Ecloga* are, as Freshfield maintains, “apparently adopted through a too-literal reading of such passages in the Bible as the twenty-ninth verse of the fifth chapter of the Gospel according to St. Matthew.”¹⁰⁸⁶

Some notes on Sāsānid Law

By way of introduction to the legal legacy of the Sāsānid Persians (224-651 A.D.), we may quote the observations of a prominent scholar in the field, Bodil Hjerrild:

“A comparison between Sasanian law and Islamic law is a venture wherein there is a need to be aware of the impossibility of finding evidential proof of any connection, only probable indications.... Sasanian law proper is known solely from one source, *Mātiyān i hazār Dātistān*, ‘The Lawbook of 1000 decisions.’ Unhappily, this important manuscript is incomplete, and the arrangement of the subjects is somewhat arbitrary. These facts, combined with the very difficult language, make the study troublesome....”¹⁰⁸⁷

¹⁰⁸⁵ Foley, “Adultery (Christian),” 133.

¹⁰⁸⁶ Freshfield, *Ecloga*, 16 (reiterated on p.21). The verse to which he alludes is the same we touched upon earlier, and which recommends the cutting off of a sinful member as preferable to one’s whole body being cast into hell (supra, p.134).

¹⁰⁸⁷ Bodil Hjerrild, “Islamic Law and Sasanian Law”, in *Law and the Islamic World: Past and Present*, eds. Christopher Tolland and Jakob Skovgaard-Petersen, (Copenhagen: The Royal Danish Academy of Sciences and Letters, 1995), 49.

After a survey of Sāsānid legal material for parallels relating to adultery and theft, Hjerrild's words ring more than true. Perhaps what is most remarkable about this material is its sheer *difference* from the other systems we have so far studied. The regulations and their underlying Zoroastrian principles are at times utterly alien to the Semitic and Greco-Latin traditions. Nevertheless, the historical reality of the Near East is such that placed Semitic and Iranian peoples in constant interaction, with the consequent interchange of ideas no doubt including those of a legal nature; parallels to our topic certainly exist, as we shall demonstrate. However true Hjerrild's warning of "the impossibility of finding evidential proof of any connection" may be, connections there must have been, and the discovery of such parallels in our chosen topics adds weight to the main drive of this thesis.

As Hjerrild also indicates, the vast majority of our knowledge concerning the Sāsānid legal system is derived from the *Mātiyān i hazār Dāristān* (hereafter: *MHD*), an extremely complex and detailed work dating to circa 620 A.D.¹⁰⁸⁸ However, despite his description of the *MHD* as "the only extant law codex from Sasanian times,"¹⁰⁸⁹ Anahit Perikhanian is quick to point out in her translation that the *MHD* is not a code at all, but a collection of cases, a manual.¹⁰⁹⁰ A great many of these cases are, in fact, contemporary with the laws of Justinian,¹⁰⁹¹ and so the *MHD* provides a unique record of Sāsānid legal development from the sixth century to the end of the empire.

The *MHD*, however, is not the only Sāsānid work which gives some insight into the law. Purported to be contemporary with the Arab conquest of Persia, the *Sad Dar* is, "as its name implies... a treatise on 'a hundred subjects' connected with the Zoroastrian religion."¹⁰⁹² Although the translator, E.W. West, implies that the work is of a later provenance and contains evidence of being written under Arab

¹⁰⁸⁸ This is Anahit Perikhanian's estimation in the introduction to her translation of the *MHD*, based on the latest document mentioned in its text, ca.615 A.D. (*MHD*, 12).

¹⁰⁸⁹ Hjerrild, *Zoroastrian Family Law*, 9.

¹⁰⁹⁰ *MHD*, 12. See pp.13ff. for an excellent overview of Zoroastrian legal tradition: its schools of law, commentaries, procedures, etc.

¹⁰⁹¹ Hjerrild, *Zoroastrian Family Law*, 19.

¹⁰⁹² E.W. West, trans., *Sad Dar*, Part IV of *Sacred Books of the East: Pahlavi Texts* (Delhi: Motilal Banarsidas, 1965), xxxvi.

occupation, it nevertheless contains descriptions of articles of law which most certainly date back to Sāsānid times or earlier.¹⁰⁹³

Finally, this survey will draw from a unique epistle known as the “Lettre de Tansar au roi de Tabaristan,” translated into Arabic from the original Pahlavi by none other than Ibn al-Muqaffa’ (d.142/759), then into Persian by Muḥammad b. al-Ḥasan b. Asfandiyār (wr.c.1210 A.D.), and surviving in several manuscripts.¹⁰⁹⁴ The author of our translation, M. Darmesteter, describes the letter thus:

“Jasnaf-shâh [a king of Tabaristan], voyant pourtant son indépendance menacée, écrivit à Tansar, le grand prêtre d’Ardashîr, qui avait été jadis le conseiller intime de son père, une lettre contenant un véritable acte d’accusation contre Ardashîr, contre sa cruauté, ses procédés d’inquisition et d’espionnage, ses lois tyranniques, ses innovations religieuses. Notre texte est le réponse de Tansar, laquelle fut jugée décisive, car Jasnaf-shâh envoya sa soumission et il conserva sa province sous la suzeraineté du Sassanide.”¹⁰⁹⁵

The significance of the letter is also aptly expressed by Darmesteter:

“Si cette lettre est authentique, c’est-à-dire si, à travers les deux traductions, arabe et persane, elle représente réellement un text émané du chapelain d’Ardashîr, elle constitue le monument le plus ancien de la Perse après les inscriptions de Darius et l’Avesta.”¹⁰⁹⁶

The above-mentioned works, then, appear to span both the beginning and the end of the Sāsānid Empire, and such parallels as exist between their punishments and those of Islam will next be investigated.

Adultery

Although our picture of adultery throughout the history of Sāsānid law is incomplete at best, it is evident that it was certainly considered a crime of both the spiritual and societal type. Jivanji Jamshedji Modi notes “[t]he ancient Iranians attached much importance to marriage, and hence they looked upon adultery with horror;”¹⁰⁹⁷ and chapter LXVII of the *Sad Dar* – addressing the question of why women must abstain from adultery – recounts the following discussion between Zaratušt and Hôrmazd:

¹⁰⁹³ West lists his concerns on p.xxxviii, though none of them seem definitive enough to date the *Sad Dar* significantly after the conquest.

¹⁰⁹⁴ The earliest of the two dated MSS, however, goes back only to 1032/1623.

¹⁰⁹⁵ M. Darmesteter, “Lettre de Tansar au roi de Tabaristan,” *Journal Asiatique* 9 (1894), 192-3.

¹⁰⁹⁶ *Ibid.*, 188.

¹⁰⁹⁷ Jivanji Jamshedji Modi, “Adultery (Parsi),” *ERE*, i.133.

“‘What occurs on her account?’ The creator Hôrmazd spoke thus: ‘It is necessary to kill her sooner than a biting serpent and similar creatures and wild beasts, because she is more harmful to my creatures.’”¹⁰⁹⁸

Elsewhere in the *Sad Dar* we are told that the sins of an illegitimate child are all on the head of the adulterous father;¹⁰⁹⁹ and the *Vendīdād* shows us that the adulterer “is bound to support the woman whom he has seduced and the children that may be born of the illicit intercourse.”¹¹⁰⁰

In literary works, “the adulterer is represented as punished by being thrown into a steaming brazen cauldron... the adulteress as gashing her own bosom and breasts.”¹¹⁰¹ Interestingly, in the “Lettre de Tansar,” the *chapelain* of Ardashīr outlines the reforms of the monarch and how the ancient law of *talion* once applied to brigand, thief, and adulterer alike; a combination of both mutilations and fees had been applied. Now, however, “[o]n coupera le nez à l’adultère, on ne lui infligera aucune mutilation qui affaiblisse une force, desorte que le coupable sera flétri sans que le travail en souffre.”¹¹⁰² Later, however, it appears that the punishment for adultery consisted merely of a fine of three hundred *stīr*, paid either to the father or husband of the *pātixshāyihā*-wife with whom the crime was perpetrated;¹¹⁰³ the deflowering of a minor was also fined, but to the amount of six hundred *drahms*.¹¹⁰⁴

At a more conceptual level, unwed fornication was never seen as an impediment to marriage,¹¹⁰⁵ nor was a woman considered an adulteress so long as she lived with only one man at a time by one of the various marriage contracts (a man might have several wives).¹¹⁰⁶ A woman, however, had the right to enter a legal

¹⁰⁹⁸ West, *Sad Dar*, 331-2. It was further believed that an adulteress caused rivers, fruit trees, and ‘the glory of righteous men’ to dry up.

¹⁰⁹⁹ Ibid., 324-6.

¹¹⁰⁰ Modi, “Adultery (Parsi),” 134.

¹¹⁰¹ Ibid. Modi cites the *Vīrāf-Nāmak*, ch.lx and ch.lxii.

¹¹⁰² Darmesteter, “Lettre de Tansar,” 524-5. Note that, if accurate, this account proves the remarkable continuity of the ancient Mesopotamian mode of *talion* straight through to the second century A.D. accession of Ardashīr.

¹¹⁰³ *MHD*, 181 (73.7), 103 (36.16-17), 271 (A14.4-5), 273 (A15.2-5). The *pātixshāy* marriage is more-or-less equivalent to a legal Muslim marriage in form, with contract, consent of guardian, mutual inheritance, etc. (Hjerrild, *Zoroastrian Family Law*, 211). These laws are of particular interest in that they illustrate, once again, the ancient mindset in which a woman’s chastity was considered a commodity; adultery was an injury to the property rights of father and husband. The man who abducted a woman thus paid two fines: the first was 700 *drahms* for adultery, the second, 500 *drahms* for the woman’s ‘theft’ (Christian Bartholomae, *Notes on a Sasanian Law-Book*, trans. L. Bogdanov, *Journal of the K.R. Cama Oriental Institute* 21 (1932): 34; and *MHD*, 181 (73.8-9)).

¹¹⁰⁴ *MHD*, 181 (73.9-10).

¹¹⁰⁵ *MHD*, 197 (83.7-8).

¹¹⁰⁶ Hjerrild, *Zoroastrian Family Law*, 17, 31.

marriage with the man of her choosing; “[t]his type of marriage was called *x^vasrāyūn*, but in the *MHD*, the usual term is *gātār kartan*, ‘to take a lover.’”¹¹⁰⁷

By far the most striking difference between Sāsānid law and any of the systems we have so far surveyed lies in the institution of *x^vētōdah*. Hjerrild explains:

“One of the most conspicuous features of the marriage law is that near relatives could marry. No incest taboo existed, so sisters could marry brothers, daughters fathers, mothers sons.”¹¹⁰⁸

Hjerrild moreover proposes that causes for this custom lay not only in the need for priestly and landed classes “to keep the power within the family,” but also “to keep the family property intact”:

“Exogamy means the disappearance of part of the family property, whichever way one looks at it, either in the form of a dowry or the cost price of a spouse. The account will never balance; no family will ever be in the same financial position as before they started marrying off their children, some will be left poorer, others will be wealthier than before. This fact alone may have been sufficient to further endogamy as next-of-kin marriage in a society in which the concept of incest was elastic.”¹¹⁰⁹

Whatever the causes, the *MHD* confirms the practice with several instances of the father marrying the daughter and the son marrying the father’s wife.¹¹¹⁰ Of course, there is every reason to believe that Arabs were cognizant of this practice among the *majūs*, evidence of which may be found in the *Kitāb al-Kharāj* of Abū Yūsuf (d.182/798). A certain *ḥadīth* attributes the practice to a king who, extremely drunk, abducted his own sister and raped her, and, having been witnessed in the act, thereafter decreed consanguineous marriage lawful and forced his subjects to accept it.¹¹¹¹

That is not to say, however, that there are no parallels to Islamic law in Sāsānid regulations of marriage and sexual offence. To begin with, the old Zoroastrian legal works make the same connection between adultery and theft as can

¹¹⁰⁷ Ibid., 18, 69, 105.

¹¹⁰⁸ Ibid., 18. For a full treatment of the topic see pp.167ff., where he explains the full history of *x^vētōdah* and confirms that it was indeed the practice of consanguineous marriage, despite the repudiation of this by certain modern Parsi scholars.

¹¹⁰⁹ Ibid., 169. He later proves, through post-Islamic legal material, that not only was *x^vētōdah* allowed to continue in the Zoroastrian community under Muslim rule, but that it was actually raised to the level of a venerated religious act, the later texts being “extremely keen to propagate this type of union...” (Ibid., 179ff.)

¹¹¹⁰ *MHD*, 33 (3.11-14, 4.1-4), 121 (44.13-14), 203 (87.3-7), 235 (104.9-11, 12-14).

¹¹¹¹ Abū Yūsuf Ya‘qūb b. Ibrāhīm, *Kitāb al-Kharāj*, (Cairo: al-Maktabat al-Azharīya li’l-turāth, 1999), 143.

be surmised from Islamic law and any of the ancient systems which preceded it. Modi, paraphrasing the seventy-seventh question of the *Datīstān-ī-Dēnīg*, says this of adultery:

“It is described as a sin which disturbs all lineage, which puts an end to all self-control and to the legitimate authority of the husband. It is more heinous than theft or spoliation....”¹¹¹²

Bartholomae records a passage from the MHD in which adultery is likened to the theft of a man’s wife:

“If he [the plaintiff] says: ‘This woman belongs to me; thou hast [her] in [thy] possession without authority,’ and it comes to legal proceedings, then the woman is not to be assigned [to the plaintiff] before the third examination in court has taken place, for, the possession is obvious and the origin of the ownership is doubtful. And if the plaintiff in a lawsuit concerning property makes a similar statement, the decision regarding the same is similar.”¹¹¹³

Once again, the wife is reduced to a (voiceless) theft-able object, and this is nowhere more clear than in that section of the *MHD* dealing with abduction, where the abductor pays not only seven hundred *drahms* for adultery, but an additional five hundred for theft.¹¹¹⁴

The *Sad Dar*, as we have seen, certainly considers the sin of adultery as deserving of death, and indicates also that an errant wife’s sin only departs after confessing to her husband and asking him to kill her, her blood being lawful to him as a consequence of the sin. Should he then kill her, the sin is said to depart.¹¹¹⁵ Elsewhere in the same chapter we learn that an adulterous woman becomes, forever after, unlawful to her husband; her return to him is considered adultery anew.

As far as punishment is concerned, it is quite possible that Sāsānid law, much like Judaic law, underwent a process by which corporal punishment was converted to fines over time. Maneckji Nusservanji Dhalla, writing on ancient Persian criminal law, informs us “[t]he usual form of corporal punishment is the prescription of a certain number of stripes (*upāzana*) with the two implements *aspa-aštrā* (‘horse-goad’) and *sraošō-carana* (‘scourge’).”¹¹¹⁶ Oftentimes, a rather extravagant number of strokes was prescribed – up to ten thousand – which has led some scholars to believe

¹¹¹² Modi, “Adultery (Parsi),” 134.

¹¹¹³ Bartholomae, *Notes*, 25 (5. 12.13ff.)

¹¹¹⁴ *MHD*, 181 (73.8-9).

¹¹¹⁵ West, *Sad Dar*, 324-6.

¹¹¹⁶ Maneckji Nusservanji Dhalla, “Crimes and Punishments (Parsi),” *ERE*, iv.294.

that they were not meant to be literally inflicted on the culprit. At any rate, “[i]n the later Pahlavi period, these stripes are converted into money value, and certain fines are laid down for the various numbers of stripes.”¹¹¹⁷ This being the case, it is certainly possible that at some time before the decrees of the *MHD*, the crime of adultery was to be punished with three hundred stripes.

Far more abhorrent to the Zoroastrians than adultery, however, was the sin of sodomy. Dhalla records it among the chief crimes labeled “*anāperetha*, ‘unatonable’;”¹¹¹⁸ and observes that, in the *Sad Dar*, “[t]his is the only crime which entitles anyone to take the law into his own hands, and to cut off the heads of the sodomites and to rip up their bellies....”¹¹¹⁹ This attitude towards sodomy seems to have continued after the Arab conquests; the tenth century *Rivāyat ī Emēt ī Ašavahištān* considers it a *margarzān*-sin, i.e., a sin deserving of death. Hjerrild explains this abhorrence of sodomy, which “must, of necessity, be regarded with revulsion by Zoroastrians the basic creed of whom was that life must be generated. Therefore, a sexual union that never results in the procreation of children cannot really be tolerated.”¹¹²⁰ Remarkably, there is once again an indication that pre-Islamic Arabs may have been knowledgeable of the sentiments of their Iranian neighbors. In al-‘Askarī’s explanation that the first instances of *al-liwāṭ* appeared when the expeditions of early Islam increased in scope and duration, he mentions that many prominent Arabs of the Jāhiliya attributed sodomy to a certain disease know as (الابنه). He then notes that the Persians used to sever the heads of both the active and passive participants, considering the active partner especially worthy of death, being that he wasted his sperm, from which a person might have been born.¹¹²¹

Being that pre-Islamic Arabs apparently had some knowledge of not only the practice of *x^vētōdah*, but of the Zoroastrian abhorrence of sodomy, an Arab familiarity with Persian marriage custom may be assumed, and may even have played a part in shaping Arab custom. We have discussed already the consanguineous *x^vētōdah* marriage, and briefly mentioned “[t]he expression *gātār kartan* (‘to take a lover’) [which] was used when a woman chose her own husband without her guardian’s consent and without coming under her (new) husband’s

¹¹¹⁷ Ibid.

¹¹¹⁸ Ibid.

¹¹¹⁹ Ibid., 296. See West, *Sad Dar*, chap.ix.

¹¹²⁰ Hjerrild, *Zoroastrian Family Law*, 199-200.

¹¹²¹ Al-‘Askarī, *al-Awā’il*, 262-3.

guardianship....”¹¹²² So, too, have we mentioned the *pātxšāy* marriage, which so closely resembles a traditional Semitic marriage as far as contracts, guardianship, and inheritance.

Yet another legal marriage, however, was known as *čakarīh*. Hjerrild describes it thus:

“The purpose of the *čakar*-institution was to procure an heir/successor for a man who had died or would die without one. With this end in view his *pātxšāy*-wife... could enter into a *čakar*-marriage as *čakar*-wife. Her husband in this second marriage would become her *čakar*-husband and their children would be their biological father’s *čakar*-children. Legally, they would be the *pātxšāy*-children of their mother’s *pātxšāy*-husband and thus his successors/heirs.”¹¹²³

The *MHD*, too, provides something of a definition:

“It is written in one place, (that)... (?) of the earlier (commentators) wrote (thus): ‘a wife [*zan ī pātxšāyīhā*] who goes to the others... is called disobedient, however a *čakar*-wife is said to be of bad conduct if she does not go to the others....”¹¹²⁴

It hardly needs to be pointed out that such would be considered in Islamic law as a sort of legalized *zinā* for the procurement of an heir; and at this point the reader may recall a passage quoted earlier from al-Bukhārī. He describes a pre-Islamic practice by which a man would send his wife to another “to obtain offspring,” resuming sexual relations with her after her pregnancy became apparent.¹¹²⁵

There is yet another type of legal union found in Sāsānid law, and the reader will no doubt understand its significance to early Islamic legal history immediately. Several provisions of the *MHD* indicate that time-limited marriage contracts may have been in use. For example, we read:

“If a woman gives herself (lit.: ‘her body’) in marriage to a man for a term of ten years....”¹¹²⁶

At least three other references to ten-year marriages occur within the *MHD*,¹¹²⁷ and thus a strong parallel to *mut‘a*-marriage is evident in Sāsānid law. Interestingly, and

¹¹²² Hjerrild, *Zoroastrian Family Law*, 211. See also pp.27ff., where the author discusses the legality of this type of marriage, that it was not considered a sin, and that, in the words of the *MHD* (36.12-16), “a daughter’s sexual life is her own affair.”

¹¹²³ Hjerrild, loc. cit. See also pp.16, 77-133; for the complete definition of *čakarīh* and a full treatment of related legislation. Perikhanian considers it a levirate marriage (*MHD*, 346f.), and related legislation appears in her translation on pp.33 (3.10-11) and 253ff. (A4.13-A5.6).

¹¹²⁴ *MHD*, 253 (A4.13-14). Brackets are taken from the parallel transliteration.

¹¹²⁵ *Supra*, p.188f. and n.934.

¹¹²⁶ *MHD*, 205 (87.17-88.2). Most of the rest of the passage is lost.

perhaps not surprisingly, the only place that *mut'a* marriage has truly survived in the Islamic world is among the Shī'a of former Sāsānid territories.

Mut'a-marriage, of course, was quickly equated to *zinā* by the proto-Sunni *fuqahā*. As a matter of fact, only one of the five types of marriage we have discussed – the *pātixshāyīh* – would have been acceptable to Islamic jurists. *X'etōdah* would clearly have been abhorred, while *gātār kartan*, *čakarīh*, and the ten-year marriage would all, no doubt, have been equated with *zinā*. This brings to light an exciting possibility, heightened by etymological considerations, that these 'irregular' forms of marriage may have in fact contributed to the Arab conception of *zinā*. Consider, for example, that the Pahlavi for 'wife' is *zan* or *zyānak*, that the word for 'marriage' is *zanīh*, and that the 'čakar-wife' is *zan ī čakar* (Bartholomae translates this as "concubine").¹¹²⁸ Notice also Perikhanian's translation of the adultery-mulct passage in the *MHD*, first in transliteration:

“*Zan ī kasān apātixšāyīhā gāt tāvān 300 satēr.*
For adultery with another man's wife the fine is 300 saters.”¹¹²⁹

Is it not possible, then, to conjecture that Arabic *zinā* and related forms owes some etymological connection to the Pahlavi terms for 'wife' and 'matrimony'? It seems inconceivable that pre-Islamic Arabs would not have know about Zoroastrian marriage custom to some extent, and we have seen some evidence that they did, not to mention some indications of Persian influence as regards the *ḡayzan*.¹¹³⁰ It is also quite likely that some of these practices would have seemed abhorrent to some ancient Arabs – as to other Semitic peoples – especially those who clung to their time-honored customs of chastity and observance of the forbidden degrees. There is some possibility, then, that the term *zinā* is connected to an older Semitic resistance to the influence of Persian marriage practices in the region, eventually coming to mean 'illicit intercourse' outside of recognized types of marriage. If this may seem hypothetical to the extreme, consider how the Arabic *zindīq* originally referred, as did its likely Pahlavi origin *zandīkīh*, to Manichaeanism, but eventually came to mean 'heretic,' or even 'free-thinker,' or 'atheist.' That is to say, a much frowned-

¹¹²⁷ *MHD*, 73 (23.1-4), 203 (87.2-3), 259 (A2.7-11).

¹¹²⁸ *MHD*, 347, 406, 407; Bartholomae, *Notes*, 5.

¹¹²⁹ *MHD*, 181 (73.7).

¹¹³⁰ *Supra*, p.187f. Note the '-zan' of *ḡayzan*. Certainly further etymological work might uncover a Pahlavi origin to this term, perhaps as a combination with the word for 'thief, theft,' *duž*; thus *duž-ī-zan* – 'thief of a wife' – which could have come into Arabic as *ḡayzan*?

upon foreign practice in a foreign tongue came into Arabic and eventually developed a more general, but loosely-related meaning. Might not the same have been true with Arabic *zinā*, referring originally to the frowned-upon foreign marriage practice (*zanīh*) of the Persians, eventually developing the more general, yet still related meaning of ‘illicit intercourse’?

A final note before moving on to theft-related issues: there are some slight similarities between Sāsānid procedure and that of the *sharī‘a*. To begin with, the *MHD* lists many instances of oaths and ordeals; the following is illustrative of both:

“It is written in one place that if a plaintiff litigates in court with the guardian and the mistress of the house, and the taking of the oath is adjudicated to the respondent and not to the plaintiff; then both (=each of them) the guardian and the mistress of the house must take the oath. And if a contestation arises between the guardian and the mistress of the house as to the taking of the oath by the mistress of the house but not by the guardian, the trial is to be conducted by oath ordeal (or “by sulphur ordeal”= a variety of ordeal imposing the drinking of a liquid containing sulphur...).”¹¹³¹

Several such oaths and ordeals are employed to establish rights of possession, such as in *MHD* 13.16ff., when “the plaintive declares that a thing belonged to Ātufarnbay but Farrxv possessed it illegally, then, Farrxv must make an answering declaration that everything is not so and that the thing belongs to him.”¹¹³² Considering the theft-adultery link as evident in the *MHD*, and the status of a wife as the possession of her husband, it is possible that similar oaths may have been used in connection to accusations of adultery – a parallel in some ways to Islamic *li‘ān*. That slander, or *anast-goβišnīh* was considered an offence is evident from the *MHD* as well, where officials are encouraged to keep court records of such cases.¹¹³³ Lastly, any “change in declaration” of the respondent during an adultery trial was to receive an unspecified punishment.¹¹³⁴

¹¹³¹ *MHD*, 53 (13.6-13). See also, for example, 37 (6.2-6), 43 (8.15-16, 8.16-9.1), 55 (13.16-14.2).

¹¹³² *MHD*, 55 (13.16ff.)

¹¹³³ *MHD*, 311 (A34.12).

¹¹³⁴ *MHD*, 47 (10.7-9); cf. 10.9-11.

Theft

According to the *MHD*, a thief was punished, once convicted, with “the brand of the *šahr*” while looting was punished with a fine of ten *bāys*.¹¹³⁵ After four such brandings, the thief was imprisoned for life,¹¹³⁶ and, curiously, the negligent husband was himself to be branded if his wife committed theft.¹¹³⁷ As in the *Syro-Roman Law-Book*, an illegal possessor of a slave might himself be seized as a slave.¹¹³⁸ The relatively late picture of Persian law provided us by these provisions of the *MHD*, however, seems little related to accounts of what came before.

The “Lettre de Tansar,” as we have seen, if accurate, describes the reforms of the founder of the Sāsānid state, Ardashīr I (the same who, it will be remembered, overthrew the Arab dynasty at Hatra with his son). Darmesteter paraphrases the explanations of Adashīr’s *chaplain*, Tansar, to the angry King of Tabaristan as regards these reforms:

“Jadis on punissait les délits contre les particuliers de mutilations qui affaiblissaient d’autant la force publique et ne profitaient pas à l’offensé que l’on veut venger : à présent, l’amende remplace la mutilation.”¹¹³⁹

In Tansar’s own words (reputedly):

“...les lois qui régissaient antérieurement la matière étaient les suivantes : on frappait celui qui avait frappé, on blessait celui qui avait blessé; on appliquait cette loi de talion au brigand et au voleur; et de même pour l’adultère, il ordonna à la fois la mutilation et l’amende, de sorte que le coupable souffrît et que la victime en retirât profit. Au contraire, quand on coupe la main à un voleur, cette peine ne rapporte rien à qui que ce soit et porte un préjudice criant à l’intérêt général; le brigand payera quatre fois autant que le voleur.”¹¹⁴⁰

This passage is fascinating in that it indicates a remarkable continuity of *talion*-oriented mutilation and mulct which must stretch back at least to Hammurabi. Ardashīr, however, apparently abrogated this for the welfare of his society.

¹¹³⁵ *MHD*, 273 (A15.2-5). The same passage also includes the fine for adultery. See also p.29 (1.13-15), where, if a slave is sold to a non-Zoroastrian, both buyer and seller are treated as thieves and branded. *Šahr* means ‘city/district.’

¹¹³⁶ *MHD*, 179 (73.1-2).

¹¹³⁷ *MHD*, 313 (A35.6-9).

¹¹³⁸ *MHD*, 149 (58.9-14).

¹¹³⁹ Darmesteter, “Lettre de Tansar,” 194.

¹¹⁴⁰ *Ibid.*, 524-5. Darmesteter footnotes the last phrase: “Brigand et voleur; l’un prend ouvertement par force, l’autre en secret : c’est la différence de *hazanha* et *tāyush* (cf. Yasna 12, 2).”

The *Sad Dar*, however, records a complicated series of punishments which accords much more closely to the system Ardashir supposedly replaced. Dhalla summarizes its provisions thus:

“The culprits had either to pay fines, or their ears and hands were cut off, or they were imprisoned. If a man stole a *dirham*..., he had to pay two *dirhams*, one of his ears was cut off, ten blows with a stick were inflicted upon him, and he was imprisoned for some time (*Sad Dar*, lxiv.2-3). If he stole another *dirham*, four *dirhams* formed his fine, he had to forfeit his other ear, to receive twenty blows, and to be imprisoned for a period twice the length of that inflicted at the time of his first crime (*ib.* lxiv.4). The third repetition of the crime was punishable by cutting off his right hand (*ib.* 5), and if, persisting in his evil work, he finally stole five hundred *dirhams*, he was to be hanged (*ib.* 6).”¹¹⁴¹

At certain points in Persian history, then, it seems likely that hand-amputation was practiced for theft, though to what extent, which areas and which time periods remains uncertain. On the basis of these sources, at least, Heffening proposes hand-amputation for theft in Islamic law “may be of Persian origin.”¹¹⁴²

As for brigandage, Al-Ṭabarī, writing on events during the reign of the Sāsānid Khosro I (531-579 A.D.), records the plundering of a Yemeni caravan en route to the emperor by a subgroup of the Banī Tamīm. To deal with them, he sent for his governor of Bahrain: “Azadhfiruz son of Gushnas, whom the Arabs called ‘the mutilator,’ because he used to cut off hands and feet [to punish criminals]....” Having lured the tribe into a fortress, “he massacred their menfolk and spared only the boys.”¹¹⁴³ Thus we see in al-Ṭabarī’s account a Persian governor punishing rebellious brigands with hand and foot-amputation as well as killing – yet another strong, pre-Islamic parallel to the punishments enjoined by the Qur’ān.

Additionally, according to the *MHD*, “[i]f two witnesses were not present, if it is said of the record of investigations / interrogations ‘(it is) shortened and not written in full...; then a trial regarding a case of robbery cannot be conducted.”¹¹⁴⁴ The punishment for such a robber, if he used force, was, as recorded in the *Sad Dar*, “to restore to the owner four times as much as he had taken, or he was to be killed if

¹¹⁴¹ Dhalla, “Crimes and Punishments (Parsi),” 295; see West, *Sad Dar*, 326-28.

¹¹⁴² Heffening, “Sariqa,” 62. I owe the references to the *Sad Dar* and the “Lettre de Tansar” to his citation.

¹¹⁴³ As cited by Hoyland (*Arabia and the Arabs*, 215, brackets are his).

¹¹⁴⁴ *MHD*, 273 (A15.5-7).

public safety required it....”¹¹⁴⁵ Thus, in conjunction with the provisions for theft, the *Sad Dar* seems to reflect Persian law both before and after Ardashīr’s reforms as detailed in the “Lettre de Tansar.” Whatever the case, the degree to which hand-amputation for theft and hand / foot-amputation or capital punishment for brigandage was practiced in the pre-Islamic Irano-Semitic milieu may now be seen as that much greater.

¹¹⁴⁵ Dhalla, “Crimes and Punishments (Parsi),” 295 See West, *Sad Dar*, chap.lxiv, where his translation suggests the highway robber was to be killed at once.

IV. Conclusions

A summary of parallels and precedents

The aim of the preceding surveys was to discover whether stoning and hand-amputation were significant features of the ancient Near-Eastern legal landscape from which Islamic law was to emerge. The evidence, as we have seen, is overwhelming. Not only have instances of stoning and hand-amputation been discovered in parallel applications of sexual offence and theft-related crimes, but they have appeared as punishments for an assortment of other crimes as well. Even more significant is that practically the entire gamut of rulings, procedures, and guiding principles attached to the Islamic legislation has found parallels within the ancient sources. Taken *en masse*, these pre-Islamic parallels and precedents cast Islamic criminal law in a new light: the *sharīʿa*, in a variety of ways, is a *typical* Near-Eastern legal system, at least as regards these crimes and their punishments. Very little that Islamic law prescribes for sexual offence and theft has not been prescribed in the region previous to Islam's emergence.

As far as stoning is concerned, we have seen: 1) the application of the stoning penalty to illicit sexual activity in the reforms of Urukagina, the Deuteronomic code, and post-biblical Judaic law; 2) the application of stoning to theft-crimes in Urukagina, the Hatrene Inscriptions, and the Old-Testament narrative of Joshua; 3) stoning applied to a host of other crimes in Judaic law; 4) some parallels to the method by which stoning is to be carried out in the Judaic legislation; and 5) etymological links between Arabic *rajm* and the Aramaic and Hebrew terms for stoning as they appear in the Hatrene inscriptions and Old Testament.

Moreover, we have seen that Arab-Islamic tradition supports the pre-Islamic application of stoning for *zinā* via one of the Kharijite arguments in opposition to it, as well as a (most likely pre-Islamic) maxim linking illicit sexual activity to stoning, and the positive (if somewhat problematic) attribution of stoning for *zinā* to a pre-Islamic Arab leader in the *Awāʿil* literature. Finally, that Arabs practiced stoning for other infractions has been confirmed by the non-Arabic sources of Agarthicides of Cnidus, writing on a Sabaeen practice, and the Hatrene inscriptions – the latter source, it will be remembered, being inscribed only a few years before the start of an Arab dynasty and explicitly addressing the Arab population.

Of course, the process of collecting this information unearthed a host of other observations and parallels related to *zinā* legislation. We have seen, for example, some rather intriguing possibilities for an etymological connection between Arabic *zinā* and Akkadian *zinništum*, '(illegal?) wife,' Hebrew *zanah*, 'prostitution,' and Pahlavi *zan*, 'wife,' or *zanīh*, 'marriage.' As far as punishments are concerned, we have found: 1) non-stoning or unspecified capital punishments for adultery in most of the ancient Mesopotamian codes, not to mention the Judaic legislation, laws of Constantine and Justinian, and the Persian *Sad Dar*; 2) flogging for sexual offences in Leviticus, the *Ecloga*, and, possibly, the *Mātiyān i hazār Dātistān*; 3) banishment-like punishments of exile and excommunication in Judaic legislation, the *Lex Julia*, *Ecloga*, and other Romaic legislation; 4) confinement in houses, convents, or brothels in Christian canon law and some Romaic sources; 5) capital or corporal punishments for rape in all of Ur Nama, Eshnunna, Hammurabi, the Middle Assyrian laws, Deuteronomy, the *Ecloga Privata Aucta*, and certain other Romaic laws; 6) capital or corporal penalties for sodomy in the Middle Assyrian laws, Old-Testament, Talmud (specifically the Sanhedrin), *Ecloga Privata Aucta*, other Romaic laws, and – as recorded in the *Awā'il* literature and the *Sad Dar* – among the pre-Islamic Persians; 7) provisions, usually capital, for bestiality in the Old Hittite laws, Old Testament, and Sanhedrin; and 8) provisions – usually including a measure of self-help – for capture *in flagrante delicto* in the laws of Eshnunna, Hammurabi, the Middle Assyrians, the Old Hittites, and the Judaic legislation.

Additionally, provisions forbidding the compulsion of daughters to prostitution are found in Leviticus; incest legislation in Hammurabi, the Old Hittite laws, and the Judaic legislation; punishments graded by social status in Hammurabi, the Old Hittite laws, Leviticus, and various Romaic laws; and adultery as an impediment to marriage in the *Lex Julia*, laws of Justinian, Christian canon laws, and the *Sad Dar*. Once again, several of these punishments and provisions have been linked to the practice of pre-Islamic Arabs. The death penalty for adultery was recorded by Strabo in the Yemen and hinted at – as a measure of self help – in the *mu'allaqa* of Imrū' al-Qays. The banishment-like punishment of outlawry can be found in both North and South Arabian inscriptions, and can possibly be inferred to have existed in Iraq from the customary practice of early jurists there. That sodomy was to receive a death penalty may also possibly be inferred from the reported

actions of certain key figures of early Islam, while a consideration of certain of the forbidden degrees is recorded of the Jāhili Arabs by al-Shahrastānī in his *Al-Milal wa'l-Nihāl*.

On a more conceptual level, the inexplicable, undeclared link between theft and adultery in Islamic criminal legislation has been mirrored time and again in practically every source of legal material surveyed for this thesis. Moreover, the nature of this link has at last been revealed through the phrasing of various ancient texts and the observations of modern scholars. In practically every legal system practiced in the Near East throughout recorded history, women have been treated – at least in a legal sense – as property: the unwed virgin fell within the property considerations of her father while the wife fell within the property considerations of her husband. Any rape or seduction of an unwed daughter or another man's wife was deemed an injury to the father's or the husband's property rights. Any complicity on her part most often merited her death; and any man caught with her or later convicted would most often meet the same fate. Adultery, seduction, and rape, in other words, were comparable to the 'theft' of a wife or daughter, or, more precisely, the 'theft' of her chastity.

The unspoken association between theft and adultery in Islamic law is thus directly inherited from the ancient systems that preceded it, although with a major difference: in Islamic law, as the husband has rights over his wife, so too does she have rights over him. Unlike most previous systems, the married man who engages in illicit, extra-marital sexual activity is, technically, just as liable to the *ḥadd* of *rajm* as any adulterous wife. The "double standard" in canon law, over which Basil of Caesarea "admitted [to] being a little puzzled,"¹¹⁴⁶ was eventually equalized by Muslim jurists on the basis of the Qur'ān.

Nor is that all as concerns *zinā*-related parallels; nearly the full range of procedural considerations finds comparable legislation in ancient laws. We have certainly seen all of 1) the consideration of conditions which – at least in part – resemble the Islamic condition of *iḥṣān*, in Hammurabi's Code, the laws of Eshnunna, certain Neo-Babylonian documents, Judaic legislation, and Christian canon law; 2) a consideration of the circumstances in which a sex-crime occurred (e.g., in the city or in the country), in the Middle Assyrian laws, Hammurabi's Code,

¹¹⁴⁶ Grubbs, *Law and Family*, 225.

an Ur-fragment, and Deuteronomy; 3) the requirement of witnesses in Hammurabi, as well as Judaic and Romaic legislation; 4) the use of oaths and ordeals in ways similar to the Qur'ānic practice of *li'ān* in certain Neo-Sumerian documents, Hammurabi, the Middle Assyrian laws, Ur-Namma, the Old Testament book of Numbers, and the *MHD*; 5) provisions detailing punishments for slander, and frequently based on the principle that the false-accuser is punished by the same penalty as his would-be accused, in all of Lipit-Ishtar, Ur-Namma, the *Syro-Roman Law-Book*, the two *Eclogas*, and the *MHD*, not to mention Hammurabi, the Middle Assyrian laws, and Deuteronomy, in which the slanderer is flogged; 6) the stipulation that the testimony of the slanderer never again be accepted, in the *Lex Julia* and Justinian's *Institutes*; and 7) a similar process by which jurists made the evidentiary requirements for application of the death-penalty nearly insurmountable in the Judaic legislation.

Arab-Islamic tradition seems to confirm the pre-Islamic practice of oath-taking for charges of adultery, while more recent anthropological work details the continued practice of the ordeal among the Bedouin. South Arabian inscriptions testify to the pre-Islamic requirement of witnesses for capital crimes; and, finally, let us not forget the Shī'ī practice of *mut'a* marriage, which appears to not only have been practiced by the Arabs of the Jāhiliya, but to have had a parallel – or perhaps even an origin – in the Zoroastrian laws of the *MHD*.

The list of parallels and precedents for Islamic theft-related legislation is no less impressive. Pre-Islamic provisions enjoining hand-amputation for theft-related offences have been found in several sources, including Hammurabi's Code, the Middle Assyrian laws, and the *Sad Dar*, while the presence of hand-cutting for theft in both the *Ecloga* and *Ecloga Privata Aucta* suggests that such was a pre-Islamic Syrian practice, and the "Lettre de Tansar" alludes to the pre-Sāsānid practice in Persia. That such was the custom in Arabia finds confirmation once again not only through Arab-Islamic literature, but the archaeological record as well. Claims of hand-cutting for theft among the Jāhili Arabs are made once in al-Shahrastānī's *Al-Milal wa'l-Nihāl* and twice in the *Awā'il* literature, while the *ḥadīth* of the Makhzūmīya points to a pre-Islamic implementation of this punishment. Finally, the stela of Ta'lab Riyām and its associated severed bronze hand confirm the practice in ancient South Arabia.

Nor was hand-amputation applied only to theft by the ancients, but we find it meted out for several other offences in Hammurabi, Deuteronomy, and the *Ecloga*, most often along the lines of that principle expressed in the Gospel of Matthew, whereby the 'offending member' is to be removed. Mutilation in general, we have seen, is a common penalty in ancient Babylonian and Assyrian law, the Old Testament codes, and the *Ecloga*.

That theft should be punished corporally finds parallels in not only the stoning and hand-amputation punishments previously discussed; but capital penalties are called for in the laws of Eshnunna, Hammurabi, and the *Syro-Roman Law-Book*, while the Old Hittite and Middle Assyrian laws call for other forms of mutilation – as does the *Ecloga* (in addition to flogging). Many of these laws, like the rulings of certain Islamic jurists, demand compensation from the thief as well, thus Eshnunna, Hammurabi, the Old Hittite laws, Middle Assyrian laws, Covenant Code, various sources of Romaic law, and, according to the *Sad Dar* and "Letter de Tansar," the Sāsānid laws.

Circumstantial considerations and conditions in Islamic theft-law find many a parallel in more ancient laws as well. Conditions of puberty and sanity are discussed by Justinian; and the distinction between open or furtive, night or day, can be found in the laws of Eshnunna, the Covenant Code and other Judaic legislation, the Twelve Tables, *Institutes* of Justinian, and the *Syro-Roman Law-Book*. The Islamic concept of *ḥirz* is mirrored to some degree in separate provisions for house-breaking in Lipit-Ishtar, Eshnunna, and Hammurabi; while the *niṣāb* has definite precedents in the Middle Assyrian and Judaic legislation. As far as procedure is concerned, the use of witnesses and oaths can be found in Neo-Babylonian documents, Hammurabi, the Covenant Code and other Judaic legislation, as well as in the *MHD*.

Regarding the distinction between theft and brigandage derived from the Qur'ān and subsequently formulated by Islamic jurists, we have seen the same in Hammurabi, as well as the Judaic and Zoroastrian legislation. Hammurabi's code is particularly significant in that it employs the etymologically related *šaraqū* for 'theft,' while the use of *ḥabatu* for 'brigandage' may also, though much less certainly, be linked to Arabic *ḥirāba*. The association with warfare apparent in the Islamic term is mirrored in the provisions of Hammurabi and the Judaic legislation, where brigandage is assumed to occur in the sphere of war. As far as the punishment

of this crime is concerned, we have seen 1) crucifixion or 'hanging' described in an ancient Hebrew narrative and prescribed by the *Ecloga*, 2) killing or banishment with the judge's consideration of appropriate punishment in the *Syro-Roman Law-Book*, and 3) hand and foot-amputation and killing as inflicted on the 'slayers of Ishbosheth' and practiced by a Sāsānid governor in al-Ṭabarī's *History*. That pre-Islamic Arabs distinguished between theft and brigandage as well is obvious by their reputed censuring of theft within the community while viewing *ghazw* as 'legitimate' (so long as conducted against others). Finally, we are told by al-Shahrastānī that the Kings of Ḥīra and the Yemen crucified highway robbers.

All of the above legal parallels, with the exception of the earlier Roman and some of the Persian, it should be noted, are purported to rest on divine authority. This is especially so with the punishment of stoning; we have seen it revealed through Moses in Deuteronomy, an oracle in regard to the Sabaeen king, a 'dreamer' in the inscriptions of Hatra, and the Prophet himself when he purportedly said "Take from me! Take from me! God has found for them a way...."

But what else does this mass of parallels show us? First of all, a quick review proves that the vast majority of them are Semitic, with obvious commonalities both legally and linguistically. Consider also that much of the Romaic legislation which has produced parallels is said to have been 'Semiticized' to a large extent. This shows, at the very least, that were the entirety of Islamic *zinā* and *sariqa*-related legislation 'borrowed' from non-Arabic sources, it would yet remain, for the most part, a Semitic law. A review of these parallels in detail, however, reveals something equally as important: only a very few are *exact* parallels. Why, then, would we assume they were 'borrowed?' Were they 'borrowed' incorrectly? Or were they 'borrowed' in exact detail and later altered? If so, then what informed the alteration? It is obvious, especially after reviewing this extensive series of parallels, that the paradigm of 'borrowing' simply cannot be applied to the majority of cases. The only paradigm that can make any sense out of the majority of these parallels is, as we have seen, the linguistic model of common source and subsequent divergence as illustrated by Barber's analogy of the two villages and, in the case of Arabic and Hebrew, by Margoliouth's use of the 'true principle.' Islamic law emerged – largely through the vehicle of Arab custom – from a vast and mostly Semitic legal milieu in which the ancestors of the new Muslims had steeped for untold centuries. Islamic law, though

markedly different from its predecessors, is yet a Semitic law, born from, and in many ways the culmination of, local traditions practiced by indigenous Near Eastern populations since before recorded history.

Considering the mass of parallels, the common source from which they appear to have evolved, the Arab-Islamic accounts of the *Jāhiliya*, and the inscriptions and archaeological evidence, it can be said with a great deal of probability that at least some groups of pre-Islamic Arabs stoned for adultery and amputated the hand for theft. That they at least knew of these penalties is definite.

Alternative theories for the stoning punishment in Islam

Of what use, then, is this knowledge that stoning and hand-cutting were known and probably practiced in pre-Islamic Arabia? As suggested in the introduction, this thesis represents only the first phase of a much larger endeavor to trace the genesis and evolution of the Islamic *ḥudūd* to their more-or-less final formulations among the various schools of law. A great deal more research will be required to advance to the next level, but it will stand on the firm basis that not only the punishments themselves, but a great deal of associated legislation is indeed far older than Islam.

By way of illustration, the following series of hypotheses has been proposed, though they should in no way be taken to be definitive arguments. Before beginning, however, we should point out that several hypotheses have already been posited in this thesis as to the pre-Islamic evolution of the Arabic term *zinā*. After all, what if the Prophet had understood *zinā* to mean the same as the Hebrew *zanah*? Is the Qur'ān in fact enjoining the flogging of male and female prostitutes? Is there more of a difference between *fāḥisha* and *zinā* than Qur'ān commentators and jurists perceived? If *zinā* refers to prostitution, is Q.24:2 truly an abrogation of Q.4:15-16? We have also posited the possibility of an etymological link to Pahlavi *zan*, 'wife,' or *zanīh*, 'marriage.' Might the exhortations against *zinā* in the Qur'ān be a sort of pro-Semitic revivalism – a campaign against the *fāḥisha* which had slowly crept into Arab society due to the influence of Zoroastrian marriage custom?

Or perhaps one could simply say that the Arabs had preserved the 'old ways' as reflected in the 'reforms' of Urukagina and early Hebrew law, and mirrored, some two and a half millennia later, in the Hatrene inscriptions. This was accomplished through the observance of the *sunan* of venerable ancestors and the handing-down of

legal maxims from generation to generation; these *sunan* and maxims were later to be forward-projected to the Prophet by jurists attempting to account for the continuing phenomenon of stoning. When Q.4 and Q.24 were revealed, therefore, they represented a break with tradition, though certain principles were still carried through. The *qādhif*, for example, was still to receive (practically) the same punishment as the falsely accused would have suffered – true to an ancient principle stretching back millennia. The Prophet most likely discontinued stoning after these revelations, though the practice continued elsewhere outside of his *umma*.

Confusion arose, therefore, after the Prophet's death, as some had known the Prophet to stone and considered this a part of his praiseworthy *sunna*, while others, mostly Qur'ānic reciters (*qurrā*), believed he had ceased once the Qur'ān indicated other methods of punishment. Knowledge of the Qur'ān did not spread as quickly as the Arab conquerors themselves, and conflicting practices soon became apparent in different regions throughout the nascent empire. Arab-Semitic custom continued to be applied and even championed, fueled further by those who understood stoning to be the Prophet's *sunna*; and this state of affairs continued for nearly a century.

Eventually, the issue came to a head, and lines were drawn up. Those who supported stoning drew upon traditions of the Prophet's words and deeds, not to mention the ancient Arab *sunan* (which included banishment as well) and pre-Islamic legal maxims such as "*al-shaykh wa'l-shaykha*," all of which were eventually attributed to the Prophet in justification of their position. The story-teller's tales became *aḥādīth*, while other *aḥādīth* reflected the state of affairs before the revelation of Q.4 or Q.24, and yet others were fabricated. Additionally, complex arguments of exceptional modes of *naskh* and *takhsīṣ* were formulated as the result of continual debate with the opposition. In effect, "the Qur'ān was interpreted... in the light of existing social conditions,"¹¹⁴⁷ and the supporters of stoning were, as Ibn al-Muqaffa' lamented in his *Risāla fī'l-Ṣaḥāba*, like "those who claim to follow the *sunna* [and] make that which is not *sunna sunna* to the point where they will spill blood without good reasons: when asked why they lay down [the] death penalty in

¹¹⁴⁷ Coulson, *History*, 49. The author is, in this case, writing on the divisive issue of inheritance between the Medinan and Kufan schools.

such cases, they will vaguely refer to cases at the time of the Prophet, later *imāms* or ‘Abd al-Malik.”¹¹⁴⁸

All of this, then, might be seen as a consequence of the Qur’ān’s break with a long-standing Arab-Semitic custom of stoning, and the eventual need to accommodate both punishments via the ‘specialization’ of the Qur’ānic injunction. This complicated evolution is thrown into stark relief by comparison with the case of hand-amputation for theft. Hand-cutting had been a Semitic standard for theft-crime since at least Hammurabi’s Code, practiced from South Arabia through to Syria, and based on the ancient principle of removal of the ‘offending member.’ Therefore, when the Qur’ān confirmed in Q.5 that male and female thieves’ hands were to be cut, the only differences pertaining directly to the punishment which arose were where to cut from and what to do for a second or third offence. Certainly no alternate punishments were proposed. No complicated explanations were offered, nor suspicious *ahādīth* raised in justification; and thus the punishment transferred neatly into the *sharī‘a*.

Of course, other theories may be formulated. Perhaps stoning, after all, was simply Caliphally-sanctioned pre-Islamic custom which somehow had to be adequately explained once the principles guiding Islamic law had been established to a certain degree, and *sunan* – whatever their origin – no longer allowed to take precedence over the Book. Or perhaps the Umayyads had been faithful to the Qur’ānic break with tradition, flogging the *zānīya* and the *zānī*, while the Abbasids, rising on the Shī‘ī wave from the East (the Shī‘ī, of course, having been noted as preservers of more ancient notions of *iḥṣān*, *mut‘a* marriage, death by burning or precipitation, etc.) enforced stoning as a ‘correction’ of Umayyad laxity and ignorance of the Prophet’s *sunna*.

Of course, bringing any one theory to a level of certainty can only be accomplished through a continuation of research through the prophetic and Caliphal eras, projects certainly worthy of future endeavor. The direction that such research will take, however, has been invariably altered by the understanding that stoning and hand-amputation were known to the Arabs before Islam, and most likely practiced by them to some extent. On a larger scale, however, all future discourse on the early

¹¹⁴⁸ As cited in Crone, "Qasāma," 189 n. 174.

development of Islamic law will now simply have to take into account its place at the culmination of ancient Near Eastern Irano-Semitic tradition.

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