

Patricia Crone

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From Kavād to al-Ghazālī

Religion, Law and Political Thought in the
Near East, c.600–c.1100

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JĀHILĪ AND JEWISH LAW: THE *QASĀMA**

How much, and in what way, did the customary law of the pre-Islamic Arabs contribute to Islamic law? The consensus would appear to be that it contributed decisively for the simple reason that it continued to be practised. The legislation of the Koran, so the argument runs, was both intended and understood as a supplement to, rather than a substitute for, the ancestral law of the Arabs; and since moreover this legislation raised more questions than it answered, it had itself to be interpreted in the light of customary law.¹ Evidently, political and social change, Umayyad regulations, foreign influence, local conditions and the like all served to modify and amplify traditional law and customs,² and such modifications are particularly noticeable in Ḥanafī law, which reflects the metropolitan society of late Umayyad Kufa.³ But even so, Arab law, and above all the customary law of the Ḥijāz, may still be said to be the single most important source of the substantive law of the Sharī'a.⁴ Its influence is manifest in all the schools, but especially in that of the Mālikīs which,

* This paper has been improved in various ways by the comments and criticisms of M.A. Cook, C. Rabin, H. Ben Shammai and other members of the conference, and last but not least, of F.H. Stewart, whose capacity to pick holes in arguments is quite unprecedented in my experience. I am also indebted to A. Mas'ūd, without whose interest in bedouin society it would never have occurred to me to look at the *qasāma*.

¹ N.J. Coulson, *A History of Islamic Law*, Edinburgh 1964, pp. 15, 19f. 22; J. Schacht, *An Introduction to Islamic Law*, Oxford 1964, p. 15.

² Coulson, *History*, pp. 21ff; Schacht, *Introduction*, pp. 15, 19ff.

³ R. Brunschvig, 'Considérations sociologiques sur le droit musulman ancien', *Studia Islamica* 1955 (reprinted in his *Etudes d'Islamologie*, Paris 1976, vol. ii); Coulson, *History*, pp. 47ff.

⁴ G. Bergsträsser, 'Anfänge und Charakter des juristischen Denkens im Islam', *Der Islam* 1925, p. 80; C.A. Nallino, 'Considerazioni sui rapporti fra diritto romano e diritto musulmano' in his *Raccolta di scritti editi e inediti*, vol. iv, Rome 1942, especially pp. 88ff; S.G. Vesey-Fitzgerald, 'Nature and Sources of the Sharī'a' in M. Khadduri and H.J. Liebesny (eds.), *Law in the Middle East*, vol. ii, Washington 1955, pp. 91f. Despite his interest in foreign borrowings, Schacht subscribed to the same view as far as the core of Islamic law was concerned: 'the first important ingredient that went into the making of the subject matter of Mohammedan religious law was the law of family and inheritance, and to a certain extent the procedure, of the pre-Islamic Arabs' (J. Schacht, 'The Law' in G.E. von Grunebaum (ed.), *Unity and Variety in Muslim Civilization*, Chicago 1955, p. 66; cf. p. 67 on penal law). Similarly M. Hamidullah, 'La Genèse du droit de la preuve in Islam', *Recueils de la Société Jean Bodin* 1963 (= *La Preuve*, vol. iii), p. 199.

originating in Medina, reflects a patriarchal society not far removed from that of the pre-Islamic Arabs themselves.⁵

At first sight there is nothing implausible about this argument which might even seem to make perfect historical and sociological sense.⁶ But whatever its *a priori* merits and demerits, it does not have much to say for itself in terms of evidence. Such studies in depth as we possess are all concerned to expose the foreign origin of apparently native institutions, not to illustrate the *Fortleben* of Jāhilī law,⁷ and the one study in depth that does concern itself with a Jāhilī institutions, Heffening's study of *jīwār*, proposes a very different development from that generally accepted. According to Heffening there was complete discontinuity in terms of Umayyad practice, and the tribal institution only entered Islamic law in the late Umayyad period when the '*ulamā*', hostile to the dynasty, turned to pre-Islamic Arabia for doctrinal inspiration:⁸ *jīwār*, in other words, was deliberately revived. It entered Islamic law as an obsolete institution, and it testifies, not to a continuity of Jāhilī practice, but to an onset of Jāhilī fundamentalism. It is a pity that Heffening's study has attracted so little attention, for much that passes for sociologically interesting fact in reality testifies to the same fundamentalist attitude. Thus the rule *al-walā' li'l-kubr* may well look archaic,⁹ but it makes its appearance at a later stage than the alternative and more advanced rule concerning the devolution of *walā'*, and it was the supposed archaism which won out in Islamic law at large:¹⁰ there is no question of seeing the transition from a tribal to a non-tribal society reflected here.¹¹ Similarly, the Mālikī and Shāfi'ī '*āqila*, which is composed of agnates, does indeed look more archaic than the Ḥanafī equivalent, which is composed of soldiers inscribed in the same *dīwān*.¹² But the Mālikī and Shāfi'ī preference for the agnatic institution rests on the

⁵ Brunshvig, 'Considérations sociologiques'; Coulson, *History*, pp. 47ff.

⁶ And the criticisms which follow in no way imply disrespect for the scholars who worked out this position: it is manifestly thanks to their work that criticism is possible.

⁷ For a bibliography, see Schacht, *Introduction*, pp. 222f.

⁸ W. Heffening, *Das islamische Fremdenrecht*, Hannover 1925, ch. 3, esp. pp. 110ff.

⁹ Cf. R. Brunshvig, 'Un Système peu connu de succession agnatique dans le droit musulman', *Revue Historique de Droit Français et Etranger* 1950 (reprinted in his *Etudes d'Islamologie*, vol. ii).

¹⁰ The alternative rule is that *walā'* is inherited like ordinary property. This rule was rejected on the ground that *walā'* is a kinship tie and that one does not inherit kinship ties, only through them. It was for the same reason, and about the same time, that sale and gifts of *walā'* came to be prohibited (cf. J. Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford 1950, p. 173).

¹¹ Cf. Brunshvig, 'Système', pp. 24, 31f. Brunshvig in fact regarded the rule as a residue of the patriarchy of Strabo's Yemen.

¹² Cf. *Encyclopaedia of Islam*², s.v. '*āqila*'.

argument that the '*āqila* was agnatic in the Prophet's days, not that the *dīwān* did not exist in Medina (which of course it did).¹³ And what it attests is not the conservatism of Medinese society,¹⁴ but the scholarly concern to reconstitute in Islamic law the tribal society in which the Prophet has lived. In both examples, as in that of *jīwār*, it is the scholars who have turned to Jāhili law, be it real or imagined, for inspiration.

There is in fact nothing in the present state of the study of the evidence to prevent one from turning the generally accepted theory upside down. Islamic law, so it may be argued, is overwhelmingly of foreign origin, one of the most important sources being Jewish, not Jāhili law. The Arab appearance of the Sharī'a is striking, but deceptive: it testifies to its ideal, not its actual origins.¹⁵ Genuine components of tribal law there certainly are in it, notably in the laws regarding inheritance and homicide, but how they got there is still an open question. Maybe tribal law continued to be practised, or maybe it was artificially revived; maybe there were also other methods of transmission, as yet unidentified. The purpose of the paper is to throw some light on this whole question of the transformation of Jāhili into Islamic law.

The *qasāma* is an Islamic institution of unmistakable Jāhili appearance. Schacht identified it as 'a kind of compurgation',¹⁶ and it is certainly some kind of collective oath, *i.e.* some form or other of an institution attested for other tribal societies. The Islamic tradition is almost unanimously agreed that it existed in the Jāhiliyya, and in some sense it clearly did. But all this is somewhat vague. What is the precise truth of the matter?

Compurgation is a procedure in which a number of persons swear an oath which serves to clear an accused of a charge. The procedure is well known from medieval Europe¹⁷ and elsewhere,¹⁸ and it still exists (or still

¹³ Mālik cited by 'Alī b. Aḥmad Ibn Ḥazm, *al-Muḥallā*, ed. M.M. al-Dimashqī, Cairo 1347-52, vol. xi, pp. 46f; Shāfi'ī cited by Shams al-Dīn al-Sarakhsī, *Kitāb al-mabsūṭ*, Cairo, 1324-31, vol. xxvi, p. 110.

¹⁴ Cf. Brunschvig, 'Considérations sociologiques', p. 69.

¹⁵ This is the position taken up by P. Crone and M. Cook, *Hagarism*, Cambridge 1977, pp. 97f, 149ff.

¹⁶ Schacht, *Introduction*, p. 184 (on the Ḥanafī institution).

¹⁷ Cf. the various papers in *Recueils de la Société Jean Bodin* 1965 (= *La Preuve*, vol. ii); H. Conrad, *Deutsche Rechtsgeschichte*, vol. i, Karlsruhe 1954, pp. 45, 199f, 506f; W.A. Shack, 'Collective Oath: Compurgation in Anglo-Saxon England and African States', *Archives Européennes de Sociologie* 1979 (I owe these references to Dr. P.R. Hyams).

¹⁸ It is attested for ancient Greek law (G. Sautel, 'Les Preuves en droit grec archaïque', *Recueils de la Société Jean Bodin* 1964 (= *La Preuve*, vol. i), pp. 138ff, and for the Ossetes (*Encyclopaedia of the Social Sciences*, New York 1949 (first published 1930), s.v. 'compurgation'). Perhaps, then, it was an Indo-European institution. But contrary to

existed until recently) among the Berbers¹⁹ and several Arab tribes,²⁰ though among the Arabs it seems to have suffered from competition with both the individual oath of purgation²¹ and the fire-ordeal.²² Wherever it

what one might expect, it is badly attested for Africa, where the only known example would appear to be that of the Ethiopian Gurage (W.A. Shack, 'Guilt and Innocence: Problem and Method in the Gurage Judicial System' in M. Gluckman (ed.), *Ideas and Procedures in African Customary Law*, Oxford 1969, pp. 158f; *id.*, 'Guilt and Innocence: Oathing, Evidence and the Judicial Process among the Gurage', *Journal of African Studies* 1976, pp. 301ff; cf. *id.*, 'Collective Oath', pp. 11f, for the negative evidence (the subtitle of this article is somewhat misleading)).

¹⁹ A. Hanoteau and A. Letourneux, *La Kabylie et les coutumes Kabyles*², Paris 1893, vol. ii, pp. 372f, vol. iii, pp. 29, 317 (influenced by Mālikī law); G.-H. Bousquet, 'Le Droit coutumier des Ait Haddidou des Assif Melloul et Isselaten', *Annales de l'Institut des Etudes Orientales d'Alger* 1956, pp. 184ff; E. Gellner, *Saints of the Atlas*, London 1969, pp. 104ff.

²⁰ It is attested for the Western desert, Sinai, Palestine and the Yemen (G.J. Obermeyer, 'The Ritual and Politics of Oath in Tribal Society', *Al-Abhath* 1973-6, p. 6; A. Kennett, *Bedouin Justice*, Cambridge 1925, pp. 40ff; G.W. Murray, *Sons of Ishmael*, London 1935, pp. 231f; O. el-Barghuthi, 'Judicial Courts among the Bedouin of Palestine', *Journal of the Palestine Oriental Society* 1922, pp. 51f; C. Landberg, *Arabica*, vol. v, Leiden 1898, p. 137ff (two different forms described); E. Rossi, 'Il diritto consuetudinario delle tribù arabe del Yemen', *Rivista degli Studi Orientali* 1946, p. 25 (a compurgation for homicide presented in a Zaydī form and a traditional one for other matters)). For a general discussion, see J. Chelhod, *Le Droit dans la société bedouine*, Paris 1971, pp. 186ff.

²¹ Cf. J.L. Burckhardt, *Notes on the Bedouins and the Wahābys*, London 1830, p. 72; Na'ūm Beg Shuqayr, *Ta'rikh Sīnā*, Cairo 1916, p. 402; L. Bouvat, 'Le Droit coutumier des tribus bedouines de Syrie', *Revue du Monde Musulman* 1921, p. 32 (based on Aḥmad Nāzif, *Uṣūl al-'ashā'ir*, Constantinople-Galata 1331, which is not available to me); Kennett, *Bedouin Justice*, p. 40; 'Ārif al-'Ārif, *Kitāb al-qaḍā' bayna'l-badw*, Jerusalem 1933, pp. 72ff, 84f; A. Musil, *Arabia Petraea*, Vienna 1907f, vol. iii, pp. 337f, cf. 342f; *id.*, *The Manners and Customs of the Rwala Bedouins*, New York 1928, p. 429; A. Jaussen, *Coutumes des arabes au pays de Moab*, Paris 1948, pp. 188f.

²² 'L'ordalie est un serment en action, le serment une ordalie en parole' (Glotz cited by Sautel, 'Les preuves en droit grec archaïque', p. 129n; cf. also Shack, 'Oathing, Evidence and the Judicial Process', p. 305n). This dictum also holds good for the Arabs, among whom the two procedures are sometimes interchangeable ('Ārif, *Qaḍā'*, pp. 84f; Bouvat, 'Droit coutumier', p. 32). But judging from the attestations, the fire-ordeal (which consists in licking a red-hot spoon, sometimes knife or sword) is the more popular procedure. For the Sinai, Palestine and Syria, see Shuqayr, *Sīnā*, p. 420; C.S. Jarvis, *Yesterday and To-day in Sinai*, Edinburgh and London 1931, pp. 44f; Kennett, *Bedouin Justice*, pp. 108ff; Murray, *Sons*, pp. 232ff; G.A. Wallin, *Reseanteckninger från Orienten*, ed. S.G. Elmgren, vol. iv, Helsingfors 1866, p. 46; Barghuthi, 'Judicial Courts', pp. 52f; 'Ārif, *Qaḍā'*, pp. 95ff, 'Awḍah al-Qasūs, *al-Qaḍā' al-baḍawī*, reprint Amman 1972, p. 49; T. Ashkenazi, *Tribus semi-nomades de la Palestine du nord*, Paris 1938, p. 87; H. Schmidt and P. Kahle, *Volkserzählungen aus Palästina*, Göttingen 1918, no 10; Musil, *Arabia Petraea*, vol. iii, pp. 210, 338ff; Burckhardt, *Notes*, pp. 69f, 72, 164f; Bouvat, 'Droit coutumier', pp. 33f; Jaussen, *Coutumes*, p. 439. According to Burckhardt, the institution was unknown in the Ḥijāz (*Notes*, p. 165), but Shuqayr says that it existed there (*Sīnā*, p. 420; similarly Kennett, *Bedouin Justice*, p. 112). According to Burckhardt (*loc. cit.*), it was also known to the Muṭayr between Medina and the Najd. For Kuwait see

occurs, it is used in the absence of proof or confession.²³ The oath is taken by both the defendant himself and a number of co-jurors who are usually chosen from among the defendant's kinsmen, the number varying with the gravity of the case: among the modern Arabs it ranges from between one and four in trivial cases to fifty, fifty-four or fifty-five in cases of homicide.²⁴ The co-jurors are in no way witnesses to the event, but merely display their readiness to believe and support the accused, the procedure being in fact a test of kinship solidarity.²⁵ If all the jurors swear, and do so correctly, the defendant is acquitted, but if one or more refuse, compensation or restitution is automatically awarded to the plaintiff.²⁶ That the pre-Islamic Arabs were familiar with such a procedure is clear from a tradition ascribed to Ibn 'Abbās in which fifty agnates of a suspected murderer are asked to swear to the latter's innocence, the successful accomplishment of the oath leading to the latter's acquittal.²⁷ Some of the

H.R.P. Dickson, *The Arab of the Desert*, London 1949, p. 531. For South Arabia we have the testimonies of Landberg, *Arabica*, vol. v, pp. 162ff; H. Freiherr von Maltzan, *Reise nach Südarabien*, Braunschweig 1873, pp. 262f, 294f; G.W. Bury, *The Land of Uz*, London 1911, pp. 11f; B. Thomas, *Arabia Felix*, London 1932, pp. 86f. See also J. Morgenstern, 'Trial by Ordeal among the Semites and in Ancient Israel', *Hebrew Union College Annual*, Jubilee Volume, 1925, where several of these references are given. Ordeals by both fire and water also existed in pre-Islamic Arabia, though they appear to have been very different (J. Wellhausen, *Reste arabischen Heidentums*, Berlin 1961 (first published 1887), p. 189). But there are also other forms of ordeals in modern Arabia.

²³ On the Arab side, this is explicitly stated by Kennett, *Bedouin Justice*, p. 40.

²⁴ Obermeyer, 'Ritual', p. 6; Kennett, *Bedouin Justice*, pp. 40f; Murray, *Sons*, pp. 231ff; Landberg, *Arabica*, vol. v, p. 138; Rossi, 'Diritto', p. 25. The defendant never has more than four co-jurors among the bedouin studied by Barghuthi ('Judicial Courts', p. 51). For the figures among the Berbers, see Hanoteau and Letourneux, *La Kabylie*, vol. ii, p. 373n, vol. iii, pp. 29, 317; Bousquet, 'Droit coutumier', pp. 187f; Gellner, *Saints*, p. 107.

²⁵ Cf. the analysis of the institution in Gellner, *Saints*, pp. 104ff. In theory the suspect's kinsmen could perhaps display their solidarity by testifying, as opposed to swearing, and the formula used in the Palestinian compurgation is certainly a testimony (below, note 44). But like the ordeal, the compurgation is an appeal to supernatural justice; and inasmuch as the Palestinian formula is sworn in the name of God, Barghuthi was clearly right in identifying it as an oath.

²⁶ There are exceptions to this rule in the Middle East. Thus the Kabylis are said to have adopted the (Mālikī) rule that refusal to swear shifts the onus of swearing to the other party (Hanoteau and Letourneux, *La Kabylie*, vol. ii, p. 373), and among the Palestinians it is the refusal of one particular co-juror to swear which is decisive (Barghuthi, 'Judicial Courts', pp. 51f). Elsewhere, however, the rule holds good (Bousquet, 'Droit coutumier', p. 191; Gellner, *Saints*, p. 112; Kennett, *Bedouin Justice*, p. 42; Murray, *Sons*, p. 232).

²⁷ Muḥammad b. Ismā'il al-Bukhārī, *Le Recueil des traditions mahométanes*, ed. L. Krehl and T.W. Juynboll, Leiden 1862-1908, vol. iii, pp. 19f; cf. J. Wellhausen, *Reste arabischen Heidentums*, Berlin 1961 (first edition 1887), pp. 187f; Muḥammad Ibn Ḥabīb, *Kitāb al-munammaq*, ed. Kh. A. Fāriq, Hyderabad 1964, pp. 140ff. This story leaves the defendant out of the *qasāma* ('if you wish, fifty people of your tribe can swear that you did not kill him'). In principle it is of course possible that the defendant's oath was seen

details connected with this procedure (identified as a *qasāma*) are hard to accept;²⁸ but since the procedure itself is virtually identical with the compurgation known from other tribal societies, not with the *qasāma* of Islamic law, one can scarcely argue that the traditionists invented it. We may take it that there was indeed a pre-Islamic compurgation; presumably its use was not restricted to cases of homicide, but of compurgations in cases of theft and the like there is no recollection.²⁹

'Compurgation' is usually used synonymously with 'collective oath'. Not all collective oaths, however, are oaths of purgation, and in the present paper I shall reserve the term 'collective oath' for those of the non-purgatory kind. Thus modern bedouin will use the collective oath in disputes over inter-tribal boundaries.³⁰ In the caliphate of 'Umar, fifty Hudhalīs are said similarly to have used it to deny that their tribe had outlawed a certain person, their object being to establish the outlaw's membership of the tribe, not to clear the tribe of guilt (the act itself was perfectly legitimate).³¹ Fifty jurors would also settle cases of disputed

as distinct from the co-jurors' *qasāma*, or even that the burden of swearing fell entirely on the latter; but I do not believe either to have been the case. Ibn 'Abbās' account is a moral, not a legal story: its point is that those who are prepared to commit prejudy in defence of a kinsman will be visited by divine punishment, and the fact that the murderer also perjured himself is irrelevant (he was a murderer anyway). Against Ibn 'Abbās we have the story of 'Ā'isha's *qasāma* in which fifty jurors swore *together* with the two protagonists (below, note 33); and a Zaydī lawyer tells us that 'Alī used to let forty-nine jurors swear *together* with the accused (Ḥusayn b. Aḥmad al-Siyāghī, *Kitāb al-rawḍ a-naḍīr*, Cairo 1347-9, vol. iv, p. 285). As we shall see, neither 'Ā'isha's *qasāma* nor that of the Zaydīs were compurgations, but co-jurors swearing in support of an individual were clearly familiar to the Arabs; and since there is not (indeed cannot be) an individual suspect in the Zaydī *qasāma*, 'Alī must here be presented as acting in accordance with Jāhilī procedure. Cf. also note 109.

²⁸ Thus we are told that the Quraysh distinguished between intentional and accidental homicide in terms of the weapon used, and that the victim's testimony counted as incriminating evidence: it was thanks to this second point that it was adduced by the Mālikīs, though it went against their doctrine in other respects, as Ibn Ḥazm mercilessly pointed out (*Muḥallā*, vol. xi, pp. 79f). There is a modern parallel to the idea that the victim's kin could exempt one juror from swearing, as Abū Ṭālib does in this story (Bukhārī, *Recueil*, vol. iii, p. 20; cf. Bousquet, 'Droit coutumier', p. 190), but it seems odd that a juror should have been able to opt out of swearing by paying his share of the blood-money without thereby causing his kinsmen to lose their case (Bukhārī, *loc. cit.*; cf. below, note 31).

²⁹ The tradition concerning a theft cited by Wellhausen, *Reste*, p. 189, is not about a *qasāma*: it is the two accused and the two accusers who swear, in both cases without co-jurors, and the tradition was meant to illustrate Koran 5:105.

³⁰ F.H. Stewart, personal communication (Sinai).

³¹ Bukhārī, *Recueil*, vol. iv, pp. 323f (cited by Wellhausen, *Reste*, p. 188); 'Abd al-Razzāq b. Hammām al-Ṣan'ānī, *al-Muṣannaḥ*, ed. Ḥ. al-A'zamī, Beirut 1970-2, vol. x, no. 18306: a robber had been killed, but since he was an outlaw, his blood was free (*hadar*). The Hudhalīs, however, denied having outlawed him and swore fifty oaths to this effect,

paternity in pre-Islamic times.³² And fifty Kilābīs are said to have misled 'Ā'isha by swearing a false oath concerning the identity of a well.³³ The oath in question was known as a *qasāma*, taken by fifty jurors, and apparently always formulated as a denial: to this extent it was identical with the compurgation, with which it presumably shares its origins. But in all three cases the jurors were out to establish facts of public interest, not to rebut a criminal charge;³⁴ and, at least in two of the cases, they swore as tribal representatives, not as the supporters of an individual kinsman. The procedure was thus a collective oath, but not a compurgation: the Arabs knew two different procedures under the same name.

The *qasāma* of the Ḥanafīs and the old schools

How does the *qasāma* of Islamic law relate to the pre-Islamic procedures of that name? For purposes of answering this question it is impossible to treat all the legal schools together. All the schools agree that the *qasāma* is a procedure which is used in connection with homicide³⁵ and which consists

whereupon 'Umar handed over the killer for retaliation (according to Bukhārī) or for detention until the blood-money had been paid (according to 'Abd al-Razzāq). The point of the story is that the jurors were supernaturally punished for their perjury, and this is all there is to it in 'Abd al-Razzāq. Bukhārī, however, adds that a Hudhalī who had been away in Syria refused to swear and redeemed his oath by paying 1000 dirhams, whereupon another juror took his place (in return for the money?). On the basis of this and Ibn 'Abbās' story (above, note 28) Wellhausen concluded that the obligation to swear could not be avoided except by payment and/or placement of substitutes (*Reste*, p. 187). But if the suspect's kinsmen were practically forced to swear, the outcome of the procedure would be predetermined and the procedure itself pointless (cf. Gellner, *Saints*, pp. 116ff). Among the modern Berbers, however, recusant jurors who are in the minority are liable to be penalized for their refusal to follow their kinsmen (not for their refusal to swear as such) by having to pay the blood-money or debt which was lost through their failure to cooperate (*ibid.*, pp. 118f; Bousquet, 'Droit coutumier', p. 191). And it is presumably a rule of this kind (implying that one refusal *did* mean loss of the case) which lies behind these traditions.

³² 'Abd al-Razzāq, *Muṣannaf*, vol. iii, no. 5800 (I owe this reference to M.A. Cook).

³³ 'Alī b. al-Ḥusayn al-Mas'ūdī, *Kitāb murāj al-dhahab*, ed. and tr. A.C. Barbier de Meynard and A.J.-B. Pavet de Courteille, Paris 1861-77, vol. iv, pp. 304ff: 'Ā'isha, on her way to Basra after the murder of 'Uthmān, was scared by the ominous name of the well and wanted to go back, whereupon Ṭalḥa and Zubayr swore that its name was not what she thought it was and got fifty men to swear with them. This was the first false testimony in Islam.

³⁴ In paternity cases the jurors apparently always swore against the man claiming to be the father of a child born to another man's wife; but as described, such disputes were more reminiscent of quarrels over tribal lands than of adultery cases.

³⁵ Qāḍī Nu'mān's statement that the Prophet and others used the *qasāma* and the oath with a single witness in property cases *khāṣṣatan* is to be read with a comma after *qasāma*: that the oath with the single witness is only used in property cases is the common doctrine

of fifty oaths.³⁶ They also agree in attaching more importance to the number of the oaths than to that of the jurors so that the collective nature of the institution has become somewhat attenuated: less than fifty jurors, sometimes even a single one, can perform a valid *qasāma* by swearing more than once.³⁷ But on all other questions there is considerable disagreement.³⁸ We may start by considering the position of the Ḥanafīs and related schools.

According to the Ḥanafīs, the *qasāma* is used if a person is found murdered in a quarter, village or other locality, and if the kinsmen of the victim suspect the residents of the locality in question of having murdered him.³⁹ Fifty members of the suspected group must swear that they did not kill the man and do not know who killed him. If they do so, they escape retaliation, but they are still obliged to pay blood-money. If they refuse, they must be imprisoned until they either swear or confess.⁴⁰

To the extent that the Ḥanafī *qasāma* is used to rebut a charge, it is an oath of purgation. But is it a compurgation? Obviously, since the jurors are neighbours rather than kinsmen, the institution is not in principle a test of

(Nu'mān b. Muḥammad Ibn Ḥayyūn, *Da'ā'im al-islām*, ed. A.'A.A. Fayḍī, Cairo 1951-60, vol. ii, no. 1486). Few lawyers as much as consider the possibility that the *qasāma* might be used in connection with crimes other than homicide, but the Imāmīs do use it in connection with loss of limbs (Muḥammad b. al-Ḥasan al-Ṭūsī, *al-Nihāya*, Beirut 1970, pp. 741f: up to six oaths are required). This is almost certainly a piece of Imāmī sophistication, not a Jāhilī survival (the oath in question is not one of purgation: cf. also the following note).

³⁶ The Imāmīs and Ismā'īlīs display their sophistication by reducing the number to 25 in cases of accidental homicide (Ṭūsī, *Nihāya*, p. 740; Ja'far b. al-Ḥasan Muḥaqqiq al-Ḥillī, *Sharā'ī' al-islām*, ed. 'A.M. 'Alī, Najaf 1969, vol. iv, p. 224; Nu'mān, *Da'ā'im*, vol. ii, no. 1488).

³⁷ *Takrār al-aymān* is permissible because *al-maqṣūd 'adad al-aymān, lā 'adad al-ḥālīfīn*, as Siyāghī puts it (*Rawḍ*, vol. iv, p. 288); and a tradition from the Prophet establishes that the procedure is not invalidated by individual refusals to swear (Ibn Ḥazm, *Muḥallā*, vol. xi, p. 91). The minimum number required varies from one to three (*ibid.*). This does not of course make sense in tribal terms. *Takrār al-aymān* is said to have been adopted by some modern bedouin (Kennett, *Bedouin Justice*, p. 42), but only when the defendant's kin group falls short of the required number: there is no question of letting jurors refuse to swear without loss of the case.

³⁸ For a lucid survey of the major points of disagreement, see Muḥammad b. Aḥmad Ibn Rushd, *Bidāyatul-mujtahid*, Cairo n.d., vol. ii, pp. 418ff. Cf. also Coulson, *History*, pp. 93f.

³⁹ For an explicit statement of this second stipulation, which later Ḥanafīs take for granted, see 'Abdallāh b. Aḥmad Ibn Qudāma, *al-Mughnī*, ed. T.M. al-Zaynī, A.'A. Fāyid and 'A.A. 'Aṭā', Cairo 1968-70, vol. viii, p. 488 (no. 7021); Ibn Ḥazm, *Muḥallā*, vol. xi, p. 73, both citing Abū Ḥanīfa.

⁴⁰ The Ḥanafī *qasāma* is discussed in detail in B. Johansen, 'Eigentum, Familie und Obrigkeit im Hanafitischen Strafrecht', *Die Welt des Islams* 1979, pp. 19ff. The present account is based on Sarakhsī, *Mabsūṭ*, vol. xxvi, pp. 106ff, and 'Alī b. Abī Bakr al-Marghināni, *al-Hidāya*, Cairo n.d., part iv, pp. 216ff.

kinship solidarity;⁴¹ but, quite apart from the fact that it might still work as such in practice, there is no reason why a compurgation could not also be a test of other forms of solidarity.⁴² There are however two obvious reasons why the Ḥanafī *qasāma* cannot be identified as such. In the first place, the Ḥanafī procedure is not one in which an accused is backed by oath supporters. It is one in which no individual needs to be accused at all: some Ḥanafīs even held that if an individual *is* accused, what follows cannot be a *qasāma*.⁴³ And the jurors do not swear in support of another person's oath, but on their own behalf, because they *themselves* are under suspicion.⁴⁴ They also swear on behalf of the wider community which they represent; but that, of course, is a characteristic of the collective oath, not of the compurgation. In the second place, the oath has lost its capacity to either purge or incriminate: just as readiness to swear now means acceptance of the obligation to pay, so refusal to swear now means imprisonment, not automatic loss of the case. The jurors are assumed to be guilty whatever they do: if they do not confess, they can only swear an oath with mitigating effects.⁴⁵

⁴¹ And the Ḥanafīs were very aware of this. Thus Shaybānī found particular pleasure in problems arising from the discovery of a *qatīl* in a mixed quarter (Muḥammad b. al-Ḥasan al-Shaybānī, *al-Jāmi' al-kabīr*, ed. A. al-Afghānī, Cairo 1356, p. 359); and Sarakhṣī's defence of the non-agnatic *qasāma* and '*āqila*' (inspired by Medinese polemics) in its turn delights the social historian (*Mabsūṭ*, vol. xxvi, pp. 107, 110; vol. xxvii, pp. 125f; cf. Johansen, 'Eigentum', p. 22).

⁴² Compare the development of the institution in medieval Europe.

⁴³ Sarakhṣī, *Mabsūṭ*, vol. xxvi, p. 114 (Abū Ḥanīfa); Marghīnānī, *Hidāya*, part iv, pp. 217f (Abu Yūsuf). This view was not accepted by the majority of the Ḥanafīs, according to whom it was only if the kinsmen accused somebody from outside the village or quarter in question that the latter would escape the *qasāma* (Marghīnānī, *ibid.*, p. 222). But, *pace* Ibn Ḥazm, the Ḥanafīs never came round to the opposite view that the kinsmen *must* accuse an individual in order for the *qasāma* to take place (*Muḥallā*, vol. xi, p. 73): the willingness of the *aṣḥāb al-ra'y* to accept a claim against a group continued to distinguish them from the other schools, as Ibn Qudāma correctly noted (*Mughnī*, vol. viii, p. 489, no. 7022).

⁴⁴ Thus the co-jurors of the Palestinian compurgation swear that 'we bear witness by God that their oath and all that they have said is true' (Barghuthi, 'Judicial Courts', p. 51). Similarly, the Berber co-jurors swear that 'thou hast spoken the truth' (Gellner, *Saints*, p. 113), while their Anglo-Saxon equivalents swore that 'by the Lord, the oath is pure and not false which M swore' (D. Whitelock, *The Beginnings of English Society*², Harmondsworth 1972, p. 140). But in the Ḥanafī *qasāma* everybody must swear that 'by God we did not kill him, neither do we know who killed him' (see for example Marghīnānī, *Hidāya*, part iv, p. 216; Sarakhṣī, *Mabsūṭ*, vol. xxvi, p. 106).

⁴⁵ Many lawyers found this odd themselves. Thus there were Ḥanafīs who argued that if the jurors refused to swear, one might as well impose blood-money on them at once without imprisoning them (Johansen, 'Eigentum', p. 19n); and a considerable number of old lawyers held that if the jurors did swear, they should go completely free (below, note 104).

Now the Ḥanafī doctrine is a slightly modified version of a position also held by Sufyān al-Thawrī,⁴⁶ the Zaydīs,⁴⁷ Ibādīs,⁴⁸ Imāmī *ḥadīth*,⁴⁹ and, insofar as one can tell, also the Syrians;⁵⁰ in short, it represents one version

⁴⁶ 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18284: 'when a *qatīl* is found among a people and two witnesses testify that someone killed him (then the case is proved against the accused); but if not, (then the people in question) shall swear fifty oaths and pay blood-money. Sufyān said: 'that is the doctrine we go by concerning the *qasāma*'.

⁴⁷ Zayd b. 'Alī (attrib.), "*Corpus iuris*", ed. E. Griffini, Milan 1919, no. 845: 'concerning a *qatīl* who is found in a quarter and whose murderer is unknown. 'Alī judged that fifty men of the quarter should swear 'by God we did not kill him, neither do we know who killed him' and then pay blood-money'. Similarly Ḥasan b. Muḥammad al-Nahwī, *al-Tadhkira al-fākhira*, British Museum, Or. 3809, fols. 281a1f (imprisonment on fols. 281a. 282a); Aḥmad b. Yaḥyā b. al-Murtaḍā, *Kitāb al-bahr al-zakḥkhār*, Cairo 1947-9, vol. v, pp. 295ff; Siyāghī, *Rawḍ*, vol. v, pp. 285ff (commentary on Zayd's corpus).

⁴⁸ Abū Ishāq Ibrāhīm b. Qays, *Kitāb mā lā yasa'u jahluhu*, British Museum, Or. 3744, fols. 102af (cf. C. Rieu, *Supplement to the Catalogue of Arabic Manuscripts in the British Museum*, London 1894, vol. ii, p. 762); 'Alī b. Muḥammad al-Basyānī, *Kitāb mukhtaṣar al-Basyawī* (sic), ed. 'A. 'Aḷā' and M. 'A. Zarqa, n.p., n.d. (printed for the Ministry of the National Heritage, Sultanate of Oman), pp. 315f; Muḥammad b. Yūsuf 'Aḷfayyish (commonly given as Aḷfiyyash), *Sharḥ al-nūl wa-shifā' al-'alīl*, vol. viii, Cairo 1343, pp. 126ff (imprisonment on p. 131). The similarity between the Ḥanafī and Ibādī *qasāmas* was noted already by F. Marneur, *Essai sur la théorie de la preuve en droit musulman*, Paris 1910, p. 295; and that this similarity goes back to the formative period has now been confirmed by the publication of Abū Ghānim's *Mudawwana*: 'if a *qatīl* is found in a tribe, Ibn 'Abd al-'Azīz was of the opinion that the *qasāma* and the blood-money are on the *aḥl al-khiṣṣa*' (Abū Ghānim al-Khurāsānī, *Kitāb al-mudawwana al-kubrā*, [Beirut] 1974, vol. ii, p. 272; I am indebted to Martin Hinds for lending me his copy of this rare book).

⁴⁹ Muḥammad b. al-Ḥasan al-Ṭūsī, *al-Istibṣār*, ed. Ḥ.M. al-Khursān, Najaf 1957, vol. iii, no. 1053: 'when a murdered man is found in the tribe of a people, they all swear, 'we did not kill him, neither do we know who killed him'; and if they refuse, they pay blood-money'. In no. 1052 'Alī establishes that the inhabitants must pay blood-money (whether they swear or not?), and in no. 1054 the suspects both swear and pay, but only after the victim's relatives have refused to swear an accusatory oath. I shall come back to all these modifications. Kulīnī has none of these *ḥadīths*, but the position appears, almost unmodified, as a minority Imāmī doctrine in Muḥammad b. al-Ḥasan al-Ṭūsī, *Kitāb al-mabsūṭ*, unpaginated lithograph, [Tehran 1855], first page of the *kitāb al-qasāma*: '(some) people say... that if a *qatīl* is found in a village which others do not mix with, and if they are accused of having murdered him, fifty upright members of the village must swear that they did not kill him... and if there is (only) one, he must swear fifty oaths... If they swear, the *diya* must be paid by the remainder of the *khiṣṣa* if there is one, and by the inhabitants of the village if there is not. Some adherents of this doctrine say, by the inhabitants in both cases'. Ṭūsī does not specify that the adherents in question were Imāmīs, but the requirement that the village be homogeneous and isolated (one form of Shāfi'ī *lawṭh*, cf. note 159) rules out that they were Ḥanafīs or Zaydīs, let alone Ibādīs. For the common Imāmī doctrine, see below, notes 161f.

⁵⁰ Thus two traditions related by Muḥammad b. 'Abdallāh al-Shu'aythī, a Damascene who died in 154 A.H., from Makhḥūl: 'a *qatīl* was found among the Hudhayl, who went to the Prophet and told him. He called fifty men and made them swear, each one for himself, 'by God, may He be exalted, we did not kill (him), neither do we know who did'. whereupon he made them pay blood-money... 'Amr b. Abī Khuzā'a said that somebody

of a position common to a large number of early schools,⁵¹ and for purposes of convenience I shall refer to it in what follows as the 'old' position.⁵² The old lawyers no more required the presence of an individual accused for the performance of the *qasāma* than did the Ḥanafīs; in fact, the Zaydīs and the Ibādīs agree that if a particular person or persons are accused, what follows is not a *qasāma*, but the procedure adopted for ordinary claims in which a defendant may clear himself of an unproved accusation by swearing an individual oath.⁵³ Unlike the Ḥanafīs, however, the old lawyers do not even require an individual accuser. The common doctrine must accordingly have been to the effect that if a corpse is found in a quarter or village, the inhabitants of the locality in question are under suspicion by this very fact: it is the authorities, not the victim's relatives who are envisaged as bringing the charge. That this is so is corroborated by the fact that the Ḥanafīs, Ibādīs, Zaydīs, Imāmī *ḥadīth* and other early traditions all devote particular attention to the case of the corpse which is found between two villages: when this happens, one should measure the distance from the corpse to the surrounding villages and suspect, and thus

was killed among them at the time of the Prophet: he placed the *qasāma* on the Khuzā'a. (making them swear) 'by God we did not kill (him), neither do we know who did'; each one swore on his own behalf; then they paid blood-money' (Ibn Ḥazm, *Muḥallā*, vol. xi, pp. 86f; Shu'aythī appears as Shu'aybī on p. 85 and Sha'bī on p. 86, but his real identity is not in doubt, cf. Aḥmad b. 'Alī Ibn Ḥajar al-'Asqalānī, *Tahdhīb al-tahdhīb*, Hyderabad 1325-7, vol. ix, pp. 280f). Awzā'ī similarly linked the *qasāma* to the discovery of a *qatīl* in a quarter or village, awarded the oath to the suspected population, and imposed blood-money (according to some); he also rejected Mālik's views on the testimony of a single witness. But he modified the old position by adopting the shifted oath, to which I shall come back (S. Maḥmaṣānī, *al-Awzā'ī wa-ta'ālīmuḥu al-insāniyya wa'l-qanūniyya*, Beirut 1978, p. 142).

- ⁵¹ It is even attested in traditions with purely Medinese *isnāds*, cf. 'Abd al-Razzāq, *Muṣannaḥ*, vol. x, nos. 18307f, where Abū'l-Zinād relates from Sa'īd b. al-Musayyab from 'Umar and also directly from 'Umar that 'Umar made a woman swear fifty times and pay blood-money. This is pure Ḥanafī doctrine (cf. Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 120; Sufyān al-Thawrī and Awzā'ī did not accept *qasāmas* by women, cf. 'Abd al-Razzāq, *ibid.*, no. 18309; Maḥmaṣānī, *Awzā'ī*, p. 142). And it is a surprising doctrine for Abū'l-Zinād, a Medinese *mawlā* who died in 130 and who elsewhere appears as the spokesman of a typically Medinese position (Ibn Qudāma, *Mughnī*, vol. viii, p. 498, no. 7033).
- ⁵² This seems a fairly innocent appellation to me, though it was queried at the conference. Doctrines shared by Sunnīs, Zaydīs, Imāmīs and Ibādīs can hardly fail to be older than those which separate them. Moreover, Abū Ḥanīfa, Awzā'ī, Shu'aythī, Sufyān al-Thawrī and Abū Khālīd al-Wāsiṭī (the presumed author of Zayd's corpus) all died between twenty and thirty years before Mālik, who in his turn died a generation before Shāfi'ī; and Abū Ḥanīfa and Awzā'ī had already begun to modify the common doctrine.
- ⁵³ Siyāghī, *Rawḍ*, vol. iv, p. 286, where it is given as the doctrine of the Hadawiyya (i.e. followers of al-Hādī), the Ḥanafīyya (an exaggeration) and Shāfi'ī after he abandoned his first position (incorrect); Abū Ishāq, *Kitāb*, fol. 102a; Afḡayyish, *Sharḥ*, vol. viii, pp. 127, 135, 137.

assign the oath to, the nearest one.⁵⁴ It is obvious that this procedure would be quite superfluous, if not impossible, if the assignation of the oath turned on the relatives' suspicions, but the same mechanical procedure is nonetheless adopted for assigning the oath when the victim is found in a house, mosque, street, ship, camp, crowd and so forth.⁵⁵ The Ḥanafī stipulation regarding the kinsmen's initiative is doubtless Abū Ḥanifa's own, and it certainly had the effect of adjusting the old *qasāma* to the Islamic concept of homicide as an aspect of private rather than public law.⁵⁶ It also had the not unfamiliar effect of making the classical doctrine look more tribal than that attested in pre-classical law. But the old doctrine must have been to the effect that the authorities incriminate a group, that all members of this group are under suspicion because a corpse has been found in their midst, and that fifty men⁵⁷ must swear to avoid retaliation at the hands of the state.⁵⁸ The institution can thus best be described as a collective oath of purgation vis-à-vis the state (though one with curiously limited effects): it does not correspond to either of the two Jāhilī procedures which we have met so far.

There are three possible ways to account for this institution. Most obviously, it might represent a pre-Islamic fusion of the compurgation and the collective oath. If somebody is found murdered and the murderer is

⁵⁴ Sarakhsī, *Mabsūt*, vol. xxvi, pp. 107, 111; Aṭfayyish, *Sharḥ*, vol. viii, pp. 128, 132ff; Ḥasan b. Muḥammad, *Tadhkira*, fol. 281a; Ṭūsī, *Isṭibṣār*, vol. iii, no. 1050, cf. Hillī, *Sharā'i*, vol. iv, p. 223 and Nu'mān, *Da'ā'im*, vol. ii, no. 1487; 'Abd al-Razzāq, *Muṣannaḥ*, vol. x, nos. 18266, 18268f; Ibn Ḥazm, *Muḥallā*, vol. xi, pp. 66, 85.

⁵⁵ Marghīnānī, *Hidāya*, part iv, pp. 219, 221f; Sarakhsī, *Mabsūt*, vol. xxvi, pp. 117f, 119; Aṭfayyish, *Sharḥ*, vol. viii, p. 130; cf. Ḥasan b. Muḥammad, *Tadhkira*, fol. 281b.

⁵⁶ Cf. J.N.D. Anderson, 'Homicide in Islamic Law', *Bulletin of the School of Oriental and African Studies* 1951.

⁵⁷ More or less. Thus the Imāmī tradition cited in note 49 holds that all the members of the suspected community must swear, a view which did not become Imāmī doctrine and which is thus likely to be old. But the contrary view that less than fifty jurors can perform the procedure as long as they swear fifty oaths must also be old: it is attested not just for the surviving schools, but also for Sufyān al-Thawrī ('Abd al-Razzāq, *Muṣannaḥ*, vol. x, no. 18285).

⁵⁸ The tradition on 'Umar's *qasāma* (below, note 69) in fact assumes that it is the authorities, not the victim's relatives, who are responsible for the choice of the jurors, a point first seen by Shāfi'ī who used it to show up the inconsistencies of the Ḥanafīs (Muḥammad b. Idrīs al-Shāfi'ī, *al-Umm*, Beirut 1973, vol. vii, pp. 13f). That the choice belongs to the authorities survived as a minority opinion among the Ibādīs (Aṭfayyish, *Sharḥ*, vol. viii, p. 135). As for retaliation, it is not clear whether the defendant who lost his case in a pre-Islamic compurgation for homicide also lost his life or merely had to pay. In Ibn 'Abbās' tradition he would merely have had to pay; but then this tradition assumes both that the pre-Islamic Arabs did not demand retaliation for accidental killings (which may or may not be correct), and that they counted this kind of killing as accidental (which is unlikely) (cf. notes 27f and 218).

quite unknown, it is difficult to use the compurgation: what is more sensible, then, than to suspect the nearest population and ask it to clear itself by a collective oath of innocence? Since the institution presupposes some sort of authority, a bedouin origin is ruled out; but nothing militates against origins in a city such as Mecca or a kingdom such as Ḥīra. Alternatively, the fusion of the two pre-Islamic procedures could have taken place after the conquests: and is not the old *qasāma* precisely the sort of institution which one would credit to Ziyād b. Abīhi or Ḥajjāj? Finally, the old *qasāma* might owe no more to the Jāhili procedures than its name and the number of the oaths.

Let us consider the first possibility. A large number of traditions assert that the *qasāma* existed in the Jāhiliyya,⁵⁹ and we have seen that this is true. The traditions in question do not, however, say that the institution of the Ḥanafīs and other old schools existed in the Jāhiliyya, so they do not get us very far. One tradition does indeed describe the old *qasāma* as having been current in pre-Islamic times; but since it is equipped with a Ḥanafī *isnād*, it would be excessively naive to accept it.⁶⁰ The Muslim tradition at large considers the first *qasāma* in Islam to have been that ordered by the Prophet in connection with the *qatīl Khaybar*, an Anṣārī who was found killed at Khaybar, a Jewish town: this is the occasion on which the Prophet is supposed to have endorsed the Jāhili institution. But the institution which he endorsed on this occasion is almost invariably described as either a *qasāma* of the Mālikī type (which is not an oath of purgation at all) or else one intermediate between that of the Mālikīs and that of the old schools;⁶¹ and the one tradition which does have the Prophet order a Ḥanafī *qasāma* also asserts that this procedure was quite new: the Prophet had the idea from God.⁶² Other traditions which present the Prophet as adhering to the

⁵⁹ Below, notes 233-8.

⁶⁰ Ibn Ḥazm, *Muḥallā*, vol. xi, p. 86, on the authority of Ḥammād b. Abī Sulaymān from Ibrāhīm al-Nakhaʿī.

⁶¹ Cf. 'Abd al-Razzāq, *Muṣannaf*, vol. x, nos. 18251ff; Aḥmad b. 'Amr Abū 'Āṣim al-Nabīl, *Kitāb al-dīyār*, Cairo 1323, pp. 42f. I shall come back to these traditions.

⁶² Kalbī cited by Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 107. The *isnād* is Kalbī from Abū Ṣāliḥ from Ibn 'Abbās, which is to say that it probably comes from Kalbī's *Tafsīr*, which Sezgin believes still to be extant (F. Sezgin, *Geschichte des arabischen Schrifttums*, vol. i, Leiden 1967, pp. 34f; but cf. below, note 111). Elsewhere too we are told on the authority of Abū Ṣāliḥ from Ibn 'Abbās that there was no Ḥanafī-type *qasāma* before the Khaybar affair: when Miqyas b. Ṣubāba found his brother slain among the B. Najjār, the Prophet gave the B. Najjār the choice between handing over the murderer if they knew him, or paying blood-money if they did not ('Alī b. Muḥammad Ibn al-Athīr, *Uṣd al-ghāba*, Cairo 1280, vol. v, p. 62. I owe this reference to M. Lecker). But this might of course reflect an Imāmī attempt to establish a Prophetic precedent for their own doctrine on the *qasāma*. It agrees with Ṭūsī's exposition (below, note 162), runs counter to the Sunni view that Miqyas' brother was killed by an Anṣārī who mistook him for an infidel during

Ḥanafī *qasāma* after Khaybar thus cannot be used as evidence of Jāhili origins even if one is sufficiently literal-minded to accept them as accounts of historical facts.⁶³ Jāhili origins, in short, receive no support in the Islamic tradition. The second hypothesis, however, is beset by similar difficulties: it is the Mālikī *qasāma*, not that of the Ḥanafis, which the Muslim tradition credits to the Umayyads and their administrators.⁶⁴ The tradition may of course be wrong: we shall see that it almost certainly is. But a wrong tradition about the Mālikī institution is no evidence for the genesis of the Ḥanafī procedure, and we have no other indication that administrative needs played any role in its formation. We do however have overwhelming evidence in favour of the third hypothesis: the inventor of the old *qasāma* would indeed appear to have been God.

In Deuteronomy 21:1-9, we find the following instructions.

If one be found slain in the land which the Lord thy God giveth thee to possess it, lying in the field, and it be not known who hath slain him, then thy elders and thy judges shall come forth, and they shall measure unto the cities which are round about him that is slain. And it shall be that the city which is next unto the slain man, even the elders of that city shall take a heifer which hath not been wrought with and which hath not drawn in the yoke; and the elders of that city shall bring down the heifer unto a rough valley which is neither eared nor sown, and shall strike off the heifer's neck there in the valley... and all the elders of that city that are next unto the slain man shall wash their hands over the heifer... and say, Our hands have not shed this blood, neither have our eyes seen it. Be merciful, O Lord, unto thy people... and lay not innocent blood unto thy people of Israel's charge. And the blood shall be forgiven them. So shalt thou put away the guilt of innocent blood from among you, when thou shalt do that which is right in the sight of the Lord.

a raid (see for example Muḥammad b. 'Umar al-Wāqidī, *Kitāb al-maghāzī*, ed. M. Jones, Oxford 1966, vol. ii, pp. 861f), and makes a very late appearance in the Sunnī literature.

⁶³ Cf. above, note 50; below, note 73. It is not stated that these *qasāma* took place after the Khaybar affair, but if one is prepared to make history of *ḥadīth*, they clearly must have. (In actual fact, of course, one cannot make history of these traditions. Since they are too contradictory to be harmonized by even the most sophisticated casuistry, some will have to be rejected. It will have to be admitted, in other words, that *some* lawyers projected their legal views back into the pre-Islamic and early Islamic past. But if so, where is the guarantee that the traditions which one chooses to regard as historical are not similarly back-projections? Back-projections and supposedly historical traditions always look disconcertingly alike.)

⁶⁴ Cf. below, p. 187.

Whatever may have been the original significance of this ceremony, we can be sure that it was neither a compurgation nor a collective oath. It was in all likelihood an expiatory act based on the assumption that the murderer would remain unidentified and that some alternative method (re-enactment of the murder in an uncultivated spot) was required to 'put away' the guilt and rid the land of its pollution.⁶⁵ What matters for our purposes, however, is not what God originally meant, but what his later readers took him to be saying, and as far as the rabbis were concerned, the ceremony cleared the innocent of guilt without thereby expiating the guilt of the murderer:⁶⁶ on the contrary, some took it to lead to his discovery.⁶⁷ The rabbis thus read the ceremony as a collective oath of purgation vis-à-vis God (and his earthly representatives), and the Muslims read it in the same way. The old *qasāma*, as I shall proceed to demonstrate, owes its existence to the fact that the lawyers took the Deuteronomic passage 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. The evidence for this contention can conveniently be presented under six headings.⁶⁸

1. In the Jewish scripture we are told that "if one be slain in the land... lying in the field... they shall measure unto the cities which are around him that is slain... and all the elders of that city shall... say: 'our hands have not shed this blood, neither have our eyes seen it.'" In Muslim *ḥadīth* we are told that "a murdered man was found between Wādi'a and Shākir, so 'Umar b. al-Khaṭṭāb ordered them to measure (the distance) between them, and they found that he was nearer to Wādi'a; 'Umar accordingly made them swear fifty oaths, every man from among them (saying): 'I did not kill him,

⁶⁵ Cf. *Encyclopaedia Judaica*, Jerusalem 1971f, s.v. 'eglah 'arufah'.

⁶⁶ If the murderer is discovered after the heifer's neck has been broken, he still has to be executed (*Mishnah, Soṭah*, 9:7).

⁶⁷ In one targum. Pseudo-Jonathan, the ceremony has become a supernatural method for the identification of the murderer: on its completion worms will appear from the droppings of the heifer and crawl over the guilty person. That the purpose of the ceremony is to discover the guilty person is also stated in emphatic terms by the Karaite Ya'qūb al-Qirqisānī, *Kitāb al-anwār wa'l-marāqib*, ed. L. Nemoy, vol. iii, New York 1941, pp. 714f.

⁶⁸ The similarity between the Biblical and the Islamic institutions was recognized already by W. Robertson Smith, *Kinship and Marriage in Early Arabia*², London 1903, p. 64n. Robertson Smith, 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.

neither do I know who killed him'.⁶⁹ Since 'Umar, according to one tradition, was the first to use the *qasāma*, this may well have been the original proof-text of the old lawyers; later it was certainly to be one of the proof-texts of the Ḥanafīs.⁷⁰ But needless to say, others were soon to be added. Thus 'Alī said that when a *qatīl* is found between two villages, the nearest is to be held liable.⁷¹ Ja'far al-Ṣādiq said the same, adding that you have to measure.⁷² And when a *qatīl* was found between two villages in the Prophet's days, the Prophet himself ordered that the distance between the two be measured; one was found to be closer by a hand's breadth and was duly held responsible.⁷³

2. How does one measure? The scriptural passage is silent on the question, but the Mishnah deals with it. Now one might have thought that the major question was where to measure to: to the first house of the village, the market place or the synagogue? But the rabbis devoted themselves to the infinitely more sophisticated question of where on the murdered man to measure *from*. 'R. Eliezer says: from the navel; R. Akiva says: from the nose; R. Eliezer b. Jacob says: from the place where he was made a slain person, from the neck'.⁷⁴ Precisely the same question is discussed by the Ibādīs. 'One measures from the place of the feet if they are (still) there. It is also said: from the place of each foot in the other direction. Some say: in the same direction'.⁷⁵ Neither the rabbis nor the '*ulamā*', Ibādī or other, were unaware of the possibility that the corpse might be found exactly between two villages: both villages bring a heifer according to the minority opinion of R. Eliezer;⁷⁶ both swear fifty oaths and share in the *diyya* according to the '*ulamā*'.⁷⁷ Moreover, there was the intriguing possibility

⁶⁹ 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18266. Also cited by Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 107 (between Wādī'a and Arḥab); Ibn Ḥazm, *Muḥallā*, vol. xi, p. 66; Siyāghī, *Rawḍ*, vol. iv, p. 285 (between Khaywān and Wādī'a). The *qasāma* formula is frequently given in the first person plural, as in Deuteronomy, cf. notes 47, 49, and the term *qatīl* corresponds to the *qetillā* of the targums.

⁷⁰ 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18253; Ibn Qudāma, *Mughnī*, vol. viii, p. 489 (no. 7021).

⁷¹ 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18269; cf. Nu'mān, *Da'ā'im*, vol. ii, no. 1487.

⁷² Ṭūsī, *Istibṣār*, vol. iii, no. 1050.

⁷³ Ibn Ḥazm, *Muḥallā*, vol. xi, p. 85; Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 111; cf. p. 107 (another Prophetic case).

⁷⁴ *Soṭah*, 9:4.

⁷⁵ Aṭṭfayyish, *Sharḥ*, vol. viii, pp. 132f (Muṣ'abī's text).

⁷⁶ *Soṭah*, 9:2. The majority view is that only one city can bring a heifer (L. Finkelstein (ed.), *Siphre ad Deuteronomium*, Berlin 1939, p. 241). Maimonides, however, thought that two cities could bring one heifer in partnership (Maimonides, *Mishneh Torah*, vol. xi, tr. H. Klein, New Haven 1954, p. 222 (9:8)).

⁷⁷ Basyānī, *Mukhtaṣar*, p. 315; Aṭṭfayyish, *Sharḥ*, vol. viii, p. 132; Sarakhsī, *Mabsūṭ*, vol.

that the corpse might be found in two parts. 'If the head is found in one place and the body in another, they carry the head to the body. Such is the statement of R. Eliezer. R. Akiva says: (they carry) the body to the head'. According to the explicit, but not very plausible, statement of the Gemara, the rabbis were here considering where to bury the victim, not the problem of where to measure from.⁷⁸ When the severed head reappears on the Muslim side, however, it is precisely in connection with the problem of measurement, and also in discussions of the problem, which the rabbis would appear to have neglected, of what constituted a legally valid corpse. 'If the head is found in the house and the body outside the house, the blood-money is on the master of the house; but if the body is in the house and the head outside the house, the *qasāma* is on the people of the village'.⁷⁹ And if the head is found with most of the body, then the *qasāma* takes place, but is there a *qasāma* without a head? And what if there is only a head? On these and other complications there are different opinions.⁸⁰

3. The Biblical ceremony takes place if 'it be not known who hath slain him', or in other words when no particular person falls under suspicion. Hence it does not take place, according to the Mishnah, if someone incriminates a particular person without being contradicted: the testimony of a single witness of probity, or even several of less than probity, suffices to raise hopes that the murderer will be identified.⁸¹ The Ibaḏīs, Zayḏīs and some Ḥanafīs, as we have seen, similarly rule that there can be no *qasāma* if as much as a single person incriminates a member of the quarter or village in which the victim was found.⁸² The Ibaḏīs and Ḥanafīs in fact rule that the *qasāma* cannot take place in the presence of incriminating evidence of any kind. The corpse has to be found in or near a village, quarter, tribe or

xxvi, p. 119. Compare also Ḥillī, *Sharā'i*, vol. iv, p. 223 (where it no longer fits, cf. note 161).

⁷⁸ *Babylonian Talmud, Soḏah*, fol. 45b. The reason given is that the Mishnah deals with the severed head (9:3) before it raises the question of how to measure (9:4). But in the Jerusalem Talmud, where the order is reversed, the rabbis also insist that the problem is one of burial, apparently on the ground that the problem of measuring has already been dealt with! (cf. M. Schwab (tr.), *Le Talmud de Jerusalem*, Paris 1960, vol. iv, pp. 326n. 327). The interpretation of the rabbis is not only unconvincing in itself, but also contradicted by *Siphre*, p. 241.

⁷⁹ Aḏfayyish, *Sharḥ*, vol. viii, pp. 131f.

⁸⁰ *Ibid.*: Sarakhsī, *Mabsūḏ*, vol. xxvi, p. 116; 'Abd al-Razzāq, *Muḏannaḑ*, vol. x, no. 18296 (Sufyān al-Thawrī); Aḥmad b. Yaḥyā, *Baḥr*, vol. v, p. 299 (Aḥmad b. 'Isā and Qāsim).

⁸¹ *Soḏah*, 9:8; cf. the discussion of the Amoraim, *Soḏah*, fol. 47b, and the detailed exposition of Maimonides, *Mishneh Torah*, vol. xi, pp. 223f (9:12ff).

⁸² Above, notes 43, 53. Abū Ḥanīfa's argument was that such an indictment exempts the group in question from the *qasāma fī qatīl lā yu'raf qātīluhu*, i.e., as the rabbis would have put it, there was no longer sufficient doubt as to the identity of the murderer.

other human group,⁸³ and it has to bear signs of violent death,⁸⁴ though there were scholars for whom the sheer discovery of a corpse sufficed;⁸⁵ but if there is any further reason for suspecting the group in question, the guilt has to be proved or disproved in the ordinary way.⁸⁶ In Biblical terms this rule makes sense, but in terms of Islamic law it does not: in the absence of incriminating evidence the suspects swear a collective oath of denial and nonetheless have to pay; in the presence of such evidence (short of two witnesses) they swear individual oaths of denial and get away with paying nothing at all. It is thus not surprising that this rule did not survive intact in classical Ḥanafī law.⁸⁷

⁸³ There is no *qasāma* if the corpse is found in a place devoid of human habitation, a waterless desert, the sea, a large river and, according to the Ibādīs, a well; nor, according to most scholars, if it is found in a Friday mosque, a public market or a crowd. Whether the dead man's blood is wasted (*hadar*) or paid for by the treasury is disputed ('Abd al-Razzāq, *Muṣannaf*, vol. x, nos. 18264, 18269; Sarakhsī, *Mabsūṭ*, vol. xxvi, pp. 117f; Aṭfayyish, *Sharḥ*, vol. viii, pp. 127, 130; Ḥasan b. Muḥammad, *Tadhkira*, fol. 281b; Johansen, 'Eigentum', pp. 22f).

⁸⁴ 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18282; Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 114; Marghinānī, *Hidāya*, part iv, p. 218; Basyānī, *Mukhtaṣar*, p. 315; Aṭfayyish, *Sharḥ*, vol. viii, pp. 126f; Ḥasan b. Muḥammad, *Tadhkira*, fol. 281b. It is hard not to suspect that this idea originates in the rabbis' requirement that the victim be slain, but not strangled, expiring, hidden in a heap of stones, hanging in a tree, or floating on the surface of the water (*Soḡah*, fol. 45b). But this is impossible to prove. It is reasonable, as the scholars themselves point out, to demand some proof that the person did not die a natural death. All definitions of *athar*, moreover, includes signs of strangling as one. The *qatīl* in a tree is accepted by the Ibādīs (Aṭfayyish, *Sharḥ*, vol. viii, p. 135, where corpses on mountains, walls and columns are added), and when the lawyers refuse to have a *qasāma* for a *qatīl* found in the sea or a large river, it is because they are public places, and anyway the water may have moved him. But there certainly is no obvious reason why there should be no *qasāma* for a *qatīl* in a well, given that even in the desert wells have owners, and it is curious that the *qatīl Khaybar*, for whom there was no *qasāma* in the end, was found in one ('Abd al-Razzāq, *Muṣannaf*, vol. x, nos. 18252, 18260; cf. the preceding note). Ibn Abī Layla was certainly in complete agreement with the rabbis when he argued that there can be no *qasāma* for the expiring because a *jarīḥ* is not the same as a *qatīl* (Sarakhsī, *Mabsūṭ*, vol. xxvi, pp. 118f; Abū Yūsuf adhered to the same view, cf. *ibid.* and Marghinānī, *Hidāya*, part iv, p. 223).

⁸⁵ Ibn Rushd, *Bidāya*, vol. ii, p. 422. This view was ascribed to 'Umar, 'Alī and Ibn Mas'ūd, standard Kufan authorities, and also to Zuhri, who appears to have been everybody's authority in matters of *qasāma*. (Note that when the Mālikīs and others rejected the need for *athar*, they did so on wholly different grounds: in itself *athar* did not suffice for the *qasāma* to take place, and the evidence which did make the *qasāma* necessary also made the presence or absence of *athar* irrelevant.)

⁸⁶ This point is made with particular clarity by Muṣ'abī in his *Nil* and Aṭfayyish's commentary thereto (Aṭfayyish, *Sharḥ*, vol. viii, p. 127, where further incriminating evidence is known enmity between the victim and the people among whom he was found, and the victim's testimony). Sarakhsī gives the example of a battle having taken place (*Mabsūṭ*, vol. xxvi, pp. 119f), while Abū Ḥanīfa rejects the victim's testimony in Ibn Ḥazm, *Muḥallā*, vol. xi, p. 73.

⁸⁷ The *qasāma*, as Sarakhsī says, is performed in the hope that the murderer will be

4. Deuteronomy lays down that the elders must swear. The Ḥanafīs and Ibādīs similarly rule that the jurors must be chosen from among the *ahl al-khiṭṭa*, the aboriginal members of the quarter who could be held responsible for its affairs, not the tenants or those who had merely bought their houses there.⁸⁸ Both also hold that they should be upright men,⁸⁹ and the Prophet himself laid down that they should be elders (*shuyūkh*).⁹⁰ But the fact that the most eminent members of the community were asked to declare that they were innocent created problems on both the Jewish and the Muslim side. There could not, according to the Mishnah, be any question of the elders being under suspicion, particularly not as the Mishnah took them to be elders of a court of justice;⁹¹ and Sarakhsī agrees that no suspicion is attached to the 'jurists, elders and upright members of the quarter' who take the oath.⁹² But even so, the rabbis argued, the elders might have been morally responsible by failing to receive the victim hospitably and provide him with an escort, or alternatively, by failing to detain the murderer.⁹³ And Sarakhsī agrees that the murder must have occurred through the neglect of the men responsible for the security of the quarter.⁹⁴ It thus makes sense that it is always those in charge of the locality in question who must pay in Ḥanafī law.⁹⁵ It does not, however, make too much sense that they must swear. Why should they declare their innocence when they have been deliberately picked for their integrity? And why should they deny knowing the murderer when their knowledge would not count as evidence even if they did?⁹⁶ It is thus reasonable that Abū

discovered. The person who incriminates a particular member of the group in question merely confirms a presumption which had already been made, i.e. that the murderer is one of them: so why not use the procedure? (*Mabsūṭ*, vol. xxvi, pp. 108, 114).

⁸⁸ Sarakhsī, *Mabsūṭ*, vol. xxvi, pp. 111f. Abū Yūsuf Ya'qūb b. Ibrāhīm, *Ikhṭilāf Abī Ḥanīfa wa-Ibn Abī Layla*, ed. A. al-Afghānī, Cairo 1358, p. 146; Abū Ghānim, *Mudawwana*, vol. ii, p. 272. Cf. also Ṭūsī, above, note 49.

⁸⁹ Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 110 (*min ṣāliḥī'l-ashīra*): Aṭfayyish, *Sharḥ*, vol. viii, p. 128 (*khiyār*). Compare the Imāmī view that they should be *min ṣāliḥī'l-qarya* (Ṭūsī, *Mabsūṭ*, first page of the *kitāb al-qasāma*).

⁹⁰ Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 107.

⁹¹ *Soṭah*, 9:6.

⁹² Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 111 (*fuqahā'*, *mashāyikh*, *ṣāliḥū ahl al-mahalla*).

⁹³ The Babylonian rabbis took the elders to be denying that the victim had ever come to them for food and escorts, while those of Palestine held them to be denying having had any knowledge of the presence of the murderer (*Babylonian Talmud*, *Soṭah*, fol. 46b; Schwab, *Talmud*, vol. iv, p. 333, *ad Soṭah*, 9:6).

⁹⁴ Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 108.

⁹⁵ Cf. Johansen, 'Eigentum', pp. 20ff.

⁹⁶ What does one say to people who ask the second question? Siyāghī's answer is that the *qasāma* is *sunna* and that if the jurors knew the identity of the murderer, they could divert the *qasāma* (and thus the obligation to pay) from themselves (*Rawḍ*, vol. iv, p. 288); Sarakhsī argues along the same lines (*Mabsūṭ*, vol. xxvi, p. 110). But the jurors can

Yūsuf should have refused to distinguish between *ahl al-khiṭṭa* and other inhabitants for purposes of the *qasāma*,⁹⁷ and that he exempted those who had been absent at the time of the event, partly because they could have no moral responsibility for it, and partly because no suspicion could be attached to them.⁹⁸ And even Sarakhsī insisted that the victim's relatives were free to include a few miscreants and other likely suspects in the jurors' ranks.⁹⁹

5. According to Deuteronomy the purpose of the ceremony is to 'put away the guilt of innocent blood': if the heifer's neck is broken, 'the blood shall be forgiven them'. But the rabbis did not, or did not want to, understand the expiatory nature of the heifer's sacrifice: naturally the elders and the innocent community which they represented were forgiven, but the injunction to put away the guilt of innocent blood meant that the murder itself was not.¹⁰⁰ It is this reading of the passage which lies behind the Muslim combination of purgatory oath and blood-money. On the one hand, the jurors and their wider group had been forgiven: retaliation was ruled out. But on the other hand, the fact that the murder itself had not been forgiven meant that it had to be either avenged or paid for, or in other words that

only divert the *qasāma* by incriminating a foreigner. If they incriminate a local man, the *qasāma* still takes place, and the same is true if they claim actually to be witnesses to the event: since all are under suspicion, their testimony is rejected. Jurors who claim to know the murderer may thus swear 'by God we did not kill him' without adding 'neither do we know who did' (thus Shaybānī), or they must swear the whole oath, adding 'except *fulān*' (thus Sarakhsī). But swear they must (*Mabsūt*, vol. xxvi, pp. 114f). The local knowledge of the elders is thus completely wasted. And even if they manage to incriminate an outsider, the procedure cannot lead to his conviction unless he is included in the jurors' ranks and happens to prefer confession to perjury. The *qasāma*, as Kasānī (a Ḥanafī lawyer) said, is like some of the pilgrim rites in that you cannot make rational sense of it: you keep it because it is *sunna* (Johansen, 'Eigentum', p. 24).

⁹⁷ Sarakhsī. *Mabsūt*, vol. xxvi, p. 112; Abū Yūsuf. *Ikhilāf*, pp. 146f. Ibn Abī Laylā agreed with Abū Yūsuf on the ground that the Jews of Khaybar who were invited by the Prophet to swear in the *qatīl Khaybar* affair were tenants (*ibid.*; 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18294).

⁹⁸ Sarakhsī. *Mabsūt*, vol. xxvi, p. 111.

⁹⁹ *Ibid.*, p. 110.

¹⁰⁰ In *Siphre*, p. 244, the injunction is taken as an order to put away evil doers; in the Jerusalem Talmud it explains why the murderer must be executed even if he is only discovered after the heifer's neck has been broken (Schwab, *Talmud*, vol. iv, p. 334, *ad Soṭah*, 9:6), and it is adduced in explanation of the same point in Maimonides. *Mishneh Torah*, vol. xi, p. 226 (10:8). The same is true of Qirqisānī, who also adduces Numbers 35:33 and other scriptural passages against exegetes who interpreted the ceremony as genuinely expiatory (*Anwār*, vol. iii, pp. 714f). But the Babylonian rabbis do not seem to have attached the same significance to this verse (cf. *Babylonian Talmud, Sanhedrin*, fol. 52b): the fact that the murderer must be executed regardless of when he is found is here explained only with reference to Numbers 35:33 (*Soṭah*, fol. 47b).

innocent blood should not be 'wasted':¹⁰¹ blood-money must thus be what God had in mind.¹⁰² It is hardly surprising that as soon as the rationale behind this rule was forgotten, the rule itself came in for heavy criticism. How, it was objected, can people both swear that they are innocent and pay as if they are guilty?¹⁰³ There were soon scholars who argued that the suspected group goes completely free unless the jurors refuse to swear;¹⁰⁴ and an oath of innocence precludes liability for blood-money in all the later schools.

6. According to Wahb b. Munabbih, 'God revealed it [the *qasāma*] to Moses in connection with every *qatīl* who is found between two villages or quarters; the Israelites did not cease to practise it, and [then] the Prophet judged by it'.¹⁰⁵ The story of how this came about is well known to the Islamic tradition.

For the first part of this story we may turn to the works of Tha'labī and Kisā'ī.¹⁰⁶ Here Wahb b. Munabbih, Ibn 'Abbās and other *ahl al-kutub*¹⁰⁷ tell us a pious tale about an upright Israelite who died leaving a small child and also a heifer (*ijla*) which he had left with a shepherd (or elsewhere). When the child grew up, he set out to retrieve the heifer, which had now become a cow (*baqara*), and in the course of so doing he displayed the exemplary filial piety for which he is chiefly remembered.¹⁰⁸ Having

¹⁰¹ *Talla, baṭala, halaka, hadara*. The concern to preserve the dead man's blood from *hadar* is frequently voiced in connection with the *qasāma*, cf. for example 'Abd al-Razzāq, *Muṣannaḥ*, vol. x, nos. 18269, 18279, 18283; Sarakhsī, *Mabsūṭ*, vol. xxvi, pp. 106ff; Bukhārī, *Recueil*, vol. iv, p. 322; Muḥammad b. Ya'qūb al-Kulīnī, *al-Kāfī fī 'ilm al-dīn*, lithograph, Tehran 1315, vol. ii, pp. 342f; Nu'mān, *Da'ā'im*, vol. ii, no. 1487.

¹⁰² Cf. the saying *lā yuqṭalu bi'l-qasāma wa-lā yuqṭallu dam al-muslim* ('Abd al-Razzāq, *Muṣannaḥ*, vol. x, no. 18289), or 'Umar's reply to the Hamdānīs on whom he imposed blood-money: *haqantum bi-aymānikum dimā'akum wa-lā yuqṭallu dam al-muslim* (Siyāghī, *Rawḍ*, vol. iv, p. 285; for other versions of the same reply, see the references in note 69).

¹⁰³ This was the objection of the Hamdānīs who received the answer cited in the preceding note. Cf. also the complete failure to understand the old institution revealed in Mālik's rule that if somebody is killed in a crowd or a mosque, his blood is wasted *because* the murderer is unknown, or 'Umar II's very Christian idea that when the murderer is unknown, the judgment must be left to the next world (Ibn Qudāma, *Mughnī*, vol. viii, p. 493).

¹⁰⁴ Thus one of the Imāmī traditions cited above, note 49. 'Uthmān al-Battī and Khaṭṭābī similarly held that the jurors must be either acquitted or obliged to pay by the procedure (Ibn Hazm, *Muḥallā*, vol. xi, p. 73; Siyāghī, *Rawḍ*, vol. iv, p. 289), and some anonymous Kufans agreed (Ibn Rushd, *Bidāya*, vol. ii, p. 420).

¹⁰⁵ 'Abdallāh b. Muslim Ibn Qutayba, *al-Ma'ārif*, ed. M.I.'A. al-Šawī, Beirut 1970, p. 240.

¹⁰⁶ Aḥmad b. Muḥammad al-Tha'labī, *Qīṣaṣ al-anbiyā'*, Cairo n.d., pp. 223ff; Muḥammad b. 'Abdallāh al-Kisā'ī, *Qīṣaṣ al-anbiyā'*, ed. I. Eisenberg, Leiden 1922f, vol. i, pp. 235ff.

¹⁰⁷ Thus Tha'labī, *op. cit.*, p. 223. Kisā'ī's story is anonymous.

¹⁰⁸ Cf. the alternative version by Suddī in Tha'labī, *loc. cit.*, in which a father rewards his

accomplished his task, he was warned by an angel not to sell the cow until Moses asked for it in connection with a *qatīl* who would be found among the Israelites and whose murderer would be unknown: Moses would need the cow to revive the *qatīl*. The young man followed the angel's advice and was amply rewarded for it in due course.

The second part of the story, the revival of the *qatīl*, is familiar not only to those who wrote about the Israelite prophets,¹⁰⁹ but also to the lawyers¹¹⁰ and, above all, the exegetes.¹¹¹ The *qatīl Isrā'īl* was a rich, but childless Jew who was murdered by his nephew (or alternatively a jealous father who killed his nephew), the corpse being dumped in the territory of an innocent Jewish tribe. When the matter came to Moses' attention, God revealed to him: 'verily God commands you to sacrifice a cow... a cow not broken to plough the earth or water the field, a sound one, without blemish'. They proceeded to sacrifice the cow until the *qatīl* was revived, accused his nephew of the murder, and died again. This is the event to which Sūra 2:63ff is supposed to allude.

According to Maqdisī, Moses took this course of action because 'some exegetes say that it was written in the Torah as a religious duty for them that whenever a *qatīl* was found between two villages and they had measured to the nearest one and assigned the guilt to it, they should, if they denied [being guilty], ask fifty of them to swear and to sacrifice a cow and put their hands on it, swearing 'by God we did not kill him, neither do we know who killed him'. Then the blood would be forgiven them (*fa-yabra'ūna min*

son for his exemplary behaviour by giving him a cow. The Prophet found this story very edifying.

¹⁰⁹ Tha'labī, *Qīṣaṣ*, p. 225; Kisā'ī, *Qīṣaṣ*, vol. i, pp. 236f (note that in this version the suspect denies his guilt on oath and gets forty upright men to swear with him, i.e. the *qasāma* is here a genuine compurgation); Muṭahhar b. Tāhir al-Maqdisī, *Le Livre de la création et de l-histoire*, ed. and tr. C. Huart, vol. iii, Paris 1903, pp. 90f=93.

¹¹⁰ Ibn Ḥazm, *Muḥallā*, vol. xi, pp. 80f; cf. also *id.*, *al-Iḥkām fī uṣūl al-aḥkām*, ed. M.A. 'Abd al-'Azīz, Cairo 1978, pp. 279, 946 (I owe this reference to Professor Kister); Ibn Rushd, *Bidāya*, vol. ii, p. 423; Ibn Qudāma, *Mughni*, vol. viii, pp. 501f, no. 7038.

¹¹¹ Muḥammad b. Jarīr al-Ṭabarī, *Tafsīr al-qur'ān*, ed. M.M. Shākir and A.M. Shākir, Cairo 1954-, vol. ii, pp. 183ff, *ad* 2:63 of the Flügel edition. Similarly Chester Beatty 5465 (unfoliated). This manuscript, described by Arbëry as a *tafsīr* attributed to Ibn 'Abbās, is listed by Sezgin as a copy of Kalbī's work (A.J. Arbëry, *The Chester Beatty Library. A Handlist of Arabic Manuscripts*, vol. vii, Dublin 1964, p. 135; Sezgin, *Geschichte*, vol. i, p. 35). The *isnād* does indeed run from 'Abdallāh b. Ma'mūn al-Harawī through six links to Kalbī — Abū Šāliḥ — Ibn 'Abbās, but there is no question of regarding the work as an early one. The treatment of 2:63ff is not so much an exegesis as a presentation of the Koranic text interspersed with glosses, explanatory passages and references to an exegetical literature the existence of which is presupposed. The story of the *qatīl* (who is mentioned by his classical name of 'Āmil) is told in such a fashion that one could not possibly understand it if one did not know it already.

damihī).¹¹² According to Tha'labī, however, the *qatīl* was murdered 'before the revelation of the *qasāma* in the Torah'.¹¹³ That was why the Israelites asked Moses to ask God for advice, Moses' request leading to the revelation of the Koranic command regarding the sacrifice of the cow; and it was after the *qatīl* had been revived and died again that 'God, may He be exalted, revealed to Moses that he should go to the Holy Land with the Israelites, and that he should look to every *qatīl* who was found between two villages or quarters and hold the nearest village responsible for the *diyya*. If they knew the killer, they should hand him over to his [the victim's] kin. If they did not know, they should choose fifty men from among their elders and upright men (*shuyūkhīhim wa-ṣulāḥā'ihim*), take a year-old cow and sacrifice it in the bottom of a valley which he named for them, and then the fifty men should place their hands on it and swear: 'by God, the Mighty, the Lord of heaven and earth, the God of the Israelites, Isaac, Jacob and Ishmael, we did not kill him, neither do we know who killed him'. On swearing, the blood would be forgiven them (*bari'ū min damihī*), and they should pay blood-money to him [the victim's] relatives. Moses continued to judge among them by means of the *qasāma* until he died, and so did the Israelites until the coming of Islam. Then the Prophet judged by the *qasāma*. And God knows best'.¹¹⁴

For the last part of the story we may turn to Kalbī's version of the *qatīl Khaybar*, cited, presumably, from his *Tafsīr*.¹¹⁵ When a Muslim was found murdered at Khaybar, the Prophet, according to Kalbī, wrote to the Jews saying that a *qatīl* had been found in their midst. The Jews wrote back saying that a similar incident had occurred in ancient Israel and that God had revealed to Moses what to do: if Muḥammad was a Prophet, he could similarly ask God. Muḥammad wrote back saying that God had shown him that he should choose fifty jurors from among them, that the fifty men should swear 'by God we did not kill him, neither do we know who did', and that next they should pay compensation. The Jews replied: 'you have judged our case according to the law (*nāmūs*)'. The *nāmūs* it clearly was.¹¹⁶

¹¹² Maqdisī, *Création*, vol. iii, p. 90 = 92f. The text has *wa-laysa ilā aqrabihimā*, which makes no sense and should clearly be emended to *wa-qīsa ilā aqrabihimā*.

¹¹³ Tha'labī, *Qīṣaṣ*, p. 222.

¹¹⁴ *Ibid.*, pp. 225f.

¹¹⁵ Cf. above, note 62.

¹¹⁶ Note also the rule that all the elders of a city, 'even if there be a hundred of them', must participate in the ceremony of the broken-necked heifer (*Siphre*, p. 243; Maimonides, *Mishneh Torah*, vol. xi, p. 221 (9:3): this is clearly what lies behind the Imāmī *ḥadīth* cited in note 49; cf. note 57. And it is evidently because the oath has been imposed by God that reluctant jurors on the Muslim side must be forced to swear (compare Maimonides, *op. cit.*, p. 226 (10:10).

What has happened? We began with genuine Jāhilī procedures only to end up in Jewish law. We expected to see a Jāhilī institution being modified by social and political change, and perhaps Koranic law, but what we have actually seen is a Jāhilī institution being reshaped to fit a Biblical blueprint: what could not be made to fit was totally forgotten. The *qasāma* testifies, not to a continued practice of Jāhilī law, but to a forgotten stage at which the Arabs accepted Mosaic law and read the Pentateuch because it was their own scripture.¹¹⁷ On the one hand, they knew full well that the *qasāma* had been revealed to Moses: we are even given an Arabic targum of the relevant passage. And they were also perfectly aware that Sūra 2:63ff is a paraphrase of Deuteronomy 21:1-9. Thus it is in elucidation of this *sūra* that the targum is adduced and the story of the *qatīl* of Israel told,¹¹⁸ and Wahb b. Munabbih and others even felt compelled to explain how the Deuteronomic *eglah* had become the full-grown *baqara* after which the *sūra* is called:¹¹⁹ what Hirschfeld published as a discovery in 1902 was common knowledge to the early commentator.¹²⁰ On the other hand, they make it quite clear that they adhered to the *qasāma* precisely because it was a Pentateuchal institution. What Moses began, Muḥammad continued; and in Kalbī's story the very proof of Muḥammad's prophethood lies in the fact that he dispenses Mosaic law: Muḥammad has here come, not to abolish the law, but to confirm it.

¹¹⁷ For other residues of this stage, see J. Wansbrough, *The Sectarian Milieu*, Oxford 1978, p. 74, citing the *kitāb al-ṣayd* of Mālik's *Muwattaʿa* ('Abdallāh b. 'Umar's prohibition of seafood was overruled on appeal to the Koran), and 'Abd al-Razzāq, *Muṣannaf*, vol. iv, nos. 8692ff (on the legitimacy of eating hares). Note also the possibly Pentateuchal origin of the Muslim laws of sorcery (G.R. Hawting, 'The Significance of the Slogan *lā ḥukma illā lillāh* and the References to the *ḥudūd* in the Traditions about the Fitna and the Murder of 'Uthmān', *Bulletin of the School of Oriental and African Studies* 1978, p. 455n; cf. 'Abd al-Razzāq, *Muṣannaf*, vol. x, nos. 18745ff). These and other topics cry out for systematic research.

¹¹⁸ Note also that in several versions of the *qatīl Isrā'īl* story, the murderer moves the corpse. This theme recurs in the legal literature. Thus Sarakhsī cites a version of the *qatīl Khaybar* affair in which the Anṣār refuse to swear, *inter alia*, because they do not know whether the corpse has been moved, and it is precisely because the corpse may have been moved that the Mālikis do not consider the discovery of one in a certain place sufficient to raise a presumption against the inhabitants of that place (Sarakhsī, *Mabsūf*, vol. xxvi, p. 109; Khalīl, *Sommario*, vol. ii, p. 695n). Note also the reflections of the Koranic *fa'ddāra'tum fihā* in 'Abd al-Razzāq, *Muṣannaf*, vol. x, nos. 18287, 18305: *man yudāri'ukum, yadra'ūna bi'l-aymān*.

¹¹⁹ But *pace* Wahb, it strikes me as more likely that the heifer went into the Koran as a cow partly because Deuteronomy calls it an '*eglat bāqār* (21:3), and partly because it was confused with the red *pārāh* of Numbers 19 (a cow for all that the English Bible translates it as 'heifer').

¹²⁰ H. Hirschfeld, *New Researches into the Composition and Exegesis of the Qoran*, London 1902, p. 108.

What date do we assign to this Pentateuchal stage? If we go by the standard accounts of the rise of Islam, there never can have been such a stage at all. Muḥammad's break with Judaism is here placed immediately after his arrival in Medina, the change of the *qibla* being the act whereby this break was constituted: and though it is granted that Jewish influence continued, Islam was henceforth an autonomous religion bent on dissociation from other creeds. Muḥammad might well have picked up both the *qasāma* and the story of the heifer from the local Jews, but the fact that his followers knew exactly where these borrowings came from is an inexplicable oddity. Muḥammad himself is unlikely to have known: after all, he confused the Deuteronomic heifer with the red cow of Numbers 19.¹²¹ And even if he did know, he hardly told his companions to consult the Pentateuch for further details. Once the borrowings had gone into Islam, all memory of their origins ought to have been lost.

Eventually, of course, the recollection did disappear from the mainstream tradition. Ibn Ḥazm, for example, knew the Koran, the story of the murdered one of Israel, and the *qasāma*; but of their common Pentateuchal roots he had no inkling. Since neither the Koranic passage on the cow nor its accompanying story makes any mention of the *qasāma*, while conversely all the legal material on the *qasāma* omits mention of the cow, one cannot tell that there is any connection between the two unless one goes to the Pentateuch. When the Mālikīs adduced the murdered one of Israel in support of a doctrine of theirs on the *qasāma*, Ibn Ḥazm thus thought them quite mad: what on earth did the *qatīl Isrā'īl* have to do with the *qasāma*? How could they come to hold so abstruse an idea?¹²² But to the early

¹²¹ Cf. Hirschfeld, *loc. cit.* It is the red *pārāh* of Numbers, not the 'eglah of Deuteronomy, which is supposed to be of a specific colour and without blemish. But the confusion is easy enough to understand: the red cow was burnt to ashes (not chopped up as the Koran implies!) to remove pollution arising from contact with corpses, while the Deuteronomic heifer was sacrificed to remove suspicions of guilt arising from the discovery of corpses; both had to be of a specific age, and neither should have been yoked.

¹²² For the references, see above, note 110 (it is only Ibn Ḥazm's refutation of the Mālikīs which is of interest). Unlike Ibn Ḥazm, the Yemenis continued to remember what the *qatīl* of Israel was about: if you have to take an oath in the Yemen, you swear, among other things, by the voice of the Prophet who drew the *qatīl* from the well. Who was this *qatīl*? He was someone who was murdered by somebody who pretended to know nothing about it; but when the murderer swore by the 'ahd of God, the *qatīl* rose from the well and indicted him (Landberg, *Arabica*, vol. v, pp. 125f). The *qatīl* of Israel has here been fused with the *qatīl* of Khaybar (who was found in a well), and it is Muḥammad, not Moses, who revives him: a neat illustration of the identity of the two situations. The Yemenis have also continued to practise the *qasāma* in cases of homicide by unknown hand, though they have simplified the procedure: it is the one who refuses to swear who is guilty (*ibid.*, pp. 137f — compare Baysānī, *Mukhtaṣar*, p. 315; this *qasāma* coexists with an ordinary compurgation, Landberg, *op. cit.*, pp. 138f.)

scholars the idea was far from abstruse because they were perfectly familiar with the Pentateuchal landscape behind the Islamic institutions. Indeed, they regarded this landscape as their own. They found their law in the Pentateuch, saw Muḥammad as a Pentateuchal revivalist, and read *Sūrat al-baqara* as a commentary to this scripture: the Koranic injunction regarding the sacrifice of the cow was taken to be part of Deuteronomy, and the story of the murdered one of Israel belongs to the *asbāb al-nuzūl* of the *Pentateuch*, the recipient of seriatim revelation here being Moses, not Muḥammad. We are still a long way away from the conviction that all previous scriptures have been superseded and left behind.

It might nonetheless be possible to reconcile this Pentateuchal phase with the traditional account of the rise of Islam by recourse to a single, if hefty, modification. A number of traditions brought together by Professor Kister assert that the Pentateuch remained a Muslim scripture into 'Umar's caliphate: 'Āmir b. 'Abd Qays used to read the Torah in the mosque, while Ka'b al-Aḥbār explained all the interesting passages to him; 'Abdallāh b. 'Amr b. al-'Āṣ read both Torah and Koran, as predicted by the Prophet himself; Abū Jald al-Jawnī, who similarly read both, used to celebrate the conclusion of each reading of the Torah by summoning people and quoting a saying on the mercy which descends on such occasions; even 'Umar held that a book known to contain the Torah as revealed to Moses on Mount Sinai should be read day and night: it was only later that the Torah was finally disposed of in Lake Tiberias.¹²³ But while these and other traditions unquestionably describe the right scriptural environment, it is by no means clear that they locate it in the right time and place. On the one hand, we have statements to the effect that 'Umar or even 'Uthmān were the first to use the *qasāma*: these statements presuppose ignorance of the Prophet's supposed action in this matter and locate the adoption of the institution at what would be the tail-end of the Pentateuchal stage.¹²⁴ On the other hand, the old *qasāma* is an institution attested for Iraqi and Syrian law, but not for the law of Medina.¹²⁵ The *qasāma* was

¹²³ M.J. Kister, 'Ḥaddithū 'an banī Isrā'īla wa-lā ḥaraja', *Israel Oriental Studies* 1972, pp. 231f, 236f. Cf. also N. Abbott, *Studies in Arabic Literary Papyri*, vol. i, Chicago 1957, p. 49.

¹²⁴ 'Abd al-Razzāq, *Muṣannaḥ*, vol. x, no. 18253; E. Gräf, 'Eine wichtige Rechtsdirektive 'Uṯmān's aus dem Jahre 30', *Oriens* 1963, p. 124, citing Muḥammad b. Jarīr al-Ṭabarī, *Ta'riḫ al-rusul wa'l-mulūk*, ed. M.J. De Goeje *et al.*, Leiden 1879-1901, ser. i, pp. 2841f (Sayf). Sayf's formulation (*li-hādha uḥdithat al-qasāma*) could perhaps be taken to mean that the *qasāma* was revived rather than invented by 'Uthmān; but the reference to other things that 'Uthmān *aḥdatha bi'l-Kūfa* suggests otherwise.

¹²⁵ The old doctrine may at best have spread to Medina (cf. above, note 51). It evidently did not originate there.

thus adopted after the conquests had started, outside Medina; and if the Torah was dumped in Lake Tiberias immediately thereafter, the lawyers and exegetes preserved an amazingly good knowledge of what was written in it. Now 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.¹²⁶ What Muslim traditions identify as the tail-end of the Pentateuchal stage, non-Muslim sources thus describe as its beginnings; and by far the simplest interpretation of Professor Kister's traditions is of course that they testify, not to the historical status of the Torah in Medina, but to doctrinal quarrels over the legitimacy of reading this (and other) scriptures at a later stage: for every tradition in favour of these scriptures there is after all another against them. And if we accept the Syriac dating of the Pentateuchal stage, the knowledge of the lawyers and exegetes certainly becomes a good deal less amazing.

There remains the question of whose Pentateuch it was that the Arabs had adopted. As has been seen, there are obvious elements of rabbinic law in the Kufan and Ibādī regulations of the *qasāma*. Some of these are likely to be secondary, but the combination of oath and blood-money, which is fundamental to the old *qasāma*, also rests on an interpretation of Deuteronomy 21:9 which is attested for (though not exclusive to) the rabbis. Similarly, the stories ascribed to Wahb and others about the pre-history of Moses' *baqara* are simply Arabic versions of a Talmudic story in which exemplary filial piety is rewarded by a precious gift of a red cow, *i.e.* one destined for the treatment of Numbers 19:¹²⁷ the exegetes found the bovine

¹²⁶ Crone and Cook, *Hagarism*, pp. 14f. 167. note 14 (where another Hagarene scripture is the mysterious *gygy*).

¹²⁷ *Babylonian Talmud, Kiddushin*, fol. 31a: 'R. Eliezer was asked. How far does the honour of parents (extend)? He said. Go forth and see what a certain heathen... did in Askalon. The sages sought jewels for the ephod, at a profit of 60,000... but as the key was lying under his father's pillow, he did not trouble him. The following year the Holy One, blessed be He, gave him his reward. A red heifer was born to him in his herd'. (The other version does not mention jewels, but cf. also Schwab, *Talmud*, vol. ii, p. 9, *ad Pe'ah*, 1:1). Suddī and others in *Tha'labī, Qiṣaṣ*, p. 223: 'a man among the Israelites acted with great piety towards his father, and his piety reached the point that when a man brought him a pearl which he wished to sell at 50,000, an extremely profitable price, and asked for the money, he said. My father is asleep and the key to the box is under his head... When his father woke up and heard of it... he said to him, You have behaved well, my son, and this cow is for you in reward for what you did'. The Talmudic story adds that the son could have sold the red cow for all the money in the world, though he only asked the money he lost through his filial piety, and the combination of filial piety, gift of a cow and rich rewards recurs in the story told by Wahb and others. Note also how in Wahb's story filial piety prevents the son from unwittingly disqualifying the cow from sacrifice by riding on it or letting others do so.

fauna of the Pentateuch as confusing as did Muḥammad.¹²⁸ And the detail concerning the heifer's age in Tha'labī's targum is likewise a rabbinic one.¹²⁹ It might thus seem reasonable to conclude that it was rabbinical Jews who lent the Arabs a copy of their Pentateuch. If so, the rabbis in question can hardly have been those of Babylonia. On the one hand, nothing in the rabbinical material is exclusive to the Babylonian Talmud. On the other hand, the stories about Moses' cow share a theme which is absent from the Babylonian Talmud, but present in that of Jerusalem,¹³⁰ and the relevant interpretation of Deuteronomy 21:9 would also appear to have been unknown to the Babylonians.¹³¹ This would fit well with the recent discovery that the *halakhah* attributed to the Jews of Medina is of the Palestinian variety.¹³² Whether it would also explain the curious agreement between the Arabs and R. Eliezer over the questions of double sacrifice/*qasāma* and the heifer's age I do not know. But one point would appear to rule out rabbinical Jews altogether. The Mishnah explicitly states that the breaking of the heifer's neck was discontinued on the proliferation of homicide at some unspecified stage in the past.¹³³ The *qasāma* was thus a Pentateuchal ordinance which, like the stoning penalty, had long ceased to be applied and which was openly acknowledged by all rabbis, be they Palestinians or Babylonians, no longer to be in force. But

¹²⁸ Thus two white or black hairs disqualify the red heifer (*Mishnah, Pārāh, 2:5*). Similarly, Qatāda took the *lā shiyata fihā* of 2:69 to mean 'no whiteness in it at all', while Muḥammad b. Ka'b said 'no colour which is different from its main colour' (Tha'labī, *Qīṣaṣ*, p. 225). But the confusion does not stop here. In Leviticus 1:3-6 we read: 'let him offer a male without blemish... he shall put his hand upon the head of the burnt offering... and he shall kill the bullock (*bāqār*) before the Lord... and he shall flay the burnt offering and cut it to pieces'. This is how the *baqara* of the Koran came to be cut up, and how the hand-washing of the elders became a laying on of hands in Maqdisī and Tha'labī. The confusion was no doubt assisted by rabbinic dicta such as 'the laying on of hands by the elders and the breaking of the heifer's neck are decided by three (persons)' (*Mishnah, Sanhedrin, 1:3*; Schwab, *Talmud*, vol. iv, p. 323, *ad Soḥah 9:1*).

¹²⁹ According to R. Eliezer, the broken-necked heifer must be one year old and the red cow two years old, a dictum which so impressed Moses that he asked if R. Eliezer might issue from his loins (*Midrash Rabba, ad Numbers 19:7*). Similarly R. Simeon in J. Neusner (tr.), *The Tosefta, Tohorot*, New York 1977, p. 172 (*Pārāh, 1:5*). But the sages disagreed: the animal is a heifer until it is three (or more) and a cow thereafter (*Pārāh, 1:1*).

¹³⁰ When the son refuses to wake his father in order to get the stone, the prospective purchasers offer to pay more, but to no avail (Schwab, *Talmud*, vol. ii, p. 9, *ad Pe'ah, 1:1*). In Suddī's version the son similarly offers to pay more for the jewel if he can delay payment until his father has woken up (Tha'labī, *Qīṣaṣ*, p. 223).

¹³¹ Cf. above, note 100. In Tha'labī's targum the obligation to pay blood-money replaces the scriptural injunction to put away the guilt of innocent blood.

¹³² M.J. Kister and M. Kister, 'On the Jews of Arabia — Some Notes', *Tarbiz* 1979 (in Hebrew with English summary).

¹³³ *Soḥah, 9:9*.

whereas the Muslim traditions on the stoning penalty delight in taunting the rabbis with their failure to abide by their own Mosaic law, those on the *qasāma* by contrast commend the Israelites on the fidelity with which they have maintained the institution from the death of Moses to the coming of Islam.¹³⁴ Who then were these Israelites? An obvious guess would be the Samaritans, of whom we at least know that they existed.¹³⁵ Alternatively, one might opt for a factor X, be it in the form of presumed survivors of the Dead Sea sectarians in northern Arabia,¹³⁶ some sort of proto-Karaites in Medina,¹³⁷ Judeo-Arabian monotheists in the Yemen,¹³⁸ or Judeo-Christians.¹³⁹ But though Yemenis would appear to have played a major role in the formation of both the *qasāma* and Islamic law at large,¹⁴⁰ there can be no question of looking for a factor X outside the borders of ancient Israel as far as the *qasāma* is concerned. God told Moses to perform the Deuteronomic ceremony 'if one be found slain in the land which the Lord thy God giveth thee to possess it'. The rabbis took this to mean that the

¹³⁴ Thus both Wahb b. Munabbih in Ibn Qutayba and Tha'labī. On the stoning penalty see now J. Burton, *The Collection of the Qur'ān*, Cambridge 1977. For the interpretation of the penalty adopted here, see Crone and Cook, *Hagarism*, p. 180, note 17.

¹³⁵ For the claim that it was the Samaritan Pentateuch that the Arabs adopted, see Crone and Cook, *Hagarism*, pp. 14f. (On the question of the relationship between the Muslim and the Samaritan creeds (*ibid.*, p. 170, note 3), see now R. Macuch, 'Zur Vorgeschichte der Bekenntnisformel *lā illāha illā llāhu*'. *Zeitschrift der Deutschen Morgenländischen Gesellschaft* 1978.) Marqah does not comment on the relevant Deuteronomic passage (J. Macdonald (ed. and tr.), *Memar Marqah*, Berlin 1963), nor is there any discussion of it in S. Noja (tr.), *Il Kitāb al-Kāfi dei Samaritani*, Naples 1970. But what with two books per millennium, it is hard to argue *e silentio*.

¹³⁶ Cf. C. Rabin, *Qumran Studies*, Oxford 1957, pp. 112ff. The treatment of Deuteronomy 21:1-9 in Y. Yadin (ed.), *The Temple Scroll*, Jerusalem 1977, vol. ii, pp. 199f, adds nothing, one way or the other, to Rabin's hypothesis. But the Damascus document is hostile to oaths (*i.e.* of the judicial kind), and it prohibits swearing by anything capable of profanation (in case the oath is false), such as the law of Moses or the initial letters of God's names, not to mention the name itself (cf. C. Rabin (ed. and tr.), *The Zadokite Documents*, Oxford 1954, ix:8ff; xv:1ff); and this hostility clearly does not go well with the Muslim insistence that the jurors must swear to their innocence in the name of God, or with the lengthy invocation of God in Tha'labī's targum.

¹³⁷ Cf. S.D. Goitein, *Jews and Arabs, their Contacts through the Ages*, New York 1964, p. 51. For Qirqisānī's treatment of the Deuteronomic passage, see above, notes 67, 100.

¹³⁸ Cf. D.S. Margoliouth, *The Relations between Arabs and Israelites prior to the Rise of Islam*, London 1924, pp. 67f. Though many more inscriptions have come to light since Margoliouth wrote, there is no proper study of this hypothesis.

¹³⁹ Cf. H.J. Schoeps, *Theologie und Geschichte des Judentums*, Tübingen 1949, pp. 334ff, and the paper by S. Pines in the present volume.

¹⁴⁰ It is a noteworthy fact that the majority of the great lawyers in early Islam were Yemenis (by descent or *walā'*): thus Shurayh, Sha'bī, Tāwūs, Ibrāhīm al-Nakha'ī and Awzā'ī. And it is hardly accidental that 'Umar's *qasāma* is said to have taken place in Hamdānī territory (above, note 69).

ceremony should *only* be performed in this land,¹⁴¹ and whoever the Arabs got the *qasāma* from understood it in the same way, as is clear from Tha'labī's targum.¹⁴² We can thus dispense with the idea of sectarian Jews breaking the necks of scrawny heifers in the Yemen or Medina: when the Arabs say that they got the *qasāma* from Israelites who had maintained the institution in force since the time of Moses, they can only be referring either to Samaritans or else to a factor X located in the Holy Land.

The *Qasāma* of the Medinese

It is time now to turn to the *qasāma* of the other schools. If the old *qasāma* is the Arab compurgation reshaped to fit a Pentateuchal peg, where does that leave the institution of the Mālikīs and later lawyers?

The Mālikī doctrine is an almost exact mirror image of the old position.¹⁴³ The old lawyers hold that the *qasāma* is to be used when the discovery of a corpse casts suspicion on a particular group without there being reason to suspect any particular person or persons. But the Mālikīs hold that the discovery of a corpse (with whatever signs of violent death) does not in itself suffice to cast suspicion on anyone, and in their view the procedure is not to be used *unless* there is reason to suspect a particular person or persons. There must be *lawth*, incriminating evidence, and to the Mālikīs such evidence consists of the testimony of either a single witness or that of the victim himself,¹⁴⁴ though the later schools give it a somewhat broader definition.¹⁴⁵ If there is *lawth*, the *qasāma* is performed. But if there

¹⁴¹ *Siphre*, p. 240; Schwab, *Talmud*, vol. iv, p. 323, *ad Soṭah*, 9:1; Maimonides, *Mishneh Torah*, vol. xi, p. 224 (10:1). It is because Jerusalem was not given to any particular tribe that it cannot bring a heifer (*Soṭah*, 9:2).

¹⁴² God told Moses to go to the Holy Land and look to every murdered one found between two villages (Tha'labī, *Qīṣaṣ*, p. 225).

¹⁴³ There is an account of the Mālikī and Shāfi'ī *qasāmas* in Marneur, *Essai*, pp. 278ff. The present account is based on Mālik b. Anas, *Muwaṭṭa'*, Cairo n.d., part ii, pp. 195ff; Khalīl b. Ishāq, *Sommario del diritto malechita*, tr. D. Santillana, Milan 1919, vol. ii, pp. 692ff.

¹⁴⁴ The single witness is not mentioned in the *Muwaṭṭa'*, but it is given as Mālik's definition of *lawth* in Saḥnūn b. Sa'īd, *al-Mudawwana al-kubrā*, Cairo 1323, vol. xvi, pp. 219f, and of course the later sources. Mālik and Layth were the only Sunnī lawyers to accept the victim's testimony (Ibn Rushd, *Bidāya*, vol. ii, p. 423; Ibn Qudāma, *Mughnī*, vol. viii, p. 501, no. 7038); but it also went into Shī'ite law (cf. below, note 163).

¹⁴⁵ Cf. below, notes 159ff. According to Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 108, Mālik himself accepted known enmity between the victim and the people among whom he was found as *lawth*, but this is not correct (cf. Ibn Rushd, *Bidāya*, vol. ii, p. 422). By way of lip-service to the *qatīl Khaybar* traditions, however, the Mālikīs did accept the discovery of a Muslim victim in a place inhabited exclusively by Jews or Christians as *lawth* (Khalīl, *Sommario*, vol. ii, p. 695n).

is *lawth*, the Mālikīs also award the oath to the accusers: where the old lawyers let the suspects clear themselves, the Mālikīs by contrast let the accusers corroborate the charge; where the Ḥanafī oath serves to dispel insufficient evidence, that of the Mālikīs by contrast serves to make it complete. Unlike the old lawyers, the Mālikīs do not force reluctant jurors to swear; but unlike tribesmen, they do not give judgement against such jurors either: if the jurors fail to take the oath, it is shifted to the other side, so that it is now the accused who has to swear. Where the old lawyers prescribe only compensation, the Mālikīs thus envisage a number of possible outcomes of the procedure. If the accusers swear, the charge is proved; and since the penalty for intentional homicide is retaliation, while that for accidental homicide is compensation, retaliation or compensation is what the accusers will get. If the accusers fail to swear, the accused may now rebut the charge, and thus acquit himself completely, by swearing fifty oaths of innocence.

The Mālikī procedure is thus a collective oath of accusation, not of purgation, let alone a compurgation. In fact, 'collective' is too generous a word. A minimum of two jurors suffice to corroborate a charge of intentional homicide, while a single juror is enough if the charge is accidental homicide; and the accused may rebut the charge, whichever it may be, by swearing all fifty oaths himself.¹⁴⁶ The fact that the jurors are the victim's agnates thus does not mean that the procedure is a test of kinship solidarity (or for that matter any other form of solidarity). It can most aptly be described as a penal analogy to the civil procedure in which the plaintiff, who can only bring one witness, may corroborate his claim by an oath.¹⁴⁷ The only difference is that two men must swear in the *qasāma* for intentional homicide (presumably modelled on the two witnesses who ought to have been adduced), and that fifty oaths must be sworn. And this analogy underlines what should be abundantly clear: like the old *qasāma*, that of the Mālikīs owes little more to the pre-Islamic procedures than its name and the number of the oaths.

This conclusion runs counter to that of Brunshvig, who would turn the assumptions concerning the pre-Islamic procedures adopted in this paper upside down. In Brunshvig's view the Medinese institution is more truly Jāhilī than that of the Iraqi schools, the accusatory oath being an archaic feature which owes its survival to the conservative nature of Medinese

¹⁴⁶ Mālik, *Muwaḥḥa*', part ii, pp. 197ff.

¹⁴⁷ The *qaḍā' bi'l-yamīn ma'a shāhid* (Mālik, *Muwaḥḥa*', part ii, pp. 108ff). The analogy was also drawn by Ibn Rushd, *Bidāya*, vol. ii, p. 423. If the victim is a non-Muslim, slave or foetus, it is in fact this procedure which is to be adopted (Mālik, *ibid.*, p. 199; Khalīl, *Sommaro*, vol. ii, p. 698).

society.¹⁴⁸ But Brunshvig's opinion is almost certainly wrong. As he presents it, the opinion is simply an evolutionary hunch, for which no evidence is adduced;¹⁴⁹ and apart from the traditions in which the Prophet endorses the Mālikī institution at Khaybar (to which I shall come back), the evidence which he could have adduced from both pre-Islamic and modern Arabia goes against it. Nor is that surprising: an accusatory *qasāma* would have been an anomaly. Tribal law is a law committed to a defence of the status quo, whatever it may be at any given time, because it is based on recognition of the fact that in a society which is both impoverished and stateless, it is hard to change the status quo without causing hardship, resistance or upheavals. The law provides a set of principles in the name of which passions can be vented and one party or the other declared to have been in the right, but once all this has happened, things are expected to go on much as before. The system is thus biased in favour of the defendant. It is the plaintiff who is the troublemaker in the sense that it is he who asks for a change in the status quo. He may of course prove his claim; indeed, he may be granted absurdly large awards: nobody is out to endorse injustice. But the awards are rarely meant to be paid, their usual fate being that of reduction to a moderate or even nominal sum as friends and relatives implore the winner to forgo so and so much for the sake of 'Allah, President Nasser and Marshal Ameer'.¹⁵⁰ And if the plaintiff cannot prove his claim, it is the defendant who has the presumption in his favour, *i.e.* it is he, not the plaintiff, who is allowed to invoke the judgement of God by oath¹⁵¹ or fire-ordeal.¹⁵² Denials, as the Anglo-Saxons put it, are

¹⁴⁸ Brunshvig, 'Considérations sociologiques', p. 69; repeated by the *Encyclopaedia of Islam*², s.v. 'qasam'.

¹⁴⁹ He found the Mālikī institution 'exorbitante' and for this reason 'surely the most archaic'.

¹⁵⁰ M.J.L. Hardy, *Blood Feuds and the Payment of Blood Money in the Middle East*, Beirut 1963, p. 95; Burckhardt, *Notes*, pp. 88, 180f; C.M. Doughty, *Travels in Arabia Deserta*, London 1936 (first published 1888), vol. i, p. 539; F.H. Stewart and H. Blanc, 'Sinai Bedouin Law' (in preparation). Blood-money also tends to be left largely unpaid in Cyrenaica, though the winner does not explicitly forgo it here (E.L. Peters, 'Some Structural Aspects of the Feud among the Camel-herding Bedouin of Cyrenaica', *Africa* 1967, pp. 266f. Since Peters' explanation turns on the existence of a debt relationship, it does not apply to Arabia).

¹⁵¹ That the oath is in principle always on the defendant is a point on which there is impressive agreement in the literature (cf. above, note 21; Doughty, *Travels*, vol. i, p. 310 (apparently out of court); Rossi, 'Diritto', p. 25 (the Prophetic dictum to this effect endorsed by the Zaydī tribesmen).

¹⁵² Cf. above, note 22. All the ordeals reported there were taken by the defendant: so much so that when two people incriminated each other, both had to undergo the ordeal (Bury, *loc. cit.*). One not unnaturally tends to assume that a defendant who must prove his innocence by licking a red-hot spoon without injury to his tongue will always be found

'stronger' than assertions,¹⁵³ and if assertions cannot be proved, they are best eliminated.¹⁵⁴ It is true that accusatory oaths have been reported in the modern literature for the Sinai and/or the Western desert, though only from there,¹⁵⁵ but these oaths almost certainly originate in Islamic law. Thus defendants here will sometimes plead guilty on condition that the plaintiff take the oath. That, as Murray points out, is a piece of bluff which sometimes succeeds because all bedouin dread to swear, partly because some tribes consider oath-taking shameful,¹⁵⁶ and more particularly because it is dangerous to put oneself in the power of God or a saint who may use the opportunity to settle old scores.¹⁵⁷ But the procedure itself is in perfect accordance with non-Ḥanafī law. Similarly, the tribesmen in question are said to allow the plaintiff, who can only bring one witness, to corroborate his claim by an oath, again in accordance with non-Ḥanafī law.¹⁵⁸ And since Egypt and Libya are Shāfi'ī and Mālikī, it is presumably from Islamic law that these procedures derive. Neither oath, moreover, is collective; and it is certainly hard to see how a tribesman who mobilized fifty kinsmen to accuse another of murder could be starting litigation as opposed to a feud.

From the point of view of tribal law the Mālikī award of the oath to the accusers is thus unlikely to be of Jāhili origin. But what is more, the prevalence of the accusatory *qasāma* in Islamic law itself militates against the view that this was an archaic procedure. Had the accusatory *qasāma* been an ancient survival in Mālikī law, one would have expected the later schools to drop it; but instead they all adopted it. The Shāfi'ī doctrine on

guilty. But since the 'fire-judge' is frequently said to lick the spoon first to prove that the fire does not harm the innocent, injury is evidently not inescapable, and Burckhardt had heard say of people who had licked the spoon about twenty times without injury (*Notes*, p. 69); Kennett estimates that acquittals are as common as findings of guilt, and the ordeal which he himself witnessed issued in acquittal; similarly, of the two people subjected to the ordeal in Bury's case, only one was found guilty.

¹⁵³ Whitelock, *English Society*, p. 140.

¹⁵⁴ Hence the verdict obtained by oath or ordeal is usually said to be irrevocable, even if the defendant is subsequently seen to be guilty (cf. Kennett, *Bedouin Justice*, pp. 44f; Morgenstern, 'Trial by Ordeal', p. 125). There are exceptions. Thus Musil knew 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 (Musil, *Arabia Petraea*, vol. iii, p. 340), and Landberg was told that the *defendant* could appeal against an unfavourable verdict (*Arabica*, vol. v, p. 173; actually one does not hear much in the literature of innocent persons being convicted). These exceptions hardly invalidate the general point.

¹⁵⁵ Kennett, *Bedouin Justice*, p. 42; Murray, *Sons*, p. 231.

¹⁵⁶ So the Ruwāla, according to Musil: being asked to swear shows that your word is not believed (*Rwala*, pp. 427, 429). Similarly Burckhardt, *Notes*, p. 183.

¹⁵⁷ Murray, *Sons*, p. 231.

¹⁵⁸ Kennett, *Bedouin Justice*, pp. 42f.

the *qasāma* is very close to that of the Mālikīs,¹⁵⁹ while that of the Ḥanbalīs in turn is almost identical with that of the Shāfi'īs,¹⁶⁰ and some Imāmīs also adhere to a doctrine almost identical with Shāfi'ī law.¹⁶¹ In other Imāmī works the Medinese conception of the *qasāma* has been superimposed on that of the old schools,¹⁶² and the same process has been effected, with

¹⁵⁹ Cf. Muḥammad b. Idrīs al-Shāfi'ī, *al-Umm*, Beirut 1973, vol. vi, pp. 90ff; Yaḥyā b. Sharaf al-Nawawī, *Minhāj al-ṭālibiyyīn*, ed. and tr. L.W.C. van den Berg, Batavia 1882-4, vol. iii, pp. 188ff; Ibrāhīm b. 'Alī al-Shirāzī, *Kitāb al-tanbīh*, tr. G.-H. Bousquet, Alger n.d. [1949-52], part iv, pp. 93f. They agree with the Mālikīs that there can be no *qasāma* without *lawth*. *Lawth* consists in the testimony of a single witness of probity or several of less than probity (but not that of the victim himself), the discovery of a *qatīl* in a homogenous quarter or village comparable with the purely Jewish Khaybar, known enmity between the victim and the people among whom he was found (on the same model), and also factors such as the discovery of an armed person smeared in blood next to a blood-stained corpse. If there is *lawth*, the oath is awarded to the accusers who, upon taking it, are entitled to blood-money (Shāfi'ī is said to have awarded them retaliation *fī'l-qadīm*, i.e. in the Iraqi transmission of his views (Nawawī, *Minhaj*, vol. iii, p. 193; Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 108; cf. H. Halm, *Die Ausbreitung der šāfi'ītischen Rechtsschule von den Anfängen bis zum 8./14. Jahrhundert*, Wiesbaden 1974, p. 18)). If they do not swear, the oath passes to the accused who acquit themselves by taking it, or alternatively the accused simply pay blood-money (cf. Shāfi'ī, *Umm*, vol. iv, p. 38). Shāfi'ī himself had a curiously mixed doctrine on the *qatīl* who is found in circumstances other than those outlined. There can be no *qasāma*, and if the victim's relatives indict a particular person, the latter clears himself by an individual oath. If the defendant refuses to swear, the oath passes to the accuser, who corroborates his claim and gets retaliation or compensation as the case may be. All this is consistent enough. But the accused still has to pay *fifty* individual oaths. Similarly, if the relatives indict every member of the locality, they all swear, but again not less than fifty oaths (cf. *Umm*, vol. vi, pp. 97 (only compensation), 99).

¹⁶⁰ Cf. Ibn Qudāma, *Mughnī*, vol. viii, pp. 487ff. The only major difference is that the Ḥanbalīs still award retaliation to the accusers who take the oath in cases of intentional homicide.

¹⁶¹ Thus Ḥillī, *Sharā'i'*, vol. iv, pp. 222ff. There is no *qasāma* without *lawth*: if someone is indicted without *lawth*, the accused rebuts the charge with an ordinary oath. *Lawth* consists in the testimony of a single witness of probity or several of less than probity, the presence of an armed person spattered with blood near a *qatīl* covered with blood, homogeneity and isolation of the quarter in which he was found, etc., as in Shāfi'ī law. The oath is accusatory and, as in Mālikī law, the effect is retaliation in case of intentional homicide. The *qatīl* who is found between two villages makes a somewhat incongruous appearance: the *lawth* is on the nearest, though it is hard to see how this goes with the definition of *lawth* given.

¹⁶² Thus Ṭūsī, *Mabsūṭ*, *kitāb al-qasāma*; *id.*, *Nihāya*, pp. 740f, 753f. There is no *qasāma* without *lawth*: if someone is indicted without *lawth*, you adopt the procedure for ordinary claims, though some people say that the oaths should be 'thickened', i.e. that fifty oaths should be sworn (thus the *Mabsūṭ*; compare Shāfi'ī in note 159). *Lawth* is defined as in Ḥillī (cf. the preceding note). The oath is awarded to the accusers who obtain retaliation if the charge was intentional homicide. If the accusers fail to swear, the oath passes to the accused who either acquits himself by taking it (if necessary all alone) or indicts himself by refusing. So far the doctrine is wholly Medinese. But if a *qatīl* is found in a tribe or village and the murderer is unknown, the local residents still pay *diya*.

greater elegance, in Ismā'īlī law.¹⁶³ Far from being an archaic and obsolete procedure, the award of the oath to the accusers was clearly the most up-to-date and fashionable doctrine.

The Mālikī *qasāma* is thus not pre-Islamic. Nor is the very close to that of the old schools. It differs from the latter above all in that the oath is awarded to the accusers and that it may be shifted: most other differences, notably the choice between retaliation and acquittal, stem from these two fundamental points. How then are these two points to be explained?

Umayyad Practice?

One explanation would be that the Mālikī institution represents Umayyad practice. We have a fair number of traditions which assert that the Umayyads, not excluding 'Uthmān, shifted the oath, and that, at least from the time of Marwān I onwards, they awarded the oath to the accusers, granting them retaliation if they swore.¹⁶⁴ In view of Schacht's opinion that Umayyad practice formed the starting point of Islamic law,¹⁶⁵ one might then conclude that the Umayyads made the pre-Islamic institution accusatory and retaliatory for the practical purpose of fighting crime:¹⁶⁶ the Mālikī institution need thus not owe anything to Deuteronomy at all. But this explanation has serious drawbacks. For one thing, practical consider-

There has to be some reason to suspect them, and Tūsi finds it unnecessary to ask them to swear to their innocence: they pay because of the suspicion. But subject to these modifications, the old doctrine applies: if the *qatīl* is found between two villages, the nearest village pays; if he is found exactly between two villages, they both pay; and if he is found in several parts, the *diya* is imposed on the one in which his heart or breast was found (*Nihāya*, p. 754; cf. also above, note 49).

- ¹⁶³ Nu'mān, *Da'īm*, vol. ii, nos. 1484, 1486f. *Laṭkh* consists in the testimony of a single witness (written into the Prophetic *hadīth*), that of the victim himself, or known enmity between the victim and the people among whom he was found. If there is *laṭkh*, the oath is awarded to the accusers who, upon taking it, obtain retaliation, as in Medinese law. If there is no *laṭkh*, but only signs of violent death, the local residents must swear and pay blood-money, as in the old doctrine.
- ¹⁶⁴ 'Abd al-Razzaq, *Muṣannaḡ*, vol. x, nos. 18261, 18275, 18298; Sarakhsī, *Mabsūṭ*, vol. xxvi, p. 109; Tabarī, *Ta'rikh*, ser. i, pp. 2841f (discussed by Gräf, 'Rechtsdirektive').
- ¹⁶⁵ Schacht, *Origins*, pp. 198ff and *passim* (repeated in most of his other writings on Islamic law). In a similar vein, though without reference to Schacht, Gräf argued that 'Uthmān's adoption of the *qasāma* lay behind the Ḥanafī refusal to recognize nocturnal burglars as *muḥāribūn*; but it is hard to see how this can be right (Gräf, 'Rechtsdirektive', esp. pp. 129, 131; there is no reference to the *qasāma* in the passage on Ḥanafī views on nocturnal burglars; the procedures laid down are quite different; even Sayf hardly meant to say that 'Uthmān's *qasāma* replaced the procedures previously used for nocturnal burglars: his tradition on such burglars merely provides a suitable historical background).
- ¹⁶⁶ It was for this purpose that 'Uthmān instituted the *qasāma*, according to Sayf. (Gräf's question whether the institution envisaged by Sayf was retaliatory must be answered in the affirmative: *istaḥaqqā* means to become entitled to whatever one is entitled to, i.e. retaliation or compensation depending on the nature of the killing; and the retaliatory institution of the Mālikīs was justified with reference to the same need to combat crime.)

ations do not explain the shifting of the oath. For another, what the traditions report are not necessarily historical facts.

In principle it is certainly plausible that the Umayyads should have contributed to the formation of the *qasāma*, or indeed Islamic law at large, but in practice we are rarely in a position to know what their legal decisions were. If the lawyers found it worth invoking Umayyad decisions, they presumably also found it worth ascribing decisions to them. The many contradictory rulings ascribed to 'Umar II obviously cannot all be authentic;¹⁶⁷ and if fewer rulings are ascribed to other Umayyads, it merely goes to show that other Umayyads lost their capacity to validate the opinions of the lawyers, not that the rulings in question are authentic.¹⁶⁸ Leaving aside 'Umar II, the major points in favour of the traditions on the Umayyad *qasāma* are that they are not formulated in terms of the Deuteronomic *qatīl* who is found slain (the *qatīl yūjad*),¹⁶⁹ and that the *qasāma* had become both accusatory and retaliatory in practice by the time of the 'Abbāsids.¹⁷⁰ But the traditions in question are contradictory,¹⁷¹ and the cases which

¹⁶⁷ 'Umar II awarded the oath to the accused and made them pay *diya*. On the contrary, he only made them pay *diya* if the oath shifted to the accusers, and half *diya* if both refused to swear: that was in his *kitāb*. If, however, the victim was wounded and later died, he made the accusers swear first. In fact, he agreed with the Prophet (and the Medinese) in accepting the victim's testimony: that too was in his *kitāb*. As governor of Medina he awarded retaliation, but when he saw that people swore without knowledge, he only imposed compensation. On the contrary, he rejected the procedure altogether, refusing to accept the oaths: that was also in his *kitāb*, and he told Zuhri as much. But in his *kitāb* one could also read that the Prophet accepted fifty oaths from less than fifty jurors. He himself followed the Prophet's precedent: once he accepted the oath of seven people, one of whom was a delinquent ('Abd al-Razzāq, *Muṣannaf*, vol. x, nos. 18256, 18265, 18278f, 18290, 18298f, 18305; Bukhārī, *Receuil*, vol. iv, pp. 321f; Ibn Ḥazm, *Muḥallā*, vol. xi, p. 67).

¹⁶⁸ Schacht himself was well aware that reconstructing Umayyad practice from Islamic law in order to assess the influence of this practice on this law meant recourse to a 'method of reasoning in circles' (Schacht, 'The Law' in von Grunebaum, *Unity and Variety*, p. 70). And the circles sometimes led to curious findings: are we to take it that the incidence of divorce before consummation was so high as to necessitate an Umayyad position on the problem? (Cf. Schacht, *Origins*, p. 193).

¹⁶⁹ Some traditions about 'Umar II apart, the only exception is the *ḥadīth* in which Sulaymān b. Hishām writes to Zuhri for enlightenment ('Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18281).

¹⁷⁰ That much is clear from the story of Ja'far b. 'Ulba, the poet who was executed under Maṣūf (Abū'l-Faraj al-Iṣbahānī, *Kitāb al-aghānī*, Cairo 1927-74, vol. xiii, pp. 49f, 53, 55). Similarly the case reported by Muḥammad b. Yūsuf al-Kindī, *The Governors and Judges of Egypt*, ed. R. Guest, Leiden and London 1912, p. 141 (caliphate of Hārūn). The criticism of the institution in the early 'Abbāsīd period also turned on the fact that it was used to inflict retaliation (I shall come back to this subject).

¹⁷¹ 'Uthmān awarded the oath to the accused according to Sayf, but to the accusers according to Zuhri (Ṭabarī, *Ta'rikh*, ser. i, p. 2841; 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18281). Sarakhṣī tells us both that the Prophet, Abū Bakr, 'Umar and the caliphs after

they attribute to the caliphs bear signs of heavy-headed stage management.¹⁷² There is no trace of the alleged Umayyad practice in what (admittedly very little) we know of Syrian law, and 'Abbāsīd evidence is not evidence for the Umayyads. Since the traditions invoke the caliphs down to Hishām,¹⁷³ at least some of them presumably date from the early 'Abbāsīd period themselves; in fact, we still find lawyers placing what appears to be the Medinese position under the aegis of 'Abd al-Malik in Ibn al-Muqaffa's *Risāla*.¹⁷⁴ And the assumption that the traditions are late would also explain, as we shall see, why the *qatīl yujad* does not figure in them. All in all, it is thus difficult to accept the traditions in question: what evidence we have in fact suggests that the Umayyads were adherents of the old *qasāma*, not that they invented that of the Medinese.¹⁷⁵

them awarded retaliation and that Mu'āwiya was the first to do so (*Mabsūṭ*, vol. xxvi, p. 109). Zuhri implies that Mu'āwiya would have awarded retaliation in the case reported in 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18261. But according to Ibn Abī Mulaika, Mu'āwiya did not award retaliation on the basis of *qasāma* (Bukhārī, *Receuil*, vol. iv, p. 321; Ibn Ḥazm, *Muḥallā*, vol. xi, p. 67). In Zuhri's version of Marwān's *qasāma*, Marwān would have awarded the oath to the accused if the latter's kinsmen had been willing to swear; but in Ibn al-Musayyab's version of the same case, the victim himself indicted the murderers, whereupon Marwān awarded the oath to the accusers ('Abd al-Razzāq, *ibid.*, no. 18261; Ibn Ḥazm, *ibid.*, pp. 68f).

¹⁷² Thus Mu'āwiya happened to come to Medina at a time when the Medinese happened to need a *qasāma* in a case which happened to involve the family of Ibn al-Zubayr who happened to disagree with Mu'āwiya over the rules of the game ('Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18261). Marwān's *qasāma* in Medina involved the sons of Balsānā and Tūlmānā whose rhyming names, though curiously Aramaic sounding, are a little hard to accept (*ibid.*; Ibn Ḥazm, *Muḥallā*, vol. xi, pp. 68f (where the names are given in full)). And the circumstantial detail that the murderer in 'Abd al-Malik's case used a stick establishes the important point that the use of a stick is evidence of intention ('Abd al-Razzāq, *ibid.*, no. 18275). The traditions which provide the historical background to 'Uthmān's adoption of the *qasāma* are no better: two male and upright witnesses in Kufa, a Companion and his son, correctly watch the event from beginning to end from the roof of their house, for all that Kufan houses at the time were reed-huts on which the eminent witnesses must have found it somewhat difficult to sit (cf. Gräf, 'Rechtsdirektive', pp. 122 and the note thereto, 123, 127).

¹⁷³ The Umayyads invoked are Mu'āwiya, Marwān I, 'Abd al-Malik, 'Umar II, Yazīd II, Hishām and Sulaymān b. Hishām ('Abd al-Razzāq *Muṣannaf*, vol. x, nos. 18261, 18274f, 18281, 18298; above, note 167). Sulayman b. 'Abd al-Malik would have been less surprising than the son of Hishām, but a well known caliph was hardly turned into a less well known prince.

¹⁷⁴ Ibn al-Muqaffa, *al-Risāla fī'l-ṣahāba*, ed. and tr. C. Pellat under the title of *Ibn al-Muqaffa*, "Conseiller" du Calife, Paris 1976 § 35: those who claim to follow the *sunna* make that which is not *sunna sunna* to the point where they will spill blood without good reasons; when asked why they lay down death penalty in such cases, they will vaguely refer to cases at the time of the Prophet, later *imāms* or 'Abd al-Malik. This need not, of course, be a reference to the *qasāma*, but the *qasāma* would fit the bill very well.

¹⁷⁵ Cf. the evidence for the Pentateuchal *qasāma* in Syria (above, note 50).

Rabbinical Law

Another possibility would be that the Mālikī institution owes its particular features to rabbinical law. What it would represent is thus not the Jāhilī institution modified by Umayyad battles against crime, but the Deuteronomic institution modified by rabbinic ideas regarding oaths. This is the hypothesis which has the evidence in its favour.

1. The shifted oath.

The shifted oath was well known to the rabbis. They knew it in two forms, both of which reappear on the Muslim side. The first was the so-called post-Mishnaic oath, which was used in connection with debts.¹⁷⁶ If a plaintiff had no evidence to show for his claim, not even a single witness, the defendant could either rebut the claim by an oath or pass the oath to the plaintiff. Precisely the same rules apply in Islamic law outside the Kufan schools, and we have already come across them in the bluffing oath of the bedouin: you plead guilty if the plaintiff is willing to swear.¹⁷⁷ In Sunnī law the oath has come to be shifted automatically on the defendant's refusal to swear, but in Ibādī law it is still up to the defendant to pass on the oath,¹⁷⁸ and the Ibādīs have also stuck to the view that it can only be used in connection with debts.¹⁷⁹

The second form of the shifted oath was the Mishnaic oath of the suspected liar. If a person has committed perjury in the past, he is not allowed to swear, and the oath shifts to the plaintiff instead. If the plaintiff is also of doubtful veracity, the result is that neither party can swear. Some rabbis accordingly held that the case should be dismissed, but others were of the opinion that judgement should be given against the defendant, and still others thought that the parties should go halves.¹⁸⁰ If we turn to the Muslim side, we find that here too the defendant of ill repute might in the opinion of some be disqualified,¹⁸¹ but as an aspect of civil procedure this view is not much discussed. Where it was discussed, and that with far-reaching consequences, was in connection with the *qasāma*.

The classical traditions on the *qasāma*, as may be remembered, concern an Anṣārī who was found murdered at Khaybar. It is a peculiar feature of these traditions that neither the Jews nor the Anṣārīs who are the parties to

¹⁷⁶ *Encyclopaedia Judaica*, s.v. 'oath': *Babylonian Talmud*, *Shevu'oth*, fol. 40b. The oath is also known as 'consuetudinary'.

¹⁷⁷ 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.

¹⁷⁸ Abū Ghānim, *Mudawwana*, vol. ii, p. 222; Marneur, *Essai*, p. 264.

¹⁷⁹ Abū Ghānim, *loc. cit.*

¹⁸⁰ *Mishnah*, *Shevu'oth*, 7:4; *Babylonian Talmud*, *ibid.*, fol. 47b.

¹⁸¹ Marneur, *Essai*, p. 222.

the dispute actually take the oath in any of the extant versions: the classical traditions on the procedure are traditions in which the procedure fails to be used. It failed to be used because the Jews were disqualified from swearing, while the Anṣārīs were reluctant to do so; and the reason why the Jews were disqualified is that they were suspected, not to say notorious liars: how can we accept the oath of infidel *Jews*, as the Anṣārī accusers asked.¹⁸² It was after all the readiness of a Jew to commit perjury in a property dispute in the Prophet's days which had occasioned the revelation of the Koranic verse on false oaths (3:71).¹⁸³ And when, moreover, it is the example of a Jew which is given in the discussion of disqualification in civil procedure,¹⁸⁴ there can be little doubt that the Jews of Khaybar were debarred from swearing by their own Mishnaic law. It is clear that the Muslims ceased to distinguish sharply between the two forms of the shifted oath, for while the Jews are usually said to have been disqualified, there are also traditions in which they merely refuse to swear;¹⁸⁵ and there was of course no question of disqualifying the Anṣārīs, who always refuse to swear on the ground that they have no knowledge of the event. Either way, however, the oath passes to the other side until both sides have failed to take it; and on the failure of both sides to take it, the legal effects proposed in these and other traditions are precisely those proposed by the rabbis for cases of dual disqualification. Thus the Prophet dismissed the case, usually paying the blood-money himself to prevent Muslim blood from being wasted.¹⁸⁶ Alternatively, he gave judgement against the Jewish defendants, imposing the obligation to pay blood-money on them.¹⁸⁷ But 'Umar, Marwān and 'Umar II all held that when both parties refuse to swear, they should go halves.¹⁸⁸ The question of how the *qasāma* became a shifted oath can thus be seen to have a simple answer: the Muslims borrowed the idea from the rabbis and applied it to individual and collective oaths alike.

2. The accusatory oath.

Once we have explained how the collective oath came to be shifted, we have in effect also explained how it came to be awarded to the accusers. The point to note is that the shifted oath is more than a mechanical procedure. It is above all a concrete illustration of an abstract principle, namely that

¹⁸² Cf. note 61. These traditions are also found in the classical *ḥadīth* collections, usually in the section on *diyāt*.

¹⁸³ Ṭabarī, *Tafsīr*, vol. vi, p. 529; cited by Marneur, *Essai*, pp. 249f.

¹⁸⁴ Above, note 181.

¹⁸⁵ 'Abd al-Razzāq, *Muṣannaf*, vol. x, nos. 18252, 18255.

¹⁸⁶ *Ibid.*, nos. 18257-60.

¹⁸⁷ *Ibid.*, nos. 18252, 18255.

¹⁸⁸ *Ibid.*, nos. 18274, 18290, 18297; Shāfi'i, *Umm*, vol. vii, p. 234.

the oath is to be awarded to whoever has the presumption in his favour: the oath shifts as the presumption changes.¹⁸⁹ And this is the principle which lies behind the accusatory oath.

The principle itself is rabbinical.¹⁹⁰ In practice, however, the rabbis could not make the rules entirely consistent with it, because the Pentateuch awards the oath to the defendant, and what scripture ordains evidently cannot be changed.¹⁹¹ In Kufan law the oath is also on the defendant,¹⁹² and it cannot be shifted,¹⁹³ a rule which holds good of civil law-suits and the *qasāma* alike: the Kufans would thus appear to have stuck to the Pentateuchal prescriptions in respect of both. But the other schools agree with the rabbis that the oath is to be awarded to whoever has the presumption in his favour;¹⁹⁴ and since they no longer felt bound by the Pentateuch, they were free to let the principle shape the rules. In civil law-suits they thus consistently award the oath to whoever has the strongest case at any given time,¹⁹⁵ shifting the oath in accordance with the vicissitudes of the pre-

¹⁸⁹ The Muslims understood this very well. Thus the traditions which impose blood-money on the accused on the failure of both parties to swear, explain that judgement is given against the accused 'because the *qatīl* was found among them', in other words because the discovery of the corpse has raised a presumption against them which persists on the failure of the two parties to either rebut or corroborate it ('Abd al-Razzāq, *Muṣannaḥ*, vol. x, nos. 18252, 18283).

¹⁹⁰ It comes out very clearly in the rabbis' attempt to make sense of the Mishnaic award of the oath to the hired labourer who sues his employer for wages (*Shevu'oth*, fols. 45aff).

¹⁹¹ Cf. Exodus, 22:11; I Kings 8:31. It makes sense that the oath should be taken by the defendant when the plaintiff can adduce no evidence at all (a post-Mishnaic rule); it also makes sense that it should be awarded to the plaintiff when the latter can adduce his account-book in disputes over debts (a Mishnaic rule). But by the same token it makes no sense that the oath should be awarded to the defendant when the plaintiff can adduce one witness (a Pentateuchal rule in the eyes of the rabbis).

¹⁹² Sarakhsī, *Mabsūṭ*, vol. xvii, pp. 28ff; Marghīnānī, *Hidāya*, part iii, pp. 156f; Zayd b. 'Alī, *Corpus Iuris*, no. 676, all with reference to the Prophetic dictum that the burden of proof is on the plaintiff and the oath on the defendant. The non-Kufan schools accommodated this dictum by defining the defendant as whoever had the presumption in his favour at any given time (Marneur, *Essai*, p. 47). Conversely, the Ḥanafīs made great efforts to accommodate the principles regarding presumptions. The combination of oath and blood-money has nothing to do with presumptions by origin, and when the jurors object to it in 'Umar's *ḥadīth*, 'Umar simply replies that it is *ḥaqq*. But in later *ḥadīths* he says that they must pay because a *qatīl* was found among them, i.e. because there is a presumption against them — which does not make too much sense because the jurors actually *have* rebutted this presumption on swearing (Sarakhsī, *Mabsūṭ*, vol. xxvi, pp. 107, 115; cf. above, note 69).

¹⁹³ Sarakhsī, *Mabsūṭ*, vol. xvii, p. 29; Marghīnānī, *Hidāya*, part iii, pp. 156f; Ibn Rushd, *Bidāya*, vol. ii, p. 459 (on the Ḥanafīs and the majority of the Kufans).

¹⁹⁴ Cf. Marneur, *Essai*, pp. 46ff.

¹⁹⁵ Thus they award the oath to the plaintiff who can adduce one witness on precisely this ground, i.e. they turn the Pentateuchal rule upside down. The Ḥanafīs, Sufyān al-Thawrī, the Ibādīs, most Iraqīs and Awzā'ī all refused to accept this (Ibn Rushd, *Bidāya*, vol. ii, p. 458; Marneur, *Essai*, p. 264).

sumption;¹⁹⁶ and if this principle is applied to the *qasāma*, it is clear that the old procedure must be changed. Either the discovery of a corpse in a certain place raises a presumption against the inhabitants of this place, or else it does not. If it does, and the old doctrine evidently implies that it does, then the presumption is in favour of the accusers and it is they who take the oath. If it does not, there is no ground for legal action unless there is further incriminating evidence. If therefore a kinsman of the victim should indict a local resident without such evidence, the latter has the presumption in his favour and rebuts the charge by an individual oath: there is no *qasāma*. If on the other hand the kinsman can adduce such evidence, then the *qasāma* does indeed take place, but since the presumption is now in favour of the accusers, it is once more the accusers who take the oath. Whichever way the rules are played, the institution must thus be accusatory.¹⁹⁷

We can see the lawyers move towards this conclusion in the many traditions in which it is no longer the old doctrine which is being laid down. The traditions in question would appear to be mainly Basran and Medinese.¹⁹⁸ Some are concerned with the *qatīl Khaybar*,¹⁹⁹ others are formulated in the general terms of the *qatīl* who is found among a people or in the open field,²⁰⁰ and the rest are traditions about the Umayyads. All these traditions agree, indeed take it for granted, that the oath is shifted. Some are nonetheless very close to the old position. Thus we are sometimes told that the people among whom a *qatīl* has been found must swear and pay blood-money:²⁰¹ here it is only when the suspects refuse to swear that

¹⁹⁶ Cf. Coulson, *History*, pp. 124f.

¹⁹⁷ But note that the logic of this argument turns on the assumption that the number of the oaths has legal significance. If the fifty oaths are regarded as merely the traditional number of oaths in connection with homicide, it could be argued that there is an accusatory *qasāma* in the presence of incriminating evidence and a defensive one in its absence: Shāfi'ī was close to this position, and the Ismā'īlīs actually adopted it (cf. above, notes 159, 163; cf. also 162). Alternatively, it could be held that either way there are only ordinary oaths. The Medinese might have argued as much. Once they had worked out their rules, it did not make much difference which of the oaths in question they chose to call a *qasāma*. Evidently, both the name of the institution and the number of the oaths required had become too venerable to be dropped, but it is an instructive thought that if the Medinese had done so, it would have been virtually impossible to reconstruct the genesis of their procedure.

¹⁹⁸ Abū Qilāba, Ḥasan al-Baṣrī, Zuhri, 'Urwa, 'Umar II and other Umayyads are the most prominent figures in the *isnads*.

¹⁹⁹ 'Abd al-Razzāq, *Muṣannaḥ*, nos. 18252, 18254f, 18257-60.

²⁰⁰ 'Abd al-Razzāq, *ibid.*, vol. x, nos. 18263, 18281, 18283, 18290; Ibn Ḥazm, *Muḥallā*, vol. xi, p. 67.

²⁰¹ *Ibid.*, nos. 18256, 18263. Similarly 18254 (no mention of compensation), 18252, 18255 (compensation if both refuse to swear), 18290 (half compensation if both refuse), 18287

disagreement with the old lawyers set in. But others turn the procedure upside down and award the oath to the accusers:²⁰² here it is only if the accusers refuse to swear that a pure or modified version of the old doctrine is adopted. The traditions disagree wildly among themselves about the legal effects of the oath: every possible combination of retaliation, *diya*, half *diya*, *diya* paid by the Treasury, and acquittal is prescribed, depending on who swears first, second or refuses.²⁰³ What we see in these traditions is in other words the disagreement which arose from the application of the shifted oath to the Deuteronomic *qatīl*. The *qatīl yūjad* is familiar to all and, outside Kufa, the shifted oath has been accepted by all; but it is not yet certain precisely how the two are going to be combined.

That the classical Medinese position emerged from this controversy over how the two were to be combined can be corroborated in two ways. First, we have the evidence of intermediate doctrines. It is in connection with the Deuteronomic *qatīl* that we first come across the view that without incriminating evidence there can be no *qasāma*. This view is credited to Zuhri who lays down that the discovery of a corpse does not in itself suffice to cast suspicion on the people near or among whom it has been found: there must also be *athar*, *shubha* or *laṭkha*.²⁰⁴ *Athar* is the sign of violent death which most of the old lawyers had agreed on regarding as necessary, and Zuhri still awards the oath to the accused. But *shubha* and *laṭkha* are what the Mālikīs were to call *lawṭh*.²⁰⁵ Other Medinese authorities tell us that if the victim's testimony is available, one should award the oath to the accusers. Here the link between incriminating evidence and accusatory oaths is firmly established, but the *qasāma* is still used in the absence of such evidence.²⁰⁶ It is by putting these two doctrines together that one arrives at

and Ibn Ḥazm, *Muḥallā*, p. 67 (compensation if the accusers take the oath on the defendants' refusal).

²⁰² 'Abd al-Razzāq, *ibid.*, nos. 18257-60 (the Prophet paid, i.e. the Treasury pays, compensation if both refuse to swear), 18281 (retaliation if the accusers swear, compensation if the oath passes to the accused), 18297 (half compensation if both refuse).

²⁰³ Cf. the two preceding notes. Virtually all the traditions agree that if the accusers swear first, the effect is retaliation; that the alternative is complete acquittal is written into nos. 18258 (= Mālik, *Muwaṭṭa'*, part ii, p. 196), 18260f.

²⁰⁴ 'Abd al-Razzāq, *ibid.*, no. 18283.

²⁰⁵ The term was familiar to them in the form *laṭkh*, which also turns up among the Ismā'īlīs (Khalīl, *Sommario*, vol. ii, p. 692n; Nu'mān, *Da'ā'im*, no. 1486).

²⁰⁶ Ibn Ḥazm, *Muḥallā*, vol. xi, p. 71: 'as for 'Urwa b. al-Zubayr, Abū b. kr b. 'Amr b. Ḥazm and Abān b. 'Uthmān, it is related from them that when the victim claims that a (certain) man or group killed him, then the kinsmen of the claimant take the oath first...'. This formulation clearly implies that the oath is awarded to the accusers under other circumstances, not that these are the only circumstances in which the *qasāma* takes place. Compare Zuhri's account of Mu'āwiya's *qasāma* in 'Abd al-Razzāq, *Muṣannaf*,

the Mālikī position: the procedure cannot be used *without* incriminating evidence, and it is *always* accusatory.

Secondly, we have the evidence of Mālik's *ḥadīths*. The only traditions adduced by him are late and elaborate versions of the *qatīl Khaybar*. The early versions of this tradition are short, shorn of narrative detail and defective in terms of *isnāds*; they are in fact traditions about the Prophet rather than traditions from him.²⁰⁷ But the *isnāds* improved when the *qatīl* got a name;²⁰⁸ and narrative details such as his business in Khaybar and his companions were soon to make the story suitable for inclusion in the historical works of Ibn Iṣḥāq and Wāqidi,²⁰⁹ while at the same time the legal and moral contents of the traditions were elaborated in a Medinese vein until almost the only residue of the Deuteronomic institution was the curious fact that the workings of a Jāhilī institution were illustrated in a case involving Jews.²¹⁰ It is two such traditions, and only such traditions, that Mālik cites: his doctrine had no independent source.²¹¹ But clearly, once incriminating evidence had been identified as consisting in the testimony of a single witness or that of the victim himself, it ceased to be of the

vol. x, no. 18261, where the formulation similarly implies that the award of the oath depended on the state of the evidence.

²⁰⁷ Ḥasan al-Baṣrī, Abū Qilāba, Zuhri and Yaḥyā b. Sa'īd [al-Anṣārī] all relate about the Prophet without referring to informants, while Sulaymān b. Yasār's tradition comes from an anonymous Anṣārī Companion ('Abd al-Razzāq, *Muṣannaf*, vol. x, nos. 18252, 18254f, 18257 (where the 'wa' relegated by the editor to the footnote should be restored)).

²⁰⁸ The victim is completely anonymous in Kalbi's story, but an Anṣārī in all the legal *ḥadīths*. When Yaḥyā b. Sa'īd acquired the informant Bushayr b. Yasār, he also obtained the knowledge that the victim was Sahl b. Abī Ḥathma or an Ibn Sahl (the former in Bukhārī, *Receuil*, vol. iv, p. 322, the latter in 'Abd al-Razzāq, *ibid.*, no. 18258). This was improved to the effect that Bushayr b. Yasār related from Sahl b. Abī Ḥathma that the victim was an 'Abdallāh b. Sahl (*ibid.*, no. 18259; Muḥammad b. Iṣḥāq, *Das Leben Muhammed's*, ed. F. Wüstenfeld, Göttingen 1859f, p. 777). An even better version has Muḥammad b. Sahl b. Abī Ḥathma relate from Sa'īd b. Ḥizām b. Muḥayyiṣa who relates from his father who accompanied the victim, 'Abdallāh b. Sahl (Wāqidi, *Maghāzī*, vol. ii, p. 713). But there are many other versions, including some in which the *isnāds* have been wholly recast (Wāqidi, *ibid.*, p. 715). The Imāmī versions are related by Ja'far al-Ṣādiq (Kulīnī, *Kāfī*, vol. ii, pp. 342f).

²⁰⁹ See the preceding note. Wāqidi's version runs into pages.

²¹⁰ All the versions except Sulaymān b. Yasār's have the Prophet award the oath to the Anṣār. The Prophet's words make it clear that if the Anṣār had taken the oath, they would have been awarded retaliation; conversely, the Jews would have been acquitted had they been allowed to swear. In some versions the Prophet even specifies that contrary to the Ḥanafī doctrine on this point, an accused must be named (cf. Ibn Qudāma, *Mughnī*, vol. viii, pp. 489f, no. 7022). Much attention is paid to the point that juniors should keep quiet in the presence of their seniors, even when the seniors are less well informed.

²¹¹ Mālik, *Muwatta'*, part ii, pp. 195f.

slightest importance where and in what state the victim was found. It is for this reason, not because they were innocent of Deuteronomy, that the Mālikīs pay so little attention to the *qatīl yūjad* and the notion of *athar*: one is occasionally told that both are irrelevant, but that is all.²¹² Legal reasoning applied to the *qatīl yūjad* thus abolished the *qatīl yūjad*; and it is for the same reason that he hardly figures in the Medinese traditions on the *qasāma* of the Umayyads.

What the Mālikī *qasāma* represents is thus a Pentateuchal institution taken to pieces. We start with a reasonably faithful copy of the Deuteronomic ceremony in the form of the old *qasāma* only to end up with an altogether different procedure. Detached from its scriptural context and examined in the light of novel ideas regarding presumptions and penalties, every procedure laid down in the Bible suggested a variety of alternatives, which could be combined and recombined in an almost endless number of ways: no two traditions are exactly alike. Worked over in this fashion, the Biblical institution was soon to be utterly transformed. What we see is in other words a classical example of the process whereby foreign institutions were to lose almost every trace of their foreign origins in Islamic law, the process described in *Hagarism* as 'dismantlement', 'grinding down' and 'pulverisation'.²¹³ It must be emphasized that the *qasāma* is not a 'foreign element' in the sense usually attached to this term, *i.e.* an isolated borrowing assimilated into a pre-existing structure. The ideas in the light of which the Biblical institution was reinterpreted and modified were themselves of Jewish origin: the *entire* structure, not merely this or that particular feature of it, arose by a reshaping of foreign law.

I should like to conclude by making two further points. The first is methodological. It should be abundantly clear that no social meaning can be attached to the differences between the Ḥanafī and Mālikī *qasāmas* and that no Anṣārī was ever found murdered at Khaybar in the circumstances so lavishly described by Wāqidī. If either has been believed, it is merely because our sources are deceptive. This point is not exactly new, but it is one which one does well to remember when using Mālik's *Muwaṭṭa'*. Few would deny that, on first reading, this book conjures up an inward-turned provincial society abiding by its local ways in more or less complete ignorance of developments outside. Thus Mālik innocently informs us that his doctrine on the *qasāma* is 'our generally approved practice, that which I

²¹² Saḥnūn, *Mudawwana*, vol. xvi, p. 220; Khalīl, *Sommario*, vol. ii, pp. 694f; Ibn Qudāma, *Mughnī*, vol. viii, pp. 494f, no. 7028. Cf. also note 85.

²¹³ Crone and Cook, *Hagarism*, pp. 97f.

have heard from those of whom I approve, and that on which past and present *imāms* agree'; similarly, the award of the oath to the accusers is 'the *sunna* on which there is no disagreement among us and which people have never ceased to practise'.²¹⁴ And apart from the two Prophetic traditions, no further authority is invoked, nor is there any allusion to rival views. Yet this impression of patriarchal innocence is totally spurious, and Shāfi'ī, for one, was not taken in: 'I wish I knew who they are whose opinions constitute consensus, of whom one hears nothing and of whom we do not know... You claim that the scholars do not disagree, but that is not so... We do not know what you mean by practice, and you do not either, as far as we can see. We are forced to conclude that you call your own opinions practice and consensus, and speak of practice and consensus when you mean your own opinions'.²¹⁵ Shāfi'ī was not perhaps polite, but he was right. Mālik's doctrine was disputed in Medina itself,²¹⁶ and Mālik, not to mention other Medinese, engaged in disputes with scholars from outside.²¹⁷ His views on *qasāma*, ordinary oaths, intentional and accidental homicide,²¹⁸ not to mention the stoning penalty, were of Jewish origin, and his traditions on the *qasāma* were late versions of Iraqi *ḥadīths*. There was no agreement, no local practice and no innocence in Medina: at the most the Medinese were a bit behind developments outside.²¹⁹ And what we see in Medinese law, or for that matter Medinese historiography, is never primitive beginnings, but the end-product of developments which began elsewhere.

²¹⁴ Mālik, *Muwaṭṭa'*, part ii, pp. 196f; for the first passage, cf. Schacht, *Origins*, p. 68.

²¹⁵ Shāfi'ī in Schacht, *Origins*, pp. 69, 84. Compare also R. Brunschvig, 'Polémiques médiévales autour du rite de Mālik', *al-Andalus* 1950, pp. 385, 391ff. (Reprinted in his *Etudes d'Islamologie*, vol. ii.)

²¹⁶ 'Many of the Medinese hold that one should award the oath to the accused' (Ibn Rushd, *Bidāya*, vol. ii, p. 421). And the most contradictory opinions are ascribed to Zuhri and Sa'id b. al-Musayyab, the Medinese luminaries.

²¹⁷ For Mālik himself, see 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18276. Note also the innocence with which Mālik asserts that 'we never heard of a *qasāma* being used against more than one man (at a time)' (*Muwaṭṭa'*, part ii, p. 198). Yet this was a controversial question on which there are several traditions with Medinese *isnāds*. Thus Zuhri tells us that Ibn al-Zubayr was of the opinion that if several persons had participated in the deed, the jurors could swear to the guilt of the lot, an opinion which Mu'āwiya refused to accept (cf. above, note 172). Both Zuhri and Sa'id b. al-Musayyab have it that Marwān I executed two murderers after a joint *qasāma*, according to the latter in Medina itself (cf. *ibid.*). And in Ibn Ḥazm we read that 'Abd al-Malik was the first to institute the rule that only one person could be killed, the *qasāma* having been used against several persons previously (*Muḥallā*, vol. xi, p. 71; accomplices are to be lashed and imprisoned for a year). Schacht might have concluded that these traditions did not exist in Mālik's time, which would date them to the thirty years between the deaths of Mālik and 'Abd al-Razzāq; but Mālik's professions of ignorance are evidently disingenuous.

²¹⁸ For the origins of the Muslim method of distinguishing between accidental and intentional homicide, compare Numbers 35:16ff.

²¹⁹ Cf. Schacht, *Origins*, p. 223.

The second point concerns the general relationship between Jāhiliyya and Islam. The two are frequently regarded as antithetical. Muḥammad's preaching, so one is told, brought about a temporary suspension of tribal society which however soon reasserted itself on Muḥammad's death: thereafter pious Muslims were to fight a long and often losing battle against the Jāhili heritage. This view is prevalent in the standard accounts of the rise of Islam and the Umayyad period, and it is a frequent theme in Goldziher's work.²²⁰ But it is not a very convincing one. It is true, of course, that bedouin *muruwwa* goes badly with the fully developed urban *dīn*, that genealogical pride came to offend the universalist sentiments of classical Islam, and that the Umayyads came to be seen as embodiments of Jāhili secularism. But it is nonetheless the fusion between Jāhiliyya and monotheism in Islam, not the occasional clashes between the two, which is both striking and culturally significant. The Prophet worked in a tribal environment, and religion did not replace tribal ties in his Medinese community: on the contrary, it cemented them. And neither the Arab predominance nor the tribal pride of the Umayyad period can be regarded as regressions from a later universalist ideal. The Arabs were *ennobled* by Islam, as tradition put it, and it was the pagan heritage of the Greeks, not that of the Arabs, that Islam sought to suppress. It was only when the non-Arabs became Muslims on a large scale, bringing their non-Arab culture with them, that the Jāhili heritage came in for serious attack, and even then it was attacked overwhelmingly because it was primitive and restrictive, not because it was ungodly. In fact, the universalist issue apart, it was clearly regarded as the very opposite of ungodly: it was Shāfi'ī with his agnatic *'āqila*, not the Shu'ūbī with his disdain for Arab tribes, who represented the Muslim pietist.

Now Goldziher regarded the *qasāma* as one of the Jāhili institutions which pious Muslims wished to suppress.²²¹ Criticism of the institution there certainly was, some of it radical; but contrary to what Goldziher implies, the critics in no way objected to the fact that the institution was of pagan origin. What they opposed was the fact, always taken for granted by them, that the procedure was used to inflict retaliation.²²² Insufficient evidence, as they pointed out, is scarcely improved by the fact that people

²²⁰ Cf. in particular I. Goldziher, *Muhammedanische Studien*, vol. i, Halle 1889.

²²¹ I. Goldziher, 'Muhammedanisches Recht in Theorie und Wirklichkeit', *Zeitschrift für Vergleichende Rechtswissenschaft* 1889 (reprinted in his *Gesammelte Schriften*, ed. J. Desomogyi, Hildesheim 1967-70, vol. ii), pp. 412ff.

²²² The legality of this was a major issue. For a survey of the various positions, see Ibn Rushd, *Bidāya*, vol. ii, pp. 420f. For traditions bearing on the question, see 'Abd al-Razzāq, *Muṣannaf*, vol. x, nos. 18276-9, 18287-9; Ibn Ḥazm, *Muḥallā*, vol. xi, pp. 67ff.

are willing to swear about things which they know nothing about, and given that nobody would accept such methods of proof in connection with *hadd* punishments, it is both irrational and unjust to use them in connection with homicide.²²³ It is for this reason that we are told that 'Abd al-Malik repented of having used it,²²⁴ and that 'Umar II wished to give it up.²²⁵ The critics certainly tried to write off the procedure as Jāhili', but it was not *because* it was Jāhili' that they tried to reject it.²²⁶ Conversely, its defenders did not uphold it because they were imperfectly Islamized, but because they were against crime. Homicide does not usually take place in the presence of two witnesses, and unless the oath could be used to replace them, so it was argued, people would kill each other and Muslim blood would be wasted.²²⁷ It was moreover the defendants of the institution, not its critics, who had the sacred figures of Islam on their side. The critics were active in the early 'Abbāsid period,²²⁸ that is at a stage at which the procedure had long been endorsed by both Prophet and caliphs, and it was because it had been so endorsed, as Zuhri told 'Umar II, that it could not be given up.²²⁹ Sa'īd b. al-Musayyab could think of no better argument

²²³ 'Abd al-Razzāq, *ibid.*, nos. 18277f: Bukhārī, *Receuil*, vol. iv, p. 322; Ibn Ḥazm, *Muḥallā*, vol. xi, p. 68.

²²⁴ Bukhārī, *ibid.*, p. 324.

²²⁵ Cf. above, note 167. Goldziher accepted 'Umar II's hostility to the *qasāma* as authentic, and it was largely for this reason that he concluded that the opposition must have come from the pietists. Since he combined his acceptance of 'Umar II's traditions with distrust of those ascribed to the Prophet, he concluded that the Prophetic traditions were put into circulation to counter the objections of the pietists. This theory evidently cannot be upheld.

²²⁶ Ibn Rushd, *Bidāya*, vol. ii, pp. 419f. Sarakhsī, a Ḥanafī, also read Zuhri's tradition on the Jāhili' origins of the retaliatory procedure as implying disapproval, though whether it was meant as such is hard to say (*Mabsūṭ*, vol. xxvi, p. 109). Cf. also below, note 232.

²²⁷ Mālik, *Muwatṭa'*, part ii, p. 197; Ibn Rushd, *Bidāya*, vol. ii, p. 420; Kulīnī, *Kāff*, vol. ii, p. 342; Nu'mān, *Da'ā'im*, vol. ii, no. 1486; cf. above, note 166. Zuhri countered 'Umar II's objections to the institution in the same vein ('Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18279). The argument was also adduced, a millennium later, in support of the Zaydī *qasāma* (Siyāghī, *Rawḍ*, vol. iv, p. 286).

²²⁸ Goldziher gives a list of them in 'Recht', p. 414n. They included Muslim b. Khālid (d. 179) and Ibn 'Ulayya (d. 193). The opinions of the early figures in the list (to which Sa'īd b. al-Musayyab could be added) are scarcely any more authentic than those ascribed to 'Umar II. The first reliable attestation of hostility to the institution would appear to be the tradition related by Awza'ī from 'Aṭā' al-Khurāsānī, a Syrian of Khurāsānī origin who died in 133, to the effect that the Companions of the Prophet did not include a single Ḥarūrī or Qadarī and that not one of them used the *qasāma*, a tradition which Abū Zur'a takes some trouble to explain away (S. al-Qawjānī (ed.), *Ta'rikh Abī Zur'a al-Dimashqī*, Damascus 1980, nos. 1908f. I owe this reference to Martin Hinds). For another list which confirms Goldziher's conjecture that Bukhārī must have been among those who rejected the institution, see Siyāghī, *Rawḍ*, vol. iv, pp. 285f.

²²⁹ 'Abd al-Razzāq, *Muṣannaf*, vol. x, no. 18279.

against it than that the Prophet would never have used it if he had known that people would imitate him,²³⁰ an infidel thought for which he is severely reprimanded by Ibn Ḥazm,²³¹ and other critics were forced to argue that the *qasāma* at Khaybar had failed to take place because the Prophet did not intend the parties to use the procedure at all.²³² Whatever its intrinsic merits or demerits, the institution was too *sacred* to be given up.

Moreover, the institution was sacred, not despite its Jāhilī origins, but rather because of them. Jāhilī law was what the Prophet had practised, and Jāhilī law was thus Islamic law unless it had been explicitly modified or rejected. The critics of the *qasāma* tried to show that the Prophet had indeed rejected it, *i.e.* they campaigned on behalf of an *exception* to the general rule that Jāhilī law is normative. But it was thanks to the general rule that the defenders of the institution, far from glossing over its pagan origins, went out of their way to read their own conception of the institution back into the pagan past. The Jāhilī oath, so we are told, could be taken by less than fifty jurors, whence the fact that it can be taken by less today.²³³ On the contrary, fifty jurors were required until Mu'āwiya changed the rules, and we ought not to do with less ourselves.²³⁴ The Jāhilī oath was shifted,²³⁵ and its legal effects were retaliation.²³⁶ On the contrary, it was only used when a *qatīl* was found among a people: they would swear and pay compensation.²³⁷ The *qasāma* was Qurashī law,²³⁸ it was practised by the Prophet's uncle,²³⁹ and it was confirmed by the Prophet himself.²⁴⁰ The *qasāma*, in short, bears witness to the fact that, like the Arabs, the Jāhiliyya was ennobled by Islam.

It was because God had raised up a prophet among the Arab tribes that the pagan past of the Arabs was to play a cultural role of considerably

²³⁰ *Ibid.*, no. 18277.

²³¹ Ibn Ḥazm. *Muḥallā*, vol. xi. p. 71.

²³² Ibn Rushd. *Bidāya*, vol. ii, pp. 419f. Similarly the anonymous scholars cited by Sarakhsī. *Mabsūṭ*, vol. xxvi, p. 109: the Prophet's question to the Anṣār whether they wanted to swear was a rhetorical one of outrage; he had seen their Jāhilī leanings.

²³³ Ibn Ḥazm. *Muḥallā*, vol. xi, p. 86, citing Ḥammād.

²³⁴ Zuhri in 'Abd al-Razzāq. *Muṣannaḥ*, vol. x. nos. 18261, 18273.

²³⁵ Zuhri. *ibid.* (note that *tardīd* or *taraddud al-aymān* sometimes means *taḥwīl al-aymān*, *i.e.* shifting of oaths to the other party, and sometimes *takrār al-aymān*, *i.e.* repetition of oaths by the same jurors).

²³⁶ Zuhri in Sarakhsī. *Mabsūṭ*, vol. xxvi, p. 109; cf. 'Abd al-Razzāq. *Muṣannaḥ*, vol. x. no. 18254.

²³⁷ Above, note 233.

²³⁸ 'Abd al-Razzāq, *ibid.*, no. 18251; Ibn Qutayba. *Ma'ārif*, p. 240.

²³⁹ Ibn 'Abbās. above, notes 27f.

²⁴⁰ Zuhri in 'Abd al-Razzāq. *ibid.*, no. 18252; Sulaymān b. Yasar. *ibid.*, no. 18254. and many others.

greater importance than that of being a storehouse of miscellaneous malpractices and superstitions. It was not, in fact, a storehouse at all, at least not in the sense that much law and other culture came out of it: even the malpractices tended to be picked up abroad. But the Jāhiliyya gave the Arabs an unshakable identity for the simple reason that it had been endorsed by God himself, and it was thanks to this identity that they could appropriate: whatever they took over became unmistakably theirs. Whether they saw the Pentateuch as an account of their own Jāhiliyya, projected foreign institutions into their own Jāhilī past, or sought inspiration in what little they remembered of Jāhilī law, it thus remains true to say that without the Jāhiliyya, there would have been no Sharī'a.

POSTSCRIPT

Re-reading this article for purposes of indexing, I am still intrigued by the early Muslim identification of the *qasāma* as a Mosaic institution and the exegetical familiarity with the Pentateuch, but the jump from there to a Pentateuchal stage now strikes me as unwarranted, as does the grand outline of the origins of the institution. It now seems to me that it would have been more fruitful to continue with an extended study of 2:63ff in *tafsīr*.

For the most recent discussion of the origins of the *qasāma* (disagreeing with the position taken here), see R. Peters, 'Murder in Khaybar: Some Thoughts on the Origins of the *Qasāma* Procedure in Islamic Law', *Islamic Law and Society* 9, 2002.