

MURDER IN KHAYBAR: SOME THOUGHTS
ON THE ORIGINS OF THE *QASĀMA* PROCEDURE
IN ISLAMIC LAW*

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Abstract

The institution of *qasāma* has intrigued both Muslim jurists and western scholars. The first were puzzled by its violation of essential legal principles, the latter by its apparent pre-Islamic origins. Because of its archaic and irrational character, western scholars assume that the institution was not applied in practice: “[I]t does not appear that this institution functioned much, even in the past, when the penal law of Islam had a certain practical application.”¹ However, the evidence of fatwa collections shows that the *qasāma* was indeed enforced by courts as late as the nineteenth century,² and the rules connected with it have now found their way into some modern Islamic criminal codes.³ The *qasāma*, it appears, was a living institution in Islamic law and not just theory. In this essay I will try to shed some light on the origins of this institution and its reception into Islamic law. I will attempt to chart the earliest developments of Islamic jurisprudence by analyzing the available hadith material and the statements of the first generation of jurists. In the conclusion I will suggest that my analysis of the material on *qasāma* corroborates Motzki’s⁴ and

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¹ *EP*, s.v. *qasam*.

² For a case from twelfth century al-Andalus, see Aḥmad b. Yaḥyā al-Wan-shārīsī, *al-Mi’yār al-mu’rib wa’l-jāmi’ al-mughrib ‘an fatāwā ‘ulamā’ Ifriqiyya wa’l-Maghrib*, ed. Muḥammad Ḥajji et al. (Beirut: Dār al-Gharb al-Islāmi, 1981), vol. 2, 308-10; for fifteenth century Ottoman law, see Paul Horster, *Zur Anwendung des islamischen Rechts im 16. Jahrhundert Die “juristische Darlegungen” (ma’rūzat) des Schejch ul-Islam Ebu Su’ud (gest. 1574)*. (Stuttgart: Kohlhammer, 1935), 58-59; for nineteenth century Egypt, see Muḥammad al-‘Abbāsī al-Mahdī, *al-Fatāwā al-Mahdiyya fī ‘l-Waqā’i’ al-Miṣriyya*, 7 vols. (Cairo: al-Maṭba‘a al-Azhariyya, 1301-3), vol. 6, 78 (27 Sha‘bān 1277). These fatwas are based on real court cases.

³ Arts. 239-256 of the Iranian Criminal Code of 1991; arts. 81-90 of the Yemeni Criminal Code of 1994.

⁴ Harald Motzki, *Die Anfänge der islamischen Jurisprudenz: Ihre Entwick-*

Powers⁵ revision of the chronology of the development of Islamic jurisprudence first put forward by Joseph Schacht in *The Origins of Muḥammadan Jurisprudence* (1950).

The classical doctrines

THE *QASĀMA* INSTITUTION SEEKS to determine who is liable for a murder if the perpetrator is unknown or the legal evidence against him or her is inadequate. There are two different interpretations of *qasāma*: the Maliki and the Hanafi doctrine. I will discuss first the Maliki rules, shared by most schools of law, and then the Hanafi doctrine, also held by the Zaydis.

According to the Malikis, *qasāma* is a procedure that the next of kin of a murdered person can invoke if there is only a strong suspicion against a suspect, based on incriminating indications (*lawth*) but no legal evidence. Under these circumstances, the victim's agnatic male relatives may swear fifty oaths in order to corroborate the suspicion. In the oath they must indicate whether the murder was committed willfully or by mistake. If they swear that the murder was willful, they may demand either retaliation (*qiṣāṣ*), or payment of the blood price (*diyya*). Otherwise, they are entitled only to blood price, to be paid by the defendant's solidarity group (*ʿāqila*). The incriminating indications (*lawth*) required for initiating the *qasāma* procedure may be circumstantial, e.g. the fact that a corpse is found in a hostile village or among a hostile tribe, the fact that a corpse was found lying on the ground shortly after a group of people had left that spot, or the fact that a person was found with blood on his clothes or carrying a blood-stained knife in the vicinity of a place where someone had been stabbed to death. The suspicion also may be based on legally incomplete evidence, e.g. the fact that before he expired the victim named his attacker, the testimony of a single witness to the killing, or the testimony of one or two witnesses who did not observe the actual killing, but saw that someone attacked or beat the victim prior to his death. The circumstances on which the suspicion is based must be proven by the plaintiff(s).

lung in Mekka bis zur Mitte des 2./8. Jahrhunderts (Stuttgart: Franz Steiner Verlag, 1991).

⁵ David S. Powers, *Studies in Qurʾān and Ḥadīth: The Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986).

The Hanafi doctrine is substantially different.⁶ If a corpse manifesting traces of violence is found in a city quarter, in a village or its vicinity (within shouting distance), in a house or on a person's land, and if the killer is unknown, the victim's heirs can bring an action against one or several persons from among the inhabitants of the quarter or village or against the owner of the house or the land. If the defendant denies the accusation, the heirs can initiate the *qasāma* procedure by exacting fifty oaths to the effect that the inhabitants or the owner did not kill the victim and do not know who did. These oaths must be sworn by fifty inhabitants of the quarter or village—chosen by the plaintiffs—or by the owner of the house or the land. Anyone who refuses to take the oath is imprisoned by the court until he confesses to the killing or agrees to swear the *qasāma* oath. The swearing, however, does not remove the responsibility of the defendants. As a result of the *qasāma* procedure they or their *'āqilas* are liable for the victim's blood price.

Anomaly of the qasāma procedure

The Maliki jurist, philosopher and systematic thinker Ibn Rushd (d. 595/1198)⁷ mentions that a number of early jurists had objected to the *qasāma* procedure in its accusatory, Maliki form. These objections, he explains, were rooted in the lack of convincing textual support and in the conflict between the Maliki doctrine of *qasāma* and the following general legal principles:

1. The doctrine violates the principle that one may swear an oath only with regard to something one knows or has observed.
2. It conflicts with the rule that the plaintiff must prove his claim and that only if he is unable to do so must the defendant swear an oath. This is one of the basic principles of the law of procedure.
3. It violates the general rule that retaliation must be based on full

⁶ For a detailed survey of the Hanafi doctrine, see Baber Johansen, "Eigentum, Familie und Obrigkeit im hanafitischen Strafrecht: Das Verhältnis der privaten Rechte zu den Forderungen der Allgemeinheit in hanafitischen Rechtskommentare," in *Contingency in a Sacred Law: Legal and ethical norms in the Muslim fiqh* (Leiden: Brill, 1999), 367-72.

⁷ Ibn Rushd, *Bidāyat al-muḥtaḥid wa-nihāyat al-muqtaṣid*, 2 vols. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1960), vol. 2, 427ff.

and complete evidence, i.e. a confession or the concurring testimonies of two legally qualified male eyewitnesses.

With regard to the textual basis of the Maliki doctrine, the Khaybar murder hadith (see below) is most often quoted to establish the lawfulness of retaliation based on *qasāma*. This hadith, Ibn Rushd comments, is not conclusive, since the plaintiffs refused to take the oaths on the ground that they had not witnessed the killing, and the Prophet did not pronounce a judgment. Some opponents of *qasāma* in the Maliki form even suggested that the Prophet's words in this hadith were not meant to be taken seriously. The Prophet, they claim, was joking in order to show that this Jahili institution was not binding and that his question to the Anṣār was rhetorical. ("You don't want to swear, do you?"). Finally Ibn Rushd mentions a hadith cited by al-Bukhārī, according to which 'Umar b. 'Abd al-'Azīz did not accept retaliation based on the *qasāma* procedure.⁸

Ibn Rushd concludes that it is preferable not to punish on the basis of *qasāma*. To be fair, he also lists the arguments of supporters of *qasāma*—especially Mālik—according to whom (1) the hadith establishes a special *sunna* that constitutes an exception to a general principle, and (2) *qasāma* promotes the protection of society because murderers usually commit their crimes out of the sight of potential witnesses.

The textual basis of qasāma

The *qasāma* is mentioned in two Prophetic reports. The first one reads (with minor and insignificant variations):

The *qasāma* existed in the Jahiliyya. Then the Prophet confirmed it as it was practiced in the Jahiliyya and pronounced a judgment on the strength of it among some of the Anṣār ("Helpers", i.e. the Medinese Muslims) regarding a person who they claimed had been murdered by the Jews.⁹

⁸ Bukhari, 6390 (Diyat, 22). The hadith material from the standard compilations is taken from the Sakhr hadith CD-ROM, GISCO (Global Islamic Software Company), *Mawsū'at al-ḥadīth al-sharīf* (Version 2.0), 1997. I refer to a hadith by the name of the compiler followed by the number given in the 'Ālimiyya Program (*tarqīm al-'ālimiyya*) of this CD-ROM and, in parenthesis, the identification according to Wensinck's *Concordance et Indices de la Tradition Musulmane*.

⁹ Muslim, 3161 (Qasāma, 8); Ahmad b. Hanbal, 16003 (vol. 4, 62), 22103

Henceforth I will refer to this narrative as the *Confirmation hadith*. The second hadith, transmitted in many variants, gives the details of the event referred to in the Confirmation hadith. There are numerous versions of this hadith, all of which have the following narrative elements in common:

Two Anṣār, named ‘Abd Allāh b. Sahl and Muḥayyiṣa b. Maḥmūd of the Banū Ḥāritha tribe, went to Khaybar. When they reached the oasis, they parted company and each took care of his own business. Later Muḥayyiṣa found ‘Abd Allāh murdered. He buried him and returned to Medina where, accompanied by his brother Ḥuwayyiṣa and the victim’s brother ‘Abd al-Raḥmān b. Sahl, he went to see the Prophet. When ‘Abd al-Raḥmān began to speak, the Prophet said: “Give due respect for age”, for ‘Abd al-Raḥmān was the youngest of them. He stopped talking and the other two related the story of ‘Abd Allāh’s killing. The Prophet asked: “Are you willing to swear fifty oaths and demand [the blood] of your companion or your killer (*ṣāḥibalikum aw qātila/ikum*)?” They answered: “How can we swear if we have not witnessed the event?” The Prophet said: “In that case Jews may establish their innocence to you (*fa-tubri’ukum Yahūd*) by swearing fifty oaths.” The three men objected, saying: “How can we accept the oaths of unbelievers?” Thereupon the Prophet paid the blood price himself.¹⁰

I will refer to this hadith as the *Khaybar murder hadith*. The numerous variants add colorful but inconsequential details, such as the exact spot at which the companions parted company, the purpose of their visit, the location in which the corpse was found, an exchange of letters between the Prophet and the Jews before the *qasāma*

(v, 375), 22557 (v, 432); Nasa’i, 4628 (Qasāma, 2), 4629 (Qasāma, 2), 4630 (Qasāma, 2); ‘Abd al-Razzāq al-San‘ānī, *al-Muṣannaf*, ed. Ḥabīb al-Raḥmān al-A‘zamī, 11 vols. (Simlak, Dabhel/Beirut, 1983), 18252, 18254; Ibn Abī Shayba, *al-Muṣannaf*, 8 vols. (Beirut, Dār al-Fikr, n.d.), vol. 6, 409.

¹⁰ Bukhari: 2937 (Djizya, 12), 5677 (Adab, 89), 6389 (Diyāt, 22), 6655 (Aḥkām, 38); Muslim: 3157 (Qasāma, 1), 3158 (Qasāma, 2), 3159 (Qasāma, 3), 3160 (Qasāma, 6); Tirmidhi: 1342 (Qasāma, 22); Abu Dawud: 3917 (Diyāt, 8), 3918 (Diyāt, 8), 3920 (Diyāt, 9), 3921 (Diyāt, 9); Ibn Māja: 2667 (Diyāt, 28), 2668 (Diyāt, 28); Aḥmad: 15509 (vol. 4, 2), 15515 (vol. 4, 4), 15515, 16639 (vol. 4, 142); Nasa’i: 4631 (Qasāma, 3), 4632 (Qasāma, 3), 4633 (Qasāma, 4), 4634 (Qasāma, 4), 4635 (Qasāma, 4), 4636 (Qasāma, 4), 4637 (Qasāma, 4), 4638 (Qasāma, 4), 4639 (Qasāma, 5), 4640 (Qasāma, 5), 4641 (Qasāma, 5); Malik: 1372 (Qasāma, 1), 1373 (Qasāma, 2); Dārimi: 2247 (Diyāt, 2). ‘Abd al-Razzāq al-San‘ānī, *al-Muṣannaf*, 18252, 18254, 18255, 18257, 18259, 18260. The Imami Shi‘ites have the same story, but with anonymous personalities and a totally Shi‘ite isnād. See Abū Ja‘far Muḥammad b. ‘Alī Ibn Babawayh, *Man lā yaḥduruhu al-faqīh*, ed. ‘Alī al-Akhondī, 4 vols. (Tehran: Dār al-Kutub al-Islāmiyya, 1390 H.), vol.4, 72-3.

procedure was initiated, and the fact that the first transmitter, Sahl b. Abī Ḥathma, was kicked sometime after the event by one of the camels paid as blood price. Most of these details can be understood as later additions meant to enliven the narrative. In a few variants the name of the victim is not mentioned, or the names of his companions are different. One variant situates the murder in Medina, where one of the Anṣār was killed upon leaving the Prophet's house and the Jews were accused of the murder.¹¹ In some variants the Prophet begins by asking the plaintiffs whether they have proof of their allegation. When they admit that they have no evidence, the Prophet proposes that the Jews swear fifty oaths of purgation as defendants.¹²

As already noticed by Ibn Rushd, the wording of the Khaybar murder hadith is ambiguous from a juridical point of view. In most versions, the victim's next of kin refuse to take the oath because they did not witness the event. They also refuse to accept purgatory oaths sworn by Jews. The hadith, therefore, describes a stalemate caused by the plaintiffs' refusal to initiate the *qasāma* procedure, with the result that the Prophet pays the blood price himself. However, the fact that the Prophet proposed the application of the *qasāma* procedure has led all the law schools to adopt this hadith as the legal basis of *qasāma*.

Origins of the qasāma

The received wisdom among Muslim and Western scholars alike is that *qasāma* was a pre-Islamic Arabian tribal institution. Western scholars identify this institution with the accusatory *qasāma* of Maliki doctrine. They hold that the Maliki version points to the archaic, tribal character of Medinese society; and that the Hanafi doctrine, which is based on the notion of territorial liability, is a subsequent development, more in agreement with the conditions of sedentary society in post-conquest Iraq.¹³

¹¹ Bukhari, 6390 (Diyāt, 22).

¹² Bukhari, 6389 (Diyāt, 22); Nasa'i, 4640 (Qasāma, 5); Abu Dawud, 3920 (Diyāt, 9), 3921 (Diyāt, 9), 3922 (Diyāt, 9); 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, 18252, 18255; Ibn Hishām, *al-Sīra al-nabawiyya*, ed. Muṣṭafā al-Saqqā et al., 2nd ed. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1955), vol. 2, 355-6.

¹³ See e.g. Robert Brunschvig, "Considérations sociologiques sur le droit musulman ancien," *Studia Islamica* 3 (1955), 69-70.

Fundamental objections to the received wisdom were raised by Crone,¹⁴ who argues that the Hanafi form of *qasāma* was the older one and that it shares only its name with the pre-Islamic *qasāma*. In conformity with her revisionist approach to the origins of Islam,¹⁵ Crone regards the Hanafi doctrine as having been adopted from Jewish law. She asserts that many Islamic legal institutions that are allegedly of Jahili origin have been shown to be borrowings from foreign legal systems and that, therefore, “[t]here is in fact nothing in the present state 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 Jahili law.”¹⁶ In her view, *qasāma*, in its Hanafi form, derives from a Pentateuchal ritual that involves purifying a region in which an unsolved murder has taken place by killing a red heifer, mentioned in Deuteronomy 21:1-9.¹⁷ This ritual points at the notion of territorial liability for murder, as found in Hanafi doctrine.¹⁸ The Hanafi requirement that the inhabitants of the region swear an oath of compurgation can be viewed as a ritual of purification similar to the one described in Deuteronomy.¹⁹ The

¹⁴ Patricia Crone, “Jahili and Jewish law: the *qasāma*,” *Jerusalem Studies in Arabic and Islam*, 4 (1984), 153-201.

¹⁵ See Patricia Crone and Michael Cook, *Hagarism: The making of the Islamic world* (Cambridge: Cambridge University Press, 1977).

¹⁶ Crone, “Jahili and Jewish law,” 155.

¹⁷ (1) If anyone is found slain, lying in the field in the land which the LORD your God is giving you to possess, and it is not known who killed him, (2) then your elders and your judges shall go out and measure the distance from the slain man to the surrounding cities. (3) And it shall be that the elders of the city nearest to the slain man will take a heifer which has not been worked and which has not pulled with a yoke (4) The elders of that city shall bring the heifer down to a valley with flowing water, which is neither ploughed nor sown, and they shall break the heifer’s neck there in the valley (5) Then the priests, the sons of Levi, shall come near, for the LORD your God has chosen them to minister to Him and to bless in the name of the LORD; by their word every controversy and every assault shall be settled. (6) And all the elders of that city nearest to the slain man shall wash their hands over the heifer whose neck was broken in the valley (7) Then they shall answer and say, “Our hands have not shed this blood, nor have our eyes seen it (8) Provide atonement, O LORD, for Your people Israel, whom You have redeemed, and do not lay innocent blood to the charge of Your people Israel.’ And atonement shall be provided on their behalf for the blood. (9) So you shall put away the guilt of innocent blood from among you when you do what is right in the sight of the LORD. (New King James Version).

¹⁸ Crone, “Jahili and Jewish Law,” 162-3.

¹⁹ *Ibid.*, 166-73.

Maliki doctrine, according to Crone, was introduced later and also owes its existence to Jewish law, to wit, the Rabbinical rule according to which judges must offer the oath to the party who has the presumption in his favor. It is highly unlikely, she argues, that the Maliki doctrine was of pre-Islamic, tribal origin, because tribal law, as a rule, is committed to the status quo, which plaintiffs try to change. Invoking contemporary Bedouin customary law as evidence, Crone asserts that tribal law is biased in favor of defendants and that it is implausible that arbiters will find for a plaintiff who has not formally proven his claim. Moreover, if the accusatory *qasāma* was in fact an ancient survival in Maliki law, one would have expected the later schools to have dropped it. But they did not.²⁰ Crone also argues that the Khaybar murder hadith, with its clear Maliki position on *qasāma*, is long and elaborate and must therefore be regarded as a later variant of the Confirmation hadith. The latter, she argues, was circulated after what she calls the Pentateuchal period of Islamic history, in order to give the Jewish institution of the *qasāma* an Arabic pedigree. The Khaybar murder hadith was adopted only after the Maliki view gained adherents at the expense of the acceptance of the Hanafi doctrine.²¹ That the notion of the *qasāma* as compurgation was also held by scholars outside Iraq is for Crone additional evidence for its being the original doctrine.²²

Pace Crone, I maintain that *qasāma* is an indigenous, Arabian tribal institution and that it is plausible that the Prophet introduced it into Islam. Although we do not have sources for the first century, I will use the hadith material and the statements of early jurists to demonstrate that in the second half of the first century there were two separate doctrines regarding the *qasāma* procedure, one associated with Hijazi centers of learning and one espoused by Iraqi scholars. The first doctrine, a continuation of pre-Islamic practice, was adopted by the Malikis. The second doctrine, originally an administrative measure to secure law and order in the garrison towns of the Iraq, survived as the Hanafi doctrine of *qasāma*.

That there was a legal institution called *qasāma* in pre-Islamic Arabia is beyond dispute.²³ It is not clear, however, whether there was

²⁰ *Ibid.*, 182-95.

²¹ *Ibid.*, 195.

²² *Ibid.*, 162-3.

²³ See Julius Wellhausen, *Reste arabischen Heidentums*, 2nd ed. (Berlin, 1927), 187-8; J. Pedersen, *Der Eid bei den Semiten in seinem Verhältniss zu*

a clear body of rules connected with it. Gräf observed that there was considerable confusion in early Islam regarding the details of the procedure.²⁴ We have little information on its application in pre-Islamic Arabia. Reports allegedly dating from the Jahiliyya or the early decades of Islam indicate that the *qasāma* was practiced to establish paternity²⁵ and the name of a well.²⁶ But there was usually a connection with bloodshed. Incidental reports suggest that the *qasāma* served to determine whether a person had been outlawed by his tribe so as to ascertain whether or not the tribe bore responsibility for a manslaughter committed by that person, to establish whether a person who had entered a house and was killed there had entered by invitation or as a burglar,²⁷ and to substantiate or avert an accusation of murder.²⁸ Reviewing the available material and taking into account the common versions of the Khaybar murder hadith (see below), it is my impression that the main function of the *qasāma* in pre-Islamic Arabia was to establish disputed facts and liability, usually, but not always, in connection with bloodshed.

A story in search of authorities: an analysis of the isnāds

In order to sketch the early doctrinal development of the *qasāma*, it is necessary to establish a relative dating of the two main hadiths. This can be done by analyzing both the *matns* and the *isnāds*, using the method for dating hadith developed by Juynboll²⁹ and Motzki.³⁰ I

verwandten Erscheinungen sowie die Stellung des Eides im Islam (Strassburg: Karl J. Truebner, 1914), 180-81, 183. Crone, "Jahili and Jewish Law," 157.

²⁴ E. Gräf, "Eine wichtige Rechtsdirektive 'Uthmans aus dem Jahre 30," *Oriens* (1963), 130-31.

²⁵ Crone, "Jahili and Jewish Law," 159, referring to 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, 5800.

²⁶ Al-Mas'ūdī, *Kitāb murūj al-dhahab*, ed. and tr. A.C. Barbier de Meynard and A. J.-B. Pavet de Courtelle (Paris, 1861-77), vol. 4, 304 ff; quoted in Pedersen, *Der Eid*, 180, note 2.

²⁷ 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, 18281.

²⁸ Pedersen, *Eid*, 181 and Wellhausen, *Reste*, 187, both referring to a story in the *Kitāb al-Aghānī*; Bukhari, 3557 (Manāqib al-Anṣār, 27); Nasa'i, 4627 (Qasāma, 1).

²⁹ G.H.A. Juynboll, "Some *isnād* analytical methods illustrated on the basis of several woman-demeaning sayings from *hadīth* literature", *al-Qantara* 10 (1989): 343-84; idem, "Early Islamic society as reflected in its use of *isnāds*", *Le Muséon* 107 (1994): 151-94; idem, *Muslim tradition*.

³⁰ Harald Motzki, "Quo vadis *Hadīth*-Forschung? Eine kritische Untersu-

will show that the wording of the common version of the Khaybar murder hadith dates from the first half of the second century, but that versions of the story were circulating in Medina in the second half of the first century. This is because the Confirmation hadith and some variants of the Khaybar murder hadith can be shown to date from the turn of the first century and must be understood as a reaction against the original version of the Khaybar murder hadith, in which the oath is first offered to the plaintiffs. I present the *isnād* bundles of the Khaybar murder hadith in Figures 1 and 2, and those of the Confirmation hadith in Figure 3.

Let us first look at the *isnād* structure of the Khaybar murder hadith (see Figures 1 and 2). I will start with Figure 2 and argue that the common link (cl) is Yaḥyā b. Saʿīd b. Qays (d. 144/761-2), a Medinese Follower, and that neither Bushayr b. Yasār (a Medinese of the Followers' generation, date of death unknown), nor Sahl (Companion, died in the early 40s/660s)³¹ can be regarded as such. I will show that Sahl was later added to the *isnād* and that the Mālik—Abū Laylā—Sahl *isnād*, the Saʿīd b. ʿUbayd—Bushayr—Sahl *isnād* as well as the Ibn Ishāq—Bushayr b. Yasār/al-Zuhrī—Sahl *isnāds* are almost certainly spurious. That means that the wording of the common version of the Khaybar murder hadith goes back to Yaḥyā b. Saʿīd and dates from the first half of the second century.

As shown in Figure 2, Yaḥyā b. Saʿīd (d. 144/761-2) was a central figure in the transmission of this hadith. His numerous students report the hadith with three different *isnāds*: Yaḥyā b. Saʿīd—Bushayr—the Prophet (the bold line in Figure 2), Yaḥyā b. Saʿīd—Bushayr—Sahl b. Abī Ḥathma—the Prophet (the thin, uninterrupted line in Figure 2), and Yaḥyā b. Saʿīd—Bushayr—Sahl b. Abī Ḥathma and Rāfiʿ b. Khadij—the Prophet (the dot-stroke line in Figure 2). Since *isnāds* tend to improve over time, it is plausible that Yaḥyā b. Saʿīd initially

chung von G.H.A. Juynboll: 'Nāfi' the *mawlā* of Ibn ʿUmar, and his position in Muslim *hadīth* literature', " *Der Islam* 73 (1996): 40-80; 193-231; idem, "The Prophet and the Cat. On dating Mālik's *Muwattaʿ* and Legal Traditions," *Jerusalem Studies in Arabic and Islam*, 22 (1998): 18-83; Motzki (1991).

³¹ Sahl b. Abī Ḥathma is said to have died at the beginning of Muʿāwiya's reign. According to most reports he was eight years old when the Prophet died; thus he was probably born around 3/624. ʿIzz al-Dīn Ibn al-Athīr, *Usd al-ghāba fī maʿrifat al-ṣaḥāba*, ed. Muḥammad Ibrāhīm Bannā et al (Cairo: Dār al-Shaʿb, 1970), vol. 2, 468; Ibn Ḥajar al-ʿAsqalānī, *al-Iṣāba fī tamyiz al-ṣaḥāba* (Cairo, 1969-1977), vol. 4, 272, no. 3516.

transmitted the hadith on the authority of Bushayr—the Prophet.³² Now, this is not a very good *isnād*, since Bushayr b. Yasār was not a Companion and cannot have been an eyewitness to the events described in the hadith. Yaḥyā transmitted the story with this *isnād* to four of his students: Hushaym, Ibn Jurayj, Abū Qilāba and Mālik. At a later stage, Yaḥyā or one of his students completed the *isnād* by inserting Sahl’s name. Although Sahl was a Companion and a member of the victim’s tribe, he does not seem to have been the best choice: born in 3 H., Sahl was only a child at the time of the Prophet’s death and he died young in the early 40s/660s. That would explain the inclusion of Rāfi‘ b. Khadij (d. 73/692-3)³³ as a parallel authority to Sahl in some *isnāds* and the addition of some further anonymous “old men of his tribe” (*rijāl kubarā’ min qawmihim*) in the Mālik—Abū Laylā—Sahl *isnāds*.

Those of Yaḥyā’s students who related the Khaybar murder hadith with the *isnād* Yaḥyā—Bushayr—the Prophet apparently were not satisfied with it. Indeed, three of them also transmitted the narrative with entirely new *isnāds* that by-passed both Yaḥyā and Bushayr.³⁴ One of the three is Mālik, who by-passed Yaḥyā and Bushayr by creating an independent *isnād*: Mālik—Abū Laylā—Sahl. This *isnād* is highly suspect, since Abū Laylā, allegedly the grandson of Sahl, does not appear in any *isnād* except this one, and Sahl cannot be regarded as an authority for this hadith. Moreover, the text of the

³² Muslim 3159 (Qasāma 3); *Muwatta’*, 1373 (Qasāma 2); Nasā’i, 4639 (Qasāma 5); ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaf*, 18257, 18258. Interestingly, Bushayr’s authority is questioned (“*za‘ama Bushayr*” i.e. Bushayr alleged) with regard to some parts of the story: the part about the Anṣār being allowed to swear first (Muslim, 3159, Sulaymān b. Bilāl from Yaḥyā) and the part about the Prophet paying the blood price himself (ibid., and Nasā’i, 4639; Malik, 1373: Mālik from Yaḥyā b. Sa‘īd). Precisely at these points alternative versions circulated in transmissions by al-Zuhri. The later insertion of Sahl b. Abī Ḥathma into the *isnād* is already anticipated in the variant transmitted by Hushaym from Yaḥyā b. Sa‘īd—Bushayr—the Prophet (Muslim, 3159). Here Sahl is introduced at the end of the story as someone who was kicked by one of the camels paid as blood price, a detail also found in the versions transmitted by Ḥammād—Yaḥyā b. Sa‘īd—Bushayr—Sahl.

³³ When Rāfi‘ b. Khadij is mentioned, he is listed as the second authority after Sahl. Only in one *isnād* does he appear as the sole authority (see next footnote).

³⁴ Hushaym relates a variant of the story with the *isnād* Hushaym—Abū Ḥayyān al-Taymī (nearly a namesake of our cl Yaḥyā; his full name was Yaḥyā b. Sa‘īd b. Ḥayyān al-Taymī)—‘Abāya b. Rifā‘a—Rāfi‘ b. Khadij—the Prophet (Abu Dawud, 3921); Ibn Jurayj does so with the *isnād* Ibn Jurayj—al-Faḍl—al-Ḥasan—the Prophet (see Figure 1) (‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaf*, 18255).

hadith transmitted by Mālik with the Abū Laylā—Sahl *isnād* is clearly an elaboration of the text transmitted by him with the Yaḥyā—Bushayr—the Prophet *isnād* and must be regarded as later. Although it is not entirely impossible that Mālik, through Abū Laylā, had tapped a vein of family stories of the Banū Ḥāritha, that is highly unlikely. In view of the similarities between the two texts, it is more likely that Mālik fabricated this family *isnād*. The conclusion must be that Mālik cannot be regarded as an independent cl apart from Yaḥyā b. Saʿīd.

Another apparent cl is Muḥammad b. Ishāq (d. 150/767), who transmits two different versions of the story to four students with three *isnāds*: One version with the *isnāds* Bushayr—Sahl—the Prophet and al-Zuhri—Sahl—the Prophet, and another, different variant on the authority of Muḥammad b. Ibrāhīm—ʿAbd al-Raḥmān b. Bujayd—the Prophet. The story attached to the first two *isnāds* is very similar to the narratives transmitted by Yaḥyā b. Saʿīd. Since I have established above that Sahl was not a real transmitter, it is plausible that Ibn Ishāq heard the story from Yaḥyā b. Saʿīd himself and appropriated his *isnād*. The other *isnād* (al-Zuhri—Sahl—the Prophet) is certainly spurious. In none of the canonical collections do we find al-Zuhri relating a report on Sahl's authority. What may have happened is that Ibn Ishāq knew that al-Zuhri also transmitted some version of the Khaybar murder hadith and included him in the *isnād*. However, he must have done so without having checked the versions passed on by al-Zuhri, for, as we shall see, these were in many respects different from the Yaḥyā b. Saʿīd variants. The story attached to the Ibn Bujayd *isnād* is presented as a correction of the common version:

Muḥammad b. Ibrāhīm [Medina, d. 120] said: "I swear by God, Sahl was not more knowledgeable than he [Ibn Bujayd], but he was older." He [Ibn Bujayd] said to him [Muḥammad b. Ibrāhīm]: By God, the case was not like that: Sahl has made up the words of the Messenger of God (pbuh), "Swear to what you do not have any knowledge about." [The true version is that] the Messenger of God (pbuh) wrote to the Jews of Khaybar after the Anṣār had spoken to him: "Someone has been found murdered amidst your houses, so pay his blood price." They then wrote that they would swear that they did not kill him and did not know who had done so. Then the Messenger of God (pbuh) paid the blood price from his own property.³⁵

³⁵ Ibn Hishām, *al-Sīra*, vol. 2, 355-6. A shorter variant is found in Abu Dawud, 3922 (Diyāt, 9).

Muḥammad b. Iṣḥāq must have been familiar with the alternative version of the Khaybar murder hadith (in which the oath was first offered to the Jews as defendants) and invented the narrative in which Ibn Bujayd corrected Sahl, his fellow tribesman. The change in the contents of the story reflects a legal dispute that had emerged in Medina by the end of the first century and to which I will return.

Finally we have to consider the Saʿīd b. ʿUbayd (Kufa, date of death unknown) strands (see Figure 2) within the complicated *isnād* cluster. The two versions transmitted by him have different middle parts but identical beginnings and endings (“Some people from his [Sahl’s] tribe set out for Khaybar and there they parted and they found the corpse of one of them, having been killed ... Then the Prophet did not want to leave his blood without compensation (*kariha an yubṭila damahu*) and therefore paid as his blood price 100 camels from the *zakah*”). The hadiths transmitted by al-Faḍl b. Dukayn (Kufa, d. 218)³⁶ indicate that after the Anṣār had told him that they had accused the Jews and that the Jews had denied the charge, the Prophet said to the Anṣār: “Can you bring evidence against those who have killed him?” They answered: “We have no evidence.” Then he said: “In that case they shall swear.” The other version was transmitted from Saʿīd b. ʿUbayd by Muḥammad b. ʿAbd Allāh b. Numayr (Kufa, d. 199).³⁷ Muslim includes the hadith immediately after a common Yaḥyā b. Saʿīd variant, but quotes only the first and last part of it. He gives the first line of the Saʿīd b. ʿUbayd version, continues with the words “and then he cited the [previous] hadith [i.e. the one transmitted by Yaḥyā]” and then concludes with the last part of the Saʿīd b. ʿUbayd version. Muslim, it seems, deliberately attempted to normalize the hadith and to adapt it to the most common version as transmitted by Yaḥyā b. Saʿīd and Mālik. Therefore, we may regard Saʿīd b. ʿUbayd as the transmitter who put these variants into circulation. It must date, then, from the second half of the second century. Saʿīd’s date of death is not known, but inasmuch as his students al-Faḍl b. Dukayn and ʿAbd Allāh b. Numayr died in 218 and 199, respectively, he cannot have transmitted them before the middle of the second century. As Saʿīd and his students were Kufans, this version represents an Iraqi attempt to come to grips with the

³⁶ Bukhari, 6389 (Diyāt, 22); Nasaʿi, 4640 (Qasāma, 5); Abu Dawud, 3920 (Diyāt, 9).

³⁷ Muslim, 3159 (Qasāma, 3).

Khaybar murder hadith and bring it into conformity with the Iraqi doctrine of *qasāma*. By the middle of the second century the Khaybar murder hadith apparently had become generally known in Iraq.

Finally we have to examine the single strand *isnāds* (see Figure 1). Among these I also count the three hadiths in which ‘Amr b. Shu‘ayb (d. 118/736-7) seems to be the cl. The three *matns* of this bundle differ so much³⁸ that they must be regarded as three separate hadiths with single strand *isnāds*. Although Motzki argued that hadiths with the ‘Amr b. Shu‘ayb family *isnād* are often authentic,³⁹ these three hadiths almost certainly represent later attempts to provide the Khaybar murder stories with respectable *isnāds*. The ‘Amr b. Shu‘ayb *isnād* would be attractive to use, since it was a family *isnād* and many other hadiths relating to penal law were transmitted on his authority.

Some of these single strand hadiths are very close to the common version transmitted by Yaḥyā b. Sa‘īd. One of these, given by ‘Abd al-Razzāq with an *isnād* that includes transmitters not listed in the standard biographical dictionaries (‘Abd Allāh b. Sim‘ān—Abū Bakr b. Muḥammad b. ‘Amr b. Ḥazm—unknown Anṣāris)⁴⁰ is identical to the version reported by Mālik on the authority of Yaḥyā b. Sa‘īd. Also close to the common version is one of the reports with the ‘Amr b. Shu‘ayb *isnād*.⁴¹ A special case is a hadith given by al-Wāqidī.⁴² It contains an elaborate and detailed version of the Khaybar murder

³⁸ The main differences are the following (A = Nasa‘i, 4641 (Qasāma, 5); B = Ibn Maja, 2668 (Diyāt, 28); C = Wāqidī, *Kitāb al-Maghāzī*, ii, 715: A and C are silent about the names of the Helpers who went to Khaybar, whereas B mentions four of them: the three usual ones with the addition of ‘Abd al-Rahmān, the victim’s brother. In A the victim is identified as the youngest son of Muḥayyiṣa, in B as ‘Abd Allāh b. Sahl, and in C not at all. In A and C the Prophet imposes the blood price on the Jews and pays part of it himself; in B the Prophet pays all of it and there is no mention of its first having been imposed on the Jews; C relates only the last part of the episode, starting with “The Messenger of God, pbuh, imposed his (?) blood price on the Jews”, leaving out the story of the killing and the discussion of the procedure. That it refers to the Khaybar murder is clear from the words: “This was the first time that the *qasāma* was applied (*fa-hiya awwal mā kānat al-qasāma*)”, meaning of course the first time in Islam.

³⁹ Motzki, *Anfänge*, 190-1. Juynboll regards the *isnāds* of ‘Amr b. Shu‘ayb going back to his great-grandfather as suspect (Juynboll, “Early Islamic Society,” 172-4).

⁴⁰ ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaf*, 18260.

⁴¹ Ibn Maja, 2668 (Diyāt, 28).

⁴² Wāqidī, *Kitāb al-Maghāzī*, vol. 2, 713.

hadith and has an *isnād* (‘Abd Allāh b. Nūḥ al-Ḥārithī—Muḥammad b. Sahl b. Abī Ḥathma—Sa‘d b. Ḥizām b. Muḥayyiṣa—his father) that seems too good to be true. This *isnād* includes the descendants of two of the story’s protagonists. The fact that the *matn* provides a wealth of details not to be found in any other version indicates that Wāqidī collected and put together all the information on the episode that was available to him and provided it with an *isnād* of his own making, including persons who were relatives of some of the protagonists, but were otherwise unknown as transmitters of hadith. In all these cases the *isnāds* must have been fabricated to create better authority for stories heard from other sources.

Other single strand hadiths seem to be independent attempts—their *matns* do not seem to be related—to provide support for the view that the *qasāma* oaths are first imposed on the side of the defendant.⁴³ Most of these can be shown to have been introduced by Kufan scholars during the second century. Two hadiths with the ‘Amr b. Shu‘ayb *isnād* must have been put into circulation after his death in 118/736-7 by Kufan scholars, since the Kufans, Ḥajjāj b. Arṭa’a (d. 145) and ‘Ubayd Allāh b. al-Aḥnas (date of death unknown), are reported to have heard it from ‘Amr. Another hadith has an *isnād* going back, via his son, to Rāfi‘ b. Khadij, who we have met before in the company of Sahl b. Abī Ḥathma in the Yaḥyā b. Sa‘id *isnāds*.⁴⁴ If we accept that this family *isnād* was fabricated, the first person who could have put it into circulation would have been Yaḥyā b. Sa‘id b. Ḥayyān (not to be confused with Yaḥyā b. Sa‘id b. Qays, the cl of the common version), who died in Kufa in 145. A second group consists of four very similar versions of the hadith, transmitted by al-Zuhri from Sa‘id b. al-Musayyib, Abū Salama ‘Abd Allāh and Sulaymān b. Yasār.⁴⁵ They must be regarded as supplements to the Confirmation hadith and will be discussed in the next section.

The *isnād* pattern of the Confirmation hadith (see Figure 3) is much simpler than that of the Khaybar murder hadith. It clearly shows that the wording was attributed to the Medinese jurist Ibn Shihāb al-Zuhri (d. 124/741-2). Although the *isnād* pattern is

⁴³ Nasa’i, 4641 (Qasāma, 5); Abu Dawud, 3923 (Diyāt, 9); Abu Dawud, 3921 (Diyāt, 9); Wāqidī, ii, 715; ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaḥ*, 18252, 18255.

⁴⁴ Abu Dawud, 3921 (Diyāt, 9).

⁴⁵ Abu Dawud, 3923 (Diyāt, 9); ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaḥ*, 18252; Wāqidī, *Kitāb al-Maghāzī*, ii, 715; Ibn Abī Shayba, *al-Muṣannaḥ*, vol. 8, 409.

problematic—al-Zuhrī’s words were transmitted only by single strand *isnāds*—and cannot be regarded as convincing proof of al-Zuhrī’s authorship, I do accept it on the strength of other evidence, to be discussed below. The Confirmation hadith contains a strong doctrinal statement based on a specific event. Whereas the doctrinal statement must have been formulated by al-Zuhrī or his teachers (Sa‘īd b. al-Musayyib [d. 93/711-2], Sulaymān b. Yasār [d. 110/728-9] and Abū Salama b. ‘Abd al-Raḥmān [d. 94/712-3]), the historical information—the Khaybar murder story—goes back to older material. It is my contention that in the older versions of the narrative, referred to only in the Confirmation hadith, the oath was first offered to the Anṣār as plaintiffs; these older versions therefore correspond with the later common version transmitted by Yaḥyā b. Sa‘īd. If we regard the above-mentioned versions of the Khaybar murder hadith transmitted by al-Zuhrī and his teachers as a supplement to the Confirmation hadith, it is evident that they are a polemical reaction to a version in which the oath is first offered to the Anṣār. Two hadiths say: “The Prophet (pbuh) said to the Jews, *and he began with them* (emphasis mine, RP): ‘Are fifty of your men willing to swear?’” Another one reads: “Thereupon the Messenger of God (pbuh) *began with the Jews* (emphasis mine, RP) and imposed fifty *qasāma* oaths upon them.” The hadiths are distinctive in that the blood price is imposed on the Jews and not paid by the Prophet, as in the standard version. If this version was formulated by al-Zuhrī or his teachers as a reaction to the common version, then the common version must be older and go back at least to the second half of the first century. Indeed, some evidence suggests that the story is historical and goes back to the Prophet.⁴⁶

As for the Confirmation hadith itself, its wording is apodictic and sounds almost polemical. It has all the characteristics of a summarized plea in a debate about the legitimacy of the *qasāma* procedure. If we understand it as an answer to the question: “What is your opinion on the *qasāma*?” it makes perfect sense: “[I consider it to be lawful, since] the *qasāma* existed in the Jahiliyya period, was adopted by the Prophet in its original form, and was applied by him

⁴⁶ The Khaybar *qasāma* is mentioned in the *awā’il* literature (reports about who introduced certain practices in Islam) and Juynboll has shown that many of the *awā’il* reports are historical. See Ibn Qutayba, *Kitāb al-Ma‘ārif*, ed. Tharwat ‘Ukāsha, 2nd impr. (Cairo: 1969), 551; Wāqidi, *Kitāb al-Maghāzī*, vol. 2, 715; G.H.A. Juynboll, *Muslim tradition*, Ch. 1.

when a Medinese was murdered in Khaybar and the Jews were accused of having killed him.” Evidently, its goal is not to give a detailed report on the Khaybar murder case, but to establish the legitimacy of the *qasāma* procedure.

This debate can be traced and dated. Around the turn of the first century the *qasāma* had come under attack by Hijazi jurists because it contradicted general principles of the *shari‘a* and because the Khaybar murder hadith is legally inconclusive.⁴⁷ According to several reports the Umayyad Caliph ‘Umar b. ‘Abd al-‘Azīz (r. 99/717-101/720) was confused about the *qasāma*. One day he asked several notables gathered around his throne whether a sentence of retribution (*qawad*) could be pronounced on the strength of the *qasāma* procedure.⁴⁸ They responded that such sentences were lawful and that previous caliphs had pronounced them. Only the chief qadī, the Basran jurist Abū Qilāba (d. 104/722-3), objected on the ground that penal sentences may not be pronounced on the basis of the statements of persons who had not witnessed the crime. It is not clear whether al-Zuhrī and his teacher, Sulaymān b. Yasār, were present at this meeting. But the Caliph ‘Umar b. ‘Abd al-‘Azīz reportedly asked their opinion on the same issue and they answered, like most of those who attended the meeting, that *qasāma* is lawful and that the Prophet and the caliphs after him had pronounced judgments on the strength of it. Al-Zuhrī also argued that the *qasāma* procedure prevented people from being killed with impunity and he asserted, alluding to Qur’ān 2:179,⁴⁹ that there is life for people in the *qasāma*.⁵⁰ Even if the reports about the debate in the presence of ‘Umar b. ‘Abd al-‘Azīz are not historical, there must have been a discussion of the *qasāma*

⁴⁷ The jurists who reportedly rejected the legitimacy of sentences of retaliation on the strength of the accusatory *qasāma* included the Medinese Salīm b. ‘Abd Allāh b. ‘Umar (d. 106/724-5) and Sulaymān b. Yasār (d. 110/728-9). Of course, criticism was also voiced by the Iraqīs, such as the Basrans Abū Qilāba (d. 104/722-3) and Qatāda b. Di‘āma b. Qatāda (d. 117/735-6), and the Kufan al-Ḥakam b. ‘Utayba (d. 113/731-2). See Ibn Rushd, *Bidāya*, vol. 2, 427ff.; Muḥammad b. ‘Alī al-Shawkānī, *Nayl al-awtār* (Cairo: Dār al-Ḥadīth, n.d.), vol. 7, 46.

⁴⁸ Bukhari, 6390 (Diyāt, 22), 3872 (Maghāzī, 37); Muslim, 3163 (Qasāma, 12); ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaf*, 18278; Ibn Abī Shayba, *al-Muṣannaf*, vol. 6, 409.

⁴⁹ “And there is life for you in retaliation (*qiṣās*).”

⁵⁰ ‘Abd al-Razzāq, *al-Muṣannaf*, 18279; Ibn Abī Shayba, *al-Muṣannaf*, vol. 6, 409.

around the turn of the first century. The Confirmation hadith is best understood in the context of this debate.

What can we conclude from the analysis of the *isnād* patterns and the *matns*? First, the text of the standard variant of the Khaybar murder hadith, in which the oath was first offered to the Anṣār, dates from the first half of the second century, i.e. prior to Yahyā b. Saʿīd's death in 144/761-2, but goes back to a story that was known in Medina already in the second half of the first century and possibly even before that time. As a reaction to it, around the turn of the first century, al-Zuhrī or his teachers circulated a version of the hadith in which the Prophet wanted the Jews to swear first. A second cluster of versions of the hadith in which the defendants were offered the oath first date from about the middle of the second century and reflect attempts by Kufan scholars to provide the Iraqī doctrine with a more solid textual base.

I will now examine three issues about which the Iraqī and the Hijazi schools were in disagreement: the lawfulness of sentences of retaliation on the strength of the *qasāma* procedure; the question of who is allowed to swear first; and finally the notion that the *qasāma* procedure is based on territorial liability. My aim is to demonstrate that the doctrines of the two schools had different origins and developed independently.

Retaliation on the strength of qasāma

One of the most prominent features of the Hijazi doctrine is that it allows sentences of retribution to be pronounced on the strength of the *qasāma* procedure. Among the Hijazis this view was not challenged until al-Shafiʿi changed his mind because he regarded the variants of the Khaybar murder hadith in which only the liability of blood price is mentioned as more authentic than the other versions.⁵¹ Even al-Zuhrī subscribed to the common Hijazi view. However, since he and his circle were of the opinion that *qasāma* was an oath of compurgation, they allowed a sentence of retaliation after a *qasāma* procedure only if the defendants refused to swear and the oath was shifted to the plaintiffs.⁵²

⁵¹ Ibn Daqīq al-ʿĪd, *Ihkām al-aḥkām sharḥ ʿumdat al-aḥkām*, 4 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.), vol. 4, 91.

⁵² ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaḥ*, 18254, 18263. As we have seen

Al-Zuhri's view, however, did not prevail in the Hijaz. The Iraqis disagreed with the Hijazis and held that the *qasāma* procedure entailed a liability only for blood price.⁵³ The Hijazi position is based on the standard version of the Khaybar murder hadith that presents the *qasāma* as an accusatory oath. The Prophet is reported to have said: "You may demand (the blood of) your companion or your killer [i.e. the person who killed one of your people] (*ṣāhibakum* (o.r.: *dam ṣāhibikum*) *aw qātīlā/ikum*)",⁵⁴ or "Then they shall hand him over to you."⁵⁵ or "He will be turned over to you entirely."⁵⁶ These versions explicitly support the lawfulness of sentences of retaliation as a result of *qasāma*. Another report expressly states that the Prophet pronounced a sentence of retaliation after a *qasāma* procedure. This, however, must have been a fabrication.⁵⁷ As I have argued above, this

al-Zuhri allowed the plaintiffs to swear first in exceptional cases. In these cases the *qasāma* might also entail capital punishment.

⁵³ E.g. al-Ḥasan al-Baṣrī (d. 110/728-9), Ibrāhīm al-Nakha'ī (d. 95 or 96/713-5), Qatāda b. Di'āma (d. 117/735-6), Abū Qilāba. Ibn Ḥazm, *al-Muḥallā bi'l-āthār*, 12 vols. (Beirut: Dār al-Fikr, n.d.), vol. 11, 295-7.

⁵⁴ Nearly all versions transmitted by Yaḥyā b. Sa'īd include these words. Of the many versions of the hadith transmitted by him, only three do not mention the consequences (Ahmad 15509; Nasa'ī 4634 and 4638) and two (Bukhari, 5677; Ahmad, 16639) read: "and demand your companion or your victim (*qātīlakum*)."⁵⁵ The last word could easily be a copyist's error for 'your murderer' (*qātīlakum*), as in the other variants. Those versions transmitted by Mālik—Abu Laylā have *dam ṣāhibikum* and leave out *qātīlā/ikum*. The hadiths of the latter group are confusing on this issue since they first have the Prophet write or say the following words to the Jews: "Either they pay your man's blood price (*yadū ṣāhibikum*) or war will be declared on them."

⁵⁵ Thus in all versions transmitted from Ibn Ishāq—Bushayr—Sahl (Ahmad b. Hanbal, 15515 (vol. 4, 4); Dārimi, 2247 (Diyāt, 2); Ibn Hishām, *Sīra*, vol. 2, 355).

⁵⁶ Muslim, 3158 (Qasāma, 2); Abu Dawud, 3917 (Diyāt, 8). This must be a late interpolation as it is only found in the variants transmitted by 'Ubayd Allāh b. 'Umar al-Qawāriri from Ḥammād from Yaḥyā, and not in the other versions transmitted by Ḥammād.

⁵⁷ There is one report to the effect that the Prophet pronounced a death sentence on the strength of *qasāma*. Abu Dawud, 3919 (Diyāt, 8). This hadith, however, does not play any role in the later discussions and is almost certainly a fabrication. The *isnād* does not reach the Prophet (it is *mursal*) and ends with 'Amr b. Shu'ayb (d. 118/736). The cl is al-Walid b. Muslim (d. 195/810-1). The incompleteness of the *isnād* may be an argument for its authenticity. However, considering that there is only one version of it and that its contents are connected with a controversial issue, I regard it as a fabrication by al-Walid. On the other hand, Mālik reportedly admitted that the Prophet never pronounced a sentence of retribution on the strength of *qasāma*, and justified his view that such sentences were valid with the argument that if the Prophet had been con-

standard version of the Khaybar murder hadith must have existed already in the second half of the first century and is probably older. In my view it reflects a continuous Medinese practice.

As a result of the differences between the Iraqi and the Hijazi doctrines, there was no consistent state policy. Reports on how *qasāma* was applied during the first half of the first century, some of which may not be historical, show that there was no clear policy. We are told that ʿUthmān,⁵⁸ ʿAbd Allāh b. al-Zubayr,⁵⁹ and ʿAbd Al-Mālik b. Marwān⁶⁰ issued sentences of retribution on the basis of *qasāma*, whereas Abū Bakr⁶¹ and ʿUmar b. al-Khaṭṭāb⁶² did not. Muʿāwiya⁶³ and ʿUmar b. ʿAbd al-ʿAzīz reportedly espoused both views.⁶⁴ The latter, we are told, had scruples about capital sentences based on *qasāma*, precisely the issue of the above-mentioned debate. All of the notables and army commanders present during the debate regarded such sentences as lawful. Only the Iraqi Abū Qilāba (d. 104/722-3), who was drawn into the debate because of his position as chief qadī, objected to this view and eloquently exposed its inconsistency by asking the caliph whether he would be prepared to stone a person to death for fornication or cut off somebody's hand for theft on the strength of the testimony of fifty of his notables in Damascus who had not witnessed the crime.⁶⁵ Evidence, of course, is the crux of the issue. Capital punishment was regarded as a serious matter and, evidently, there were those who were reluctant to take a life, in the absence of sufficient evidence, on the strength of an oath.

fronted with such a case, he would have pronounced such a sentence. ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaf*, 18276.

⁵⁸ Ibn Ḥazm, *al-Muḥallā*, vol. 11, 295.

⁵⁹ *Ibid.*, vol. 11, 291.

⁶⁰ ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaf*, 18275; Bukhari, 6390 (Diyāt, 22).

⁶¹ Ibn Ḥazm, *al-Muḥallā*, vol. 11, 289; ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaf*, 18276.

⁶² Ibn Abī Shayba, *al-Muṣannaf*, vol. 6, 410, 415; ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaf*, 18276, 18286, 18287.

⁶³ As an opponent: Ibn Ḥazm, *al-Muḥallā*, vol. 11, 291; as an advocate: Muḥammad b. Abī Sahl al-Sarakhsī, *al-Mabsūṭ*, 30 vols. (Cairo: Dār al-Maʿrifa, n.d.), vol. 26, 109.

⁶⁴ As an opponent: Ibn Ḥazm, *al-Muḥallā*, vol. 11, 297; as an advocate: ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaf*, 18276; Ibn Ḥazm, *al-Muḥallā*, vol. 11, 297.

⁶⁵ Bukhari, 6390; ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaf*, 18278.

Who swears first?

Hijazi doctrine holds that the *qasāma* oaths are sworn by the plaintiffs. As I have demonstrated, the oldest versions of the Khaybar murder story that circulated in Medina during the second half of the first century must have presented the *qasāma* as an accusatory oath. This doctrine, however, was not without opposition in Medina.

By the end of the first century a group of Medinese scholars emerged around al-Zuhri, who argued, like the Iraqis, that *qasāma* was an oath of compurgation. Their main argument, it seems, was that the prevailing doctrine conflicted with the general rules of procedure, according to which an oath is sworn by a defendant only when the plaintiff has failed to produce evidence for his claim. Evidently, al-Zuhri⁶⁶ tried to ward off criticism of the lawfulness of the *qasāma* by showing that it followed the normal rules of procedure and was offered to the defendants when the plaintiffs could not prove their allegation. That al-Zuhri's doctrine was independent and was not adopted from the Iraqis is clear from the differences between al-Zuhri's view and that of the Iraqis: according to al-Zuhri, the *qasāma* oath, following the normal rules of procedure, shifts to the plaintiff when the defendants refuse to swear, whereas according to the Iraqi doctrine, the defendants, represented by persons selected by the plaintiffs, are compelled to swear and imprisoned if they refuse to do so. The opinion of al-Zuhri and his circle did not prevail in the Hijaz. Later scholars, however, were aware of the procedural irregularity and tried to give the *qasāma* an exceptional status, by putting into circulation a report to the effect that the Prophet had said that the

⁶⁶ Al-Zuhri is reported to have put forward the following two views on this issue: (1) the *sunna* of the Prophet was to offer the *qasāma* to the defendant and his agnatic male relatives whenever the plaintiff(s) did not produce sufficient evidence ('Abd al-Razzāq al-Šan'ānī, *al-Muṣannaḡ*, 18254); (2) this was the practice of 'Umar b. al-Khaṭṭāb, except in cases in which the victim had accused someone before he died (Ibn Ḥazm, *al-Muḥallā*, vol. 11, 290, par. 2152). It is true that al-Zuhri held that under certain circumstances the plaintiffs are entitled to swear first, as in the case in which three persons confess to having murdered someone, when only one of them could have killed him; or the case in which a person is found murdered in a house, the inhabitants of which claim that he had entered it to steal, whereas his next of kin assert that he had been invited to enter ('Abd al-Razzāq al-Šan'ānī, *al-Muṣannaḡ*, 18280 and 18281). However, such cases were exceptions to his general rule that the defendants are the first to swear the *qasāma* oaths.

plaintiff must produce evidence and the defendant must swear, except in the *qasāma* procedure.⁶⁷

In Iraq, the *qasāma* was generally regarded as an oath of compurgation, i.e. to be sworn by those on the side of the defendant(s). This view is ascribed to leading Iraqi scholars such as Shurayḥ (d. ca. 80/700), Ibrāhīm al-Nakhaʿī (d. 95-96/713-5), Abū Qilāba (d. 104/722-3), al-Shaʿbī (d. 110/728-9) and al-Ḥasan al-Baṣrī (d. 110/728-9).⁶⁸ This must have been the prevailing view in Iraq during the second half of the first century. As I will argue below, this type of *qasāma* probably originated in a practical administrative measure that was based on common sense. The reports in which the Iraqi doctrine is attributed to the caliph ʿUmar (see below) may well possess a core of historical truth.⁶⁹ It would seem that the Khaybar murder hadith, which was transmitted almost exclusively by Medinese scholars, was originally unknown in Iraq. There is no indication that the Iraqis were concerned about its doctrinal implications until the middle of the second century. Only then did they try to come to grips with it by circulating versions in which the Jews, as defendants, were first offered the oath, and by inventing interpretations of the common version in order to bring its meaning into conformity with their doctrine. Of the latter, the most common is that the Prophet's words, when he offered the oath to the Anṣār, implied disapproval ("How can you swear and demand the blood of your companion!").⁷⁰

Qasāma and territorial liability

A distinctive feature of the Hanafi doctrine is the element of territorial liability: the very fact that a corpse is found on a person's private land

⁶⁷ Bayhaqī, *al-Sunan al-Kubrā*, vol. 8, 123; Dāraquṭnī, *al-Sunan*, vol. 3, 110, 111.

⁶⁸ ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaḥ*, 18255 (al-Ḥasan al-Baṣrī), 18256 (ʿUbayd Allāh b. ʿUmar); 18270 (Ibn Sīrīn—Shurayḥ); 18271 (Ibn Sīrīn—Shurayḥ); 18284 (Ibrāhīm al-Nakhaʿī); Ibn Ḥazm, *al-Muḥallā*, vol. 11, 292, par. 2152 (al-Ḥasan al-Baṣrī); Ibn Qudāma, *al-Mughnī*, 11 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.), vol. 8, 76 (al-Shaʿbī and al-Nakhaʿī); Bukhari, 6390 (Diyāt, 22) (Abū Qilāba).

⁶⁹ ʿUmar ordered that the *qasāma* was to be sworn by the defendants (Ibn Abī Shayba, *al-Muṣannaḥ*, vol. 6, 410; ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaḥ*, 18287) and that the *qasāma* procedure could not result in capital punishment (Ibn Abī Shayba, *al-Muṣannaḥ*, vol. 6, 414; ʿAbd al-Razzāq al-Ṣanʿānī, *al-Muṣannaḥ*, 18286). For his decision on territorial liability, see the references in Figure 4.

⁷⁰ Sarakhsī, *al-Mabsūṭ*, vol. 26, 109.

or in his house or in a village or quarter, in combination with a formal accusation by the victim's heirs against the owner or one or more of the inhabitants, suffices for initiating the *qasāma* procedure and results in an obligation to pay the blood price after fifty oaths of purgation have been sworn.⁷¹ The owner of the house or land or the inhabitants selected by the plaintiff for swearing the *qasāma* have no real choice: if they refuse to swear that they did not kill the victim and do not know anything about it, they are imprisoned until they either swear or confess. The only function of the swearing is to put pressure on the killer to confess, if he is among those inhabitants selected to swear.

Although the Hanafi doctrine is closer to the rules of procedure and evidence than the Hijazi one, it is still anomalous. According to these rules, if an accusation is unsubstantiated and the defendant swears a purgatory oath, the plaintiff's claim is denied. This was precisely the view concerning *qasāma* of 'Uthmān al-Battī (Basra, d. 143/760),⁷² an Iraqi scholar who obviously attached great importance to the general rules of procedure. According to the prevailing view, however, in spite of their collective purgatory oaths, the defendants are still liable for the blood price. The anomaly is noticed in a report in which 'Umar b. al-Khaṭṭāb explains the Hanafi doctrine to the inhabitants of a place in which a corpse had been found. Realizing the inconsistency, one of them protested: "O Commander of the Believers, our oaths did not protect our properties, nor did our properties protect us against [the obligation of swearing] oaths."⁷³ In other words: by swearing the *qasāma* we incurred a liability instead of being absolved from the plaintiff's claim, and if we had been willing to pay, we still were obliged to swear.

This liability can only be explained as territorial liability, i.e. a liability resulting from the duty of the inhabitants of a quarter or village or of the owner of land to guarantee the security of their territory. This is exactly what later Hanafi jurists mentioned as the

⁷¹ Although al-Zuhri held a similar doctrine, there are important differences, e.g. the rule, mentioned in the previous section, that the defendants are not compelled to swear, as in Hanafi law. Also al-Zuhri's doctrine is not based entirely on territorial liability, but also on the procedural rule that the defendant swears first in litigation.

⁷² Ibn Ḥazm, *al-Muḥallā*, vol. 11, 300; Shawkānī, *Nayl al-Awtār*, vol. 7, 49. A similar view is attributed to al-Awzā'ī. Ibid.

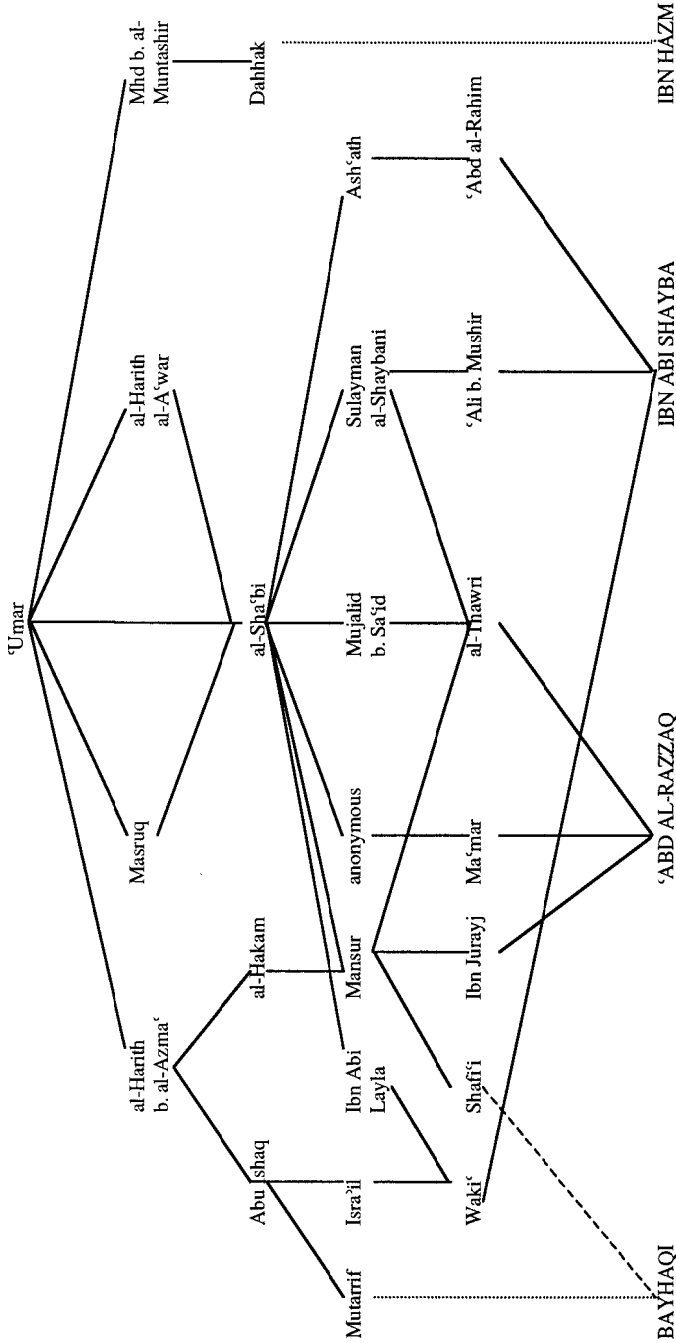
⁷³ 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaf*, 18266, 18267.

main justification for the procedure: the inhabitants or owners of landed property, they say, are in the best position to guarantee the security of a place and therefore they are held responsible for any blood shed on their territory. In this way the perpetrator, if he were among the inhabitants, might be exposed, since most people take oaths seriously and would not swear a *qasāma* oath if they knew anything about the killing. Therefore the Hanafi jurists argued that the obligation to pay the blood price originated in the legal ties—right of ownership or usufruct—connecting people with the location in which the corpse is found. Other arguments found in the Hanafi literature are not very convincing. The most common one is that the claim of retaliation is averted by the *qasāma* and that the liability for the blood price remains. This, however, is an unlikely explanation as there are no grounds whatsoever for demanding capital punishment.

Little is known about the origin of the Iraqi *qasāma*. There is no evidence that it emerged as a reaction against an older doctrine. It is plausible, therefore, that the Iraqis followed this doctrine from a very early period. The doctrine of territorial liability is attributed to the Caliph ‘Umar. He is reported to have ordered that, when a murder victim is found in the area between the territories of two tribes, the distances between the corpse and these territories are to be measured and the *qasāma* is to be imposed on the tribe whose territory is closest to the corpse. This report is widely known and was first circulated by the Iraqi jurist al-Sha‘bī (d. 103 or 110/721-2 or 728-9), as the *isnād* bundle shows (see Figure 4).⁷⁴

We may therefore assume that the doctrine existed in the second half of the first century. However, it is possible that territorial liability is even older and was introduced, immediately after the conquest of Iraq, as a measure to insure law and order in the newly founded garrison cities. This possibility finds support in the position, according to Hanafi doctrine, of the *aṣḥāb al-khiṭṭa*, members of the Arab tribes or clans to whom certain plots of land in these cities were

⁷⁴ Ibn Abī Shayba, *al-Muṣannaf*, vol. 6, 411, 413, 417; ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaf*, 18266-68; Ibn Ḥazm, *al-Muḥallā*, vol. 11, 290; Bayhaqī, *al-Sunan al-Kubrā*, vol. 8, 134-5; Shawkānī, *Nayl al-Awtār*, vol. 7, 46-7. It is evident that al-Sha‘bī first reported the story directly on the authority of ‘Umar, whom he cannot have met, and that later transmitters added intervening links or invented totally new *isnāds* that by-passed al-Sha‘bī. In order to give the story even higher authority, later scholars attributed it to the Prophet and to ‘Alī, in both cases with single strand *isnāds*. Ahmad b. Hanbal, 10913 (vol. 3, 39), 11416 (vol. 3, 89); Ibn Ḥazm, *al-Muḥallā*, vol. 11, 291.



Sources: Ibn Abi Shayba, vi, 411, 413, 417; 'Abd al-Razzaq, 18266-8; Bayhaqi, viii, 134-5; Ibn Hazm, xi, 290.

Figure 4. Isnad bundle of the Measuring hadith

allotted. Early Hanafi scholars were of the opinion that the *aṣḥāb al-khiṭṭa* were the persons to swear the *qasāma* oaths and to pay the blood price:

If a victim of murder is found among a tribe in Kufa, and there are [also] inhabitants [not belonging to the tribe] and persons who have bought their houses [from the *aṣḥāb al-khiṭṭa*], then the *qasāma* and blood price is imposed on the *ahl al-khiṭṭa* and not on the inhabitants and buyers. The following issues are connected with this point. One: As long as one of the *aṣḥāb al-khiṭṭa* remains in the place, then, according to Abū Ḥanīfa and Muḥammad [al-Shaybānī], the buyers are not liable in this matter. According to Abū Yusūf, however, the buyers in this respect are in the same position as the *aṣḥāb al-khiṭṭa* ... Abū Ḥanīfa and Muḥammad argued that the *aṣḥāb al-khiṭṭa* have a greater right to manage the affairs of the quarter than the buyers.⁷⁵

The special status of the *aṣḥāb al-khiṭṭa* indicates that the doctrine was introduced in a period before the *khiṭaṭ* as administrative units had become obsolete, i.e. before the last decades of the first century.⁷⁶ Although the evidence is indirect, it is likely that the responsibility of the inhabitants of quarters and villages for unsolved murders committed in their neighborhoods was introduced as a practical measure to ensure law and order in the newly founded garrison towns shortly after the conquest of Iraq. Such an arrangement is characteristic of a military environment, where collective penalties are often used to ensure discipline. As we have seen, the distinctive elements of Iraqi doctrine were ascribed to ‘Umar b. al-Khaṭṭāb. If, as I maintain, the doctrine originated in Iraq not long after its conquest, it is tenable that these reports are historical.

Conclusion

I have examined here the earliest developments of the *qasāma* doctrines in Islamic jurisprudence. By analyzing the relevant hadiths, taking into account both their *isnāds* and their *matns*, and by studying the statements of the earliest jurists, I arrived at the conclusion that by the middle of the first century, and probably even before that time, there were two distinct doctrines of *qasāma*, one espoused by Iraqi scholars, the other by Medinese; and that these doctrines had separate

⁷⁵ Sarakhsī, *al-Mabsūṭ*, vol. 26, 111-2.

⁷⁶ *EP*, s.v. *khiṭṭa* (P. Crone): “the erosion of the tribal ties in the Marwanid period rendered the system obsolete; ... the *khiṭaṭ* survived only as place-names.”

and independent origins. These findings contradict the standard wisdom regarding the origins of the *qasāma*, i.e. that in the early days of Islam there was only one type of *qasāma* (either the Hijazi type, according to the standard view, or the Iraqi type, according to Crone) and that one type developed out of the other.

That the Iraqi *qasāma* had its origin in governmental measures to insure law and order in the new military garrisons of Iraq is suggested by the original Hanafi doctrine that only the *aṣḥāb al-khiṭṭa* are liable for the blood price of persons killed in the quarter by unknown persons. The Iraqi *qasāma* is based on two elements: the rule that the *qasāma* as an oath of compurgation is imposed on the defendants and the rule of exclusive territorial liability that is unaffected by the swearing of the oath. The first rule has been attributed to a number of Iraqi jurists from the second half of the first century. The second rule reportedly was introduced by the Caliph ‘Umar b. al-Khaṭṭāb. The best known of these reports, which requires the measuring of the distance between a corpse and neighboring villages, was put into circulation by al-Sha‘bī (d. 103 or 110/721-2 or 728-9). Now, Schacht was very skeptical about opinions ascribed to representatives of the “ancient” Iraqi school. In general he regarded such opinions as having originated at a much later date.⁷⁷ However, in the case of *qasāma*, I find his skepticism unwarranted. Because of the rule that as long as the *aṣḥāb al-khiṭṭa* are present, they, and not the actual inhabitants, are liable, the doctrine must have been introduced in a period in which the *khiṭaṭ* were functioning as administrative units, i.e. before the last decades of the first century. Indeed, the doctrine may have been introduced shortly after the conquest of Iraq and the reports ascribing it to ‘Umar may have a kernel of historical truth. Iraqi scholars did not attempt to provide more authoritative textual support for the doctrine by means of Prophetic hadiths until the middle of the second century, when versions of the Khaybar murder hadith were put into circulation in which the defendants were first offered the oath after the plaintiffs had admitted that they did not have sufficient evidence.

The Khaybar murder hadith plays a central role in the Medinese doctrine. The wording of the hadith as we have it goes back to Yahyā b. Sa‘īd (d. 144/761-2). The doctrine of *qasāma* as an accusatory oath, however, must be much older. That it existed already by the

⁷⁷ Schacht, *Origins*, 228-37.

end of the first century is shown by the Confirmation hadith and the variants of the Khaybar murder hadith, put into circulation by al-Zuhri (d. 124/741-2) or his teachers, in which the Jews were allowed to swear first. These variants were prompted by a turn-of-the-first-century controversy regarding the legitimacy of the accusatory *qasāma*. Several independent reports indicate that the caliph 'Umar 'Abd al-'Azīz and a number of contemporary Medinese jurists had misgivings about sentences of retaliation pronounced on the strength of the accusatory *qasāma*. These misgivings were inspired by the anomalous character of the Medinese doctrine of *qasāma*: it violated the normal rules of procedure and the rule that sentences of retaliation required high standards of proof. This discussion apparently prompted al-Zuhri (or his teachers) to deviate from the Hijazi doctrine and to argue that in the case of *qasāma* the oath is offered to the defendants. Since these views were a reaction to the prevailing Hijazi doctrine, the accusatory *qasāma* must have existed in the second half of the first century. I suggest, with due caution, that the Medinese doctrine was a continuation of the pre-Islamic practice, which is the generally accepted view.

My findings contradict Crone's theory on the origins of the *qasāma*. She maintains (1) that the Hanafi doctrine is the older one and has its origins in Jewish, Pentateuchal law, and (2) that the Maliki notion goes back to Jewish, Rabbinical law and was later made to look like a Jahili institution. The validity of her theory is undermined by her failure to situate the developments she describes on a time scale, which makes it difficult to refute her position. I will discuss her main arguments:

- (1) *The commitment of tribal law to the status quo and its bias in favor of the defendant suggest that it is highly unlikely that the Maliki doctrine was originally a tribal institution.*

This argument is circumstantial and not very solid. Crone bases it on present-day Bedouin customary law. The underlying assumption is that Bedouin societies and Bedouin laws have not changed over the course of fourteen centuries. Since Bedouin communities cannot exist independently and live in symbiosis with settled communities, the social and economic changes that these settled communities have experienced have surely affected the lifestyle of the Bedouin. Present-day Bedouin customs, therefore, do not necessarily reflect those of early Islam.

- (2) *The Confirmation hadith is shorter than the Khaybar murder hadith and therefore older.*

As I have shown above, this conclusion is not supported by our examination of the *matns* and the *isnād* clusters of these reports. The version of the Khaybar murder story in which the plaintiffs are offered the oath first must be older than the Confirmation hadith.

- (3) *The early jurists debated the lawfulness of death sentences on the strength of the qasāma procedure, and some Medinese scholars regarded the qasāma as an oath of compurgation. This is additional evidence that the Maliki doctrine was later and had to overcome strong resistance.*

This argument is not convincing. The existence of a discussion about retaliation on the strength of *qasāma* does not constitute proof that one view preceded the other. If both views originated at roughly the same time, as I argue, a similar debate can be expected. Moreover, the existence of Medinese scholars holding that *qasāma* is compurgation can be explained as a reaction against the older, opposite view, and does not have to be understood as a remnant of the older, Hanafi view.

Crone's main argument, however, are the similarities between the Hanafi doctrine and the Pentateuchal ritual described in Deuteronomy in cases of unsolved murder. The Deuteronomic law clearly combines two ideas: the collective responsibility of the inhabitants of a region for murders committed therein, and the pollution of the land by an unpunished murder, which necessitates the expiation of the blood-taint by ritual purification.⁷⁸ Both elements, according to Crone, exist in the Hanafi doctrine. In her view this doctrine makes sense only if we regard the *qasāma* sworn by the inhabitants as a ritual of expiation. On the basis of these similarities, she concludes that the Hanafi *qasāma* is derived from Jewish law.

The conclusion that one legal system borrowed from another on the strength of similarities in institutions and doctrines is often unwarranted. Before raising the issue of influence, one should investigate whether the emergence of a certain doctrine or institution can be explained from within a legal system. As I have shown, such

⁷⁸ Henry McKeating, "The development of the law of homicide in ancient Israel," *Vetus Testamentum* 25 (1975): 46-68, 62-3.

an explanation is possible, indeed highly plausible. The Iraqi doctrine can be explained as the introduction of a practical measure that, in order to buttress its legitimacy, was equated by those who introduced it with the Jahili *qasāma*. Of course, we may speculate about whether or not they invented it themselves by bending a vaguely known Jahili institution to their purposes, or followed other models. Indeed there are interesting parallels in ancient Middle Eastern law. One of these is the ancient Hebrew ritual of Deuteronomy 21:1-9, mentioned by Crone and described above. Although ancient Jewish law does not recognize an actionable liability in such cases, the ritual is implicitly based on the notion that the inhabitants of a region are in some way responsible for serious crimes committed in their area and must perform rituals to cleanse the area. Another parallel is the legal notion of territorial liability found in paragraphs 23 and 24 of Hammurabi's Code which stipulate that the inhabitants of a region must provide compensation for damage resulting from theft and robbery if the perpetrator is not apprehended. Moreover, the Hittite laws contain a provision establishing that the owner of the land on which a person is found murdered, or the inhabitants of neighboring villages, are liable for his blood price.⁷⁹ Now, similarities in legal institutions do not necessarily imply borrowing.⁸⁰ Different groups may find similar solutions to similar problems. In view of the gaps in our knowledge of the legal history of the Middle East immediately before the rise of Islam, theories on the influence of older Middle Eastern legal systems on the development of Islamic law are perforce speculative.

Fifty years ago, Schacht argued that Islamic jurisprudence did not begin until the second century and that hadiths going back to the Prophet were first put into circulation in the first half of the second century. With regard to the circulation of prophetic hadiths, I have found no solid evidence to challenge his conclusion. I have argued that both the Khaybar murder hadith and the Confirmation hadiths, the *isnāds* of which go back to the Prophet, were in existence before 144/761-2. The underlying story, however, circulated already in the

⁷⁹ See H. A. Hoffner, "On Homicide in Hittite Law," in *Crossing Boundaries and Linking Horizons: Studies in Honour of Michael Astour on His 80th Birthday*, ed. G.D. Young et al. (Bethesda, Maryland: CDL Press, 1997), 293ff.

⁸⁰ On the problems of tracing the influence of other legal systems in Islamic law, see Ulrike Mitter, "Das frühislamische Patronat: Eine Untersuchung zur Rolle von fremden Elementen bei der Entwicklung des islamischen Rechts" (Doctoral dissertation, Katholieke Universiteit Nijmegen, 1999): 14-18.

second half of the first century, either without an *isnād* or with an incomplete *isnād* (e.g. Bushayr—the Prophet; Ibn al-Musayyib—the Prophet). In my opinion it is plausible, albeit difficult to prove, that the hadith refers to an historical incident that was remembered and that informed Medinese practice.

As for the origins of Islamic jurisprudence, my findings regarding the *qasāma* support Motzki's conclusions,⁸¹ as well as those of Powers with regard to the law of inheritance,⁸² and suggest that the religious specialists, as Schacht calls them, of the late first century were interested not only in religious and ethical issues, but also in technical aspects of the law. Even if the report about 'Umar b. 'Abd al-'Azīz's misgivings about the *qasāma* and his questioning of scholars about it does not refer to an actual debate held in his presence, there is ample evidence to suggest that purely legal questions in connection with the *qasāma* were being discussed by Medinese jurists around the turn of the first century. From the reactions of al-Zuhri and the members of his circle we can infer that there was a Medinese doctrine of *qasāma* as an accusatory oath in the second half of the first century. It is inconceivable that such a doctrine and its implications were not discussed by the scholars of the period. A similar conclusion can be drawn regarding contemporary Iraqi scholars. Schacht assumed that the attribution of opinions to Iraqi scholars of the second half of the first century is not historical. This view can be challenged. From the *isnād* bundle of the report in which 'Umar orders agents to measure the distance between two villages before deciding which village would be subjected to the *qasāma* procedure, it is clear that al-Sha'bī played a pivotal role in the discussion (see Figure 4). If that is true, it is likely that other jurists of his generation participated in the discussion. This is corroborated by the fact that the Iraqi doctrine is based on the short-lived institution of the *khiṭṭa* and must have been introduced before the institution became obsolete. It is highly unlikely that the consequences of this development were not discussed by the religious specialists.

⁸¹ Motzki (1991).

⁸² Powers (1986).

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