THE UNIVERSITY OF CHICAGO

REVALUING THE PRICE OF BLOOD:

HOMICIDE IN ISLAMIC JURISPRUDENCE AND OTTOMAN LAW

A DISSERTATION SUBMITTED TO

THE FACULTY OF THE DIVISION OF THE HUMANITIES

IN CANDIDACY FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

DEPARTMENT OF NEAR EASTERN LANGUAGES AND CIVILIZATIONS

BY

AMIR ARMON TOFT

CHICAGO, ILLINOIS

AUGUST 2020

Table of Contents

Tables

Acknowledgements

This dissertation is the capstone not only to my doctoral studies, but in fact to two decades of study and intellectual growth reaching back to when I began learning Arabic seriously in the summer before high school. Since then, I have been blessed with a steady stream of teachers, classmates, friends, family, and even some strangers who have in some measure helped me along my way. Though I can only name some in this space, I am grateful to everyone who has offered me knowledge, advice, encouragement, or simply patience throughout the enigmatic process of graduate school.

The University of Chicago has provided about the best graduate home one could ask for. Above all, I thank my adviser, Ahmed El Shamsy, who gave his attentive support throughout graduate school and had faith in me from when I first applied to when I wrote the last word of this dissertation. My other committee members, Cornell Fleischer and Tahera Qutbuddin, not only helped me work through thorny textual problems and research questions; they also guided me toward being a better teacher and colleague. The faculty at the Department of Near Eastern Languages and Civilizations (NELC) have contributed to my growth in one way or another. I wish to thank Helga Anetshofer, Kağan Arık, Orit Bashkin, Kay Heikkinen, Hakan Karateke, Frank Lewis, Holly Shissler, Paul Walker, and John Woods. Colleagues who, through their and collegiality and good conversation, eased the slow and often lonely grind of graduate school include Tahir Abdullah, Zahit Atçıl, Mohamad Ballan, Aamir Bashir, Kevin Blankinship, Süleyman Dost, Nathaniel Miller, Jessica Mutter, Jawad Qureshi, Julio Rivera, Rachel Schine, and Tunç Şen, and Mariam Sheibani. The staffs in NELC and the Center for Middle Eastern Studies during my time—Brittany Ciboski, Amina Dreessen, Traci Lombre, Tom Maguire, and Amanda

Young—deserve the gratitude of every student. They solve crises, including a few of my own, and generally keep the place from falling apart. Thank you all.

I also spent one enriching year each at two law schools. This supplement to my graduate studies furnished a comparative apparatus with which to make Islamic law and government both relevant and intelligible to legal scholars broadly speaking. At the University of Chicago Law School, where I complete the Master of Legal Studies Program, I would like to thank Tom Ginsburg, Richard Helmholz, Daniel Hemel, Brian Leiter, Richard McAdams, and David Weisbach. At the Yale Law School, the Abdallah S. Kamel Center for the Study of Islamic Law and Civilization supported a fruitful year of research. I'm grateful to the Kamel Center's directors, Owen Fiss and Anthony Kronman; the fellowship program's coordinator, Bradley Hayes; and a host of new friends at the law school and the broader university who provided a font of collegiality, hospitality, and good ideas: Abdullah Alaoudh, Omer and Lisa Bajwa, Frank Griffel, Mike Karpman, Nadia Marzouki, Alan Mikhail, Shawkat Toorawa, Gideon Yaffe, and Travis Zadeh.

My most special thanks go to teachers, friends, and family who have supported and encouraged me from the start. Well before graduate school, various traditional scholars laid the foundation for what became and will be, *inshāʾ Allāh*, a lifelong study of Islamic history and thought. The first to encourage me down this road was Shaykh Ahmad Zaki Hammad, in whose home as a boy I was first exposed to Islamic learning. My abiding love and gratitude go then to the teachers who laid the foundation at the Institute of Islamic Education: Aziz Ahmed, Bilal Ali, Yasir Nadeem, Abdullah Saleem, Abdurrahman Saleem, Saad Saleem, Sulaiman Saleem, and Ubaidulla Saleem. *Jazākum Allāh khayrā*.

Among my friends, Hamzah Jamjoom, has for almost two decades kept me from taking myself too seriously. He usually fails, but he never stops trying. What more could you ask for in a friend? Ubaydullah Evans and Abdullah Felten have always provided good company or something stimulating to talk about other than my research. Deserving of honorable mention is my cat, Marjan, who, though declining to read any of my chapters, provided a warm presence and welcome breaks to the monotony of homebound writing.

I come at last, and most importantly, to my family. It is a curious irony that one's family, though usually having the least to do with one's professional life, have the most to do with one's professional success. They are also the ones that we—or, speaking for myself, that I—do not thank enough. To my parents, Fatemeh and Gaylord, and my siblings, Ali and Noor: Thank you for raising me, loving me, and supporting me. *Bārak Allāh fīkum*. I am grateful also to my in-laws, Cheryl and Ted, for providing many relaxing winter retreats in the clean mountain air of Wyoming. Finally, I thank my wife, Caitlin, and my son, Layth. They entered my life at the beginning and end of graduate school, respectively, and have enriched my life and work beyond measure.

الحمد للذي بنعمته تتم الصالحات

Abstract

This dissertation examines homicide in Ottoman-era Islamic jurisprudence. Broadly speaking, it aims to articulate a more accurate theory of criminal law in Islamic jurisprudence, one that takes into account both theoretical doctrines and practical institutions. This study therefore makes a methodological and a substantive intervention in the study of Islamic law.

Methodologically, I argue against the scholarly tendency to evaluate Islamic law within its theological guise. Put differently, Islamic law is rarely seen as law first and Islamic second. Far more common is to view Islamic law as a narrower exercise in scriptural interpretation. Because the Shariʿa was God's law, it is often held, Muslim jurists historically drew no distinction between law and morality and therefore no distinction between law and politics. For jurists, the Shariʿa was a single, universal system of law, permitting no political division and no legislation from temporal rulers. This standard account, however, overlooks the historically and politically contingent nature of Islamic jurisprudence. This dissertation contends that Islamic law, analogous to Roman law in premodern Europe, was a legal *tradition* that over time got worked into discrete territorial legal systems. It is on the subtitle to this study distinguishes between Islamic jurisprudence and Ottoman law.

The distinction between tradition and system appears most saliently in the domain of criminal law and is illustrated best through homicide. Modern scholars have generally looked for Islamic criminal law in the traditional books of Islamic legal science (*fiqh*). Because intentional homicide in Islamic jurisprudence carried the possibility of the death penalty through requital (*qiṣāṣ*), it usually gets classified as a crime. These texts, however, were mostly concerned with civil matters, addressing the relationships

among people rather than the relationship between people and the sovereign. I argue that jurists theorized homicide primarily as the violation of a private right, and considered its remedies, including both compensation and requital, as *civil* remedies, in that the victim's heirs held the right to exercise or forgo the option. For the criminal dimension of homicide, we must look to the public jurisdiction of temporal sovereigns. Jurists held, I argue, that the sovereign ruler possessed the competency and discretion to make rules and institutions in furtherance of the common good, such as the punishment of offenders who escaped civil liability. Ottoman legal institutions illustrate well this distinction between the private and public domains of the law. By keeping these two domains distinct, therefore, I propose a more accurate description of the normative and institutional framework of Islamic criminal law.

INTRODUCTION

The Problem of Islamic Criminal Law

THE CASE OF SATILMIŞ THE FALCONER

On December 12, 1579, a man named Kılıç Ketḫüdā b. Muṣṭafā presented at the court in Üsküdar to report a homicide. Located on the Asian side of the Bosphorus, Üsküdar was one of the four districts that then made up the greater city of Istanbul, the capital and administrative center of the Ottoman Empire since its conquest in 1453 under Sultan Meḥmed II. According to the entry in the court record, Kılıç Ketḫüdā came on behalf of the Ibrāhīm Aġa, one the head falconers in the *Bīrūn*, or the Outer Palace service. Hawking was a favorite pastime of the Ottoman court, for which a whole organization of bird keepers, both in the capital and the provinces, was set up to care for different kinds of sporting birds and to accompany the sultan on his hawking parties. For young men graduating from the Interior Palace (*Enderūn*) service, the Outer falconry corps was one of several desirable next steps.[1] There were three main divisions of falconers (*doġancıyān*), organized hierarchically according to bird type: the keepers of the merlins (*çaqırcıyān*) at the top, then the keepers of the peregrines (*şāhīnciyān*), then the keepers of the sparrow-hawks (*atmacacıyān*). Like others in the Outer Service, the head falconers were salaried imperial servitors, or *qul*s, and subject to promotion up the ranks of administrative service. Ibrāhīm Aġa, as head of the peregrine keepers (*şāhīncibaşı*), was therefore poised to be promoted to head merlin keeper (*çaqırcıbaşı*). In turn, the head merlin keeper, as head of the entire corps, was the fourth in the line of the major Outer Palace units.[2] Because they accompanied the sultan on campaign,

[1] Ismail Hakkı Uzunçarşılı, *Osmanlı devletinin saray teşkilâtı*, 2nd ed. (Ankara: Türk Tarih Kurumu, 1984), 421.
[2] H. Inalcık, "Doghandji," in EI2. Abdülkadir Özcan, ed., *Kanunnâme-i Âl-i Osman: Atam Dedem Kanunu* (Istanbul: Hazine

the head falconers were included among the so-called Officers of the Stirrup (*rikāb aġaları* or *üzengi aġaları*).[3]

Palace falconry, therefore, was not an incidental operation, and a homicide of or by someone within the falconers' ranks amounted to the killing of or by a servant in the employ of the Ottoman house. The occurrence of such an event under Ibrāhīm Aġa's watch was thus undoubtedly a matter of both personal and professional concern. Accordingly, when he heard about the killing, he sent his steward, Kılıç Ketḫüdā, to the Üsküdar court to get the available information duly on record. When he arrived, Kılıç Ketḫüdā rendered the following formal statement: "I heard that,[4] in the vicinity of Üsküdar, a falconer named Satılmış b. Muṣṭafā stabbed one ʿAlī b. Ömer with a knife and killed him in the stable attached to Ibrāhīm Aġa's quarters.[5] I request that this be looked into and the truth of the matter be investigated."

The location of this event is also worthy of note. Üsküdar was important for more than being a desirable royal hunting ground.[6] In the late sixteenth century, it was also a district of growing cultural activity and strategic significance. The Ottoman royal confidant and one-time grand vizier, Şemsi Aḥmed Paşa, whose eponymous mosque and college still sit right on the shores of the Bosphorus, held a salon at his home that influential and aspiring men of letters sought to attend.[7] Furthermore, with the

---

Yayınları, 2012). [*Need to acquire page number.* Temporary older edition of same work in: *Tarih Dergisi*, p. 31–32.]

[3] Uzunçarşılı, *Osmanlı saray teşkilâtı*, 388.

[4] Kılıç Kethüda does not explicitly say "I heard." However, the finite verb (*katl eylemiş*) carries that suffix *-miş*, which indicates that the information was not obtained directly. The secondhand nature of the information comports with the judge's decision to send an inquest to verify Kılıç Ketḫüda's claim.

[5] The original looks like it reads *merḥūm Ibrāhīm Aġa*, meaning "the late Ibrāhīm Aġa." This is also how the editors have transcribed it. If this is correct, then perhaps Kılıç Kethüda was sent because the head falconer had died. Alternatively, the word could actually be (or be misspelled as) *merqūm*, meaning "aforementioned." It makes no material difference to the case.

[6] Uzunçarşılı, *Osmanlı saray teşkilâtı*, 420, 423. Even today, there is a square, now containing a well-trafficked park, that preserves the bird-hunting heritage in the name *Doğancılar Medanı* ("Falconers Square"), and next to it is a mosque named after Çakırcı ("Falconer") Hasan Paşa.

[7] Cornell Fleischer, *Bureaucrat and Intellectual in the Ottoman Empire: The Historian Mustafa Âli (1541–1600)* (Princeton, NJ: Princeton University Press, 1986), 74–75

rekindling of hostilities against the Safavids in the east, Üsküdar likely served as a mustering point for troops heading off on campaign. The population of Üsküdar, too, was almost assuredly growing.

Üsküdar's increasing significance was reflected in the fact that its court was presided over by high-ranking members of the Ottoman scholar-bureaucrats, or *ʿilmiyye*, who by the late sixteenth century had developed into a highly structured and internally differentiated professional class.[8] The judge on the bench when Kılıç Ketḫüdā came to give his report was one Ibrāhīm Çelebi Efendi b. Ilyās al-Galatavī. Little or no narrative material exists about Judge Ibrāhīm's life—he does not appear, for example, in any Ottoman biographical dictionary[9]—but we can gather quite a bit from his titulature in the court register. Ottoman titulature in the sixteenth century was not arbitrarily applied. The titles *çelebi efendi* suggest that Judge Ibrāhīm was a "gentleman scholar," that is, someone both well born and well educated. *Efendi*s were generally those who received training in the Ottoman law colleges (*medrese*s) and were distinguished from *beğ*s and *paşa*s, who were military administrators by virtue of their training in the Palace or by their service either as actual field commanders or provincial governors. Moreover, Judge Ibrāhīm's name is preceded by an elaborate Arabic string of titles: "the most authoritative of the Muslim judges, the most suitable of the believing governors, the font of virtue and certitude, the one distin-

[8] On the emergence, integration, and differentiation of the Ottoman scholarly class, see generally Abdurrahman Atçil, *Scholars and Sultans in the Early Modern Ottoman Empire* (Cambridge: Cambridge University Press, 2017).

[9] He is not mentioned, for example, in Nevʿizāde ʿAtāyi's *Ḥadāʾiq ül-haqāʾiq*, the main continuation to Taşköprizāde's seminal Ottoman biographical dictionary, *al-Shaqāʾiq al-nuʿmāniyya*. Given that many or most of those at Judge Ibrāhīm's rank were recorded in these sources, the omission seems unusual. In personal correspondence, Abdurrahman Atçıl suggested the reason could be that Üsküdar had not yet been made into a *mevleviyyet* jurisdiction (see below). However, as I mentioned below, Üsküdar had become a *mevleviyyet* in 1570. Judge Ibrāhīm's absence from biographical records, then, could be the result of the recency of Üsküdar's elevation to a top-level jurisdiction, combined with Judge Ibrāhīm's exceedingly short tenure there (two months).

guished by the providential favor of the Aid-Giving Sovereign, our master and the one in all ways distinguished above us."[10] Such titles correspond to the scholar-bureaucrats' ranks, which, like the ranks of the Palace cavalry units, were set down in the Law Book of the Ottoman House attributed to Meḥmed II (*Qānūnnāme-i Āl-i Osmānī*).[11] This law book specifically contained rules pertaining to Ottoman servitors, including professors who taught in the Ottoman colleges and judges who presided over Ottoman courts.

Judicial titulature at once signaled a judge's rank and salary. Judge Ibrāhīm's elaborate title therefore indicates that he was a 500-asper judge (*beşyüz aqçeli qāḍī*) and that Üsküdar was a 500-asper judgeship. This was the highest judicial pay grade, available in only the most important and populous jurisdictions. As a mark of their importance, these jurisdictions were called *mevleviyyet*s and their holders *mevlā* (pl. *mevālī*) or, alternatively *mollā* or *monlā*.[12] In the late sixteenth century, of the hundreds of large and small judicial posts throughout the empire, only twenty-four were *mevleviyyet*s.[13] Üsküdar had been added to this list in 1570, less than a decade before our case at hand.[14]

Unlike those who made a career of serving as judges in smaller towns, those who made it to the 500-asper level of judicial service could only to do so by first gaining candidacy (*mülāzemet*) by the learned

[10] The manuscript is slightly damaged, cutting off small bits of each line, but because these are known titles, I was able to inter what should be there. The full title is as follows: *aqḍā quḍāt al-muslimīn awlā wulāt al-muwaḥḥidīn yanbūʿ al-faḍl wa-l-yaqīn mawlāna wa min kull al-wujūh awlānā*.

[11] On the historicity of the Meḥmed II's law book, in spite of scholarly concerns about forgery, see Fleischer, *Bureaucrat and Intellectual*, 197–200; cf. Abdülkadir Özcan, ed., *Kanunnâme-i Âl-i Osman: Atam Dedem Kanunu* (Istanbul: Hazine Yayınları, 2012), Giriş.

[12] F. Müge Göçek, "Mewlewiyyet," in EI2; J. Calmard, "Mollā," in EI2.

[13] Bilgin Aydın and Rıfat Günalan, "XVI. Yüzyılda Osmanlı Devleti'nde Mevleviyet Kadıları," in *Prof. Dr. Şevki Nezihi Aykut Armağanı*, ed. Gülden Sarıyıldız et al. (Istanbul: Etkin Kitaplar, 2011), 19–34 at 21.

[14] Atçil, *Scholars and Sultans*, 197.

establishment, then by working their way up the ranks in a series of ascending positions, first as a professor, then as a judge.[15] The typical Ottoman judicial career was extremely itinerant, involving a succession of short appointments, but from the 500-asper level a judge would then be eligible for service at high levels of administration. Judge Ibrāhīm exemplifies the fast-moving nature of Ottoman judicial careers. He served at Üsküdar for only about two months, after which he was promoted in early 1590 to serve as finance officer (*defterdār*) in the Erzurum province, a significant position at the time given the increasingly frequent campaigns against the Safavids.[16]

When Kılıç Ketḫüdā came to court, then, he was no doubt entering upon someone well seasoned in the workings of the Ottoman judicial system. After he made his statement, the court's report describes what happened as follows:

> In accordance with the law, Mevlānā Eyyūb Halīfe was dispatched, along with the Muslims named hereunder, to go and look into it. Indeed, the same ʿAlī was found killed in the stable, wounded in the lower left part of the chest. And Satılmış, who was suspected of killing the decedent, was also found present in the stable. When questioned in the noble court of law, Satılmış willingly and voluntarily made an explicit, open, and legally valid confession. He said: "The decedent ʿAlī and I got into it with each other. And as we hurled fierce insults at each other, the fight got serious and I stabbed ʿAlī in the lower left part of the chest, killing him. No one else was involved. ʿAlī perished from my blow." Upon request, the statement described herein by the confessing Satılmış was recorded as it transpired. Recorded on the 28th of Shawwal in the year 987 [*December 12, 1579*].

[15] On the different career tracks of Ottoman scholar-bureaucrats, see Atçil, chap. 10.

[16] On events in Erzurum at this very time, from the perspective of Ottoman bureaucrat and man of letters Muṣṭafā ʿĀlī, see Fleischer, *Bureaucrat and Intellectual*, 85–89.

Witnesses to the procedure: Muṣṭafā Beġ b. Hüseyn, Muṣṭafā Beġ b. Mikā'īl, Velī b. Aḥmed, Ramażān b. Sefer, Īsā b. Muṣṭafā, ʿAlī b. Iskender, Meḥmed Beġ b. Mūsā, Īsā b. Muṣṭafā, ʿAlī b. Iskender, Meḥmed Beġ b. Mūsā,[17] Arslan b. Ferrūh, Maḥmūd b. ʿAbdullāh, Bekr b. Murād, Çalabverdi b. Hüdāverdi, Osmān b. Aḥmed, Mūsā b. Turhan, Osmān b. Süleymān, Ḥasan b. Turhan and others.[18]

THE PROBLEM OF ISLAMIC CRIMINAL LAW

There are certain conceptual associations about law that have become so intimately associated in the public imagination that the existence of one necessitates the existence of the other. The strength of these associations is reflected in certain phrases embedded in our everyday lexicon. Take, for example, "law and order." Through both political sloganeering and mass media, including one of the most successful franchies in American television history, the notion that law exists merely to produce social order, and that social order can only result from law, has become powerfully entrenched at very least in American popular culture. "Crime and punishment" produces a similar effect. This combination, with repetition, reinforces the idea that an act without punishment is not criminal and that anything resembling punishment points to the commission of a crime.

These lexically reinforced associations, to be sure, are rooted in generally observable realities. Law is indeed connected to the establishment of social order, and crime is indeed marked in part by triggering punishment. Yet the breathless repetition of such couplets can lead to a distortion of those realities that is not incidental. Scholars of the Western legal tradition, and more specifically legal historians and

[17] There could be a clerical error, unless two of the witnesses were named ʿAlī b. Iskender and two Meḥmed Beġ b. Mūsā.
[18] For this case, see Rıfat Günalan et al., eds., *Üsküdar mahkemesi 51 numaralı sicil* (*H. 987–988 / M. 1579–1580*), İstanbul Kadı Sicilleri 8 (Istanbul: İSAM Yayınları, 2010), 105–6 (no. 101; fol. 14r-1).

legal sociologists, have in recent decades begun calling into question ingrained assumptions about the meaning and nature of law, order, crime, and punishment, and about the interconnections among these concepts.[19] Order can be achieved, some have argued, without recourse to the institutions and officials of the legal system; and what constitutes a crime or a punishment may be more subtle and complex than first meets the eye.

This dissertation aspires to make a similar contribution to the study of Islamic law. In the pages that follow, I present a critical inquiry into the nature of Islamic criminal law. Through a focused examination of homicide in both Islamic jurisprudence and Ottoman law, this dissertation demonstrates that Islamic criminal jurisprudence is both historically and politically contingent.

As this last sentence suggests, my argument arises from two general points of dissatisfaction with most of the scholarship on Islamic criminal law. The first is about the nature and scope of the thing called "Islamic law" or "Islamic jurisprudence." These terms are generally taken, and I also take them, to be largely synonymous. The problem is that Islamic jurisprudence is generally construed to have been the legal system of all Muslim polities, whether Ottoman or otherwise. Against this view, I will argue that, although possessing a natural connection, Islamic jurisprudence and Ottoman law are distinct conceptual complexes. Islamic jurisprudence is a *tradition* of legal thought and doctrine; Ottoman law was an institutionalized *system* of Islamic jurisprudence attached to a particular political entity. My second point of dissatisfaction concerns the apolitical tenor of historical contingency in Islamic legal studies. Historical contingency, I argue, must explicitly account for political contingency as well in order

[19] See, for example, Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russel Sage Foundation, 1979); Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1994); Lawrence M. Friedman, *Crime without Punishment: Aspects of the History of Homicide* (Cambridge: Cambridge University Press, 2018).

to make any sense when we speak of an Islamic legal system. To put it more straightforwardly, if you wish to talk about how Islamic law worked in given place and time, you cannot separate between law and politics.

OVERVIEW OF THE DISSERTATION

This argument of this dissertation plays out over seven chapters, split into three parts. Part I, consisting of Chapters 1–3, addresses the substantive law of homicide. There I show most directly that homicide in Islamic jurisprudence was conceived as a primarily civil matter. Homicide, an extension of bodily injury, was viewed as a breach of bodily integrity. Homicide doctrine therefore possessed an economic logic analogous to that of damage to property or breach of contract. Its primary remedies, including the sanction of requital (*qiṣāṣ*), consisted in compensation, not punishment.

Part II strengthens this substantive argument by examining procedural elements of homicide. Procedural law, as I show in Chapter 4, naturally reflects the substantive character of legal norms. Chapter 5 then reviews how homicide, when treated as a civil matter, was subject to the same procedural strictures as other civil matters.

In addition to its predominant civil dimension, homicide also implicated public concerns about social order and security. Part III addresses this public dimension of homicide in Islamic and Ottoman law. Chapter 6 articulates a juridical space in Islamic jurisprudence for criminal law. This space authorized the public authority, in furtherance of legitimate common interests and pursuant to broad principles of law, to adopt positive measures and impose sanctions. The constraints of normativity, in other

words, did not bar the public authority, if acting in good faith, from criminalizing and punishing behavior deemed damaging to the civil society. Chapter 7 then concludes the dissertation by interpreting homicide in Ottoman law through the lens of analytical model developed in the preceding chapters.

On the strength of this overview, the reader may, if so desired, proceed to the body of the dissertation. The remainder of this introductory chapter consists of an elaboration of the problem, introduced above, of locating crime in Islamic law, followed by several sections on methodology that inform the argument of this study.

LOCATING CRIME IN ISLAMIC LAW

In this section, I present here in miniature what I will elaborate over the long arc of this dissertation. My aim is both to ground the work as a whole and to assist those requiring a summary.

Registered Silence

When Sultan Süleymān the Lawgiver died in 1566 CE after a forty-six-year reign, the Ottoman Empire's territory had reached its maximal expanse and its structure of government had come near its full maturity.[20] The post-Süleymanic era witnessed a general shift in the state's focus away from expanding its territorial holdings and toward effectively governing them. Though foreign tensions did not come to a halt, hostilities significantly cooled. From 1566 to 1596, and again from that year until twenty years later, the Ottoman sultans did not participate in a single military campaign.[21] The new inward focus was both

[20] Though, of course, it continued to evolve afterward. The literature that describes and appraises subsequent developments in the Ottoman state are legion. For a synoptic work covering the period immediately after this study's, see Baki Tezcan, *The Second Ottoman Empire: Political and Social Transformation in the Early Modern World* (New York: Cambridge University Press, 2010).

[21] Leslie Peirce, *The Imperial Harem: Women and Sovereignty in the Ottoman Empire* (New York: Oxford University Press, 1993), 168.

a continuation of a long trend of bureaucratic consolidation,[22] extended to the beginning of the sixteenth century and even earlier, and probably in some measure a reaction to disturbances within the well-protected domains (*bilād-i maḥrūse*) of the empire. In the half century or so following Süleymān's death, the attention of Ottoman government officials was occupied by rebellions in the provinces and capital.[23]

One of the crucial sources from which historians have reconstructed these developments around the realm is the Ottoman judicial register (*sicil*, pl. *sicillāt*).[24] Unlike documents drafted and kept by high-ranking palace officials in the capital, the registers were locally maintained in the jurisdictions (*qażā*) to which they belonged. In offering an account of concrete court proceedings, the registers present, for the legal historian, a useful complement to the more studied and deliberately written works of jurists. An additional virtue of the judicial registers is that, apart from having a fairly consistent and formulaic format that makes them relatively easy to read, their entries were written more or less as the events described were taking place. Courts were busy places. On any given day, a dozen or more separate issues, ranging widely in subject matter, may have come before a given court. This meant that entries in the register were summative, recording only what is legally relevant: the register is not a full blow-by-blow of what took place nor a transcript of everything spoken in court. However, the entries also have a real-time quality that offsets the reasonable concern that it was legal officials representing people's affairs

[22] Abdurrahman Atçil, *Scholars and Sultans in the Early Modern Ottoman Empire* (Cambridge: Cambridge University Press, 2017), 126.

[23] On provincial rebellions, see Mustafa Akdağ, *Celâlî isyanları (1550–1603)* (Ankara: Ankara Üniversitesi Basımevi, 1963); Suraiya Faroqhi, "Town Officials, *Timar*-Holders, and Taxation: The Late Sixteenth-Century Crisis as Seen from Çorum," *Turcica* 18 (1986): 53–82. And on major disturbances among the slave soldiery of the Porte, see Cemal Kafadar, "Janissaries and Other Riffraff: Rebels without a Cause?," *International Journal of Turkish Studies* 13, no. 1–2 (2007): 113–34.; Baki Tezcan, "The Ottoman Monetary Crisis of 1585 Revisited," *Journal of the Economic and Social History of the Orient* 52 (2009): 460–504 at 497–8.

[24] On the *sicil* generally, see Suraiya Faroqhi, "Sidjill," in EI2.

rather than the people themselves. The stylized language routinely breaks to quote the straightforward, sometimes earthy spoken language of the parties bringing their business to the court.

Because of the wide coverage of the judicial registers—wide in the sense both that registers were kept in the various districts of the Ottoman provinces, and that each register contains a great deal of local information—we expect to see crimes like homicide accounted for in these sources. Indeed, to a certain extent they are. For example, in the late sixteenth, a particularly gruesome murder took place in the Anatolian town of Çorum.[25] But this event is in many ways an outlier. It has a sensational aspect resembling that of the Clutter family murder—a big slaughter in a small town—captured in Truman Capote's nonfiction novel, *In Cold Blood*. More significantly, it reflects the general provincial unrest that characterized the late sixteenth century and exercised Ottoman officials. The noting of this event, therefore, says little about Ottoman law's handling of more ordinary crimes, particularly in the empire's larger cities.

On this question, Ottoman registers are unusually quiet. We may take homicide as an index. A given register for larger Ottoman cities usually covers about one year's time and contains somewhere between three to five hundred cases. Of these it is rare to find more than a few cases involving a homicide, and frequently registers contain none. In the thousands of Ottoman court registers that have survived from the sixteenth century, there exist extremely few records of homicide. The registers seemed to record any matter brought to its attention. Why, then, do we see such a general dearth of recorded criminal cases?

There are a couple of obvious potential explanations that make this puzzle seem less puzzling. The first is by further clarifying the function of the judicial registers and what their "cases" contain. The

[25] Suraiya Faroqhi, "The Life and Death of Outlaws in Çorum," in *Armağan: Festschrift Für Andreas Tietze*, ed. Ingeborg Baldauf, Suraiya Faroqhi, and Rudolf Vesely (Prague: Enigma Corporation, 1994), 59–77.

registers show that the court was a kind of clearing house for all affairs of some importance happening in or generally concerning the jurisdiction it served. These issues included everyday transactions, contentious litigations, inventories of estates after death, administrative notices sent from the capital, and sundry matters that people thought fit to bring to the court's attention. without seeking an explicit decision. Indeed, it is fair to say that the majority of entries do not involve any kind of decision at all. For this reason, scholars who regularly study the Ottoman registers have divided the majority of register entries into two general categories: entries that certify the proceedings of any hearing (*ḥüccet*) and entries containing an explicit notice that judge has made an actual decision (*i'lām*).[26] The majority of register entries are of the former type. We should expect, then, that criminal matters would be drowned out by all the other matters the court had to deal with.

Second, it could well be that Ottoman cities and towns were generally safe places and that, in a given year, homicide and other violent crimes were a relatively rare event. Of course, whether three or five homicides in a year is a lot of or a little is a subjective matter. But it is fair to say that, for early modern cities that were (compared to today's cities) moderately populated, a dozen or so annual homicides in a judicial district would be alarmingly high. Even modern cities that are reputed to have crime problems have, statistically speaking, high degrees of safety and low rates of homicide. Take Chicago. According to an annual report by the Chicago Police Department, there were 769 homicides in Chicago in 2017.[27] That seems like a lot—and, given that that figure represents 769 lives taken by violence, it is a lot. Statistically, however, that figure amounts to .028 percent of the approximately 2.7 million people residing within Chicago's corporate limits. With far smaller populations, we should not expect to see more than

[26] Ahmet Akgündüz, "I'lâm," in TDVIA.
[27] https://home.chicagopolice.org/wp-content/uploads/2018/10/2017-Annual-Report.pdf (accessed March 24, 2019).

a few homicides every year in large Ottoman cities. So we cannot discount the happy possibility that rarity of homicide cases suggests that most Ottoman cities big enough to have an appointed judge were, on the whole, safe places, and that people settled most of their issues with means other than deadly force.

Still, there are other aspects of this registered silence that call for a closer look. Most saliently, those homicides that do get recorded often look incomplete. *A* hales *B* into court, for example, claiming that *B* killed *C*. In instances, the record ends there. In other instances, the judge questions *C*, who admits that the claim is true, and the record ends there. Or the judge asks *B* to present evidence and, failing that, asks *C* to take a decisory oath, and the records ends there, with no indication that the authorities will look further into the matter. Again and again, homicide "cases" on record have a desultory quality that seems odd for such a serious issue and, from a legal historian's perspective, presents frustrating challenges. I mentioned above that scholars broadly distinguish between judicial documents containing a certification of a transaction or other common proceeding and judicial documents containing a court decision. Nearly all homicide cases are of the former kind, which gives homicide claims a rather transactional quality. There is hardly any case in which the judge sentences the offender. Moreover, one scarcely finds a case recording capital retribution for homicide (*qiṣāṣ*). In cases that do have a final disposition, the outcome is the awarding of compensation (*diya/diyet*), or "blood money" as some call it, payable by the killer to the victim's estate.

The registered silence, therefore, lies not in the quantity of homicide cases reported. Rather, the puzzling silence lies in what may be fairly described as judicial passiveness. Though certainly not true everywhere, it appears in many cases as though judges were constrained in some way from pursuing

information of homicide beyond the terms of the party bringing the information to light. This lacuna in the record, if so it may be called, demands some further investigation.

Homicide and Crime in Islamic Legal Scholarship: A Critical Review

One of the most persistent themes in Islamic legal studies is the tension between sacred and secular law. Sacred law, consisting in the doctrines of Muslim jurists (*fuqahā'*), represented the revealed law of God, which in principle made a universal claim on all human affairs. Every matter of human concern, whether moral or legal, was covered in some way by the doctrines of Islamic law. Supposedly against the authority of jurists and without the sanction of God, various temporal rulers throughout Islamic history implemented policies of their own on affairs of government concern. The tension between sacred and secular seemed frequently to turn into outright conflict between the learned legal community and the ruling establishment. Scholars have frequently taken episodes of such conflict as evidence of Islamic law's difficulty, if not incommensurability, with secular political affairs.

Secular law in Islamic polities acquired probably its most concrete form under the Ottoman dynasty, who made a habit of putting their law into writing. In the fifteenth century, Ottoman sultans began to draft and promulgate public legal statutes that were called, in Turkish and Arabic, respectively, *yasaġ* and *qānūn*.[28] Usually compiled into statute books called *qānūnnāme*s, these laws were explicitly identified as deriving from the Ottoman custom, or *'örf* (from Ar. *'urf*), which is specifically identified with the royal policies of the dynasty (*siyāset-i sultānī* or *yasaġ-ı pādişāhī*). For this reason, the *qanūn*, when viewed as the whole body of Ottoman customary law, is variably referred to in the sources as Ottoman

[28] Both terms may refer either to a discrete statute or collectively to all Ottoman statutory law. See Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Ménage (Oxford: Clarendon Press, 1973), 167–68.

custom (*ʿörf-i osmānī*),[29] royal custom (*ʿörf-i pādişāhī*), and sultanic custom (*ʿörf-i sulṭānī*).[30] The various executive officials who were charged with implementing Ottoman policies were thus known as the *ehl-i ʿörf*. Previous dynasties of Turco-Mongol vintage, notably the Mamluks, implemented policies that were public and clear enough for jurists to note when a legal practice did or did not belong to sultanic custom (*ʿāda sulṭāniyya*).[31] However, it remains debated whether any pre-Ottoman dynasty, whether Mamluks or their predecessors, formally committed these usages to writing.[32] What makes the Ottoman statutes unique, then, is not that they were the first to be formulated, but that they seem to have been the first to be formalized in writing and widely disseminated.

The Ottoman statute books were of different types, with some being generally applicable to the entire empire and other being addressed to specific provinces or classes of imperial subjects.[33] The statute books of general applicability were dispatched to judges and other administrative officials for implementation. Their contents touched for the most part on fiscal and criminal matters. The binding agent between these two areas of law was, to be sure, the raising of revenue.[34] However, the interpretation of Ottoman law's focus on taxes and crimes may cut in two ways. A cynical interpretation would

[29] See, for example, Robert. Anhegger and Halil Inalcık, eds., *Ḳānūnnāme-i Sulṭānī ber mūceb-i ʿÖrf-i ʿOsmānī: II. Mehmed ve II. Bayezid devirlerine ait Yasaḳnāme ve Ḳānūnnāmeler* (Ankara: Türk Tarih Kurumu Basımevi, 1956).

[30] On the various usages of *ʿörf*, see Heyd, *Studies*, 168–71.

[31] Heyd, 169.

[32] Guy Burak, "Between the *Ḳānūn* of Qāytbāy and Ottoman *Yasaq*: A Note on the Ottomans' Dynastic Law," *Journal of Islamic Studies* 26, no. 1 (2015): 1–23 at 1n2.

[33] Inalcık, "Ḳānūnnāme," in EI2. See also, Halil Inalcık, *The Ottoman Empire: The Classical Age, 1300-1600*, trans. Norman Itzkowitz and Colin Imber (New York: Praeger Publishers, 1973), chap. 10.

[34] We should forget that a government's preoccupation with protecting its streams of revenue is not unique to premodern empires. Tax evasion in the United States is a severely punished crime, and legal scholars have studied the phenomenon of using tax fraud as a pretext for prosecuting criminals who escape justice. Perhaps the most notorious example, at least in American popular culture, is Al Capone, the Chicago mobster who was convicted in 1931 of tax fraud, which, unlike the murders he was strongly suspected of being connected with, could be proven at the standard required under American evidence law. See, for example, Linda S. Eads, "From Capone to Boesky: Tax Evasion, Insider Trading, and Problems of Proof," *California Law Review* 79 (1991): 1421–84; Daniel C. Richman and William J. Stuntz, "Al Capone Revenge: An Essay on the Political Economy of Pretextual Prosecution," *Columbia Law Review* 105 (2005): 583–639.

hold that, because a dynasty needs to raise funds, it must maintain order. Certainly, law is, almost by definition, an instrument of social control, and an effectively enforced criminal law could have the effect of disciplining people into obey the sovereign authority. Ottoman criminal law, furthermore, often sanctioned offenders with fines, which would have served as a further source of extracting revenue.[35]

However, because fines and other criminal sanctions easily opened the door to corruption and excess, a purely law-and-order regime, concerned single-mindedly with coercing people to pay, could not have been sustained for long. Another interpretation, as Halil Inalcık has shown, is that Ottoman public law was perhaps less about establishing order and more about establishing legitimacy.[36] The logic may be described as follows: To maintain a solvent treasury, the imperial center had to work up a fiscal system that could reliably raise revenue from the empire's taxpaying subjects (*reʿāyā*) while also maintaining the conditions of security under which the populace would willingly part with a large chunk of its wealth. To do so, the ruling house turned to its military-administrative (*ʿaskerī*) class, a diverse collection of officials, both military and civilian, who were charged with running the central and provincial governments, collecting and forwarding taxes, and defending against internal and external dangers, all in return for two basic privileges: exemption from taxes and a regular grant of income. In addition to protecting the frontiers against foreign enemies, military-administrative officials were empowered to pursue and punish offenders who were deemed to pose a material threat to society. These official powers and privileges, however, came at a big cost. The sultan and his palace servitors, in order to show that they could keep provincial officials in line, reserved the right to remove them or even punish them for misconduct. Committing the criminal law to writing, therefore, served two reciprocal purposes. Not

[35] For an overview of the Ottoman regime of fines, see Heyd, *Studies*, 275–99.
[36] Halil Inalcık, "Suleiman the Lawgiver and Ottoman Law," *Achivum Ottomanıcum* 1 (1969): 105–38.

only did it put taxpaying subjects on notice that bad behavior would be sanctioned, but it also put military-administrative officials on notice that they too would be sanctioned for exceeding the terms of the criminal law. Ottoman rescripts of justice (*ʿadāletname*s), ordinarily sent out at the beginning of a new sultan's accession, affirmed the obligations of officials and announced that wronged subjects could send a petition (*ʿarż-ı ḥāl*) directly to the palace for redress.[37] Recorded episodes show that ordinary people took this option to raise complaint seriously.[38] Securing assent, at least as much as maintaining order, seems to have been a central concern of Ottoman public law.

Because domestic security underpinned the legitimacy of demanding taxes from the populace, criminal justice and fiscal efficiency were, for the Ottoman public legal regime, closely connected. It is not surprising, therefore, to find the oldest Ottoman general statute books containing both criminal and fiscal laws in a single document. By the beginning of the sixteenth century, the criminal provisions had become separated and elaborated into what, for all intents and purposes, become the criminal code of the Ottoman Empire.

The functional relationship between Ottoman criminal law and the criminal doctrines of Islamic jurisprudence exemplifies the sacred/secular tension in Islamic legal historiography. Scholars in general seem unsure what to make of this relationship. Uriel Heyd, in his classic study of Ottoman criminal law, regards the Ottoman example as the continuation of a long tradition of more or less dismissing Islamic criminal law as useless to secular affairs. He makes his position eminently clear from the book's opening

[37] Halil Inalcik, "Adâletnâmeler," *Belgeler* 2, no. 3–4 (1965): 49–142; Halil Inalcık, "Şikâyet hakkı: '*Arż-i ḥāl ve ʿarż-i maḥżar*'lar," *Osmanlı Araştırmaları* 7–8 (1988): 33–54.

[38] See, for example, Cornell H. Fleischer, "Of Gender and Servitude, ca. 1520: Two Petitions of the Kul Kızı of Bergama to Sultan Süleyman," in *Mélanges En l'honneur Du Prof. Dr. Suraiya Faroqhi*, ed. Abdeljelil Temimi (Tunis: Fondation Temimi pour la Recherche Scientifique et l'Information, 2009), 143–51..

sentence:

> The criminal law of the *sharīʿa*, as is well known, never had much practical importance in the lands of Islam. Its substantive law is rather deficient…. Moreover, its rules of evidence are so strict that a number of offences cannot be punished adequately. Since the very first centuries of Islam, therefore, criminal justice remained largely outside the jurisdiction of the cadis.[39]

On this account, the Islamic lawcourt (*maḥkama sharʿiyya*), because of its strictures and deficiencies, forced temporal rulers to create "extraordinary jurisdictions" in order to address the shortfall of justice by dispensing with the "rigid rules of the *sharīʿa* penal law and criminal procedure."[40] The most famous of these jurisdictions was the court of grievances (*maẓālim*), first instituted by the Abbasid caliphs, meant to address official malfeasance and other injustices that the "ordinary" lawcourts either lacked the resources to handle or were not legally competent to address.[41] Other such jurisdictions included, at various times and places, that of the market inspector (*muḥtasib*), the head of police (*ṣāḥib al-shurṭa*), and the criminal inspector (*wālī al-jarā'im*).

Over the years since Heyd's study, scholars have greatly refined our understanding of the constitutional dimensions of Islamic law and the roles of government officials with quasi-judicial functions.[42] Importantly, these contributions have walked back the common wisdom that the existence of jurisdictions apart from that of the traditional judge (*qāḍī*) was intrinsically repugnant to Islamic law. Whereas

---

[39] Heyd, *Studies*, 1.

[40] Heyd, 1.

[41] On the court of grievance in scholarship, see Mathieu Tillier, "The Mazalim in Historiography," in *The Oxford Handbook of Islamic Law*, ed. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018), 357–80.

[42] See, for example, Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfī* (Leiden: E.J. Brill, 1996); Mohammad Fadel, "Adjudication in the Mālikī *Madhhab*: A Study of Legal Process in Medieval Islamic Law" (PhD diss., University of Chicago, 1995); Kristen. Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2011).

previous scholars of Islamic judicial history were wont to call these jurisdictions "extraordinary"[43]—a description that in this context carries more the meaning of "extralegal," suggesting that such jurisdictions were ad hoc or otherwise outside of the ordinary bounds of the law—more recent scholarship on Islamic judicial practice seems to avoid this kind of language.[44]

Despite these advances, however, legal scholarship has adopted and continues to maintain a narrative about Islamic criminal law that, I argue in this dissertation, is substantially at odds with classical jurisprudence. It is now conventional to identify three categories of criminal offenses in Islamic law. The first category consists of a set of offenses that carry fixed penalties (*ḥudūd*). Jurists agreed upon four such offenses: illicit sexual relations (*zinā*), including both fornication and adultery; slander (*qadhf*), specifically meaning the false accusation of illicit sexual relations; theft (*sariqa*), defined generally as the taking something of significant value that is held under guard, as distinct from an act of conversion; and wine drinking (*shurb al-khamr*). Some jurists included three others under the heading of fixed crimes: brigandry (*qaṭʿal-ṭarīq* or *ḥirāba*), which in certain ways resembled a kind of premodern terrorism; apostasy (*ridda*); and blasphemy. These offenses all entailed capital punishment or corporal punishment in varying measures. What made these offenses "fixed" was not only that the quantum of punishment was set, but that the list of offenses could not be arbitrarily increased or decreased. Unique among offenses, these offenses were considered to be breaches of divinely mandated moral boundaries (the literal meaning of *ḥudūd*) and therefore violations of God's rights (*ḥuqūq Allāh*).[45] This entailed two

[43] See especially Émile Tyan, "Judicial Organization," in *Law in the Middle East*, ed. Majid Khadduri and Herbert J. Liebesny (Washington, DC: The Middle East Institute, 1955), 236–78; cf. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 2nd edition (Leiden: E. J. Brill, 1960).

[44] See, for example, Intisar A. Rabb and Abigail Krasner Balbale, eds., *Justice and Leadership in Early Islamic Courts* (Cambridge, MA: Islamic Legal Studies Program, 2017).

[45] On the moral boundaries of God, see Hina Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure* (New

things. First, when the offense was established, no private or public authority was permitted to derogate from its punishment. Second, the rules of evidence were generally commensurate with the severity of the offenses. Sanctions required a higher burden of proof and were defeated by the presence of any doubt (*shubha*).[46] In any case, because of their association with the fixed penalties, these offenses are generally called *ḤUDŪD* CRIMES.

The second category of criminal offenses concentrates on homicide and personal injury. The penalties for these offenses, depending on the level of severity and degree of intent, were governed by a version of the *lex talionis*, from which we get our word *retaliation*. Talionic punishment for homicide and injury could either be a quintessential in-kind retaliation (*qiṣāṣ* or *qawad*) or, for lesser forms of the offense, the payment monetary compensation (*diya*). Retaliation for a homicide would amount to capital punishment. For a permanent mutilation, retaliation would general involve the surgical removal of the same limb on the offender. In the scholarly literature today, these offenses are commonly called *QIṢĀṢ* CRIMES.

Finally, the third category comprised offenses that, because they did not fall into either the *ḥudūd* or *qiṣāṣ* categories, were subject to *taʿzīr*, a penalty of "censure" whose quantity and application fell to the discretion of the public authority with jurisdiction over the matter. This is something of a miscellaneous category, as jurists did enumerate neither the offenses that could be discretionarily punished nor the types of punishments that could be imposed. It may be gathered from the writings of jurists, how-

York: Cambridge University Press, 2015), 64–67

[46] On the matter of doubt in Islamic law, particularly with reference to the *ḥudūd*, see Intisar A. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law*, Cambridge Studies in Islamic Civilization (New York, NY: Cambridge University Press, 2015)..

ever, that they deemed a number of common punishments to be acceptable in principle, such as imprisonment, flogging, public scorn, and banishment.[47] Some jurists put down certain standards to limit the excessive exercise of discretion, such as by restricting punishments from exceeding the fixed penalties. At the same time, on matters of public concern, jurists also gave wide discretion to executive authorities to implement punitive policies (*siyāsa*), which at times could include the death penalty.[48] The offenses in this category are, given the discretionary nature of their penalties, referred to by scholars as *TAʿZĪR* CRIMES.

This three-part typology, to judge from recent scholarship, seems to have become the standard way of sorting out crimes in Islamic law.[49] No scholar claims that these categories are native to Islamic jurisprudence. Rudolph Peters, for examples, notes that "criminal law is not regarded as a single, unified branch" of Islamic jurisprudence, and that the purpose of the typology is therefore to pull together the various strands of criminal law found throughout the books of Muslim jurists.[50] In doing so, scholars may also be following the lead of prominent Muslim legal scholars, notably ʿAbd al-Qādir ʿAwda, whose comparative textbook on Islamic criminal law continues, since it was published in the 1950s, to be a common reference for law students in the Arab world.[51] ʿAwda was a prominent twentieth-century Egyptian civil lawyer who attempted to put Islamic criminal law into the language of his fellow Arab civil

[47] Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2005), 65–67.

[48] Peters, 67–8. Peters draws a conceptual distinction between *taʿzīr* and *siyāsa*, with the former referring to punishment for acts already prohibited by Islamic law and the latter to acts that the public authority independently punishes on grounds of maintaining public order. This hard distinction, however, is hazardous to make, and Peters does not cite where it comes from. Jurists, at least in the Hanafi school, referred to certain a policy-based punishments as being done as being carried out *taʿzīran* and *siyāsatan*. See, for example, Muḥammad Amīn b. ʿUmar Ibn ʿĀbidīn, *Radd al-muḥtār ʿalā al-Durr al-mukhtār*, 13 vols. (Riyadh: Dār ʿĀlam al-Kutub, 2003), 6:19.

[49] Peters, *Crime and Punishment*, 7; Rabb, *Doubt*, 30–7.

[50] Peters, *Crime and Punishment*, 7.

[51] ʿAbd al-Qādir ʿAwda, *al-Tashrīʿ al-jināʾī al-islāmī muqāranan bi-l-qānūn al-waḍʿī*, 2 vols. (Beirut: Dār al-Kitāb al-ʿArabī, n.d.).

lawyers (*qānūnīyyūn*). In his work, he proposes several lines along which to categorize Islamic criminal law, including the severity of punishment, whether the act is one of commission or omission, whether the act is intentional or unintentional, and whether the act is performed against an individual or a group of individuals. The punishment-based categorization is the same three-part typology that we have seen: *ḥudūd*, *qiṣāṣ*, and *taʿzīr*.[52]

ʿAwda's work, however, may not be taken as a restatement of classical law. ʿAwda himself is quite transparent in the introduction about his motivations and qualifications. His study is an attempt to make sense of Islamic criminal law, and his approach is not only comparative but also extremely polemical. ʿAwda assumes, like many European-influenced civil lawyers, that there exists a fundamental basic opposition between God's timeless law (*sharīʿa*) and man's contingent law (*qānūn waḍʿī*), and he sets out to demonstrate that the former possesses everything the latter has and more.[53] However, ʿAwda, by his own admission, comes to Islamic law as an intellectual and professional outsider. Although, he says, he had been an admirer of Islamic history, he began studying classical Islamic jurisprudence only in 1944, just a few years before writing the book. And although he stands in awe at the Islamic legal tradition, he also complains about the inconsistent and exhausting organization of Islamic jurisprudential works. ʿAwda all but admits that his project is a kind of treasure hunt for Islamic criminal law, whose purpose is to distill Islamic criminal law out of the mass of legal doctrines to be found in the books of

Not many Arab law school curricula are published online. One of them, belonging to King Abdulaziz University in Saudi Arabia, includes ʿAwda's work. See https://law.kau.edu.sa/Pages-course-desc.aspx (accessed March 28, 2019). My other information on this point is anecdotal. I am informed by Abdullah Alaoudh, a trained Saudi civil lawyer, that many Arab law schools do still assign ʿAwda's work. On another occasion, when I told an Egyptian legal scholar that I was working on homicide in Islamic law, he asked me whether I had read ʿAwda's work.

[52] ʿAwda, *al-Tashrīʿ al-jināʾī*, 1:78–83.

[53] See especially ʿAwda, 1:4–6.

the four Sunni schools rather than to elaborate Islamic criminal law as premodern jurists themselves did. My point is that identifying where criminal law resides in Islamic jurisprudence is very much at the heart of ʿAwda's work. His study, then, is in many ways of a piece with that of other modern scholars who stand looking at Islamic law from the outside in. The book is the product of a deep, intensive, and independent inquiry into Islamic jurisprudence. This in no way diminishes the work's value or importance; for if the product of a few years' independent study were grounds for dismissal, everything that follows here in this dissertation ought to be treated the way. My point is only that ʿAwda's work cannot be taken as modern articulation, by a classically trained scholar, of Islamic criminal law.

I am sympathetic to usefulness of putting Islamic law, for the sake of conceptual clarity, into terms that we use today. This dissertation carries the same spirit. In the case of Islamic criminal law, however, the three-part typology that scholars have adopted, far from a simple exercise in translating classical concepts, has more serious implications. Specifically, I argue that rebundling the proscribed acts that are found here and there in the books of jurisprudence into a unified category of "crime," on the grounds that they all entail consequences that look like punishment, amounts to a fundamental reconceptualization of Islamic criminal law. The fact that the doctrines for *ḥudūd*, *qiṣāṣ*, and *taʿzīr*, though certainly related, were consistently elaborated in separate chapters of jurisprudence, each with a very different set of rules, is prima facie evidence that Muslim jurists did not conceptualize these areas of law as being driven by a unified set of general principles.

As this review has tried to show, the key problem is that scholars, in homing in on punishment, have taken the outcome of the act (i.e., punishment) as a necessary and direct indicator of the nature of the act. If it looks like punishment, in other words, it is punishment; and if it the act punishment, the act is

a crime. This sort of know-it-when-I-see-it sense of what constitutes crime works for historiography on the social phenomena of violence, corruption, and other nefarious behavior.[54] In legal historiography, however, such a loose definition does not suffice. The upshot is that there remains considerable ambiguity about what distinguishes a crime in Islamic law from a noncrime. Instead, scholars continue to use the tentative language of "criminal matters," effectively papering over a whole area of jurisprudence.

Homicide illustrates this tentativeness well. While, on the one hand, scholars refer to homicide and personal injury as part of Islamic criminal law—perhaps because the lurid act of killing another human being is, for the ordinary modern observer, nothing if not a crime—they simultaneously recognize that homicide falls "somewhere between *ḥudūd* laws and torts."[55] Where exactly does it fall in between these two very different things? For his part, ʿAwda does not clarify things when he refers to the "crimes of retaliation and compensation" (*jarāʾim al-qiṣāṣ wa-l-diya*).[56] Beyond homicide and personal injury, does anything else fall into this category? Is death or injury caused by an unintentional act, as in the case of accidents, considered a crime? Does compensation constitute a "punishment" for these crimes?

The most thorough survey of the nature of homicide in Islamic law remains J. N. D. Anderson's excellent article, published almost seventy years ago. In this article, Anderson takes up the question whether homicide in Islamic law is a crime or a tort—that is, whether it is a criminal or civil wrong. In framing the question this way, however, Anderson all but ensures a tentative result. Why must homicide be a crime *or* a tort? As anyone familiar with the O. J. Simpson murder trial (1994–95) will know, a single

[54] See, for example, Fariba Zarinebaf, *Crime and Punishment in Istanbul, 1700–800* (Berkeley, CA: University of California Press, 2010).
[55] Rabb, *Doubt*, 34.
[56] ʿAwda, *al-Tashrīʿ al-jināʾī*, 1:244–48.

act of homicide can give rise to both criminal and civil actions, and these legal actions may have materially different, indeed wholly opposite, outcomes. Instead of considering this possibile duality, Anderson effectively assumes that homicide is a tort and then searches for points in the doctrine where "the concept of crime seems to be emerging."[57] This conclusion remains highly unsatisfactory. Since Anderson, some scholars have worked on the moral dimensions of Islamic homicide law.[58] However, we have come scarcely closer to full picture of homicide in Islamic law.

Summary of the Argument

This dissertation picks up the conversation more or less where Anderson left off. The driving question is effectively the same as his: what is the nature of homicide? On this question, I argue, in no uncertain terms, that Muslim jurists, in their works of legal science (*fiqh*), conceived homicide fundamentally as a civil wrong entailing civil liability. However, I push this conclusion one step further. I also argue that the sanctions customarily associated with homicide in Islamic law, including the penalty of retaliation, is a *civil* remedy, not a criminal one. Let me be unequivocal: I argue that even when someone chose to exercise the option of having someone executed for committing an intentional homicide, this was not, according to classical Islamic jurisprudence, a criminal penalty.

The rigorously civil nature of Islamic homicide law forcefully points toward an obvious set of questions: If homicide is a tort, can it *also* be a crime in Islamic law? If so, where in the conceptual framework Islamic law do we find this criminal dimension of homicide? Here I argue that, in the Islamic discursive

[57] J. N. D. Anderson, "Homicide in Islamic Law," *Bulletin of the School of Oriental and African Studies* 13, no. 4 (1951): 811–28 at 814.

[58] Paul R. Powers, "Offending Heaven and Earth: Sin and Expiation in Islamic Homicide Law," *Islamic Law and Society* 14, no. 1 (2007): 42–80; cf. Paul R. Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunnī Fiqh* (Leiden: E.J. Brill, 2006), chap. 6.

tradition, the criminal dimension of homicide—and the concept of criminal law in general—falls within the broad domain of *taʿzīr*. As mentioned above, *taʿzīr* (and its complement, *siyāsa*) is a general principle of discretionary public policy, granting the holder of political authority wide latitude to take action in the service of the polity's common good. With such discretion, temporal rulers could form offices and delegate powers, and these rulers and their delegates could also pursue and punish wrongdoers deemed to be a danger to the public. The idea of public political discretion, embedded in the twin notions of *taʿzīr* and *siyāsa*, therefore constitutes the juridical grounds for governments to criminalize and punish offensive behavior.

This argument may be put another way. Criminal law is politically contingent. I contend that, beyond a broad set of abstract principles, there is no such thing as "Islamic" criminal law. Criminal law is quintessentially a matter of public policy, and it can therefore only be spoken of concretely within the context of a particular polity's legal system. Consider by comparison the common-law tradition, which, though originating in Britain, is now represented by the independent legal systems of the United States, Canada, India, Australia, and the other former colonies and dependencies of the British Empire. The shared legal tradition of these countries means that these countries will likely have certain superficial similarities in their criminal jurisprudence. However, just a little below the surface, the criminal law of each legal system differs widely. Indeed, within the United States alone, because of the country's peculiar legal history, criminal codes vary considerably from one state to the next. The criminal law consists in what each independent sovereign political entity deems fit to be proscribed and punished. The grounds on which the polity decides to do so may be either moral or prudential. Homicide, it is safe to say, is nearly universally considered to be immoral. Things like counterfeiting, though perhaps in some

way immoral because of its dishonesty, may more likely be prohibited because of the practical harm they cause. In either case, however, both homicide and counterfeiting only become *criminal* when the officials of the legal system designate it as such, and legal systems will likely varies in what punishments they desire and have the means to impose. It can therefore be studied with any measure of detail at the level of the legal system. For the same reason that it is more precise to speak of English, Indian, or American criminal law than of common-law criminal law, it is more accurate, I argue, to speak of criminal law in the Abbasid, Mamluk, or Ottoman legal systems, or perhaps even of the criminal law of one of their subregions to the extent that that locality had some degree of political autonomy.

For homicide, then, the civil and criminal components derive from different sources. While the traditional discourse of Islamic legal science provides for the civil doctrine of homicide, as well as the general grounds for discretionary public policy, the concrete substance of criminal homicide resides in the policies of each legal system. Because criminal law is susceptible to variation from one polity to another, a satisfactory illustration of my thesis must come through an examination of a particular Islamic polity. I have chosen to focus my attention on the Ottoman Empire. In principle, this study could be conducted on any Islamic polity. However, Ottoman law is rare among Islamic legal systems. It presents for the legal historian both a body of Islamic jurisprudence and a body of written statutory law, as well as a wealth of legal documentation.

This dissertation does not attempt on its own to outline a complete general theory of criminal law in Islamic jurisprudence. That is a much bigger project. However, it does seek to add some refinement to what constitutes a "criminal matter" in Islamic jurisprudence. Previous scholarship generally ignored the political dimension of criminal law. By examining both civil and political jurisprudence, I seek in

this study to correct this oversight and present a model for future studies in Islamic criminal law.

NOTES ON METHODOLOGY: TRANSLATING ISLAMIC LAW

One of the recurring debates in Islamic legal studies, particularly among those who work on Ottoman law, is the relationship between *sharīʿa* and *qānūn*. I wish to leave my full reflections on this point till the conclusion, as they will make better sense after I have presented the evidence on which my own position rests. What will be more fitting here is to discuss what I mean by "Islamic law"—or, to put it more pointedly, what I think should be meant by this term.

Generally speaking, I use "Islamic law" and "Islamic jurisprudence," more or less interchangeably, to cover the full breadth of Islamic legal principles, doctrines, and rules. Using these terms, rather than *sharīʿa* or *fiqh*, provides an uncomplicated (and unitalicized) way of rendering a foreign legal tradition into familiar English words. But, more importantly, using these terms highlights confusion, and therefore demands clarification, about what exactly we are talking about when we talk about Islamic law. The following, therefore, is not a self-indulgent exercise in nomenclature. One of the aims of this dissertation, as I hope gradually becomes clear, is to crystalize the full scope of Islamic law.

To begin with, using "law" and "jurisprudence" interchangeably (or nearly interchangeably) is not slipshod usage. In the Anglo-American legal tradition,[59] the words *law* and *jurisprudence* overlap considerably with each other, and on their own these terms are subject to the ordinary ambiguity of language. *Law* may denote related but substantially different things: the general political system that orders

[59] I suppose I could make a similar statement for the Continental tradition as well. But because Continental law was has been mediated in multiple languages, I do not want to risk generalizations that apply specifically to the anglophone tradition of law.

human activities; a single legislated statute; the aggregate of legislation, judicial precedents, and accepted legal principles; the doctrines of a specific area of a legal system; and a profession.[60] For each of these meanings, respectively, we say that people obey the law, legislatures pass a law, courts apply the law of the land, legal scholars may specialize in tort law, and attorneys practice law. Many people easily sort out these various shades of meaning within their home legal culture. Many educated Americans know, for example, that the federal Constitution is "the law" but that the concrete rules derived from it are neither self-evident nor absolute.[61] Few people find this tension troubling.

Similarly, *jurisprudence* in Western legal culture has multiple senses. One the one hand, it is high-mindedly concerned with theories about the nature of law rather than the more concrete rules of its application. Jurisprudence, as Richard Posner has bitingly put it, "addresses the questions about law that an intelligent layperson of speculative bent—not a lawyer—might find interesting. What is law? … Where does it come from? … What is the purpose of law? … A practicing lawyer or a judge is apt to think questions of this sort at best irrelevant to what he does, at worse naive, impractical, even childlike."[62] At the same time, *jurisprudence* commonly refers to a system, body, or division of law, and also to judicial precedents considered collectively.[63] One may say, therefore, that American jurisprudence retains formal prohibitions against adultery even when it does not implement them, or that Judge So-and-so's criminal jurisprudence tends to be harsh on repeat offenders. Again, for those at home in their legal

[60] The language used here is partly paraphrased and partly taken directly from the entry in *Black's Law Dictionary*, but I have left out quotations marks to avoid clutter. For a full list of meanings, with updated examples drawn from the writings of legal scholars, see *Black's Law Dictionary*, 10th ed., s.v. "law."

[61] Many people, however, do not know the difference. This discrepancy between common and technical knowledge opens to door, for good or ill, to rhetorical exploitation. For example, when someone stands up waving the US Constitution and saying "The Constitution is the law of the land," that is only half true. In fact, most American jurists would say that constitutional law, though embodied in the Constitution, in fact consists in the decisions of the Supreme Court.

[62] Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990), 1.

[63] *Black's Law Dictionary*, 10th ed., s.v. "jurisprudence."

culture, especially those with some background in law, these usages usually do not pose a problem.

When we turn out attention to Islamic law, challenges of translation arise that, I argue, are more serious than many perceive them to be. We can assume that historical inhabitants of Islamic legal culture intuitively sorted out the various meanings of words like *sharīʿa*, *fiqh*, and *qānūn*. The *sharīʿa*, like the "law," could refer both to the specific rules and to the general aspiration of those rules. The same intuitive sense may persist now. However, the continuity of the Islamic legal tradition has been disrupted—some might argue broken—by the hegemony of Western legal models, and one may rightly question whether anyone's home legal culture today may be called Islamic. The debate among scholars is ongoing about whether Islamic law and Western modernity may coherently coexist.[64] In any case, the commonly felt sense that law and jurisprudence in the modern Islamic world are not now as they were in the past throws the meanings of words like *sharīʿa*, *fiqh*, and *qānūn* into confusion even among Islamic legal experts, let alone among legal scholars generally. Many nations in the Muslim world, for example, have written Islamic "supremacy clauses" into their constitutions, which prohibit the passing of laws that are repugnancy to the *sharīʿa*.[65] What does this mean?

If these native terms themselves are variously apprehended, then certainly their translation into neat and easily apprehended terms—like "Islamic law" and "Islamic jurisprudence"—is fraught with hazards. For a long time, the *sharīʿa* has been thought of as "jurists' law," an academic production "created by independent legal experts" called *fuqahāʾ*, and the discipline by which they articulated this law was called *fiqh*. In a frequently cited article, Aharon Layish argues that the modern Muslim world's legal

[64] See, notably, Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2012).

[65] Dawood I. Ahmed and Tom Ginsburg, "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions," *Virginia Journal of International Law* 54 (2013): 1–83.

coming-of-age consisted in the *sharīʿa*'s transformation "from jurists' law to statutory law."[66]

What is problematic about Layish's formulation is its severe presentism. It ignores parallel modern developments in global legal culture. Calling Islamic law jurists' law is not at all incorrect. What is wrong is to say that Islamic law was uniquely a jurists' law.[67] The Continental legal tradition, at least in its one-time guise, is jurists' law *par excellence*. Jurists' law—or *Juristenrecht*, as notable German scholars have called it—developed in Continental Europe "due to the effort of legal experts who have no place in the hierarchy of state officials, as was the case with the case with jurists of classical Rome and the commentators of medieval Italy."[68] The medieval tradition of the European glossators and commentators bears a striking resemblance to the same tradition cultivated by their contemporaries in the Islamic world.[69] The common law of the Anglo-American tradition too, though often characterized as judge-made law, historically relied on the contributions of jurists. Through the writing of treatises, British and American jurists sought both to address law as an academic discipline and to assist practitioners in determining good law from bad law.[70] Until being supplanted by caselaw in the early twentieth century, theses treatises also continued to be one of the main vehicles of legal education in the United States.

In similar fashion, Layish is not wrong in identifying expansive statutory activity with modern law. Where his description of Islamic law misleads is to suggest that this trend was unique to the Islamic world. The scarcity of sovereign promulgations in the premodern Islamic world is commonly taken as

[66] Aharon Layish, "The Transformation of the *Sharīʿa* from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt Des Islams* 44, no. 1 (2004): 85–113.
[67] I do not claim that Islamic legal scholars have been unaware of other traditions of jurists' law. However, I have not come across anyone who draws this reasonable comparison, which would thus
[68] A. Arthur Schiller, "Jurists' Law," *Columbia Law Review* 58, no. 8 (1958): 1226–38 at 1226.
[69] O. F. Robinson, T. D. Fergus, and William M. Gordon, *European Legal History: Sources and Institutions*, 3rd ed. (London: Butterworths, 2000), chaps. 3–4.
[70] Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (New York: Oxford University Press, 2004), 245.

evidence that rules not deriving from scriptural interpretation or juristic deliberation were fundamentally at odds with the *sharīʿa*. According to this narrative, in other words, Muslim jurists did not permit rulers to legislate because God alone made laws and men could only discover them.[71] This dissertation aims in part to show that this narrative is incoherent. On its face, though, it relies on the presumption that parallel attitudes about the source of law did not exist in Europe. The West's longstanding tradition of natural law, in both legal theory and practice,[72] points to a metaphysical underpinning to Western law. Furthermore, the investment of positive legal authority in the legislature, above all other branches of government, emerged in Europe only in the eighteenth century. Before then, legislatures were not popular assemblies and were nowhere nearly as active as they would be come and as they are today. The doctrine of popular legislative supremacy that emerged during the French Revolution, for example, was in great part a reaction to unbridled judicial power, or *gouvernement de juges*, a formula coined by later French jurist Edouard Lambert.[73] And the founders of the United States, who were products of the same moment, implemented the same principle when mapping out their new government.

From the outset of this study, then, I seek to shed this terminological baggage. The situation is such that scholars still find it necessary to explain exactly what *sharīʿa* and *fiqh* mean, where they overlap and diverse, and whether English substitutes can do an adequate job.[74] Because the English terminology of Islamic legal studies has not arrived a solid, uniform convention, this dissertation seeks in part to

[71] SCHACHT SOMEWHERE.

[72] Natural law was long thought to be the preserve of Continental lawyers and found in England only among university-trained jurists, not among the common-law lawyers who staffed the judiciary. Against this view, however, see R. H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambrige, Massachusetts: Harvard University Press, 2015).

[73] MERRYMAN CIVIL LAW. Cf. Marie Seong-Hak Kim, "'Gouvernement Des Judges' Ou 'Juges Du Gouvernement'? Revolutionary Traditions and Judicial Independence in France," *Korean Journal of International and Comparative Law* 26 (1998): 1–42.

[74] See, for example, Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Lanham, MD: Rowman & Littlefield, 2014), introduction.

develop an expanded and coherent set of terms for talking about the various parts of what we call "Islamic law" or "Islamic jurisprudence." The following usages are what I propose and what I will use in this dissertation.

Islamic Law & Islamic Jurisprudence (*Sharīʿa*)

Generally, when I speak of "Islamic law" or "Islamic jurisprudence" without qualification, I refer in some way to the *SHARĪʿA*. By *sharīʿa*, in turn, I refer to the whole, undifferentiated field of Islamic legal discourse without reference to any of its technical particularities. This evokes the sense of "obeying the law" mentioned above, which refers to a general disposition of compliance rather than actual compliance with a specific rule. Therefore, anything of even remotest concern for Muslim jurists—whether how to pray, how to treat your spouse, how to adjudicate a case in court, or how to collect taxes—falls into the vast domain of the *sharīʿa* and therefore into ISLAMIC LAW.[75] "Islamic law" includes, importantly, both matters of private conscience and matters of political or otherwise public interest. The actual discourse of jurists, by contrast, is what I typically mean when I speak of ISLAMIC JURISPRUDENCE. This discourse has multiple components, which break down as follows.

Islamic Legal Science (*Fiqh*)

Fiqh is often rendered as "jurisprudence," and the experts known as *fuqahāʾ* are usually referred to as "jurists" or, less often, "lawyers." I have no problem with the latter, as both are simple descriptors for

[75] The *conceptual* unboundedness of *sharīʿa* does not necessarily entail the *jurisdictional* boundedness of *sharīʿa*. Therefore, my usage here does not seek to challenge Sherman Jackson's notion of the "Islamic secular." With this term, Jackson argues that the *sharīʿa* is limited in practical scope, in that certain areas of human activity are not covered by explicitly prescribed rules. At the same time, Jackson also argues that no human activity, even when the *sharīʿa* is silent on it, falls outside of the "adjudicative gaze" of God. See Sherman A. Jackson, "The Islamic Secular," *American Journal of Islamic Social Sciences* 34, no. 2 (2017): 1–31. It is the latter sense in which, according to my usage, the *sharīʿa* covers the full field of human life. I discuss the matter of Islamic legal jurisdiction, as it specifically relates to homicide, in Chapter 6.

those who are trained in law and jurisprudence. However, given the breadth of the term *jurisprudence*—referring, as we have discussed, to both academic inquiry and the concrete opinions of jurists—it does not satisfactorily describe *fiqh* and therefore needs to be refined. *Fiqh* refers to the technical discipline of deriving concrete rules through the application of broad principles to specific cases and questions. Given that its primary mode of communication was the legal commentary (*sharḥ*), this discipline also resembles its counterpart in medieval Europe. For these reasons, I prefer to call *fiqh* LEGAL SCIENCE. So termed, *fiqh* corresponds fairly neatly to medieval European *scientia juris* or, among later German legal scholars, *Rechtswissenschaft*.[76]

The conceptual content of legal science, particularly when it is in written form, is known as LEGAL DOCTRINE. The term *legal doctrine* has not been used uniformly across place and time. But what makes legal doctrines "doctrinal" is that they are fleshed out by learned experts in such a manner as to be studied studied by other experts and taught to students. In Anglo-American contexts, legal doctrines usually refer to broadly applicable principles or conceptual frameworks of law.[77] For example, a statute of limitations, as a concept, is a doctrine barring the hearing of claims that are not brought forth in a timely fashion. But it is in treatise-like judicial opinions that the operation of this and other doctrines are elaborated. In the more transparently scholastic setting of Continental law, legal doctrine refers to the written productions of jurists. Islamic legal doctrine refers to the same thing and therefore includes all scholarly writings on law by Muslim jurists, whether in the form of a short treatise, a long commentary, or a single legal opinion. This would exclude, for example, poetry written by a jurist. More importantly,

[76] For an accessible and recent introduction to legal science, see Aleksander Peczenik, *Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law*, vol. 4, A Treatise of Legal Philosophy and General Jurisprudence (Dordrecht: Springer, 2005).
[77] *Black's Law Dictionary*, 10th ed., s.v. "doctrine."

it would also exclude judicial records, which, as a general rule, did not constitute a binding precedent.

Islamic legal science, as many familiar with *fiqh* will know, was formally divided into two parts, the *furūʿ* ("branches") and the *uṣūl* ("roots"). The *furūʿ al-fiqh* comprised the specific rules, standards, and standards on any given issue of law.[78] Many scholars term these "positive law." I suspect that this grows from the notion, mentioned above, that Muslim jurists discovered God's law. Positive law, however, is today always understood as rules established or enacted by human legal institutions. Positive law in any given time and place is usually clear and univocal; in other words, *X* cannot be simultaneously legal and illegal. Given the multivocality of Islamic legal science, consisting as it does of numerous conflicting opinions, it is hard to say that the *furūʿ* as a class constitute positive law. For the same reason, the legal opinions (*fatāwā*, sg. *fatwā*) of jurisconsults (*muftī*s) that made up part of the body of *furūʿ* are similarly not positive law.[79] A legal opinion may become positive law if it is specified by someone with public legal authority. But when not so specified, the total body of *furūʿ* is not positive law. My preference is to refer to it instead as SUBSTANTIVE LAW.

The *uṣūl al-fiqh*, by contrast to the *furūʿ*, made up the subdiscipline of HERMENEUTIC LEGAL THEORY. Although the substantive law of the formative jurists rested on theoretical principles,[80] the theoretical discipline known as *uṣūl*, it has been shown, reached its maturity later, sometime around the four or

[78] Rules, standards, and principles are different types of legal norms. They denote, in order, a descending degree of constraint that the legal norm imposes; or, put differently, in the clarity or "brightness" of the line that a norm draws between two things. To say, for example, that one must be an "adult" to drive a car, where an adult is defined as someone over sixteen, is to express a rule. Conversely, a standard would be to say that one must be "reasonably capable and mature" to drive a car, leaving more room for discretion. A principle, even more generally, might be to say that people in a society have the right to use the roadways to move about freely. On the difference between these terms, see FIX FIX FIX Lawrence B. Solum, "Legal Theory Lexicon: Rules, Standards, Principles." *Legal Theory Blog*. https://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-rules-standards-and-principles.html (accessed March 22, 2019).

[79] Wael B. Hallaq, "From *Fatwās* to *Furūʿ*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society* 1, no. 1 (1994): 29–65.

[80] Umar F. Abd-Allah, *Mālik and Medina: Islamic Legal Reasoning in the Formative Period* (Leiden: Brill, 2013), 507–16.

fifth Islamic century. This discipline's hallmark is its commitment to linguistic formalism, whereby words and phrases found in authoritative texts (*nuṣūṣ*) are interpreted as yielding consistent meanings.[81] The discipline of *uṣūl*, in its typical medieval guise, is in many ways more a hermeneutic science resembling exegesis than legal theory as such. This is why I qualify it as "hermeneutic" legal theory. Even though hermeneutic legal theory purports to explain the basis of a given legal norm, such explanations, given the discipline's latter-day emergence, can seem post hoc. This in no way diminishes the legitimacy or the historical significance of this discipline on Islamic legal science.[82] But it does mean that there is no *necessary* connection between hermeneutic explanations and the bases of the legal norms themselves. Throughout the history of Hanafi school, Hanafi jurists drew on the ancient stock of the founding jurists' opinions, and they developed a hierarchy of authority between those opinions. In the books of substantive law, furthermore, the reasoning for a given opinion is often put in terms of logic rather than linguistics. And when later jurists had to depart from a preferred opinion for some reason, they did so by invoking a pragmatically grounded principle such as equity (*istiḥsān*).[83] The key point for this dissertation is that the substantive law may be studied on its own terms without necessary reference to the scholastic analyses of hermeneutic legal theorists.

Islamic substantive law was traditionally divided into two further parts: devotional law and civil law.

[81] For example, take the verse commanding ablution, which lists the limbs to be washed before prayer. Hanafis *uṣūlī*s interpreted the word *wa* (meaning 'and') as being non-ordinal. In other words, the verse only mandated which limbs were to be washed without also mandating that they be washed in the order listed. [Get source for this.]

[82] For perhaps the most penetrating study in English of Islamic legal hermeneutics, see Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta, GA: Lockwood Press, 2013).

[83] See, for example, Mohammad Fadel, "'*Istiḥsān* Is Nine-Tenths of the Law': The Puzzling Relationship of *Uṣūl* to *Furū*' in the Mālikī *Madhhab*," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: E. J. Brill, 2002), 161–76.

This division was both conceptual, in that each branch differed in certain broad principles, and doctrinal, in the they were formally separated in the books of substantive law. DEVOTIONAL LAW (*ʿIBĀDĀT*) consists of the rules governing the relationship between God and the believer and therefore is more or less synonymous with such ritual matters as prayer, fasting, and almsgiving. The chapters on devotional law are customarily placed before those on civil law.

Islamic CIVIL LAW is sometimes also called "interpersonal law" because the Arabic term by which it is called (*MUʿĀMALĀT*) denotes the interactions between human beings in an organized society and the legal issues that arise because of those interactions. The term *civil law* does the same work and is also more familiar.

Because it covers the vast majority of human activity, Islamic civil law is, by volume, the greatest part of the written legal doctrine. Anything involving the transfer of property falls under civil. This includes both actual property (e.g., tangible things like goods and real estate) and constructive property (e.g., rights and obligations). The chapter on sale (*buyūʿ*) is therefore a major part of Islamic civil law doctrine, and it has numerous subchapters that take up a big proportion of most legal treatises. Rules about constructive property concern the exchange of rights and benefits rather than physical things. For example, the chapter on leasing (*ijāra*), which includes the hiring of both goods and services, involves the exchange of an intangible benefit (like the use of a home or someone's physical labor) for something tangible (money). Following the same logic, the contract of marriage is metaphorically conceived as an exchange involving both non-tangible and tangible property, namely, spousal services and material and emotional support. Other chapters discuss injury to property. This includes conversion of

(*ghaṣb*) and injury against (*jināya*) one's physical property. The same logic of property damage also extends to bodily harm and homicide, both of which are a form of injury (*jināya*).

When referring to specific areas of Islamic civil law, I will refer to them, of course, as "law" but with the appropriate qualifier. Most saliently, I will speak frequently in this dissertation of Islamic "homicide law" and "injury law."

Public Law & Political Jurisprudence

Classical Islamic jurisprudence, to my knowledge, had no such category with a formal designation that corresponds to *public law*, which makes my use of the term somewhat hypothetical. The absence of the designation, however, does not mean that jurists did not recognize a sphere of interest and activity concerning the commonalty (*ʿawāmm*) as a whole that was distinguished from the interests and activities of the polity's individual members. From an early period, then, a number of jurists concerned themselves with the nature of public authority (*wilāya*), which lay at the heart of sovereignty and political power. This public authority was legitimate and necessary: it enabled a range of officials—judges, magistrates, military officers, sultans, and caliphs—to form and leverage the apparatus of government in order to deliver benefits, such as food and security, that private individuals or groups of individuals could not reliably deliver themselves. Because it often involved the use of various degrees of force, public authority was also subject to abuse. Muslim jurists were aware of this inherent tension and that this sphere of officialdom needed to be duly addressed. Most jurists, however, were not public officials. Nevertheless, jurists as a class, like jurists in many traditions (including law professors today), constituted a powerful profession that exerted persuasive authority and produced most of those who occupied the judiciary and many of those who occupied other positions in government. There emerged, therefore, an

important body of specialized legal writing related to matters of public authority. This writing was not as heavily populated, and therefore not as finely articulated, as treatises on Islamic civil jurisprudence. But, over time, two primary genres emerged.

The first genre addressed the nature of sovereignty and the practical powers of the sovereign to mediate among subjects and between subjects and officials. These are matters today usually filed under the heading of constitutional law. The academic discipline that discusses how governmental authority is constituted, however, is called POLITICAL JURISPRUDENCE (*AḤKĀM SULṬĀNIYYA* | *SIYĀSA SHARʿIYYA*) and, in the Western tradition, has been variously called *jus politicum*, *droit public*, and the *science of political right*.[84] I apply the same disciplinary term to the writings of Muslim political jurists.

The basic investigation undertaken by Hobbes, Locke, Montesquieu, and other Enlightenment writers has formed the theoretical basis for the sovereignty and public authority in modern systems of government. In similar fashion, the questions that al-Māwardī, Ibn Taymiyya, Ibn al-Qayyim, and Dede Efendi address in their respective treatises are indispensable for understanding how the same general political principles operated in premodern Islamicate governments. What legitimate discretionary action could the sovereign take in the interest of the public good when the public need was violated or otherwise unmet? Did the sovereign have any say in determining what the public good actually was? Did the sovereign's discretion extend only to military defense and collection of taxes or to internal affairs as well? Could the sovereign, for example, create (i.e., legislate) rules not specifically found in the civil law but in furtherance of interests embodied by the jurists' civil law? For example, could the sover-

[84] Martin Loughlin, "Political Jurisprudence," *Jus Politicum* 16 (2016): 15–32 at 16.

eign prohibit certain such kinds of behavior and implement such sanctions as are not expressly prescribed by the civil law? Such issues were the substance of Islamic political jurisprudence. Like its later Western counterpart, the works in this classical Islamic discipline were somewhat amorphous and fell under different headings. Yet they all attended to a set of related issues.

The second genre was ADJUDICATION (*QAḌĀ'*). Often found under the heading *adab al-qāḍī*, it is sometimes translated by scholars as the "etiquettes" of the judge, but it is far more soundly referred to as the "discipline" of adjudication. This genre, on the one hand, addressed the concern of judicial comportment and corruption. Judicial manuals laid down certain ethical canons on how to hold court and how to conduct one's social interactions so as not to project an image of impartiality. But the significance of these works went far deeper than simply judges to behave. These works also articulated the theoretical basis for the judge's jurisdiction, which constituted the judges' specific kind of political authority (*wilāya*). This political authority was the very foundation on which holding went from an ordinary legal opinion to a judicial decision that materially affected people's lives. How did one acquire such jurisdiction? Was it limited, or could it be limited, by subject matter or by territory? Such questions were the stuff of the manuals on adjudication.

Coming to Terms with Islamic Law

The purpose of this terminological exposition is twofold. The first is simply practical. I will deploy this the terminology outlined here throughout this dissertation, and I wish readers to know specifically what I am talking about.

The second reason goes to the heart of this dissertation's argument. When scholars speak of "Islamic" law and "Islamic" legal doctrine, they often refer exclusively to what I am calling Islamic civil law.

The looseness in standard scholarly terminology is, on the one hand, understandable. Islamic civil law, as I have said, constitutes the great bulk of legal thought and therefore the great bulk of written legal material available for scholars to study. It is reasonable for Islamic legal scholars, then, to say "Islamic law" and expect other experts to know what they are referring to. However, we have seen with "jurists' law" that imprecise nomenclature has unwittingly led to misapprehension about what Islamic law historically was and was not. I argue here that using "Islamic law" as synonym for "Islamic civil law" constitutes, or at least leads to, a similar misapprehension among modern scholars of Islamic law. The implications of this misapprehension, I argue, are significant.

In identifying Islamic law (*sharīʿa*) with Islamic civil law (*fiqh*), if only implicitly, scholars have succeeded in marginalizing Islamic public law. To be clear, no scholar to my knowledge has ever said that the disciplines of political jurisprudence and adjudication are not Islamic. However, there is a widespread tendency in legal scholarship to view the business of jurists as cosmically at odds with the business of public officials.[85] As the typical narrative suggests, jurists, as keepers of Islamic law, were bound to participate in the profane affairs of state only so far as was necessary to preserve the integrity of the the law. This seems to be why, for example, many jurists were reported to speak in the severest terms against serving as a judge or in the ruler's court, unless truly compelled by circumstance, even reporting statements of the Prophet containing the same admonition. This interpretation of the classical attitudes toward public service, however, is off the mark. It misapprehends the natural tension between power of jurists and power of rules as suggesting that the former is legitimate while the latter is not. Moreover,

[85] For a brief overview of the scholarship in this vein, see Mariam Sheibani, Amir Toft, and Ahmed El Shamsy, "The Classical Period: Scripture, Origins, and Early Development," in *The Oxford Handbook of Islamic Law*, ed. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018), 403–36 at 417–18.

this interpretation ignores that identical apprehensions exist in other jurisprudential traditions about the tendency of executive power to oversteps its legitimate bounds.

In any case, because Islamic public law has been generally marginalized, the totality of "Islamic" law is seen to reside within the four corners of Islamic civil doctrine. I argue, therefore, that scholars have searched, and continue to search, for all matters of Islamic law, including criminal ones, within the doctrines that Muslim jurists classified as civil, that is, those governing the relationships among people rather than the relationship between people and the sovereign. However, criminal law—if we adopt, as I do, the meaning universally accepted today—requires the involvement of a public actor to be criminal law. For the general principles governing the authority of such public actors, we must turn to the public law literature.

To put the argument more bluntly, scholars have been looking for Islamic criminal law in the wrong place. This dissertation argues in favor of expanding the analytical scope of "Islamic law" to include both civil and public law. This requires regarding as part of the the Islamic legal tradition writ large such literature as is typically considered to fall within the discipline of political thought. Much of this political thought has a legal edge, and indeed a fair portion of it was written by jurists. Adding this "political jurisprudence" jurisprudence to the mix, as it were, will therefore afford us a fuller, if now more complex, picture of the Islamic law's full doctrinal range. For Islamic political jurisprudence is both separate from and intimately tied together with Islamic civil jurisprudence. In turn, this more accurately defined scope of Islamic law will allows us to formulate a more coherent narrative of Islamic criminal law in both its general principles and its specific forms.

I seek to illustrate this broader definition of "Islamic" law through homicide. Most of homicide law,

as the forthcoming chapters will show, resides in the books of Islamic civil jurisprudence. As some scholarly have uneasily pointed out, these rules are predominantly civil in nature. To make sense of the criminal dimension of homicide in Islamic law, such as it was, we must turn both to the works of public jurisprudence and to the concrete acts of public officials.

NOTES ON METHODOLOGY: LAW AND POLITICAL CONTINGENCY

My apparent claim that homicide is not a crime in Islamic law, and that retaliation is not a punishment, is made with some provocation in mind. But the claim is no cheap trick. In making this argument, I seek to show that the equivocation about homicide in the scholarship, as discussed above, arises from a general lack of clarity around two questions. First, what exactly do we mean, within our own modern legal discourse, when we deploy the terms *crime* and *punishment*? Second, if we adopt these terms, along with their modern meanings, to talk about Islamic law, where exactly is the location of *criminal law* in Islamic jurisprudence?

The tentativeness about whether homicide is a crime or a tort exists, I argue, because scholars usually start from appearances—the result of the act (a dead body) and the remedy (retaliation or compensation)—and work backward toward conclusions about the law. This approach is a misordering of operations. It begins with the resemblance between one remedy of homicide—retaliation—to what we, in our ordinary experience, associate with punishment. This superficial resemblance, however, masks a fundamental difference: Homicide in Islamic legal science is classified as a species of personal injury, governed by the same general principles of private interest that govern injury to property and breach of contract. Homicide in modern legal systems, by contrast, is a kind of public injury, governed

accordingly by general principles of public interest and by rules that the government sets in furtherance of those principles. To shoehorn the Islamic doctrines of homicide into the category of crime, therefore, does some violence to classical expositions of Islamic legal principles. Doing so reinscribes those principles within the a framework of public law as understood today, without considering whether jurists themselves considered them in the same way.

This dissertation therefore seeks, as much as possible, to work forward rather than backward. I examine the doctrines of Islamic homicide law, offering my own interpretive analysis while trying not read alien principles of criminal liability where there are none—that is, without looking for an "emergent" idea of crime and punishment. Furthermore, to keep concepts like crime and punishment in order, I draw regularly on comparative insights from modern legal scholarship, particularly Anglo-American legal scholarship.

In its substantive claims, then, this dissertation attempts to avoid similar confusion by bearing certain methodological considerations in mind. These considerations were embedded in the summary of the argument above, but I wish briefly to make them explicit here.

Political Contingency

Islamic legal historiography, it seems somewhat redundant to say, has always borne historical contingency in mind. Not only how law operated in the past, but also how that operation did or did not change, is something that any legal historian is sensitive to. However, although Islamic legal scholars have discussed contingency in Islamic law in one way or another,[86] these discussions have generally concentrated on the social, and less often on the political, dimensions of legal doctrine. In other words, studies

[86] Perhaps the best representation of scholarship on Islamic legal contingency, though certainly not the only, may be found

on contingency have generally limited themselves to how Islamic law accommodated and reflected variations in social structure but not to how or whether it managed to the same with various arrangements of governmental institutions.

An important step in this direction was taken many years ago by Baber Johansen. In examining how the Islamic regime of divine and personal rights (*ḥuqūq Allāh* and *ḥuqūq al-ʿibād*) furnished a framework for drawing and imposing limits on governmental authority, he pointed up the potential that Islamic jurisprudence possessed, even as a "sacred" law, could embrace different political expressions of law. However, Islamic law remained a closed system of law, fundamentally characterized by socioeconomic, but not political, factors. Within this system, each school of jurisprudence was marked by the social milieu in which it grew up. The Hanafi school, for instance, reflected the concerns of merchants, artisans, and other urban types.[87] Notably absent from the discussion of Islamic law's limits on government, however, is any serious discussion on the actual structure of government. Although a number of scholars have further discussed the implication of divine and personal rights, few have identified the political contingency that is embedded in that regime.

To address this lacuna, this dissertation accounts for the politically contingent nature of Islamic law. Specifically, I show that law generally, including Islamic law, is a function of not only the substantive and procedural rules elaborated by jurists, but also the jurisdictional environment in which it operates.

---

in Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: E. J. Brill, 1999), a collection of essays. Another notable study on change in Islamic legal doctrine is Wael B. Hallaq, "From *Fatwās* to *Furūʿ*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society* 1, no. 1 (1994): 29–65.

[87] See, for example, Baber Johansen, "The Claims of Men and the Claims of God: The Limits of Government Authority in Hanafite Law," *Pluriformiteit En Verdelin van de Macht in Het Midden-Oosten, Middenoosten En de Islam-Publicatie* 4 (1980): 60–104. Cf. Baber Johansen, "Urban Structures in the View of Muslim Jurists," *Revue Des Mondes Musulmans et de La Méditerranée* 55–56, no. 1–2 (1990): 94–100.

Jurisdiction in Islamic jurisprudence, or *wilāya*, is a frequently overlooked concept. Yet it is this concept that in many ways linked the rules on the books to the political institutions that implemented them. Furthermore, because jurisdiction varied considerably from Islamic polity to Islamic polity, bringing it into view encourages us to zoom in on the way Islamic law operated in those various environments.

Legal System versus Legal Tradition

Accounting for the political contingency of law forces us, therefore, to avoid viewing Islamic law as a closed system of jurisprudence. Against this view, this dissertation contends that Islamic law was a tradition of legal thought that got instantiated over time in a variety of legal systems that shared an obvious Islamic kinship but were distinguished by the institutional and other political factors. What distinguished one legal system from another was not only the salience of this or that body of rules or this or that school of law but also the structure of the local governing authority. In its assignment of jurisdictions and public offices, the public authority often embodied the locality's political customs, but it also adopted and implemented policies that were geared either toward its own preservation or, less cynically, toward the pressing needs of polity.

It is to make this point—that Islamic law embraced a plurality of legal systems—that this dissertation does not stop at studying homicide in "Islamic jurisprudence" alone. Instead, I study homicide in both Islamic jurisprudence *and* Ottoman law. My focus on Ottoman law, therefore, serves more than to make the scope of study manageable. It points up a conceptual distinction that is far from incidental and that should be obvious but is not. Few historians of medieval European law have difficulty reconciling that tradition's robustly Roman heritage with the internal variety of Europe's various legal sys-

tems. Yet a similar reconciliation in Islamic legal historiography has yet to gain traction. In drawing attention to the distinction between tradition and system, therefore, I advocate for the study of Islamic law not as a historical unity but as a family of related systems in different regions and times in Islamicate history. It is my hope that, with time, such mealy phrases as "Islamic law says" will be largely banished from the active vocabulary of Islamic legal scholars.

Islamic jurisprudence, and particularly Hanafi jurisprudence, undoubtedly supplied a major part of the normative substance of Ottoman law. But what made Ottoman law Ottoman were the political customs (*ʿörf*) and sovereign enactments (*qānūn*) that were adopted, first implicitly and then expressly, by the Ottoman ruling house and its servitors. These policies did not bury Ottoman law's Islamic heritage, but they did distinguish Ottoman legal administration from its counterparts elsewhere in the Islamicate world. Criminal law, being fundamentally defined by acts of the sovereign authority, is the space in which we may see this distinction between "Islamic jurisprudence" and "Ottoman law" most markedly. In this dissertation, I examine how classical Islamic jurisprudence on homicide was received by Ottoman jurists and then incorporated into the active doctrines of Ottoman criminal law.

Law and Exegesis

A further methodological component to this dissertation, following on taken notably by Mohammad Fadel, is to regard Islamic law as law first and as Islamic second.[88] This approach does not seek to sanitize Islamic law of its religious character. In adopting it, rather, I merely emphasize that there is an important

[88] Mohammad Fadel, "Adjudication in the Mālikī *Madhhab*: A Study of Legal Process in Medieval Islamic Law" (PhD diss., University of Chicago, 1995), 23–25.

difference between the disciplines of law and exegesis,[89] and that my aim is to concentrate on the former so as not to turn legal interpretation into a straight matter of scriptural interpretation. What frequently happens is that the "Quranic law," supplemented by the traditions of Hadith, is first presented as the paradigmatic expression of the revealed law of God against which the doctrines of jurists are then assessed.[90] By contrast, I take the doctrines of jurists as the point of departure and only admit Quranic analysis insofar as jurists themselves, in their *legal* discourse, invoke principles laid out in scripture.

This approach militates against the perception of Islamic law as a scholastic discourse that was too wrapped up in the minutiae of its own scriptural hermeneutics to possess the dynamic ability to adjust to the practicalities of the world. Although tempered in recent decades, the stubborn view remains that Islamic law's practical weaknesses lay, unlike other legal traditions, in its unusual character as a sacred law. This is not the place for a full-throated response to this position. Suffice it to say, however, that there is nothing historically unusual about sacral elements in law. Most legal traditions with roots in the premodern world have had to reconcile scholastic and scriptural commitments with the immediate demand for functioning legal institutions. It cannot be contested that a great many rules, standards, and principles in Islamic jurisprudence had their roots in scriptural references. But when Islamic law stood, as it were, on its own two doctrinal feet, the discipline of jurisprudence acquired a logical momentum that made it stand apart from exegesis. This independence made Islamic law susceptible to the social and political contingency that, as just discussed, enabled its integration into a plurality of legal cultures,

[89] Mohammad Fadel also draws a similar disciplinary distinction in "Islamic Legal Reform between Democracy and Reinterpretation" (lecture, College of William and Mary Law School, Williamsburg, VA, February 6, 2018). https://soundcloud.com/user-36623013/fadel-lecture-01-edited (accessed January 18, 2019).

[90] See, for example, Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 224–27; Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 9–20.

each of which may be studied without recourse at every step to scriptural analysis.

Legal Normativity

Finally, this dissertation presupposes that the normative discourse of Islamic jurisprudence exerted a powerful influence on the structure and operation of legal institutions. This is not to indulge in the naive view that the Ottoman or any other Islamicate legal system did not test the normative boundaries of traditional Islamic legal discourse. The reconciliation of the Chinggisid *yasa* to the Islamic *sharīʿa*, notably, was in certain ways a seemingly futile exercise. But it is hard to find any rich and mobile legal tradition that is devoid of such internal tensions and conflicts. For historians, the important question is how that legal tradition coped with such tensions and, furthermore, which of its internal elements held sway. My contention is that the community of Muslim jurists, to the extent that they viewed themselves as a community, continued to constitute a powerful legitimating force for rising political rulers. As the Ottoman house's confessional identity crystalized into an avowedly Sunni dynasty, its Turco-Mongol legal heritage was domesticated by Islamic law, not the other way around, and the norms of Islamic jurisprudence strongly influenced both Ottoman legal enactments and Ottoman legal institutions.

Reflecting this contention, this dissertation therefore concentrates more heavily on normative doctrine than on documentation. Indeed, my hypothesis is that the norms articulated by jurists can help explain a great deal of what we see, as well as what we do not see, in such legal documents as court records. The meaning of "doctrine," furthermore, should be clarified. As I suggested in my terminological exposition above, doctrines, like Islamic law, extend beyond Islamic civil jurisprudence. As such, this dissertation identified the doctrine of homicide law in an array of primary sources. These include not only Islamic legal science (*fiqh*), supplemented by assorted Ottoman legal responsa (*fatāwā*), but also

writings on adjudication (*qaḍā'*) and other areas of political jurisprudence, as well as political philosophy. To give additional texture to the jurists on whose writings I focus, I draw on biographical dictionaries. For Ottoman doctrine as such, I turn mainly to Ottoman statutes (*qānūn*) and other quasi-legislative material.

With respect to strictly documentary sources, I have consciously chosen only to draw from the Ottoman judicial records (*sicillāt*). This choice has been made with an eye to limiting the scope of present inquiry, but it admittedly limits the picture of Ottoman law to court practice alone. Future expansions of this research will therefore look, not only at a broader range of court cases, but also at other types of administrative records. Notable among these are the registers of important affairs (*mühimme defterleri*), which recorded rescripts, orders, and other correspondence from the Imperial Council to provincial officials, often in response to a complaint or other petition deemed serious enough to be raised to the palace. Examining these records will allow for adding a further vertical dimension to the examination of Ottoman law.

NOTES ON METHODOLOGY: OTTOMAN LEGAL NORMATIVITY

By the second half of the sixteenth century, the Ottoman Empire had reached its institutional maturity. Istanbul under Sultan Süleymān and his successors had established itself not only as the imperial capital but also as a destination for young men with scholarly, literary, or political aspirations, or often some combination of the three. The reemergence of this city as a leading center of culture and learning, after a long period of decrepitude under Byzantine rule, was a deliberate project, beginning in earnest from the 1453 conquest by Sultan Meḥmed II. A key component to the project's success was the creation and

elaboration of a dedicated Ottoman public service. Even into Meḥmed's reign, the emerging empire still had many of the marks of a principality competing for regional influence, facing, on the Anatolian side, other royal Turcoman families with similar claims to power and, on the Balkan side, an array of independent-minded warriors who did not welcome the prospect of coming under an expanding Ottoman polity.[91]

The new public service included, notably, the formation of a scholarly profession, a distinctly Ottoman class of Muslim jurists and theologians that would staff the empire's courts and other legal institutions. Alongside the military-administrative apparatus, these scholar-bureaucrats became an integral part of the Ottoman imperial administration.[92] However, the professional identity of the *ʿilmiyye*, as they came collectively to be known, was not fashioned overnight. In response to political events both foreign and domestic, both in the late fifteenth century but most earnestly in the first half of the sixteenth, the sultanate actively undertook to establish a well-defined and well-trained cohort of scholars (*ʿulemāʾ*) who combined impeccable Islamic credentials with political loyalty to the Ottoman house.

The program was, on many fronts, a massive success. Careers like that of Judge Ibrāhīm, as seen above in the *Case of Satılmış the Falconer*, demonstrate that members of the Ottoman political elite who sought stable employment had to get their training in Ottoman institutions and establish their bona fides in Ottoman positions. In particular, the learned doctors of the law had both to get their training in the Ottoman law colleges and to serve as professors and judges in the Ottoman system of legal education

[91] For a study of the expansion and consolidation of Ottoman power in the Balkans, see Nikolay Antov, *The Ottoman "Wild West": The Balkan Frontier in the Fifteenth and Sixteenth Centuries* (Cambridge: Cambridge University Press, 2017).

[92] *Scholar-bureaucrats* is Abdurrahman Atçıl's term for the professionalized class of Ottoman scholars. This compound term, as explains, delineates an occupation and social function that are captured by neither term on its own. Atçıl, *Scholars and Sultans*, 5–7.

and judicial administration. Because of this active and largely successful program, modern historiography has generally concluded that the Ottoman house managed to take firm control of legal learning and legal practice. In former periods of Islamic history, by contrast, legal matters had been the preserve of the amorphous but perennially powerful class of jurists (*fuqahā'*), who jealously guarded their mastery over the law from the encroachments of temporal rulers. The Ottoman capture of Islamic law, it is supposed, is illustrated by the establishment of the Hanafi school as the official school of the empire, and moreover by the promulgation of written dynastic statutes (*qānūn*). The Ottoman state, in other words, wrested Islamic legal normativity away from the jurists along with the jurists themselves.

The view of Ottoman interventionism in the law is a natural extension of the conscious and well-documented formation of a professional learned class. Such a view, however, runs counter to my earlier contention that norms articulated by jurists continued to hold considerable sway over Ottoman legislation and adjudication even after the Ottoman legal system reached its maturity in the mid sixteenth century. Because my argument is substantially underpinned by the premise that Islamic legal normativity continued to exert an independent influence, it is important to assess the view that such influence was severely undercut by the Ottoman state.

Books of High Repute and the Official Ottoman School

The seeming Ottoman capture of Islamic law, scholars have argued, appears perhaps most saliently in the regulation of the imperial college curriculum, through which the Ottoman state established Hanafism as the official school of the empire. There is no question that the government, alongside its role in setting up a system of colleges, had some hand in setting the agenda for education in the imperial law colleges. However, the question remains whether the state actively regulated exactly what jurists

would teach their students and whether the dominance of Hanafism among Ottoman jurists amounted to establishing an official school. The case in favor is supported by series of imperial documents, dating to the sixteenth century, that appear to assign textbooks by name for study at the various college grades. When this first happened is not definitively known, since not all of these documents are explicitly dated. Some have concluded that the reign of Sultan Süleymān is the earliest we can say the curriculum was set from above, on the strength of a 1565 document that appears to be an imperial decree (*fermān*).[93] However, there is at least one document associating textbooks with schools going back at least thirty years earlier.[94] The Ottoman curriculum, such as it was, had been set since at least the 1520s.

Nor was the 1565 decree the first imperial directive of its kind. There is a surviving regulation, with the heading "Regulation for the Learned Class" (*Qānūnnāme-i Ehl-i ʿIlm*), that assigns major textbooks to the school grades at which they were to be taught. This regulation was almost assuredly issued before the 1550s. Though carrying no date, it makes no reference to the schools of the Süleymān Complex even as it tells which books were to be taught at the Sahn Preparatory and Sahn schools, which suggests that it was issued earlier. The regulation is worth reading in full:

> Under the eminent seal of the sultan and by high imperial edict, to which obedience is due and which is carried out through divine favor and aid, it has thus been decreed: Whereas the providential aid and guidance of God have been freely granted to one of my high station, such that the trust of upholding the divine commandments and prohibitions has been laid at the gate of my prosperous and just realm,[95] it is

[93] Shahab Ahmad and Nenad Filipovic, "The Sultan's Syllabus: A Curriculum for the Ottoman Imperial *Medreses* Prescribed in a *Fermān* of Qänūnī I Süleymān, Dated 973 (1565)," *Studia Islamica* 98/99 (2004): 183–218.
[94] Atçil, *Scholars and Sultans*, 173. The document Atçıl cites, though without quoting anything in particular, is TSMA D. 8823.1, which he dates to about 1523. I have not yet been able to review this document myself.
[95] The language here plays on two rhyming Arabic words—*shiʿār* and *dithār*—that are commonly found paired for their euphony and complementary meaning. In the most literal attested meaning, *shiʿār* (akin to the word *shaʿr* 'hair') meant a

therefore needful to keep and maintain the task of upholding the symbols of faith and executing the rules of the manifest law, and therefore to waste no time in girding the distinguished scholars with their knowledge and distinction. The purpose of this is to enable those of already fine disposition and prolific knowledge to pass through a period of fermentation, in which to apply themselves wholly and seriously to mastering the branches and roots[96] and discussing the rational and traditional.[97] Thus shall each of them be equipped with the distinction and qualification to take up appointment in the professional fields of teaching and jurisprudence. Each shall be adorned with the fruitful knowledge and good character that comes with carrying the mandates of the Book and the Sunna. And each shall tread in step with the esteemed virtues and fine acquisitions, the right paths both intellectual and spiritual, and the conscientious and pious disposition that come with their calling. For this reason, my eminent command and imperial decree on the matter have gone into effect as follows:[98]

---

garment worn directly against the skin. In extended usage, which seems just as old, it was used to mean a standard on the battlefield or, more generally, any thing or deed that distinguished one group from another; in modern situations, this has become the word for a political slogan. *Dithār*, which seems to be the far less common of the two (uncommon enough to be omitted from midsize dictionaries) and usually doesn't appear without its partner, meant an outer garment worn over the undergarment. Used together, the two words expressed things that were held dear. In a hadith, the Prophet, toward the end of his life, told the Medinese followers who embraced and supported him that they were his *shiʿār*, while all others were his *dithār*. It is not unlikely that this allusion would have been clear to the learned addressees of the sultan's regulation. I have modified the wording to avoid a strange-sounding translation, but the original language names prosperity (*devlet*) and justice (*maʿdilet*) as the sultan's inner and outer garments, respectively. *Prosperous* seemed a more suitable rendering of *devlet*, which is often unthinking translated as a political "state." While what the Ottoman house had established at this time was a state, this word does not cover the usages of *devlet*, which historically included both material wealth and temporal power, both of which are hinted by my chosen translation.

[96] The terms here are *furūʿ* and *uṣūl*. I have preferred to preserve the botanical imagery of *branches* (*furūʿ*) and *roots* (*uṣūl*), rather than saying something like "positive law" and "legal theory," so as not to collapse the terms' multiple meanings. Given the disciplinary relationship between Islamic law and theology—indeed, between law and theology in many parts of the premodern world—the terms *furūʿ* and *uṣūl* can also refer to these two disciplines, respectively, rather than just different facets of law. This point is somewhat trifling, since either way of translating it would not be wrong as such. A better reason to leave the words in their more literal sense is that doing otherwise would simply muddle the translation. It's probably better to leave the language clear and open to interpretation as it would have been to the original audience.

[97] *Maʿqūl* and *menqūl*, respectively, both borrowed directly from their Arabic equivalents. These terms were commonly used as a broad typology of Islamic learning, the rational embracing disciplines like logic, rhetoric, theology, and jurisprudence, the traditional disciplines like Quranic exegesis and Hadith. Inevitably these disciplines overlapped. The fundamental precepts of theology, for instance, were supplied by scripture, but more rarefied questions were explored dialectically.

[98] The bulleted items are not visually separated in the original document, which presents the decree in solid columns of text. The editor of the work I have consulted (see next footnote) added numbers to the margins of the facsimile and carried those

- Henceforth, no student, without having completed the customary lessons of scholars-in-training (*ṭullāb-ı ʿilm*), shall by any other means be admitted to candidacy at my Sublime Threshold. If one of this disapproved sort should gain candidacy, he shall not be regarded as one of the candidates.
- As the authoritative books (*kütüb-i muʿtebere*) have by ancient practice been read, in the very same way shall students now read them. No one shall attend lessons with anyone who hastens through them or seeks advancement by teaching them as the student wishes. This prohibition of mine henceforth ends this practice. Any professor who should give lessons in any manner he wishes or accept a student who wishes the same, will be not only be removed from office but also subject to major sanction. Such professors as teach however they desire shall no longer been sought for lessons, and their students shall not gain candidacy at the Porte.
- Any capable student who has in some fashion studied some quantity of the customary books with a previous professor shall carry a certificate (*temessük*) in which those details shall be clarified. And no subsequent professor shall except him without first reviewing the certificate.
- They shall read the books of legal science (*meshrūʿāt*), both the extended works and the digests, in accordance with ancient practice, above all for those desiring to take a position in the judiciary.
- Of the authoritative books, the senior professors shall teach the *Commentary on ʿAḍud* in legal hermeneutics, the *Hidāya* in substantive jurisprudence, the *Kashshāf* in exegesis, and such other texts as they choose. Professors one level below them shall teach texts up to the *Talwīḥ* in legal

number over to his transcription. I have chosen not to use numbers, since the original does not include separately enumerated articles, but still to separate the provisions with bullets to ease reading and later reference.

theory. All junior professors below that level shall teach the *Commentary on the Ṭawālīʿ* in theology, the *Commentary on the Maṭālīʿ* in logic, the *Extended Treatise* in rhetoric, the *Annotated Tajrīd* in theology, and such didactic texts and commentaries in jurisprudence as they are able. In short, the later customary books shall not be begun until the earlier ones have been read.

- The time during which students review their lessons to the professors, each given a due share, shall be closely attended to. Henceforth they shall not add any time to the balance of any one student.
- The judges of every province and the administrators and supervisors of every college shall abide by this regulation. If therefore should be any one of the professors or students who does not comply with this regulation, they shall admonish him. And if they do not admonish him they will be subject to major sanction.
- Henceforth advanced students shall not entice one another with blandishments.
- Professors may propose to have their capable students in the preparatory schools teach the *Commentary of the Shamsiyya* in logic and more advanced works until they reach the *Iṣfahānī*.
- When these students gain candidacy and arrive at the Porte, even then shall they carry with them as certificates the letters written by their professors.
- And when professors grant diplomas, neither the quantity of books studied nor the method of study shall be written untruly in the certificates which they write, nor shall they say other than the truth. If upon investigation something contrary to what has been alleged comes to light, they will be subject to major sanction.
- Professors may assign capable students assisting them a regimen of teaching four lessons per week. They shall discipline one who fails and relieve one who fails repeatedly.

Thus, from this moment forward, if this regulation should be breached any of the professors or students,

they will be subject to major sanction and painful punishment. Let them accordingly take caution. Of this let them be advised, and upon the noble seal let them rely.

Written by high command.[99]

The preamble first lays out the sultanate's logic for assuming a supervisory role in the formal education of the empire's scholars. As head of a realm marked by the symbols and laws of the *sharīʿa*, the document proclaims, the sultan is obligated to facilitate the intellectual and professional formation of its learned carriers. Implied in this obligation is a parallel one to ensure quality; each of the scholars emerging from these schools must be on the whole equally competent to perform the various functions required of them. On these grounds, the sultan is entitled to issue specific directives for the institutions of learning under his charge.

In the grandiloquent language of its day, the regulation purports to solve what might today, in the jargon of some political economists, be called a collective action problem. The same problem was faced by the Ottoman Empire generally in other areas of its administration in the early sixteenth century, and still more generally by most early modern imperial states emerging at the same time. Indeed, the same problem is faced by any substantial territorial polity that has to work out how power should be distributed on a continuum of center and periphery.[100]

---

[99] Ahmet Akgündüz, ed., *Osmanlı kanunnâmeleri ve hukukî tahlilleri* (Istanbul: Osmanlı Araştırmaları Vakfı, 1990), 4:661–6. The original document may be found at TSMA R. 1935, fols. 94v–95v.

[100] To give more modern and familiar examples, federated (like the Germany, India, Russia, the US, and many others) and decentralized unitary states (like Spain) face some version of this problem at their formation. So too, on a larger scale, do international confederations like the European Union. Organizational failure in the former may lead to a major political conflict, as with the Catalan constitutional crisis in 2017, or to a bloody dissolution of the polity, as with the American Civil War (1861–5). In the case of a confederation, which lacks the power of enforcement and therefore relies more on voluntary compliance from its members, failure can lead to institutional inefficacy, as when European states ignore the judgments of the European Court of Justice; see Michael Blauberger and Susanne K. Schmidt, "The European Court of Justice and Its Political Impact," *West European Politics* 40, no. 4 (2017): 907–18. Though the technologies of governance have changed, as have political ideologies about autonomous rule, the fundamental problem of balancing local and central rule remain the same.

The collective action problem may be outlined as follows. Nascent governments of large territories, concerned with establishing legitimacy and securing loyalty, must deliver goods that their subjects expect, including basic necessities like food and safe transportation but also more abstract ones like justice. But governments also face limitations on their resources and must therefore choose which goods to deliver themselves and which to leave to the market or other available social forces. This basic constraint on the capacity to deliver public goods is an intuitive but useful way of explaining how governments, past and present, behave without having to rely alone on vague and deterministic notions of tradition. The early Ottoman system of raising military forces by awarding provincial elites a grant of land (*tīmār*) and exempting them from taxes on the produce, in exchange for mustering a number of troops proportional to the size of their grant, certainly had its roots in local customs of land tenure.[101] But during the fourteenth and fifteenth centuries, when Ottoman rule had not yet established the full apparatus of imperial governance, this system was additionally an effective way of maintaining cultivated land, feeding peasants, keeping provincial elites happy, and raising a defense of the realm without having to accomplish each one of these tasks directly. They were instead left to the person or class of persons who could perform them best. The same logic animated the practice of tax-farming in the Ottoman Empire and elsewhere.[102]

[101] H. İnalcık, "Tīmār," in EI2.

[102] The term "tax-farming," used here because familiar to many scholars, falsely obscures the fact that it is in essence no different from regular farming. The activity of farming historically went beyond, and the word *farming* meant more than, just crop cultivation. Farming had, by definition, everything to do with taxation. A bit of etymology can help. Until the sixteenth century in English, *farm* (deriving from the Medieval Latin *firma* 'fixed [payment]') simply meant a fixed rent, rather than a percentage of crop, paid up by the tenant for the right (called usufruct) to occupy and enjoy the land's produce. It came to mean a tract of land leased for cultivation only later and by extension. See *OED*, s.v. "farm." In medieval and early modern Europe, farming also meant collecting the farm payments, and farmers were therefore essentially debt collectors. Farmers themselves paid duties for the right to collect farms, with the understanding that would retain the different for themselves. Therefore, farmers (the collectors) had an incentive to get skilled cultivators who could produce a sufficient

A problem of collective action, by contrast, arises where no class of persons can successfully deliver the desired good on its own. The formal administration of law, in order to resolve disputes that people can't resolve on their own, is a common example of this problem. So it was with the Ottoman Empire. In the first half of the sixteenth century, when the sultanate looked increasingly away from establishing its own legitimacy and toward establishing an apparatus of governance capable of managing its huge territory,[103] effective legal administration required a regular system of courts staffed by a regular corps of professional judges, who had gone through a period of training and then through the process of gaining candidacy and promotion. It would have been unlikely to establish such a professional corps without a reasonably unified system of legal education, nor such a system of education without formal standards of learning. The regulation thus lays out what core books ought to be studied by every judge in training. It also provides guidelines—such as requiring students from non-imperial colleges to provide proof of their previous studies and professors to reward students on the basis of merit—clearly designed to close off shortcuts.

The "Regulation for the Learned Class," when viewed alongside the 1565 edict, ostensibly supports the hypothesis that the sultanate regulated the curriculum. This hypothesis, I would like to argue, is misleadingly overstated. It grows easily out of the position, which is now almost universally taken for granted by scholars and repeated without comment, that the Ottoman dynasty established Hanafism

surplus of crops that would exceed the farming duties. The same setup, in its basic form, is what Ottoman tax-farming entailed. The term "tax-farming" is in a way somewhat redundant, though perhaps necessary to distinguish it from the commoner meaning of farming as cultivation. Nevertheless, the reader should keep in mind that tax-farming was a common institution throughout early modern Europe, particularly in England and France, to address a common problem of land tenure. See, for example, Noel D. Johnson and Mark Koyama, "Tax Farming and the Origins of State Capacity in England and France," *Explorations in Economic History* 51 (2014): 1–20.

[103] Atçil, *Scholars and Sultans*, chap. 6.

as the official school of law in the empire. The official establishment of Hanafism, as the scholarship suggests, consisted in little more than the Ottoman state's participation in determining which school's substantive rulings were to be executed by imperially appointed judges, with the complementary aims of limiting judicial discretion and bringing uniformity to judicial decision-making.[104] A reasonable corollary of this attempt to control the legal doctrine applied by judges would naturally have been to do the same with the legal curriculum studied by future judges in school. The regulation above seems to do just this. It directs professors at the imperial colleges to teach only the "authoritative books" (*kütüb-i mu'tebere*) of law and canonizes certain books by name.[105]

But if all that is required to make a school or curriculum official is the mere involvement of the ruler in shaping doctrine or education, that is a thin criterion indeed.[106] Hanafi doctrine itself, as much as or more than the doctrine of other schools, bears the imprint of historical tensions between jurists and rulers. It could justly be said that, from its inception, Hanafi doctrine was partially inflected by temporal interests because Abu Yusuf, one of the school's primary authorities, was appointed chief judge of the realm by the Abbasid caliph Harun al-Rashid and wrote a seminal work on taxation, *Kitāb al-Ḫarāj*, explicitly at the caliph's request. It could also be said that in the Mughal Empire, Hanafism achieved some kind of official status through its adoption and patronage by the emperor Auranzeb Alamgir (d. 1708).[107] Law falls at the intersection of precept and practice, and we ought therefore to expect nothing

[104] Rudolph Peters, "What Does It Mean to Be an Official Madhhab? Hanafism and the Ottoman Empire," in *The Islamic School of Law: Evolution, Devolution, and Progress*, ed. Peri Bearman, Rudolph Peters, and Frank Vogel (Cambridge, MA: Harvard University Press, 2005), 147–58.

[105] Or, by an alternative translation, "books of high repute." See Guy Burak, *The Second Formation of Islamic Law: The Ḥanafī School in the Early Modern Ottoman Empire* (New York: Cambridge University Press, 2015), chap. 4, esp. 130–35.

[106] I have discussed this elsewhere. See my review of Guy Burak's *Second Formation of Islamic Law,* in *Journal of Near Eastern Studies* 77, no. 2 (2018): 333–35.

[107] Muhammad Khalid Masud, "Religion and State in Late Mughal India: The Official Status of the *Fatawa Alamgiri*," *LUMS Law Journal* 3, no. 1 (2016): 32–50. Masud, to be clear, argues that Hanafism did *not* achieve official status in India under the

less than varying degrees of state involvement. What exactly is it that makes the Ottoman official school special?

Officialness is a slippery concept, susceptible to a number of definitions. It may therefore not be profitable to dig in too hard against the claim that Hanafism was the official Ottoman school, since the strength of that claim rests largely on what you mean by an official school. I do not contest that Hanafism was suitable, with its mechanism of establishing preponderance (*tarjīḥ*) for certain opinions over others,[108] to the Ottoman imperial objective in the sixteenth century of bringing regularity to legal administration. What I contest, rather, is the presumption that the Ottoman dynasty's relationship with Hanafism was idiosyncratic among all Islamic dynasties without a thoroughgoing explanation. Instead, in almost every instance where it is mentioned, Hanafism's official status is taken as a truism and any intervention by the sultanate in matters of law pointed to as confirming evidence.[109] No theoretically rigorous test of what it meant to be an official school has yet been adopted or worked out. The suitability

Mughals. However, he applies Rudolph Peters's test of officialness, which amounts only to determining whether Hanafi doctrine became the only source of doctrine applied by imperially appointed judges. My point here is that Peters's test is inadequate.

[108] The Hanafi move to grade the school's accumulated opinions and arrange them in an order of priority reached its height in the late Mamluk period, notably with the work of the Egyptian jurist Qasim b. Qutlubugha (d. 879/1474), who died between Meḥmed II's conquest of Istanbul and Selim I's conquest of Egypt. See Talal Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbughā's Commentary on the Compendium of Qudūrī* (Leiden: Brill, 2017). The timing of Ibn Qutlubugha's life is not insignificant. He, along with his work, was eventually included in the Ottoman intellectual genealogy. See Burak, *Second Formation*, 91.

[109] This is precisely what Peters does. His essay never answers the title question "What does it mean to be an official *madhhab*?" by constructing an objective test. In fact it answers the clunkier question, "What did Hanafism, as the Ottoman Empire's official *madhhab*, look like?" This suggests that the primordial relationship between jurists and that state was one of fierce independence, undone by the Ottomans' overmatching project of centralization. It is telling that Peters holds out Saudi Arabia, which he asserts gives its judges unfettered freedom to decide with little or no government oversight, as a relic of that primordial relationship. He also reproduces the Weberian trope of *Kadijustiz*, whose historical value has been largely discredited. See Intisar A. Rabb, "Against *Kadijustiz*: On the Negative Citation of Foreign Law," *Suffolk University Law Review* 48 (2015): 243–77, esp. 348–57; cf. Amir Toft, "Freeing the Kadi's Justice: Max Weber and Methodology in Ottoman Legal Historiography," in *Rethinking Late Ottoman Civilisation*, ed. Samy Ayoub and Jeannette Okur (Edinburgh: Edinburgh University Press, forthcoming).

of Hanafism's unified body of doctrine to an increasingly bureaucratic judicial profession is too loose a test, nor even the decision from above to have a particular school's doctrine applied in the imperial courts. The subject of the official school deserves a separate treatment, but it pays here to make a couple of observations on it, since the official curriculum is its natural extension.

The first observation is that there is an important difference between the regulation and the regularization of jurisprudence. Regulation entails reaching into the machinery of legal reasoning and controlling the process by which legal rules, which may translate in practice to judicial decisions, are made. It is doubtful that the Ottoman sultans ever did this. Against this claim, some may point to the text of the *Maʿrūżāt*, or *Submissions*, of Ebussuʿūd Efendi (d. 1574) as evidence of interference in the jurisprudential process.[110] Ebussuʿūd, who served as chief judge and then chief jurist, first under Süleymān and then under Selim II, is commonly credited with bringing Ottoman sovereignty and administrative policy within the legitimate gaze of the Shariʿa.[111] The *Submissions* is a short but varied collection of legal opinions submitted, as the title suggests, to Sultan Süleymān by Ebussuʿūd.[112] Nearly every entry ends with a

[110] The text of the *Maʿrūżāt* was prepared in an Arabic-character edition, along with German translation, introduction, and notes, by Paul Horster, ed., *Zur anwendung des islamischen rechts im 16. jahrhundert: die "Juristischen Darlegungen"* (*Maʿrūzāt*) *des Schejh ül-Islam Ebū Suʿūd* (*Gest. 1574*), trans. Paul Horster (Stuttgart: W. Kohlhammer, 1935). A recent Turkish edition, with transliteration to Latin characters, came out recently by Pehlül Düzenli; see Pehlül Ebussuʿūd Efendi, *Maʿrûzât Şeyhülislâm Ebussuûd Efendi*, ed. Pehlül Düzenli (Istanbul: Klasik, 2013). All citations will be to the Düzenli edition.

[111] Imber, *Ebu's-Su'ud*. For a synoptic version, see Colin Imber, "Ebu's-Suʿud (d. 982/1574)," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, ed. Oussama Arabi, David S. Powers, and Susan A. Specktorsky (Leiden: E. J. Brill, 2013), 401–14. Cf. Snjezana Buzov, "The Lawgiver and His Lawmakers: The Role of Legal Discourse in the Change of Ottoman Imperial Culture" (PhD diss., 2005).

[112] The This is how Uriel Heyd reads the title, namely, that the direction of the submissions were from jurist to sultan. See Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Ménage (Oxford: Clarendon Press, 1973), 182. I have no problem with this reading, which is supported by the preamble of the text and is in step with the common sense of *maʿrūż* and *ʿarż-ı ḥāl*, Ottoman terms of art that usually mean a "petition" or some other mattered referred to the government for review. In this case, however, it would be well to remember—without reading too much into it—that it is the sultan seeking counsel from the jurist and petitioning him for opinions on matters of administrative concern.

note that the answer was "written by Ebussuʿūd" and sometimes also with a reference to an earlier authority of the Hanafi school.[113] The opinions are presented in that question-and-answer format (*mesʿele-cevāb*) that is common to legal responsa. What makes these responsa special, of course, is that we know the questioner, that the questioner is the sultan, and that the sultan's questions highlight issues of special administrative concern. Many scholars have highlighted the questions dealing with property and penal concerns, but the questions also touch on a range of issues, such as communal prayer, almsgiving, and marriage, in which private and public interests are intertwined.

Those who promote the official school hypothesis may point to the various points at which Ebussuʿūd cites edicts issued by Süleymān to support his ruling, which suggested sultanic interference in the jurisprudential process of rule-making.[114] This interpretation, however, throws the *Submissions* out of context and wrongly foregrounds the sultan's role in the business of jurisprudence. Though its opinions were likely put in writing earlier, the collection in the form that comes down to us was put together and submitted soon upon the accession of one of Suleyman's predecessors, most likely Murad III, who came to the throne a couple of months after Ebussuʿūd died.[115] The preamble implies that the new sultan may not have been inclined to implement "the late" Ebussuʿūd's opinions, and the text then lays out the issues and opinions anew, complete with references to Hanafi authorities and to the Süleymānic edicts that were passed to execute these opinions. The edicts are cited not to support the ruling itself or its reasoning, but apparently to point up an executive precedent for the new sultan, as if

[113] These authorities range from the earliest figures, Abu Hanifa, Abu Yusuf, and al-Shaybani, through such medieval jurists as Sadr al-Sharia and Qadikhan, and on to such Ottoman-era figures as Molla Hüsrev and Kemalpaşazade.
[114] Peters, "Official Madhhab," 153, citing Horster, *Juristischen Darlegungen* (*Maʿrūzāt*), 28–9.
[115] Heyd, *Studies*, 184; cf. Repp, *Müfti of Istanbul*, 280. Picking up on Heyd, who surmises that the new sultan was Selim II, Repp finds evidence in the preamble to suggest that it was in fact Murad III.

to admonish, "Your royal predecessor, Süleymān the Lawgiver, put these rulings in force, and so must you." If the *Submissions* reveals anything about issues that did not customarily fall within the sultan's jurisdiction, it is that jurists held sway in dictating the rules law and that sultans showed these rules at least some deference. This assertion is not weakened by observing that jurists relied on the power of the sultan, as Ebussuʿūd clearly relied on Süleymān, for ratification and enforcement. Rules of law are never self-executing. What makes the opinions in the *Submissions* rules is arguably that Ebussuʿūd, backed by previous authorities, said so, not that the sultan put them into force.

What the Ottoman state sought to do, as indeed would any large territorial polity hoping to survive for long, was to regularize the legal system, more specifically the judiciary. This is a very different thing from regulating the content of the law itself. Regularity of judicial decisions, whereby the law in practice achieves some measure of predictability, is a primary desideratum of any legal system. This desire for order in the judiciary informed the development of certain genres of legal writing in all schools, particularly the abridgment (*mukhtaṣar*) and similar works that distilled the rules of the school.[116] The same desire lay behind the Mamluk system of appointing a chief judge from each school and setting rules to keep the system from crumbling in a welter of forum-shopping and appeal.[117] The Ottoman choice, by contrast, was to have all imperially appointed and salaried judges be trained in Hanafi jurisprudence and to apply that school's opinions in the cases they heard.

This policy, while making Hanafism the school of choice in the state-appointed judiciary, did not

[116] Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*," *Islamic Law and Society* 3, no. 2 (1996): 193–233.
[117] Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qāḍīs* under the Mamluks," *Islamic Law and Society* 10, no. 2 (2003): 210–28.

amount to adopting an official school. Two reasons stand out. First, judges were jurists before they became judges, and the power to declare legal norms never really left the hands of jurists. Ebussuʿūd seems not to have been unusual in this regard. Most judges, when being assigned to a new jurisdiction, received an appointment letter (*berat*). This letter often contained the formulaic instruction "to adhere to enforcing the provisions of the laws of the Prophet and to applying divine commands and interdictions, not to overstep the boundaries of the true Shariʿa, properly to follow in the questions that present themselves the various opinions [transmitted] from Hanafi imams, to find their *most correct opinions* and to act accordingly."[118] If the same verbiage appeared on every appointment letter, it is not unlikely that repeated use would have weakened its force. But even when viewed at face value, the instruction awards rather extraordinary discretion to judges. It does so by recognizing the uncertainty of figuring out what the "most correct opinion" is on any given issue, and by offering no guidance on how judges are to interpret the specific facts of any case brought before them. Second, the Ottoman policy school did not erase the other schools, particularly in Syria and Egypt, where Shafiʿism and Malikism maintained a strong tradition, nor did it invalidate out of hand the decisions of judges from other schools. Apart from a subset of issues, on which the Hanafi opinions were given precedence, decisions by non-Hanafi judges were to be upheld.[119] We should expect the official school of law to refuse coexistence with another normative regime within the same institutional structure. Yet although the Hanafi school was preferred, the other schools, even in judicial settings, were not denied the imprimatur of the sultanate.

The second observation to make is that assertions by historians about the official Ottoman school

[118] Akgündüz, *Osmanlı kanunnâmeleri*, 1:70. Emphasis mine.
[119] Peters, "Official Madhhab," 156–7.

are made in the long shadow of Islamic law's confrontation with modernity. The rapid rise of uncompromisingly secular regimes in Turkey and elsewhere in the Middle East has continued to color the way scholars appraise regimes of law and government that have receded from memory. A central critique of this dissertation concerns the repeated failure of Islamic legal historiography to explain how a strong, ostensibly secular ruler could coexist felicitously with the carriers of an ostensibly sacred tradition of law.[120] Their only resort has been to deny any such felicity and to characterize their coexistence instead in terms of a perennial struggle between the piety-minded scholars and the power-hungry rulers. The same struggle between sacred and secular, in the Ottoman case, has been coded in the conflict between the *şerīʿat* and *qānūn*, a conflict that is presumed to have pulsed throughout all stages of the empire. Even seasoned historians, at least when it comes to law, slide easily between eras separated by centuries, as though the factors determining the course of law in one era or the other were the same.[121] By the nineteenth century, the argument continues, the increasing pressure exerted by the European growth of legislative supremacy and codification meant that something had to give, and what gave in the end was the sacred law. Tanzimat reformers increasingly adopted institutions, such as a civil code in the form of the *Mecelle*, similar to those of the West.

The substantive merit of this argument—that the Tanzimat legal reforms, and particularly codification, were more about playing catch-up to secular trends than providing indigenous responses to internal pressures for reorganization—has been increasingly called into doubt.[122] I decline to pursue the

[120] Put this somewhere else: "The problem arises from viewing the shariʿa as a closed system of jurisprudence that simply tolerates temporal legislation, rather than a complex system of rules that legitimately integrates the interpretation of jurists and the policies of rulers."

[121] H. Inalcık, "Ḳānūn," in EI2.

[122] Samy Ayoub, "The *Mecelle*, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and Twentieth Centuries," *Journal of the Ottoman and Turkish Studies Association* 2, no. 1 (2015): 121–46; Mohammad Fadel,

question of nineteenth-century reforms here, in part because it will take us too far afield, but in part to make a historiographical point: the nineteenth-century developments in Ottoman law had no bearing on the form of Ottoman law in the sixteenth century and therefore ought not to influence how historians write the history of early modern Ottoman law. This may be self-evident on its face; I suspect that few serious historians think that Ottoman officials in the sixteenth century were already thinking ahead to the Tanzimat. A corresponding point, however, seems often to get missed. The hallmarks of the legal systems that ripened in nineteenth-century Europe ought similarly to have no bearing on how historians write the history of Ottoman law in the sixteenth century. These hallmarks include legal monism, legislative supremacy, and ruthlessly hierarchical bureaucracy—features that have become nearly universal features of legal systems but were either weak or nonexistent in much of the world before the nineteenth century. It is as hard for modern scholars to imagine a legal system without these features as it for a fish to imagine life without water; legal monism, legislative supremacy, and bureaucracy are embedded in all advanced legal systems today. Yet these notions are imported to the sixteenth century at the risk of great distortion.

Take, for example, the notion of a formally rational jurisprudence. Formal rationality, in simple terms, is the deductive principle that the general controls the particular. A rule of general applicability is first articulated by a supreme rule-making body, which is usually called a legislature, and then it is applied machine-like to specific cases by a corps of arbiters, who are usually called judges.[123] Judges

"Back to the Future: The Paradoxical Revival of Aspirations for an Islamic State, Review of *The Fall and Rise of the Islamic State* by Noah Feldman," *Review of Constitutional Studies* 14, no. 1 (2009): 105–23.

[123] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (New York: Bedminster Press, 1968), 2:811. The machine-like quality of the legal system, where decisions flow automatically from preformed rules, is an idealized hallmark of formal rationalism. It is important to identify formal rationalism with Continental

apply, not interpret, the preset rules of legislatures. To many today, this is simply the way law works in practice. Yet beyond its intuitive surface—rules come first, application comes second—this ideal of law is a peculiarly modern conceit, having achieved the height of its articulation in Continental Europe with the German school of legal science (*Rechtswissenschaft*). Its reception by Anglo-American jurists was mixed.[124] And its reflection of what legislatures and judges actually do—that is, whether judges merely apply legislation without some kind of interpreting—relies as much on legal ideology as it does on reality.

The notions of the Ottoman official school and official curriculum, wherein events at the lower levels of the system flow ineluctably from decisions taken above, are similarly asserted under the influence of modern legal ideology. It fits within our cognitive framework about law to say that the state controlled the apparatus of making and applying the law. Like other such top-down explanations, however, this one explains precious little. What precisely do we learn about the Ottoman legal system, in the sixteenth century or at any point in its history, by claiming that the sultanate established an official school and curriculum? The claim, once accepted, provides a neat interpretation of documents like the "Regulation for the Learned Class" and the 1565 edict. More often, however, it saves us from confronting the challenging details that a deeper reading of these documents would uncover.

The Scholars' Syllabus

The "Regulation for the Learned Class," as mentioned, may seem to confirm the sultan's role in setting

law, as distinct from English law. One of Weber's primary targets of criticism was the English common law, which he regarded as formally irrational and the modern exemplar of *Kadijustiz*.

[124] Mathias Reimann, "Nineteenth Century German Legal Science," *Boston College Law Review* 31, no. 4 (1990): 894–7. Cf. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

the canon of learning in the law colleges. But because many historians are already primed to accept the official control of Islamic law, they see the parts of this document that support that view. For example, they see what looks like a fixed book list set from above. To claim that the sultanate, by virtue of a few generally worded decrees, heavy-handedly controlled every aspect of legal education and practice, that the sultanate was able to eliminate judicial discretion from the legal system by instituting an official curriculum school, seems facially implausible. It also seems to be unsupported by the document when looked at in its totality. The regulation set standards of quality control to bring uniformity to legal education, but uniformity and rigid, top-to-bottom control are different things.

A closer look at the document reveals a picture in which jurists, possessing technical mastery of their field, retain substantial bargaining power in determining what gets taught and what does not. Different passages stand out that may go unnoticed if one is looking for evidence of an official curriculum. It states for instance, that students should read the "authoritative books" as they have "by ancient practice been read." The repeated invocation of ancient practice (*ʿādetce* or *ʿādet-i qadīme*) suggests a preexisting tradition of legal textual learning. These "authoritative books," which in law included such works as the *Hidāya* and the *Talwīḥ,* were central texts well before they became Ottoman textbooks, and it is reasonable to conclude that government administrators overseeing the colleges had to take the lead of jurists in assigning them for the curriculum. The document also states that, in addition to these assigned texts, professors at advanced levels may teach "such didactic texts and commentaries in jurisprudence as they choose and are able to teach." Taken at face value, then, the curricular standards set out in the regulation placed considerable discretion in the hands of the professors.

Then there is the edict of 1565, which contains a list of thirty-nine books in the various disciplines

of collegiate learning and appears to have explicitly and definitively established a "sultan's syllabus."[125] This document has been boldly declared the "first known documentation in Islamic history of a move by the state to establish a canon of religious learning."[126] It further confirms the "official identity of Ottoman Islam,"[127] which amounts largely to the Ottoman embrace Hanafism, which was the "official legal rite of the Ottoman state."[128]

There are two problems with this argument, one building upon the other. The first, which I hope you may already detect, is that it begs the question of the Ottoman official school—and with it the Ottoman official curriculum—when it ought to prove it. Those who are convinced of the official school, however, may be forgiven for seeing in this document further evidence of it and therefore not revisiting a settled question. The bigger problem is that the argument of the state-mandated canon is based on a misreading of the text. Shahab Ahmed and Nenad Filipović have translated the document heading as "a list of the books required for the imperial *medreses*, given to the *Müderris Efensis* [teachers] in accordance with the decree of the Padishah." They have taken *lāzim* to mean "required," a sensible reading at first glance. However, *lāzim* is a slightly false friend in Turkish, meaning something more like "needful" or "necessary" than mandatory. Even in Arabic, the word tends to connote more a requirement of need ("You are required to eat so as not to starve") than a requirement of obligation ("You are required eat only after everyone has received their food"). The heading is more correctly understood like this: *Medāris-i ḥāqāniyye-ye lazim olub fermān-ı pādişāh-ile müderris efendilere vėrilen kitāblarun beyānıdur.*

An exposition of the books needed by the imperial colleges and granted to the college professors by

[125] Ahmad and Filipovic, "Sultan's Syllabus." The document may be found at TSMA E. 2803/1.
[126] Ahmad and Filipovic, 186–7.
[127] Ahmad and Filipovic, 207.
[128] Ahmad and Filipovic, 218.

royal edict. This interpretation is supported by peripheral features of the document. First, is not itself an edict; it only cites one. We therefore can't conclude much about what the edict's purpose, since no preamble is reproduced that fleshes it out. The document consists of a single page, and this heading is the only expository material. It is therefore not at all "self-explanatory," as Ahmed and Filopović claim, such that we may conclude confidently that it represents "an intervention on the part of the Ottoman state to prescribe the books to be used in the imperial *medreses*—in other words, to lay down a *medrese* curriculum."[129] If anything, it says the opposite. On the strength of the single expository sentence, it is more plausible, and surely equally possible, that professors at the imperial colleges compiled the book list and lodged a request that the sultan granted it by a one-off edict. It could well be that the professors lacked sufficient copies of the books they and their students needed to complete their courses.[130] If we remember that books were generally expensive to produce in the sixteenth century, and that the college finances were in the hands of the state, it would be sensible that the professors would appeal to the center for material assistance. Second, the document ends with the words "all told 55 [titles]" (*yekūnu cemʿan 55*). The format is therefore that of a bookkeeping record, setting down the quantity of titles requested and duly fulfilled. The order of the sultan seems to support a curriculum already in place, not a decision to impose a new one.

The content of the book list also makes this a strange candidate for a syllabus. Only a few of the common disciplines are represented, and there is one glaring omission. Apart from jurisprudence, the books cover three disciplines: lexicography (which we may consider a branch of grammar) and the twin

[129] Ahmad and Filipovic, 186.
[130] I am grateful to Ahmet Tunç Şen for suggesting this possibility (personal correspondence).

scriptural subjects of Quranic exegesis and Hadith traditions. These alone do not encompass the disciplines we know were studied in the colleges. But even if we were to say that this is a syllabus for advanced students, allowing us to leave aside propaedeutic subjects like grammar, logic, and mathematics, it is strange that the list does not include a single book in theology. A stranger thing, calling into doubt the conclusion that this was a syllabus at all, is the lack of any instructions on what order these books were to be read in or on how much were to be read at all. Some of the titles, such as the dictionaries *al-Qāmūs al-muḥīṭ* and *al-Ṣaḥāḥ*,[131] are references by definition that seem unsuitable as textbooks. Other titles, such as al-Zaylaʿi's commentary on the *Kanz al-daqāʾiq* and Qāḍīkhān's *Fatwas*, are massive multivolume[132] works that may have been unfit for classroom instruction. If we take another look at the 1565 document heading, it seems clearer that these books were probably deemed necessary by professors for their students' learning but may not all have been texts to be studied in full as part of a standardized curriculum. It says that they were "required" but not what exactly they were required for. When compared furthermore with the Regulation, the 1565 document is quite an un-sultanic piece of legislation if indeed it reflects a radical move by the state to establish a new canon of learning. The Regulation for the Learned Class lays down some explicit standards of learning and promises enforcement. By contrast, this document looks more and more like a simple reading list.

There is also some circumstantial evidence that makes it yet more implausible that this document

[131] The latter work, a dictionary whose full title is *al-Ṣaḥāḥ fī al-lugha* and was written by Ismaʿil b. Hammad al-Jawhari (d. 1003), is sometimes rendered as *al-Ṣiḥāḥ*. They are both correct, but there is some historical evidence that scholars read it as *ṣaḥāḥ* (a rare equivalent of *ṣaḥīḥ*, meaning "correct"); see Shams al-Dīn Muḥammad al-Tabrīzī, *Sharḥ al-Mullā Ḥanafī ʿalā al-Risāla al-ʿaḍudiyya fī ādāb al-baḥth wa al-munāẓara*, ed. al-Sayyid Yūsuf Aḥmad (Beirut: Dār al-Kutub al-ʿIlmiyya, 2014), 1:366. I mention this not just as a philological nicety; it is also useful for searching purposes, since the title may get cataloged under both transliterations.

[132] Not just in modern editions. Al-Zaylaʿi's commentary was in "a number of volumes" even in the fifteenth century. See Abū al-Fidāʾ Zayn al-Dīn Qāsim ibn Quṭlūbughā, *Tāj al-tarājim*, ed. Muḥammad Ḫayr Ramaḍān Yūsuf (Damascus: Dār al-Qalam, 1992), 204.

reflects a new curriculum. The date, to begin with, is 1565. That is quite late to introduce a new curriculum. If one were introduced, we may expect to see a strikingly original list of books that distinguished the learning of Ottoman students. Yet this one is rather unoriginal. The titles are nothing that we would not expect their non-Ottoman contemporaries to have studied. And indeed we find this to be so. Ibn Ṭūlūn was a reputable Damascene scholar and jurist who died in 1546, fewer than twenty years before the date of our document. Born in 1475, his life pretty evenly straddled the periods of Mamluk and Ottoman control in Damascus and Egypt. He was old enough to study under such late Mamluk luminaries as Jalāl al-Dīn al-Suyūtī (d. 1505). But he still lived long enough into the Ottoman period to be regarded with justice as an Ottoman-era scholar.[133] Nevertheless, by virtue of education or professional placement, he was not an "Ottoman" one. He appears to have spent his whole career in Syria, lecturing prominently in Hanafi jurisprudence at a few colleges and mosques, including for several years at the Umayyad Mosque. He did not teach at any Ottoman college or serve in any Ottoman court (or, it seems, in any court at all). It is not surprising, then, that he goes unmentioned by the later biographical works of Ottoman scholar-bureaucrats. Yet to judge by the books he read as a student, he seems to have gotten an education similar to that of students in the Ottoman colleges. In his short autobiographical work, titled *al-Fulk al-mashḥūn*, he takes us subject by subject through the main books he studied and who he studied them under.[134] Many of the works we see there—the *Hidāya*, the *Talwīḥ*, the *Commentary on the Ṭawāliʿ*, just to name a few in law and theology—are also found in the 1565 document or in the earlier Regulation for the Learned Class.

[133] For a synopsis of Ibn Ṭūlūn's life, see Conermann, "Ibn Ṭūlūn."

[134] Shams al-Dīn Muḥammad ibn ʿAlī ibn Ṭūlūn, *Al-Fulk al-mashḥūn fī aḥwāl Muḥammad ibn Ṭūlūn*, ed. Muḥammad Khayr Ramaḍān Yūsuf (Beirut: Dār Ibn Ḥazm, 1996), 41–53.

Inasmuch as the curriculum was fixed, it was probably set long before 1565. It is unlikely that the new document introduced, let alone mandated, a new curriculum for the colleges. At most, one could say that, if it does reflect a state effort to influence the curriculum, it builds on what was already in place. Read against the other evidence I have introduced, however, the document matter-of-factly builds on a program of learning already in place. It strengthens the hypothesis that, beyond a minimum requirement of essential texts discussed in the Regulation (and presumably other documents that we do not have access to), the professors had substantial sway when it came to the subjects and books to be taught.

These documents, then, reveal an important tension that we should take stock of. Earlier in this section I suggested that the Regulation aimed to solve the collective action problem of increasing uniformity in the empire's courts by increasing uniformity in the education of judges. Judicial consistency, to the extent that it was achieved, satisfied the abstract vision that Ottoman political theorists held of justice as a core prerequisite for the legitimate ruler. The aspiration toward internal justice, however, existed side by side with an external challenge to Ottoman political legitimacy. The sultanate, upon its rise from frontier principality to territorial empire in charge of the old Islamic heartlands, had to establish the Islamic credentials of the learned men who staffed the imperial colleges and courts. Ibn Ṭūlūn's work strongly suggests as much. The biographical dictionary that he devoted to recording the lives of the "latter-day Hanafis" conspicuously leaves out so many prominent members of the Ottoman learned class, including the well-known and well-regarded judge Mollā Ḫüsrev, that one strains to interpret the omission as anything other than a protest against the new political masters of Syria and Egypt. The Ottoman scholars he does include are those who spent some time studying in the former Mamluk

lands.[135] Although Ibn Ṭūlūn lived for several decades after the Ottoman conquest and wrote this dictionary toward the end of his life, his autobiography suggests that he carried some bitterness or frustration over seeing the old centers of learning so suddenly stripped of their prominence and patronage.

The challenge of Ottoman education was therefore to produce scholars who were loyal to the new political centers yet respectable to the old ones. And it had to do so without already having a stable corps of scholars who were prepared to support the Ottoman claim to rule. How did it strike this balance? The evidence suggests that the Ottoman house concentrated on the location and infrastructure of education, as well as the conditions for movement within the system, while deferring a more hands-off approach to the content of education to the scholars. The regulation, if read again as a whole, is relatively unconcerned that students study a particular selection of "authoritative books" so much as that they all study the same selection. The syllabus itself, it seems, belonged not to the sultan, but to the scholars.

Normative Jurisprudence and Ottoman Law

These documents, when read more closely, seem to point to the continuing power of jurists, at least through the sixteenth century, concerning the law's normative content. Additional anecdotal evidence, drawn from Taşköprizāde's biographical encyclopedia of Ottoman scholars, further suggests that, in the sixteenth century, the Ottoman control over the doctors of the law was not quite as iron-clad as is supposed or as it perhaps as it eventually became.

---

[135] Burak, *Second Formation*, 107. Burak takes this omission as a "robust critique of the notion of the learned hierarchy and an official [school]." I think this is too fine-grained an inference to draw, since, for the reasons I discussed earlier, the very notion of an official school seems to be more a product of modern historiography than Ottoman political theory. Still, the omission that Burak points out is too glaring to be a mistake, especially because in other work he demonstrates that he knew prominent members of the Ottoman learned elite who don't show up on the biographical dictionary; see Burak, 109.

Taşköprizāde relates a remarkable story of Ottoman scholars concerning the life of Sinan Paşa (d. 891/1486).[136] Born Yūsuf b. Ḫızır, Sinan Paşa belonged to a family of prominent Ottoman scholars who made a reputation for themselves within their lives and, through their scholarship, after their deaths. Sinan and his two brothers all served in some capacity in the emerging system of Ottoman law colleges. Sinan himself was distinguished with having a close relationship with Meḥmed II, who mentored him and encouraged him to study under some of the prominent men of knowledge coming to the new Ottoman capital. Sinan, unlike his brothers, grew so close to Meḥmed II that he was appointed for a short stint, from 1477 to 1478, as grand vizier. However, the two had a disagreement over something, which Taşköprizāde does not explain (and perhaps did not know), and Meḥmed removed Sinan from his post and imprisoned him. The imprisonment prompted leading scholars in Istanbul to confront Meḥmed in the Imperial Council. These scholars had been assigned to maintain Meḥmed's collections of books. According to Taşköprizāde, these scholars threatened to burn the books and abandon Meḥmed's dominion if he did not release Sinan from prison. Meḥmed relented. The feud continued, however. After some time Meḥmed sent Sinan off to be judge of Seferihisar, a backwater near Izmir, as well as professor of the college there, an appointment that amounted to banishment. On his way, though, Sinan was harassed by a physician whom Meḥmed reportedly sent to treat him for a bogus illness with a combined "treatment" of a medicament and a daily beating of fifty stripes. When the scholars in Istanbul caught wind of this ill treatment, Ibn Ḥusamüddin wrote a letter to Meḥmed admonishing him to "cease this injustice, or else I will abandon your dominion." Meḥmed again relented. Sinan spent several sad years

[136] This Sinan is to be distinguished from Koca Sinan Paşa, the resilient and controversial statesmen who was appointed five times as grand vizier under Süleyman and his successors. Koca Sinan lived and died entirely in the sixteenth century. The Sinan of which I speak was of the fifteenth century. On the present Sinan Paşa, see Aylin Koç, "Sinan Paşa," in TDVIA.

in Seferihisar until Meḥmed died. When Bāyezīd II took the throne, he restored Sinan to a respectable position as professor at the Darülhadis College in Edirne, and he also awarded him with stipends and time off teaching in order to write.[137]

What is remarkable about this story is not so much its historicity. If it happened as Taşköprizāde reports, it is a strong statement about Sultan Meḥmed's reliance on the support of scholars. The mere threat to quit the Ottoman dominion was enough to chasten the sultan. It is possible that Taşköprizāde, living in the following century, may have gotten some of the details wrong or perhaps exaggerated Sinan Paşa's standing. However, the fact that he related this story so frankly about so revered a figure as Meḥmed the Conqueror, even during the reign of Süleymān, only further highlights the confidence and independent-mindedness that scholars continued to maintain. A bowdlerized version of this story, I imagine, would not depict Meḥmed II in such patently unflattering terms.

On the basis of the foregoing analysis, I find it valid to consider Ottoman-era Islamic jurisprudence, at least as late as the sixteenth century, as exerting an influence on Ottoman legal institutions that is not incidental. This does not mean, it bears repeating, that practice never diverged from theory, or that the two were never in practice. But such tensions and divergences exist in any legal system, and they do not detract from the importance of the normative jurisprudence.

[137] Taşköprüzāde, *al-Shaqā'iq al-nu'māniyya fī 'ulamā' al-dawla al-'uthmāniyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 1975), 106–8.

Part I

The Substantive Law of Homicide

The process of defining and classifying legal acts may run in two directions. They may be seen as acts that, because of certain defining qualities, give rise to certain consequences; or they may be seen as acts that, because they give rise to certain consequences, possess certain defining qualities.

To make this less abstract, let us look at the ubiquitous set phrase "crime and punishment." There is a reason that these two words so often go hand in hand. When assessing whether an act is a crime, we often look to whether it is remedied by a punishment. Conversely, when assessing why an act is punished, we often look to whether the act possesses such qualities of moral culpability as to warrant punishment. For example, if you stand on a bridge over a river known to be a popular fishing destination, and then throw a rock that strikes and kills someone standing on the river bank below, the criminality of that act is both defined by certain qualities of the act (e.g., knowledge, intent, commission) and signaled by the remedy that attaches (e.g., shame, imprisonment, death). In a coherent jurisprudence in which crimes are remedied by punishment and punishment is only applied to crimes, how criminality is defined and how it is signaled should align. It should not matter whether we appraise legal actions ontologically or consequentially: criminality must entail punishment, and punishment must entail criminality. In the rock-throwing example, we punish the act because we deem it criminal, and we deem the act criminal by assigning a punishment. But what if punishment only "looks" like punishment? This question is not meant to be self-indulgently philosophical. Its purpose, rather, is to link my forthcoming discussion of homicide with a broader inquiry into the location of crime in Islamic law.

Islamic homicide law is usually classified as criminal because it entails the possible outcome of the

death penalty under the remedy of requital, or *qiṣāṣ*.[138] Not unreasonably, requital is commonly associated with the *lex talionis*. The *lex talionis*—sometimes anglicized as the law of "talion," to which the English word *retaliation* is etymologically related—is the eye-for-an-eye principle whereby offenses ought to be requited with punishment equal in degree and kind. Given the vivid formula of an "eye for an eye" and the implication of authorized private retaliation, the *lex talionis* is today associated with periods in legal history that are generally deemed barbaric or precivilized. Developed legal traditions have shed this premodern vestige, it is supposed, and the retention of the *lex talionis* therefore marks Islamic law as an aberration requiring explanation. However, the puzzle of Islamic law's talionic principles may reflect as much or more Western scholarship's own struggle to reconcile the *lex talionis* in its own tradition.

The Western legal tradition has had a hard time coming to terms with the *lex talionis*. On the one hand, Western Christendom has tried to distance itself from the *lex talionis* as a pre-Christian Hebrew practice repudiated apparently by none less than Christ himself. And contemporary Western liberal theory of punishment, which traces its roots to the eighteenth century, has made little room for the retaliatory impulse embedded in the *lex talionis*, which many theorists are happy to consign permanently to the unenlightened past. On the other hand, the *lex talionis* is attested explicitly in major achievements of human legal activity, such as the Babylonian Code of Hammurabi and the Roman Twelve Tables.[139] Though perhaps apparent, it is worth pointing out that the term *lex talionis*, usually presented thus in Latin, suggests that it has a Roman law heritage and is therefore part of the genealogy

[138] For reasons that I will explain shortly, I will translate *qiṣāṣ* as "requital," or occasionally "equivalent requital" to emphasis the principle of equivalence. I will carefully avoid translating it as "retaliation" or "retribution."
[139] David VanDrunen, "Natural Law, the *Lex Talionis*, and the Power of the Sword," *Liberty University Law Review* 2 (2008): 945–67.

of the Western legal tradition that grew out of that heritage. Moreover, the *lex talionis* retains a visceral appeal, even in the present day, as the fundamental expression of balanced and dispassionate justice. "Getting even," as Ian Miller discusses in his study of talionic justice, is an abiding and deep-seated human desire that deserves to be taken seriously.[140] The *lex talionis* amounts to the verbal equivalent to Lady Justice, or *Iustitia*, the allegorical personification of justice that originated in antiquity and is still found ubiquitously in sculpture at Western and Western-inspired judicial buildings around the world. Depicted usually as a blindfolded woman bearing a sword and balanced scales, Lady Justice represents, like the *lex talionis*, the swift and precise administration of the law. Talionic principles do not only appeal to an intuitive sense of justice; they also, in some way, continue to inform Western retributivist theories of punishment.[141] Only when it is viewed in the crudest terms—that is, when the vivid biblical formula of an "eye for an eye" and a "tooth for a tooth" is allowed only the most literal interpretation—does the *lex talionis* entail the primitive and vindictive idea that persons injured ought to exact revenge by doing unto their aggressors what was done unto them. By contrast, the Western legal tradition, having managed to distinguish between the formula's rhetorical effect and its legal content, has drawn a distinction between private revenge and retribution, thus allowing for nonliteral interpretations of balanced justice. Yet Western scholars have not always extended the same charitable view to other legal traditions.

On Islamic law in particular, older Western scholarship, in a way that appears distasteful or offensive today, previously interpreted Islamic law's remedy for homicide in religious-historical terms. Islam, like

[140] William Ian Miller, *Eye for an Eye* (Cambridge: Cambridge University Press, 2006).
[141] Mark Tunick, *Punishment: Theory and Practice* (Berkeley: University of California Press, 1992).

Judaism, is a legal religion in a way that Christianity historically is not. And unlike Western Christendom, the world of Islam failed to put distance between itself and the ancient Jewish practice of taking life for life and limb for limb. The Quran (5:45), which narrates the Hebrew practice seemingly without disapproval, is pointed to as evidence:

> In [the Torah] We prescribed for them: A life for a life, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and retribution for wounds. Yet whoever would forgo this, out of charity, then it will be taken as an atonement for the one ⌜who has suffered injury⌝. But whoever does not rule by what God has sent down—then such as these are the wrongdoers.

Because such a characterization of Islamic law now reflects subtle, or indeed overt, animus toward both Islam and Judaism, repeating the same account may be, if nothing else, politically unacceptable. In any case, scholarship had yet to offer a new substantive narrative of Islamic homicide law beyond restating the old one and refraining from comment. Requital, or *qiṣāṣ*, is simply the unreformed Islamic punishment for the crime of intentional homicide. It leaves the punishing and pardoning power in the fickle and vindictive hands of the victim's heirs, thereby limiting the ability of public officials to dispassionately bring about just outcomes. If the family decides to have the convicted murderer killed, the government can do nothing even when there may be good reason not to execute the killer. And if they decide to pardon and take the blood money, the government cannot punish further even when the killer poses a serious threat to society. Therefore, requital has the real potential of frustrating the cause of justice.

The three chapters of this part argue that modern scholarship has misapprehended the criminal nature of Islamic homicide law. This does not mean, it bears repeating, that Islamic law did not recog-

nize homicide potentially as a crime. The criminal dimension of homicide is something that I will explore toward the end of this study. My argument here, however, is that the substantive doctrine of Islamic homicide law strongly suggests a civil rather than criminal logic. The three chapters systematically pursue this thesis.

In Chapter 1, I argue that homicide's criminal nature may not identified with the sanction of *qiṣāṣ*. If we adopt the modern theories of punishment that go hand in hand with a modern theory of criminal law, we cannot rightly consider (requital) *qiṣāṣ*, despite its appearances, to be a punishment. This chapter aims in part to show that requital has been given outsize attention to the point of swallowing up all other doctrine pertaining to homicide. The paradigmatic remedy of Islamic homicide law, as Chapter 2 shows, is in fact monetary compensation. By putting a price on blood, as it were, this form of compensation confers an economic logic that is at odds with the standard criminal theory that seeks to match punishment to the offender's moral culpability. Chapter 3 then shows in greater detail that homicide, when the doctrines are viewed all together, is classified as part of the civil doctrine of injury (*jināyāt*).

CHAPTER ONE

Requital (*Qiṣāṣ*): Punishment or Penalty?

In this chapter, I argue that requital (*qiṣāṣ*) is not a form of punishment. This claim will no doubt appear outlandish at first blush, but it is not meant to be. It grows out of the question I posed earlier: what happens when punishment only looks like punishment? When parents discipline their children for misbehavior, we often call such disciplinary measures punishment while intuitively distinguishing it from punishment under law. Some legal philosophers have given labels to this intuition, distinguishing between "marginal" and "paradigmatic" punishment.[142] What makes the marginal punishment by parents of their children look like the paradigmatic punishment under law is that it involves, as a consequence of misbehavior, the imposition by a higher social authority of deprivations that resemble those of legal punishment—such as material deprivation (e.g., denying allowance), shaming (e.g., timeout in the corner), incapacitation (e.g., grounding), and the infliction of pain (e.g., spanking). What makes such punishments intuitively different, however, is that they are imposed neither by an authorized political authority nor for the violation of some politically articulated law. They therefore do not represent expressions of general social condemnation as paradigmatic legal punishments are thought to be.

There are, however, examples of politically authorized sanctions that blur the line between marginal and paradigmatic punishment. Take the very modern, but very relatable, example of assessing fines for parking violations. In some American jurisdictions, those who accumulate a certain number of parking tickets may be subject to having their cars booted or impounded, which the violator cannot

[142] See, for example, Hugo Adam Bedau and Erin Kelly, "Punishment," *Stanford Encyclopedia of Philosophy* (Winter 2017), https://plato.stanford.edu/archives/win2017/entries/punishment/, §3.

undo without paying a large sum in addition to the unpaid tickets, which in turn may have increased significantly from penalty accruals. For the poor who are unable to pay these mounting sums, they may have to suffer the irreversible consequence of having their confiscated vehicle sold in order to satisfy a part of the fines. In a very real sense, the government uses its authority to create a wrong, then to fine those who commit it, and finally to limit their mobility by temporarily or permanently seizing their property. The proceeds of those fines go to the government, and there is no apparent party that has suffered harm as a result of the violator's wrong. The act and the remedy bear the hallmarks of the criminal law, yet no one calls parking violators criminals or their violations crimes, nor do they call the fines punishment.

Joel Feinberg, a scholar in the Anglo-American tradition who made significant contributions to the moral philosophy of crime and punishment, addresses this definitional problem of punishment in a way that provides useful insights for us here. In a now classic essay on the expressive function of punishment, he draws a useful distinction between the general class of penalties, which includes lighter deprivations like fines and disqualifications, and the narrower subclass of afflictive punishment, which includes the more emphatic deprivations, such as imprisonment and hard labor, that we ordinarily associate with criminal punishment. We are generally primed to think, he writes, that "mere penalties are less severe than punishments, but although this is generally true, it is not necessarily or universally so."[143] It does not stretch the imagination to say, for example, the some of the parking violators above would rather be punished with a short stint in jail than be penalized with the loss of their vehicles and the payment of big fines. Similarly, the loss of one's job and reputation for workplace misconduct could,

[143] Joel Feinberg, "The Expressive Function of Punishment," *The Monist* 49, no. 3 (1965): 397–423 at 398–9.

depending on one's socioeconomic circumstances, have more devastating and far-reaching effects than being made to stand in front of a post office wearing a sandwich board reading "I stole mail; this is my punishment" as a consequence for committing the act so described.[144] Yet modern legal systems would define mail theft, but not workplace misconduct,[145] as a crime meriting punishment. Why? This question raises theoretical and empirical questions that must be tackled legal system by legal system—Feinberg focuses, of course, on American law—and I am concerned here with no such analysis of modern legal systems. The relevant point is that it is not so simple, and can often be grossly misleading, to adopt an open-ended definition of punishment and then to use that definition when assessing what is and is not a crime.

Muslim jurists have certainly referred to requital as an *ʿuqūba*, which is commonly (and not entirely incorrectly) translated as *punishment*. But *ʿuqūba* can be deployed, to use the terms above, in both marginal and paradigmatic senses—embracing, in a worldly sense, both general penalties and afflictive punishments and, in an otherworldly sense, the divine chastisement of God. With respect to requital specifically, many jurists have been hesitant to call it an *ʿuqūba*, noting that it is an absolute private right to impose or waive it.[146] I would like to suggest, therefore, that *ʿuqūba*, when deployed in legal contexts,

[144] See United States v. Gementera 379 F.3d 596 (9th Cir. 2004), in which a US appellate court found that the judge who impose this sentence had the authority to punish the offender with such public "reintegrative shaming" rather than sending him to prison. Of course, whether one would prefer to lose one's job or to be publicly shamed will certainly vary from situation to situation. Nevertheless, it is conventional to call the former a penalty and the latter a punishment. According to Feinberg, this conventional distinction of terminology is not arbitrary but has a moral underpinning.

[145] By misconduct I mean anything that would not be deemed criminal by the law, such as swearing at one's boss. It is possible, of course, that more serious misconduct could also entail criminal action.

[146] ʿAbd Allāh b. Muḥammad Dāmād Efendi, *Majmaʿ Al-Anhur: Sharḥ Multaqā Al-Abḥur*, 2 vols. (Istanbul: Maṭbaʿa-i ʿĀmire, 1901), 1:585. Dāmād Efendi's work, as I discuss below, will serve as a main primary source for the doctrine on homicide. The exact wording here is that "requital is the absolute right of the subject (*ḥaqq al-ʿabd muṭlaqan*) and may therefore be waived." Requital is therefore distinguished from the fixed (*muqaddar*) sanctions of the *ḥudūd*, which are the sovereign's moral duty to impose when established by evidence, and from the unfixed sanctions of *taʿzīr*, which are left to the sovereign's discretion.

be translated with the relatively more neutral term *sanction*. This translation is appropriate in part because *ʿuqūba* carries the connotation in Islamic jurisprudence of a "consequence," and specifically one that follows any moral failing (*dhanb*).[147] following but also because *punishment* today, as I have just suggested, evokes a field of normative meaning that is not neatly captured by the Arabic term.

Modern penal theories seek both to define punishment's essential qualities, as Feinberg set out to do, and also to furnish a framework for morally justifying the institution and the various forms of punishment. Broadly speaking, these justificatory theories are divided into two types: consequentialist theories and deontological theories. I will summarize in a moment what these two theoretical classes entail. In general, though, consequentialist theories locate the justification of punishment in the potential to create desirable outcomes, notably the deterrence of future wrongs. Conversely, deontological theories locate the justification of punishment in the principle that wrongs deserve some form of retribution. More recent, and arguably more coherent, theories have synthesized consequentialist and deontological elements.

The sanction of requital for murder in Islamic law seems to square with one or both of these theoretical frameworks. Requital, seemingly by definition, enables retribution for harm done, and the Quran strongly suggests that the reason for allowing requital is to deter the recurrence of murder and thus preserve life. However, when the moral basis of requital is examined closely, it fails to align with the justificatory theories of deterrence or retribution as articulated by legal scholars today. Requital simi-

[147] See, for example, ʿAlāʾ al-Dīn al-Bukhārī, *Kashf al-asrār ʿan Uṣūl Fakhr al-Islām al-Bazdawī*, 4 vols. (Istanbul: Şirket-i Saḥāfiye-i Osmāniye, 1892), 4:147.

larly fails to fit within the definition of punishment. I argue that, to the extent that we accept the modern definition and theory of punishment, we cannot regard requital as a form of punishment.[148] Perhaps the obvious question that follow is, If requital is not punishment, then does Islamic law not permit punishing those who commit homicide? This question, which I will address later in this dissertation, would get us ahead of ourselves. For now, I wish to concentrate on my contention about the punitive nature of requital.

To substantiate my argument that requital is not punishment, this chapter will examine the Quranic verses relevant to homicide and their exegetical interpretation (*tafsīr*) by Ottoman jurists. I focus specifically on the respective works of Kemālpaşazāde (d. 940/1536) and Ebussuʿūd (d. 982/1574.[149] In the introduction to this dissertation, I said that the approach I would adopt is to regard Islamic law as law first and as Islamic second. This approach does not seek to deprive Islamic law of its religious character. In adopting it, rather, I merely emphasize that there is an important difference between the disciplines of law and exegesis,[150] and that my aim is to concentrate on the former so as not to turn legal interpretation into a straight matter of scriptural interpretation. What frequently happens is that the "Quranic

[148] I wish to emphasize that I am not making the normative argument that we ought to dispense with the modern definition and theory of punishment. Both definition and theory have emerged organically and are broadly applicable, *mutatis mutandis*, in analyzing non-Western and premodern legal systems. At this point, I am simply making the positive argument that requital does not satisfy the modern definition of punishment, nor does the moral justification offered by Muslim jurists align with the moral justification offered by today's jurists for modern punishment. In chapter five, I will argue that, to the extent punishment exists for homicide, it must be found in Islamic law's political jurisprudence. This is a part of the legal discourse that has nothing to do with the requital of fatal injuries, which most scholars erroneously pinpoint as the location of Islamic law's punishment for homicide.

[149] Ebussuʿūd's exegesis, though often simply referred to as his *Tafsīr*, is properly titled *Irshād al-ʿaql al-salīm ilā mazāyā al-kitāb al-karīm*, 9 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.). Kemālpaşazāde's exegesis, to my knowledge, has no ornamental title and has been published as *Tafsīr Ibn Kamāl Bāshā Zāda* [sic], ed. ʿIzz al-Dīn Jūliya, 3 vols. (Morocco: Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmiyya, 2014).

[150] Mohammad Fadel draws a similar distinction in "Islamic Legal Reform between Democracy and Reinterpretation" (lecture, College of William and Mary Law School, Williamsburg, VA, February 6, 2018). https://soundcloud.com/user-36623013/fadel-lecture-01-edited (accessed January 18, 2019).

law" is first presented as the paradigmatic expression of the revealed law of God against which the doctrines of jurists are then assessed. By contrast, I take the doctrines of jurists as the point of departure and only admit Quranic analysis insofar as jurists themselves, in their *legal* discourse, invoke principles laid out in scripture. It would seem to be a violation of my own approach, then, to devote any space to the *exegetical* analysis of homicide.

In offering an exegetical prelude to my analysis of homicide law, I have three objectives. First, I aim to avoid the unintended suggestions that scripturally founded norms, when they existed on a given issue, were absent from or pushed into the background of legal thought. Jurists certainly took the Quran seriously, and it was a significant part of the Ottoman legal education and even of the written output of Ottoman jurists. Both Kemālpaşazāde and Ebussuʿūd were leading jurists, and both served as Ottoman chief jurisconsults. That they each wrote a Quranic exegesis is noteworthy, and omitting their relevant exegetical contributions while focusing on their legal opinions would be somewhat disingenuous. But exegesis, as the matter of requital will show, did not necessarily or uncontroversially determine with substantive rules of law. In a somewhat analogous way, American judges have routinely cited the Bible in the dicta of their legal opinions as persuasive supplements to the primary legal reasoning of the court's decision or as articulations of moral principles that underpin the legal rules.[151] Kemālpaşazāde and Ebussuʿūd, in their Quranic commentaries, themselves subtly suggest that they regarded exegesis as a discipline distinct from law—at least insofar as homicide was concerned. The verses on homicide do provide the kernel of the law, but their legal entailments were far from complete on a simple reading

[151] See, for example, *Payne v. Tennessee* 501 U.S. 808 (1991), citing "eye for an eye" in Exodus. On biblical quotation in American judicial decisions, including a rather comprehensive catalog of cases that cite the Bible, see Sanja Zgonjanin, "Quoting the Bible: The Use of Religious References in Judicial Decision-Making," *New York City Law Review* 9 (2005): 31–91.

of those verses. The substantive rules were to be found in the works of law, not works of exegesis.

My second objective in beginning with exegesis, which is perhaps the reverse of the first, is to affirmatively position Quranic exegesis in the study of Islamic law. If the Quran does not tell us all the rules, then what function does its exegesis serve? It would be reckless to answer this question in absolute terms. However, while exegesis does not seek to elaborate the legal rules on any given issue, it is one of the best sources for understanding the moral underpinnings for a great deal of Islamic jurisprudence.[152] This is particularly true for homicide. The moral justification of requital, as we will see, is important in helping us determine how Islamic jurisprudence categorizes homicide.

This last point relates to my third objective. By repositioning exegesis vis-à-vis jurisprudence, I aim to show that focusing on the Quranic verses connected with homicide and requital unduly skews the focus away from the compensatory aspects of homicide law. The apparently punitive nature of requital, which I contest, wrongly strengthens the impression that homicide in Islamic jurisprudence is mainly a criminal rather than civil matter. My core argument, it bears repeating, is that homicide, as addressed in the books of Islamic legal science, is a civil offense.

[152] Scholars, as I have already suggested, have fretted for a long time about the "legal" versus the "moral" content of the Quran. See Mariam Sheibani, Amir Toft, and Ahmed El Shamsy, "The Classical Period," 404–9. This question is a further reflection of the modern discomfort with the relationship between law and religion, as well as the tenuous conceit that law and morality can be entirely disentangled. However, all legal systems, even today, have to contend with the morality of their institutions and rules. Many American lawyers object to widespread incarceration—which is ostensibly lawful if one accepts the legitimacy of imprisoning criminals—to a great extent on *moral* grounds even as they put forward legal arguments against it. With Islamic law, it is quite clear that jurists made their own distinction between the foundational principles and standards in the Quran and the formal *rules* that came to make up the body of jurisprudence. In saying that Quranic statements are principally moral, I am not saying that there is no "legal content" to the Quran. I am merely asserting that the definitive statement of law is not to be found in exegesis.

THEORIES OF PUNISHMENT

Before turning to the verses, I will first provide a brief sketch of the modern theory of legal punishment. These theories both define and justify punishment with reference to some chief purpose that punitive sanctions, unlike nonpunitive sanctions, seek to achieve. The two leading justifying purposes of punishment, at the unavoidable risk of oversimplifying, are deterrence and retribution. Each of these concepts, in turn, fits within a broader framework of moral theory.

In contemporary moral philosophy, consequentialism and deontology make up the two chief theoretical headings under which Western philosophers, especially since the Enlightenment, have discussed the normative justification for permitting, requiring, or prohibiting human actions. Legal philosophers have adopted the same framework for punishment. Both consequentialist theories and deontological theories aim to provide the grounds on which any individual act of punishment, as well as the very institution of punishment, ought or ought not to be instituted.[153] Consequentialist theories, as the name suggests, hold that the normative validity of a practice depends only on its consequences. A consequentialist theory is therefore forward-looking, justifying punishment with reference to some desired end.

[153] The distinction between the practice of punishment and any given act of punishment is not trivial. First of all, it points to the possibility that a society have an institution of punishment in place but never an occasion for its application. This, though rationally possible, rarely happens in practice. What does commonly happen, however, is that a specific punishment goes unapplied, whether because the action that gives rise to it never takes place or because society has generally stopped punishing that action in practice. For instance, "[a]lthough prosecutions for adultery or fornication have become rare in modern times, some [American] states continue to have statutory provisions that prohibit adultery and fornication, and the mere lack of prosecution under the adultery statute does not result in that statute becoming invalid or judicially unenforceable." See Marie K. Pesando, "Adultery and Fornication," *American Jurisprudence*, vol. 2, §1. In other cases, laws are rendered obsolete by political or social change (e.g., the Fugitive Slave Clause in the US Constitution, which was mooted, not repealed, by the abolition of slavery). Many obsolete statutes, no doubt originally written with a straight face, look either quaint or hilariously dated now, providing material to jokesters of a later time. The more significant aspect of the distinction between an institution and act of punishment is that it allows a society to sanction the practice of punishment yet severely limit its application by proscribing certain types of punishment or constraining the circumstances under which it is applied. For example, most legal traditions have permitted the death penalty, and many still do, yet have restricted the ways in which one may be executed.

Deterrence of future wrongdoing is a salient, but not the only, end for which a consequentialist would justify punishment.[154] Deterrence is often tied together with a utilitarianism, a version of consequentialism that sees punishment as justified when it increases the overall social welfare.[155] By contrast, deontological theories justify punishment with reference to the self-standing moral obligation to punish wrongdoing, rejecting the idea that the moral validity of punishment depends on its consequences. Deontological theories are therefore backward- or inward-looking, justifying punishment as either intrinsically good or as satisfying the demands of fairness. Retributivism is probably the most widely accepted deontological theory of punishment. Retributivists disagree in subtle, though not insignificant, ways, but they are unified in the general proposition that that offenders ought to be punished because their punishment ought to match their offense in kind and degree. Retributivism therefore makes the major epistemological assumption—which, like overall welfare for the utilitarian, does not always sit well in practice—that we can know with reasonable certainty which offense deserves which punishment. At all events, retributivists hold that, when it is established that an offender deserves punishment, no other moral consideration can hold sway.[156]

---

[154] An end related to deterrence is obedience to the law: punishment may be justified because, by deterring would-be wrongdoers, it makes people comply with the law. Legal compliance, however, opens a discussion far wider than whether whether people ought to be punished for wrongdoing. First of all, before reaching the empirical question of why people in fact do obey the law, there is the normative question whether people ought to obey the law. This question matters because such obedience usually involves compliance with the orders of legal officials rather than simply abstract moral propositions. On theories of obedience to the law, see Leslie Green, "Law and Obligations," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002), 514–48. Second, legal compliance takes us far beyond the realm of penal concerns, applying as much to why people comply with more mundane things, such as traffic rules, and why people consent to mediation and abide by the decisions of mediators. Such positive questions take us beyond moral philosophy to include the social sciences. In this space, deterrence, along with other principles, is invoked not as an explanation, not a justification, of legal compliance. See Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (Cambridge, MA: Harvard University Press, 2015).

[155] Utility is a slippery concept, and that which contributes to or detracts from it must be defined by a given society. On this question, Walter Sinnott-Armstrong, "Consequentialism," *Stanford Encyclopedia of Philosophy* (Winter 2015 Edition), §3. https://plato.stanford.edu/archives/win2015/entries/consequentialism/.

[156] Bedau and Erin, "Punishment," §3.

Another way to distinguish between consequentialist and deontological theories of punishment is to look at how they prioritize the moral good and the moral right. Consequentialism holds that the good has priority over the right. Although consequentialists disagree substantially about what constitutes the moral good, but they agree that an action's morality consists in whether it increases the overall good. Conversely, deontology holds that the right has priority over the good. "If an act is not in accord with the right," deontologists hold, "it may not be undertaken, no matter the good that it might produce (including even a good consisting of acts in accordance with the right)."[157]

Caricatured versions of pure consequentialism and pure deontology are subject to frequent and easy criticism, and the flaws of one provide much of the motivation to adopt a theory belonging to the opposing category. Consequentialism is criticized for being morally indifferent—for punishing or permitting behavior by looking at the aggregate state of affairs that that behavior brings about rather than the intrinsic qualities of the action and the agent. The famous trolley car problem illustrates the deontological objection to consequentialist morality. In this moral dilemma, pushing one person in front of an oncoming trolley car, killing him, would save five people who are tied to the tracks a little farther ahead. On the pure assessment of the overall good, whereby five lives are greater than one (assuming all lives are of equal value), pure consequentialists would argue that pushing the man in front of the trolley car is morally justified. Conversely, deontology is criticized for being blindly focused on the balancing of moral scales even when doing so yields no clear benefit for the individual or for society. Kant's well-known desert island hypothetical is held out as an example of such exaggerated retributivism. If an island community were all to quit the island, he wrote, they ought to execute every last murderer in

[157] Larry Alexander and Michael Moore, "Deontological Ethics," *Stanford Encyclopedia of Philosophy* (Winter 2016), §2. https://plato.stanford.edu/archives/win2016/entries/ethics-deontological/.

the prisons before leaving, "for otherwise the people can be regarded as collaborators in this public violation of justice."[158]

However, as Mark Tunick shows, neither utilitarians (exemplifying the consequentialist approach) nor retributivists (exemplifying the deontological approach) adopt a pure form of their respective theory. In other words, serious utilitarians do not hold that innocent people may be punished if doing so would increase overall welfare, nor do serious retributivists hold that punishment may never be mitigated on pragmatic grounds. Even Bentham, the paradigmatic utilitarian, and Kant, the paradigmatic retributivist, may be read as subtly tempering their arguments with a touch of the opposing theory.[159] Nevertheless, the two theories were long held to be more or less mutually exclusive, such that penal theory and practice must be guided by one or the other. In the early twentieth century, at least in the United States, theory and practice strongly favored a utilitarian model, favoring the prospective principles of deterrence and rehabilitation[160] over the retrospective principle of retribution. In his characteristically colorful fashion, Oliver Wendell Holmes (d. 1935), the U.S. Supreme Court justice, expressed the kind of resigned and self-consciously rational penal spirit of the time:

> If I were to have a philosophical talk with a man I was going to have hanged … I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law

[158] Immanuel Kant, *The Metaphysics of Morals*, ed. Lara Denis, trans. Mary J. Gregor, rev. ed. (Cambridge: Cambridge University Press, 2017), 116 [6:333 in the Academy Edition].
[159] Mark Tunick, *Punishment: Theory and Practice* (Berkeley: University of California Press, 1992), 69–102.
[160] Deterrence and rehabilitation, of course, are not the same, and it is not necessary to elaborate how they differ. But because they are unified in being forward-looking principles, and therefore in their opposition to the role of retribution in punishment, they are frequently grouped together.

must keep its promise.[161]

So long as the common good is served by the punishment, such statements hold, no consideration ought to be given to the severity of the offense or to the offender's degree of responsibility, and certainly not to the preferences of the victim or the members of the community who have suffered the harm. Proportionality, being deemed a remnant of archaic ideas of retribution, may serve no restraining function.

After World War II, a number of broad shifts took place in Western legal scholarship. Among them was disillusionment with the deterrent and rehabilitative aims of punishment, which, perhaps counterintuitively, led to a mounting application of punishments that were perceived to be ineffective, arbitrary, and unfair. The response was to synthesize utilitarian aims with the basic principle of proportionality embodied in retributivism. One of the leading figures in this movement, at least among legal philosophers, was the extremely influential H. L. A. Hart (d. 1992). Hart refused to see utilitarian and retributivist theories as incommensurable, instead pointing out how each of them sought to answer different questions. Punishment raises not simply the question whether to punish, but also the questions whom, how much, and by what means. No single theory can address all of these questions adequately.[162] Hart argued that a synthetic approach to punishment, combining the utilitarian *purpose* of social welfare and the retributivist *principle* of proportionality, was the best way to ensure against the arbitrary imposition of harsh punishments.[163]

---

[161] Cited by Morris J. Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment," *Oxford Journal of Legal Studies* 28, no. 1 (2008): 57–71 at 64–5n32.

[162] Fish, 66.

[163] An overzealous commitment to proportionality, of course, can have its own perverse consequences. One of them, as observed today in the United States and Canada, is the application of a schedule of mandatory minimum sentences. Such schedules were instituted originally to serve proportional punishment by preventing judges from over-sentencing offenders, but the same schedules so limited the discretion of judges as to prevent them from mitigating sentences in view of the gravity of the offense and the blameworthiness of the offender. See, e.g., Fish, 68.

The conscious attempt by Hart and his successors to synthesize consequentialist and deontological principles in a way also recovered the prior history of penal theory. When these theories were consciously formulated from the eighteenth century onward, their purpose was not simply to justify punishment but also, in the opposite direction, to delimit the scope of its application. Both utilitarianism and retributivism, with all their variations, were immanent critiques of punishment. Rather than examine the foundation of punishment itself, they assumed that punishment can and ought to be justified. Their aim was to locate inconsistencies in the going practices and argue for necessary changes in punitive policy—including, as Bentham argued, the abolition of capital punishment— without undermining punishment as a political institution. Extreme examples like the trolley car dilemma and the desert island scenario, to the extent that they demonstrate anything, ought to be taken more as dramatic illustrations of a central principle than as arguments of what is morally right. As it happens, theories that are both dominantly utilitarian and retributivist have been and still are invoked to argue *against* certain punishments. Within the utilitarian framework, the principle of deterrence serves simultaneously as a positive and a negative standard—negative in that the demonstrated failure of a given punishment to deter socially disapproved behavior would render that punishment *un*justified. Similarly but distinctly, in retributivist theory, such ideas as criminal desert and equivalence are invoked not only to establish that offenders ought to be punished but also that certain types of punishment ought not to be imposed when they are shown to be disproportionate. Therefore, it is wrong to say that utilitarians and retributivists' primary objective is to justify brutal and unjustifiable punishments through the unfeeling application of cold principles, such as that the "ends justify the means" or that "the killer should be killed."

These phrases are caricatures that distort the substantive conclusions of many utilitarian and retributivist theorists. It is similarly wrong to say that retributivism, because the word suggests vindictiveness, or utilitarianism, because it operates on a cold calculation of cost and benefit, leads to harsher penalties. Indeed, many modern legal scholars, on the basis of utilitarian *and* retributivist principles, have argued against the death penalty for murder or at all. The question whether an offense ought to be punished, as well as the question of how the offender ought to be punished when punishment is justified, is so fact-specific that it is reckless to rely on generalized impressions of this or that theory.

What can all this tell us about requital in Islamic law? Regardless of whether they are taken in pure or synthesized form, however, deontological and consequentialist arguments—and more specifically, desert-based retributivism and deterrence-based utilitarianism—lie behind nearly every punishment legislated and imposed by modern legal systems, often without being explicitly stated. Even if penal theorists have convincingly criticized the dichotomy as an oversimplification,[164] it remains true that retributivist and utilitarian considerations cover the general field of modern criminal thought. No doubt my summary has itself oversimplified the scholarship. But it is not my purpose here to present a systematic survey of modern punishment theory, and furthermore it is extremely easy to get twisted into classificatory knots.[165] My purpose is simply to point out that the two classes of theories so pervade

[164] Bedau and Kelly, "Punishment," §3.

[165] Some argue that retributivist theories are not necessarily all deontological. It might be more accurate, as Mark Tunick does, to see deontology as a subdivision of retributivism, which has other distinguishable variations. Another retributivist theory, for example is that punishment's primary purpose is to make society's condemnation of wrongdoing explicit. This expressive purpose of punishment is not quite a deontological account—in that the punishment serves not to satisfy a moral obligation but to publicly disavow the wrongdoing and to vindicate the *future* integrity of the law—and is therefore subtly forward-looking but in way that is not about deterrence and therefore not about maximizing social utility. See Tunick, "Punishment," 90–94. But Tunick also acknowledges that the condemnatory function of punishment is consequentialist only "in some sense." Apart from this small window to the future, then, retributivist theories are generally concerned with ex post or per se justifications of punishment.

modern legal thought that anything that looks like punishment is immediately put into either consequentialist or deontological terms. This includes, in Islamic law, the potentially capital sanction of requital. The two Quranic verses prescribing requital seem superficially to meld retributivist and utilitarian principles. On the one hand, requital is, in the most literal sense, a desert-based matching between action and consequence, requiring the taking of the life of "a freeman for a freeman, a slave for a slave, and a female for a female." On the other hand, the Quran invokes what looks like a deterrence justification, claiming that the application of requital will, by taking the life of some, preserve "life" for general society.

The remainder of this section is dedicated to showing that, despite its superficial comportment with the theories of punishment discussed here, requital for homicide in Islamic law fails to fit either the retributivist or the utilitarian framework of punishment. In other words, the elements of desert and deterrence in requital are distinguishable from the principles of desert and deterrence invoked in modern penal theory to justify punishment. I will draw this distinction by examining how exegetes, as represented by Kemālpaşazāde and Ebussuʿūd, have understood the two Quranic verses on requital. For convenience, I refer to these verses, in order, as the Equivalence Verse and the Deterrence Verse. Let us look at them in turn.

INTERPRETING REQUITAL

The Equivalence Verse

The Equivalence and Deterrence Verses are found in Sūrat al-Baqara, vv. 178–9. The verses read as follows:

[178]O you who believe! ⌜Equivalence in⌝ retribution is prescribed for you regarding ⌜all⌝ those who are murdered.[166] ⌜For instance:⌝ The ⌜life of the⌝ freeman ⌜who is killed⌝ for ⌜the life of the⌝ freeman ⌜he has killed⌝; and the ⌜life of the⌝ slave ⌜who is killed⌝ for ⌜the life of the⌝ slave ⌜he has killed⌝; and the ⌜life of the⌝ female ⌜who is killed⌝ for ⌜the life of the⌝ female ⌜she has killed⌝. But if one is granted a pardon ⌜from execution⌝ by his brother ⌜in faith⌝, then let ⌜the latter⌝ pursue ⌜restitution⌝, in accordance with what is right. Moreover, let his ⌜due⌝ compensation be ⌜remitted⌝ in the most excellent way. This ⌜commandment⌝ is an alleviation from your Lord, and thus a mercy ⌜from Him for it frees you from lawless vengeance⌝. So whoever commits an offense ⌜of reprisal⌝ after this ⌜compensation is taken⌝, then for him, there shall be a most painful torment. [179]Hence, there is, in retribution, life for ⌜all of⌝ you, O people of ⌜discretion and⌝ understanding, so that you may be ever God-fearing.[167]

The word *qiṣāṣ* is rendered differently from translation to translation. Ahmad Z. Hammad, who uses half-brackets to set off the original text from his interpretive additions,[168] translates it as "retribution" but adds that equivalence is implied by the word *qiṣāṣ*. In somewhat similar fashion, Muhammad Asad

[166] The word *qatlā* in the verse has the neutral meaning of "those who are killed," whether the circumstances of the killing be lawful or unlawful. Translating it here as "those who are murdered," as Hammad does, specifies that the verse refers to homicide, but it also introduces the implication, which is not necessarily implied by the verse's language, that the homicide spoken of here is *intentional* homicide. Translating *qatlā* as something like "those who are killed ⌜by homicide⌝" would be neutral but not elegant, and Hammad's translation methodology consciously incorporates interpretations drawn from disciplines, like law, that fall outside of scripture as such. However, it is useful to note the easy overlap between law and exegesis.

[167] Hammad, like most translators, interprets the final phrase here (*laʿallakum tattaqūn*) as referring to the quality of *taqwā*, often rendered as the "fear" or "consciousness" of God that stops the faithful from performing immoral acts. However, it is worth noting that the verb *ittaqā* also means "to take extreme caution." Accordingly, some exegetes have interpreted this verse to mean that requital is prescribed "so that you may take caution" not to commit an act—in this case, murder—that will incur divine displeasure.

[168] Without the bracketed material, the verses would read like this: "O you who believe! Retribution is prescribed for you regarding those who are murdered. The freeman for freeman, and the slave for slave, and the female for female. But if one is granted a pardon by his brother, then let pursue in accordance with what is right. Moreover, let his compensation be in the most excellent way. This is an alleviation from your Lord, and thus a mercy. So whoever commits an offense after this, then for him there shall be a most painful torment. Hence, there is life for you in retribution, O people of understanding, so that you may ever God-fearing."

renders it "[the law of] just retribution."[169] Arthur Arberry and Marmaduke Pickthall, not reasonably, evoke the law of the talion by translating it as "retaliation." And Yusuf Ali elides the notion of retribution entirely and calls it "the law of equality." Each of these translations is competent, with some preferring to be more literal and others preferring to fold in contextual clues, so it is not appropriate or necessary here to evaluate how accurately they render *qiṣāṣ*. But the variety in translation of this one word suggests prima facie that *qiṣāṣ* has layers of meaning that are hard to capture in a single rendering.

However it is translated, it is understandable, from a straight reading of the verses, why *qiṣāṣ* is naturally understood as a punishment. To exact retribution—to inflict pain for having inflicted pain—is perhaps the most visceral and basic form of punishment. However, neither mere hard treatment nor the desire for vengeance is sufficient on its own to distinguish legal punishment from all other penalties. Therefore, to forestall our gut reaction that *qiṣāṣ* is punishment, I have chosen to translate it as "requital." This word has the advantage of being more neutral, as one can requite both love and pain. In calling it requital, I intentionally avoid "retaliation" so as to not to suggest vindictiveness, which isn't necessarily implied by *qiṣāṣ*, and "retribution" so as not to confuse *qiṣāṣ* with the retributive theory discussed above.

The Equivalence Verse introduces requital as "prescribed" and therefore, strictly speaking, lawful. However, the verse's normative position—that is, what exactly the verse says ought to be—is not immediately evident. Is the verse saying that the one *ought* to or that one *may* be requited for murder? Put differently, is the verse enjoining that requital be imposed on the murderer or, if requital be imposed, that it be imposed in the right way? This normative ambiguity seems to be what Hammad ("⌜equivalence in⌝ retribution") and Ali ("the law of equality"), and less so Asad ("just retribution"), try to address

[169] The bracketed material is Asad's.

in their respective translations.[170] Their interpretive interventions seem to push the verse away from its apparent meaning. After all, in both tone and substance, it is very different to say that "retribution is prescribed" than to say that "equivalence in retribution is prescribed." This shift of focus, from *retribution* to *equivalence*, is supported by the remainder of the verse's content and by the particular state of social life that the verse, according to its exegetes, apparently sought to address. Kemālpaşazāde and Ebussuʿūd exemplify what exegetes, and following them jurists, understood as the verse's primary objective.

Requital for murder is defined as "doing to the killer or injurer exactly as he did" (and the same, *mutatis mutandis*, for bodily injury).[171] For Kemālpaşazāde and Ebussuʿūd, it is equivalence that serves as the defining feature of requital in Islamic law. In their interpretation, the Equivalence Verse forcefully presents a negative, rather than a positive, reformulation of the widespread and ancient practice of requital. The Islamic law of talion, then, is not that one ought to exact measure for measure (positive principle) but that one ought to exact no more than measure for measure (negative principle). The verse aims, in Kemālpaşazāde's view, not to mandate the exercise of requital or to hold it out as the optimal remedy for unlawful killing but, quite the opposite, to discourage its use. "The aim of the verse is to prohibit excess (*manʿ al-taʿaddī*), for those in the Days of Ignorance used to go to great excess in killing."[172] In other words, requital is a mitigating moral principle, not a maximizing one, intended to reduce the proliferation of killing while not invalidating the lawful desire for vengeance.

[170] Arberry and Pickthall, in using "retaliation," could be driving at the same interpretation if retaliation is primarily taken to mean exacting an equal measure rather getting even. The vindictive connotation of retaliation is too strong, however, to clear up the ambiguity.
[171] Ibn Kamāl Bāshā, *Tafsīr*, 564.
[172] Ibn Kamāl Bāshā, 564.

The verse may be divided into two halves. The first half, reproduced here for convenient reference, both announces and illustrates the principle of equivalence:

> O you who believe! ⌜Equivalence in⌝ retribution is prescribed for you regarding ⌜all⌝ those who are murdered. ⌜For instance:⌝ The ⌜life of the⌝ freeman ⌜who is killed⌝ for ⌜the life of the⌝ freeman ⌜he has killed⌝; and the ⌜life of the⌝ slave ⌜who is killed⌝ for ⌜the life of the⌝ slave ⌜he has killed⌝; and the ⌜life of the⌝ female ⌜who is killed⌝ for ⌜the life of the⌝ female ⌜she has killed⌝.

Kemālpaşazāde drives home his point—that the verse, by emphasizing equivalence, redefines the requital as a mitigating principle—in several ways, some more subtle than others.

First, he draws attention to the use of the plural when the verse prescribes requital regarding "those who have been murdered" (*qatlā*), not simply regarding "one who has been murdered" (*qatīl*). The plural form suggests that the verse is "concerned with preventing excessive retaliation. For if such excess is prohibited when a group of people is killed, then the prohibition applies a fortiori when a single individual is killed."[173]

Second, Kemālpaşazāde addresses what it means, as the verse literally says, for requital to be "prescribed." He notes first that the verse's focus on requital immediately puts us in a discussion of intentional homicide (*qatl al-ʿamd*), the most extreme form of homicide. To prescribe is to make binding (*ilzām*). Does prescription here mean that the perpetrator of an intentional homicide must be pursued and punished, as binding equivalence might imply, with nothing less than equal requital? Kemālpaşazāde's interpretation, in emphasizing equivalence rather than requital itself, throws a different light on the question. He suggests that the verse is not directed at punishing the perpetrator but at

[173] Ibn Kamāl Bāshā, 564.

binding all parties involved. The event of a homicide, Kemālpaşazāde reminds us, implicates multiple parties, and the verse binds each of them not to exceed the bounds of their respective prerogatives either by omission or commission. "Some of them are bound with carrying it out—namely, the public authority (*sulṭān*) when the legal executor demands [retaliation]. Some of them are bound with surrendering themselves [to the consequences of their actions]—namely, the killer. Some of them are bound to assist with and assent to the final [outcome].[174] And some are bound not to go to excess [in punishment]—either to exercise requital, or to take compensation, or to pardon."[175] This last group, though not named, clearly refers to the legal executors, who are not permitted to have their vengeance and take money too. This rule—the option for retaliation or compensation but not both—involves a subtle argument about property that reveals a great deal about how Muslim jurists conceptualized homicide. We will revisit it a little later in this chapter when we discuss the doctrine on intentional homicide

Third, and perhaps most provocatively, Kemālpaşazāde draws out the verse's emphasis on equivalence by showing that its specific prescriptions concerning retaliation are not meant to establish operable legal rules of punishment but to highlight the moral enormity of excessive retaliation. The person-for-person principles announced in the verse—freeman for freeman, slave for slave, and female for female—apparently suggest that status differences between the killer and victim, particular with respect to freedom and gender, barred the remedy of retributive execution. A freeman could not be executed for killing a slave, nor a slave for killing a freeman, nor a man for killing a woman. But this was not the legal rule. At least for Hanafis, a freeman could indeed be executed for intentionally killing a slave, as

[174] It's not clear who this category refers to. My guess is that it refers to anyone who is not an immediately party to the event that is unhappy with the final result—such as those who would wish an executed perpetrator pardoned or a pardoned perpetrator executed.
[175] Ibn Kamāl Bāshā, 563.

could a man for intentionally killing a woman. According to Kemālpaşazāde and Ebussuʿūd, the verse specifically addresses the internecine conflict in Arabia during the Prophet's time. "During the Age of Ignorance," Ebussuʿūd writes, "there existed blood feuds (*dimā'*) between any two given Arab tribal subdivisions, and any member of one was entitled to take revenge against any member of the other. 'We shall kill one of your freemen for one of our slaves,' they would swear, 'and one of your males for one of our females.' When Islam came, they brought the matter to the Messenger of God for judgment, and this verse came down ordering them to deal equally."[176] Both Kemālpaşazāde and Ebussuʿūd interpret the verse as prohibiting the practice of arbitrary requital divorced from individual culpability. The verse, therefore, expresses a moral, not a legal, hypercorrection to the Arabian tribal practice. The two exegetes show that, if the verse were taken as the basis for the law of retaliation, it would lead to perverse outcomes. Literally construed, the equivalence described by the verse could be taken to its extreme, whereby individuals may be punished only for killing members of the same class, thus undermining individual culpability and effectively denying requital to those outside the class. "There is no indication herein," however, "that a freeman may not be executed for killing a slave, nor a male for killing a female, nor vice versa. Those who view the verse's implied meaning as proof that a freeman may not be executed for killing of a slave have nothing here to hold on to."[177]

In highlighting equivalence, then, the first half of the verse does two related things. First, it privi-

[176] Abū al-Suʿūd, *Irshād*, 1:195.

[177] Ibn Kamāl Bāshā, *Tafsīr*, 565; cf. Abū al-Suʿūd, *Irshād*, 1:195. The interlocutors here, as we shall further soon, are non-Hanafis, especially Shafiʿis and Malikis, who held that gender- and freedom-based differences could bar the option of requital. Hanafis, by contrast, held that requital was barred between members of different polities, defined broadly in terms of political domicile (*dār*), but that, within the same political group, status-based differences did not necessarily bar requital.

leges the rights and obligations of individuals over those of the collective; second, it distinguishes between the moral and legal dimensions of requital. Equivalence is a strong moral principle: it prohibits arbitrary requital by defining moral culpability in individual terms. Culpability for killing falls only upon the individual who kills, and the right to seek requital falls only to the individual who is killed. It can easily be seen, however, that this principle is potentially too strong when *moral* culpability is translated into rules of *legal* liability. When the individual is narrowly defined, as the verse may suggest, equivalence could effectively eliminate the option of lawful requital when there is a categorical mismatch between the killer and killed. Jurists therefore spent a good deal of space defining the protected legal status (*ʿiṣma*) covered by the law of homicide, and we will discuss this important concept when we survey the doctrine of homicide later in this chapter. For now, it is sufficient to say that Hanafis, generally speaking, defined protected legal status more in political than personal terms, such that those under a single political head (*imām*), regardless of their personal or confessional status, were regarded equal in the protections afforded by the law of requital.

The second half of the equivalence verse raises the option of pardoning the killer. For convenience, I repeat it here:

> But if one is granted a pardon ⌜from execution⌝ by his brother ⌜in faith⌝, then let ⌜the latter⌝ pursue ⌜restitution⌝, in accordance with what is right. Moreover, let his ⌜due⌝ compensation be ⌜remitted⌝ in the most excellent way. This ⌜commandment⌝ is an alleviation from your Lord and a mercy. So whoever commits an offense ⌜of reprisal⌝ after this ⌜compensation is taken⌝, then for him, there shall be a most painful torment.

This part of the verse, Kemālpaşazāde explains, is an extension (*tafrīʿ*) of the first half's discussion of

requital and further emphasizes that equivalence is a negative rather than positive principle. The option of equivalent requital seeks to individualize rights and obligations.

Individual right, captured in the passage's first sentence, is implied by verse's suggestion that each of the victim's heirs individually possesses the right both of requital and of pardon. "The prescribed [requital] is the individual's right (*ḥaqq al-ʿabd*) and is therefore void if he chooses to void it."[178] The verse uses a peculiar passive construction[179] that Kemālpaşazāde and Ebussuʿūd both interpret as awarding forgiveness moral priority over requital. This priority is reflected in the legal rule that, if even just one of the victim's heirs decides to pardon, the remaining heirs may only take their portion of the monetary damages. This, according to Kemālpaşazāde, is the meaning of "pursuing [restitution] in accordance with what is right" (*ittibāʿ bi 'l-maʿrūf*). The mitigating principle is further emphasized in the verse's closing statements. The option to pardon, and the corresponding option to take compensation instead, is at once a divine alleviation, "in that it prevents requital against the offender" and thus further bloodshed, and a divine mercy, that is does "not eliminate the right" of the victim's heirs to receive some recovery for their loss.[180] Overstepping the limits of the available options—"such as by killing someone other than the killer, or killing [the killer] after either pardoning or taking compensation"—is a grave legal and moral offense subject, respectively, to worldly and otherworldly punishment.[181] Legally, the transgressive retaliation would be considered a new homicide subject to the same penalties, including

[178] Ibn Kamāl Bāshā, *Tafsīr*, 565.
[179] Rather than say "if his brother [i.e., the victim's heir] pardons him," the verse reads "if he [i.e., the killer] is given any pardon by the his brother." The use of the indefinite *shay'* (lit. "a thing") as the passive voice subject (*nā'ib al-fāʿil*) is glossed as *shay' min al-ʿafw* (lit. "anything of pardon"). Used this way, *shay'* in the indefinite means something like "at all." The verse's phrasing therefore implies, as the exegetes interpret it, that any pardon at all, from any of the victim's heirs, has the effect of dropping the option to execute.
[180] Ibn Kamāl Bāshā, 567.
[181] Ibn Kamāl Bāshā, 567.

lawful requital, as the original killing; and, morally, the enormity of the killing could subject the killer, without God's forgiveness, to divine punishment in Hellfire.[182]

Requital, in view of this analysis, does not fit comfortably within the framework of retributivism. Retributivist theories, though disagree in their appraisals of what kind of punishment fits what kind of wrong, nevertheless agree that wrongdoing *ought* to be punished because it *deserves* to be punished. By contrast, requital at most embodies the normative position that those who kill with intent *may* be killed if all the prerequisites are satisfied, and moreover that forgoing this option is morally desirable. We will address below whether, according to Islamic jurisprudence, intentional homicide deserves requital, but the unequivocal preference for waiving it at minimum throws the question of desert into question and clearly distinguishes Islamic requital from retributivist capital punishment. Under a retributivist theory, the grounds for abandoning a certain type of punishment must address the question of moral desert, and such grounds, in any case, do not include the victim's or victim's family's altruistic preference to pardon the offender. Wickedness deserves punishment, a retributivist would hold, even if the measure of wickedness and the punishment is open to dispute. Islamic requital presents a very different moral logic: the victim's heirs ought to forgo requital, but the severity of the offense warrants their decision to exercise it. It is hard to conclude, then, to read a retributivist justification into Islamic law's law of requital.

The Deterrence Verse

This brings us then to the Deterrence Verse. I label it so because the verse enunciates the deterrent purpose of requital:

[182] Abū al-Su'ūd, *Irshād*, 1:196.

> Hence, there is, in retribution, life for ⌜all of⌝ you, O people of ⌜discretion and⌝ understanding, so that you may take caution.

The deterrent thrust of the verse is borne out not only by its apparent meaning, but also by its almost universal exegetical interpretation. Most exegetes say that, for those possessing reason and intelligence, awareness of the retributive penalty will, as Ebussuʿūd puts it, "deter the killer from killing" (*yardaʿ al-qātil ʿan al-qatl*).[183] Having sketched out the predominant modern theories of punishment, in which deterrence of future criminality plays a major role, we may be tempted to view equivalent retribution in Islamic law within the same theoretical framework. Indeed, on the strength of such statements as Ebussuʿūd's, the Deterrence Verse may easily be construed as furnishing a straightforwardly deterrence-based moral justification for capital punishment. This construction, however, does not hold up under close scrutiny. The moral argument that jurists extract from this verse is more subtle than the bare proposition that the threat of being killed deters potential killers.

Perhaps the most glaring problem is that requital, even though it is offered in the Deterrence Verse on the grounds of preventing future delinquency, seems literally to embody a retrubutivist rationale (even if not, as we saw in the last above, a retributivist justification).

The preventive powers of a threat are, to begin with, rationally and morally tenuous. It is not all obvious that knowing the fatal consequence of murder would deter all rational individuals who are inclined to commit the act. Indeed, common observation suggests that some people will not comply no matter how great the threat. Nor is it clear, even if we were sure that most rational and informed people

[183] Abū al-Suʿūd, 1:196.

would be deterred from killing by the threat of execution, that killing justifies being killed. Muslim jurists, too, were aware of the tension inherent in deterring the future taking of life by taking another life, and it was not lost on our two exegetes that the Deterrence Verse embodies a practically explicit contradiction. "Equivalent retribution entails killing, the taking of life," which does not square with the desire to preserve it.[184] For Kemālpaşazāde and Ebussuʿūd, the verse itself highlights this puzzling idea with a subtle but rhetorically brilliant turn of phrase. It uses, first of all, an inverted word order that emphasizes the first word—requital—and highlights the unusualness of the verse's proposal for stemming the vicious cycle of violence. Requital, furthermore, is "used where its opposite would be expected. The word *requital* is made definite and *life* indefinite, suggesting that in this regime lies the preservation of a great deal of life, to a degree that can hardly be described."[185]

For our two exegetes, the deterrent potential of retribution to which the verse points—and indeed the limitations of that potential—comes into focus in the context of the whole passage. We have already seen that Kemālpaşazāde and Ebussuʿūd read the Equivalence Verse, in view of pre-Islamic tribal warfare and the pattern of successive and indiscriminate retaliation, as a mitigating revision of the existing norms of retaliation. The current verse continues against the same backdrop. "Were requital not legislated," Kemālpaşazāde writes,

> and were the practices of the Age of Ignorance allowed to continue—killing someone other than the killer or killing a group in return for a single person—chaos would have reigned among the public, leading to the eruption of civil strife and war and depriving people of security. Through the legislation of

[184] Ibn Kamāl Bāshā, *Tafsīr*, 568.
[185] Abū al-Suʿūd, *Irshād*, 1:196; cf. Ibn Kamāl Bāshā, *Tafsīr*, 568.

> equivalent retribution, then, this impulse for revenge (*thā'ira*) was quelled, as awareness of [its individual consequences] would have deterred anyone who would desire to murder. Thus the killed would be saved from being murdered, and the killer would be saved from execution. Because those of understanding would not be drawn toward murder, security among people would be restored. The result, therefore, is life, not just for the two saved souls, but for many others, who may thus enjoy safety, security, and prosperity.[186]

Kemālpaşazāde and Ebussuʿūd make clear, furthermore, that the Quran speaks in aspirational rather than empirical terms. The Deterrence Verse does so by addressing its core proposition to "those of understanding" (*ulū 'l-albāb*). This phrase, perhaps intentionally ambiguous in its scope, seems in any case to refer not simply to the general class of rational persons (*ʿuqalā'*) but to those who are especially given to "contemplating the wisdom of equivalent retribution" and considering such a grave action's consequences before committing it.[187] Such people will "take caution," as the verse says, to "avoid killing without right."[188] The Deterrence Verse therefore cannot be construed as the naive claim that the threat of killing the killer will deter *all* would-be murderers from going through with the deed. If anything, by addressing itself to "those of understanding," the verse seems to recognize that a substantial proportion of people will fail to understand or internalize the message. This implicit recognition in turn frees us from the problem of having to interpret the Deterrence Verse as a *justification* of requital. It is possible to read it as no more nor less than the reasonable claim that rational persons who understand the potential individual consequences of murder are less likely to commit it.

[186] Ibn Kamāl Bāshā, 568–9.
[187] Abū al-Suʿūd, *Irshād*, 1:196.
[188] Ibn Kamāl Bāshā, *Tafsīr*, 569.

A better interpretation of the Deterrence Verse, then, is that requital is not a remedy for bloodshed as such but a remedy for indiscriminate bloodshed. This interpretation allows the Deterrence Verse, as I have suggested, to harmonize with the Equivalence Verse. It bears repeating that the Equivalence Verse mandates, not simply requital, but *equivalent* requital. These are very different things: the former is an affirmative principle that opens the door to revenge killings, while the latter is a negative principle that severely limits when killing is authorized in response to another killing. The affirmative principle says that the killer must be killed, while the negative principle says that only the killer may be killed.

The interpretation of requital as a negative principle is further made sensible by the historical conditions into which it was introduced. In a social regime built around corporate identity, such as that of pre-Islamic Arabia but also of much of the world for many centuries hence, collective retaliation was already a normal and recognized way of dealing with deadly conflict. Introducing requital alone (*You may kill the killer*) would have been superfluous, and putting it forward as any kind of solution for internecine warfare would have been a laughable proposition carrying little moral persuasion. Far more radical would have been to fundamentally reframe, as the verses seem to do, the natural desire for revenge. The moral force of equivalent requital, and consequently its deterrent effect, flowed from focusing moral responsibility around the individuals immediately involved in the act of the killing. When responsibility was distributed across the tribe or other social group, the fear of retribution was unlikely to deter anyone, as any member of the grieving tribe was entitled to kill any member of the offending one. Conversely, if the killer knew that culpability fell squarely upon him or her, and that he or she alone would suffer the (potentially fatal) consequences, this knowledge was more likely to give pause—that is, to deter. Similarly, if the heirs to a victim of a completed murder knew that, on pain of being executed,

they could not go out and indiscriminately kill members of the murderer's tribe, they too were more likely to hesitate. Unlike utilitarian theories of punishment, deterrence constitutes neither the justification nor the purpose of requital but an argument about the morally salutary outcomes that could result if people were put on notice of their individual responsibility for committing murder. The Deterrence Verse therefore strengthens the Equivalence Verse's objective in severely limiting the circumstances under which requital could be exercised. Indeed, as we saw with the Equivalence Verse, if the individual were defined with extreme narrowness, equivalence had the potential to so constrain requital as to severely underenforce its application.

It may not even be a stretch to say that the underenforcement (or perhaps even the nonenforcement) of requital may have been a specific desideratum of the new retributive regime. The Equivalence Verse "suggests," Ebussuʿūd writes, "that forgiveness by some [of the heirs] amounts to forgiveness by all in that it cancels the option of requital. And *this is what customarily happens*: a pardon is usually granted by at least one of the heirs."[189] By preserving retribution as a lawful outcome, yet expanding the force of forgiveness such that an individual pardon can save the murderer's life, the verse serves to validate the desire for vengeance while simultaneously raising the burden to satisfy it. Ebussuʿūd, it bears emphasizing, is making not simply a theoretical statement but an empirical one as well. The language he uses about "what customarily happens" (*al-wāqiʿ fī al-ʿāda*) could be a hypothetical claim about what people do when someone in the family is killed: one of the heirs pardons the offender. But this observation is likely rooted in a personal observation of social behavior. Ebussuʿūd, having served as a judge before eventually being appointed chief jurisconsult, probably noted that intentional homicides, when they

[189] Abū al-Suʿūd, *Irshād*, 1:195. Emphasis mine.

occurred and were established,[190] were usually pardoned by at least one of the victim's heirs. This simple observation can go a long way in explaining why the Ottoman court records hardly attest any cases of in which requital was exercised for intentional homicide.

To the extent that Ebussuʿūd's observation was hypothetical—that is, that at least some people, in order to maintain harmonious social relations, will likely pardon murderers—it raises a different question concerning requital for homicide. The question is as follows: If the verses' purpose is not only to mitigate requital by tying it to the individual, but also to effectively eliminate its practice by giving forgiveness the widest effect possible, what is the purpose of allowing requital at all rather than eliminating it altogether? This question has a positive and normative facet. On the positive side, can there exist a remedy when in fact there is little or no occasion to exercise it? The answer is yes. Legal philosophers have shown that "it is possible to have a practice of punishment—an authorized and legitimate threat system—ready and waiting without having occasion to inflict its threatened punishment on anyone."[191] On the normative side, if few such cases ever arise, why ought such a rule to exist? The answer may be that certain rules retain a subtle power by their very existence even when they are rarely practicable.

In any case, Ebussuʿūd's statement about what customarily happens reveals something deeper about the nature and purpose of requital in Islamic law. If requital was preferably not applied, and indeed rarely was, it is hard to view deterrence as the moral *justification* for the institution. Punishment can only deter if it is both legitimate and credible. Requital must therefore be distinguished from capital

[190] There are, of course, other reasons why we, for the most part, do not see cases of equivalent retribution being imposed. The biggest reason is the hurdle of establishing intent, which had to be surmounted before even reaching the question of pardoning the offender. We will see a little later is this chapter how Hanafi jurists defined intentional homicide.
[191] Bedau and Kelly, "Punishment," §7.

and other punishments that are explicitly justified on the basis of deterrence. A deterrence-based justification argues that a punishment *ought* to be imposed if is believed to prevent future occurrence of the wickedness being sanctioned. In the case of requital, deterrence is at most a desired byproduct in such societies as privilege corporate over individual moral responsibility.

DEFINING PUNISHMENT: PUBLIC CONDEMNATION BY PUBLIC AUTHORITY

Now that we have closely reviewed the two verses as exegetes—or at least as two leading Ottoman exegetes—understood them, we are now in a better position to assess whether the moral underpinnings of requital match those of punishment. So far, I have argued that the Equivalence and Deterrence Verses articulate a coherent position that, though resembling retributivist and utilitarian theories in some respects, does not justify requital on grounds either of just deserts or of deterrence. True, the Equivalence Verse says, like retributivist theory, that requital ought to be strictly proportional and furthermore ought to be imposed only on the individual found guilty of the act of murder; and the Deterrence Verses says, like utilitarian theory, that requital can potentially serve the overall welfare of society by preventing future murder. But neither verse, as interpreted by our exegetes, says that requital ought to be either imposed or waived on grounds of criminal desert or deterrence. The basis for its imposition and for its waiver, rather, arises from the individual victim's right to be requited for the wrong done to him or her, a right that, because the victim is dead, transfers to his or her heirs. Because its justificatory theory is entirely different from that of capital punishment, requital is not properly regarded as punishment.

All these precious moral distinctions, however, may just amount to a distraction from the task of

defining requital. Recall Joel Feinberg's article, cited above, in which he attempts to clarify the distinction between punishment and penalty. There Feinberg's task is to determine what *defines*, not what justifies, punishment. Definition, he rightly implies, gives rise to but also logically precedes justification. Deterrence and just desert, I have argued, do not furnish the Islamic moral justification for requital. But so what? Deterrence and desert, Feinberg notes, are also invoked to justify noncriminal sanctions, so these two qualities are insufficient to distinguish punishment from the miscellaneous run of hard treatment that are called penalties. Capital requital, no one would deny, is hard treatment, and as such it is susceptible to the label of punishment if it exhibits punishment's defining features, regardless of whether it is justified in retributivist, utilitarian, or other terms. Does the penalty of requital satisfy the modern definition of punishment?

There is no universal consensus among Western moral and legal philosophers about the definition of punishment, and indeed no one can truly claim to have captured the essence of punishment. However, to look at two definitions that most philosophers would accept—one older, one more recent—we can satisfactorily arrive at the conclusion that requital is not punishment in its paradigmatic form. Each of these definitions highlights a slightly different aspect of punishment.

The first definition was expressed by Jeremy Bentham in the eighteenth century. It is easiest to understand the definition by quoting the full passage in which it appears:

> The consequences we have hitherto been speaking of are the *natural* consequences of which the act, and the other articles we have been considering, are the causes: consequences that result from the behavior of the individual, who is the offending agent, without the interference of political authority. We now

> come to speak of *punishment*: which, in the sense in which it is here considered, is an *artificial* consequence, annexed by political authority to an offensive act, in one instance; in the view of putting a stop to the production of events similar to the obnoxious part of its natural consequences, in other instances.[192]

Bentham's normative theory of punishment, in line with his utilitarian program of maximizing overall social welfare, consists in the total reduction of the evil consequences that follow from the perpetration of offensive acts. He calls these evil consequences "mischiefs." When someone commits an offensive act, it produces a primary mischief, such as taking a human life, and a secondary mischief. Secondary mischiefs include both natural ones, such as the loss of support and companionship after a homicide, and artificial ones, such as the sanction to which the offender is subjected. These "artificial consequence[s], annexed by political authority to an offensive act," is what for Bentham defines "punishment."

Requital fails to satisfy both parts of this definition. First, requital is not an "artificial" consequence of homicide but the natural and proportional result of the offender's breach, as it were, of the implicit promise not to kill the victim. This will become clearer later in this chapter, when we observe how the Muslim jurists theorized homicide in quasi-contractual terms. Both requital and monetary compensation were a kind of repayment for breaking the implied contract that human beings in a single political community have not to kill each other. In any case, requital was not an additional consequence layered artificially atop the natural consequence of paying for a life with a life. Second, requital is not annexed by the political authority to the offensive act. This does not mean that the political authority does not administer the process of establishing culpability and imposing the sanction. All legal sanctions,

[192] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907), ch. 12, §36. Italics in the original.

whether civil or criminal, are by definition administered by the political authority. What Bentham seems to be referring to here is a sanction that the political authority itself manufactures, such as by statute, and then imposes upon the offender.

The second definition is provided by Joel Feinberg: "Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted."[193] This definition, apart from being a less stodgy and idiosyncratic than Bentham's, speaks to two key aspects of punishment. The first is its reprobative or condemnatory function, the second its representation of the public will, whether real or imagined. What distinguishes punishment from other penalties, in other words, is not just that it is hard treatment, but that it is a "conventional symbol [] of public reprobation."[194] Requital falls short of this definition. Its primary purpose is if anything compensatory, not an expression of public disgust and resentment for the offender. The compensatory nature of requital is further driven home by the fact that the individual heirs, not the public authority, retain the right to waive the penalty.

Requital falls short of this definition in one other way. One of the derivatives of social reprobation, Feinberg notes, is the vindication of the law. When someone breaks the law by committing an offense, that act must be met with the hard treatment of punishment in order to emphatically reaffirm the law's meaning and force. If legal officials refuse, for example, to punish those found to have committed murder, the public, not to mention potential future murderers, is unlikely to take such rules seriously. The vindication of the law, therefore, requires a minimum the normative commitment to, if not the actual

[193] Feinberg, "Expressive Function of Punishment," 400.
[194] Feinberg, 402.

practice of, punishing those who break the law. We have already seen how this is not the case with requital. Our exegetes pointed out clearly, not only that most people did pardon intentional killers, but that it is normatively preferable that the heirs *not* demand the imposition of this penalty.

The analysis in this section has set out not only to explain the seeming anomaly of requital—a capital sanction amid what are otherwise civil sanctions—but also to make it square with the present-day scholarly understanding of punishment. The task has been no less challenging for modern legal scholars to articulate what punishment is and is not. Requital is an anomaly only insofar as modern legal systems have virtually eliminated the decision to penalize from the hands of those who suffer most from the murderer's mischief. It seems unfamiliar nowadays that the laypeople, even those closest to the victim, should have any say in the killer's fate. Yet, as Ian Miller suggests in his impassioned essay on retaliation, such official monopolization of punitive power may be the historical oddball.

I do not wish to argue that punishment in Islamic law is incompatible with—that is, that it may not be restated in terms of—consequentialist and deontological theories of criminal punishment or some combination of the two, nor that Bentham's or Feinberg's definitions of punishment are wholly incompatible. I am saying merely that requital, or *qiṣāṣ*, does not fit within this definitional and justificatory framework. This raises the question whether requital may be properly classified as a criminal punishment. Given the dominant identification in modern legal philosophy between legal punishment and criminal punishment, I see no problem in trying to translate classical Islamic norms in those terms. What I object to, however, is shoehorning *qiṣāṣ* into the same framework and then reconfiguring the rest of homicide law to fit a modern conception of crime and criminal punishment.

CONCLUSION

In this chapter, I have taken on the most glaring feature of homicide that would lead us to classify it as part of Islamic law's criminal jurisprudence. I have argued that, contrary to appearances, *qiṣāṣ*, which I call requital, does not fit within the theories that underpin the modern practice of legal punishment. We have seen how legal philosophers broadly divide normative justifications of punishment into consequentialist and deontological theories, often advocating a strong version of one while constraining its perverse implications with elements of the other. Utilitarianism, the chief version of consequentialist theories of punishment, rests primarily on a principle of deterrence; retributivism, the main type of deontological theories, justifies punishment in terms of the offender's desert and the moral obligation to meet offense with a proportional sanction.

Requital, on its face, contains elements of both deterrence and proportionality. Yet, as we have seen, these alone are not sufficient to elevate a mere penalty to a criminal punishment. Massive fines deter, and proportionality explains why you ordinarily do not pay a thousand dollars when you cause ten dollars of damage. The modern theory and practice of punishment additionally presume that the sanction be carried out not only by the political authority but also at the political authority's total discretion. If I kill someone, the state has total discretion either to prosecute me or not and, if I am convicted, to punish me in the manner it sees fit. Requital defies this mold by putting its exercise firmly within the hands of the victim's heirs. The political authority, at least in principle, cannot carry out requital against the family's wishes, nor can it deny their demand to have it carried out for a proven intentional homicide.

My purpose here is not to make requital seem less unusual to the present-day observer. Nor do I wish to argue that Islamic law did not permit the political authority, beyond the family's imposition of

requital, to criminalize and punish homicide for the benefit of society. What I seek to show here is only that punishment, even in requital, is not the chief concern of Islamic homicide law. Even if the remedies for homicide serve to chasten past killers and deter future ones, the specific rules in the books of legal science have nothing to do with punishing the wrongdoer as such. The chief concern of Islamic homicide law, as I discuss in the coming two chapters, is to compensate for harm and to redistribute loss as far as possible across the members of society.

CHAPTER TWO

Valuing the Price of Blood: Compensation (*Diya*) and the Economics of Homicide

The last chapter called into question the classification of requital (*qiṣāṣ*). I argued that, although a penalty, requital may not be considered a "punishment" according to the definition and normative theories of modern legal philosophers. This argument, for both substantive and psychological reasons, is a necessary step toward substantiating the broader thesis of this dissertation. As I said at the end of the last chapter, the foregoing analysis shows, in perhaps excruciating detail, that requital is not a doctrinal anomaly. Requital, in other words, is not a punitive remedy crammed into what is otherwise a regime of civil compensation for wrongful death, but itself a kind of civil penalty. This finding in turn opens the door, first, to explaining the coherent *civil* doctrine of Islamic homicide law, as I will do in the remainder of this part and Part II; and, second, to answering whether Islamic law makes any place for punishing homicide as a crime the way we understand that term today, which I will do in Part III.

The previous chapter also prods us to consider how we tend to register legal systems of non-Western origin while perhaps ignoring or misapprehending tensions within our own. The normative framework discussed above may be applied comparatively to non-Western contexts, as I tried myself to do, but it must be remembered that this framework is bounded up with concerns peculiar to Western intellectual, political, and legal history. Utilitarian and retributivist theories of punishment reflect old anxieties within Western jurisprudence about the relationship between the increasingly reified state and its legal subjects. The impulse to define and justify punishment in particular occurred in the ferment of Western early modernity, during which, among other developments, legislative activity swelled

and the reach of the state surpassed anything previously known. This regime of law came to be characterized by legal monism, legislative supremacy, and expansive executive power, which in turn translated to the state's monopolization of violence. The authorized use of violence, as well as decisions about when and how to use it, fell henceforth within the remit of the state.

The paradigms of this legal regime are now so entrenched in both Western and non-Western nations that they affect the way we study the history of all legal systems, including whatever legal system one might call one's own. One of these paradigms is the extreme curtailment of private redress for fundamentally private wrongs. True, private redress for many injuries between persons, initiated and terminated by the injured parties, makes up the civil law of most countries. But the modern state, possessing legal personhood, dominates much of the legal playing field by degrees. Many governments, while they can be sued by citizens, can also bring civil action of their own for injuries committed against the state. Even in private suits between citizens, the state, together with the legal profession, plays so close a role in administering the outcome as to almost co-opt the process.[195] And any injury that involves the intentional use of violence is partially or entirely removed to the sphere of criminal law, over which agents of the state exercise exclusive control and in which neither offender nor victim have much of a say. Given the visibility and expansive discretion of public prosecutors today, moreover, the notion that

[195] The Anglo-American law of torts, although rooted in tradition, seems markedly quaint to many observers, including students. By way of personal anecdote, I noted during a torts course at the University of Chicago Law School that many students instinctively favored administrative penalties, in the form of fines payable to the state, over compensatory damages, payable to the victim, as the right and the most socially productive remedy for injury. For its part, the UChicago Law School is famous for developing and popularizing the school of law and economics, which emphasizes the superior ability of private individuals over governments to sort out their differences. Opponents of this school attack the inability of private individuals to deliver just outcomes and the foolishness of diminishing government when government able to do so. These politics lie outside the scope of this paper. However, one insight that law and economics provides is that legal doctrines, before the codification movement and before the growth of modern governments, were internally ordered not only by logical rationality but by economic principles intuitively recognized by jurists.

private individuals could press a criminal suit for violent injuries appears decidedly alien. Yet even in the West, the public prosecutor is a historical latecomer, emerging in the Anglo-American tradition no earlier than the sixteenth century out of peculiarly English judicial institutions.[196] Even after the slow emergence of the public prosecutor, it was relatively common for private persons to bring criminal actions.[197] In the United States, for instance, privately funded prosecutions occurred commonly in the nineteenth century and were slowly eliminated by federal and state governments over the course of the twentieth century.[198] Today private prosecution is pretty much a dead letter, and public control over the levers of prosecution is virtually absolute.[199] The private redress in Islamic jurisprudence for something that looks criminal therefore looks a great deal less unusual.

In arguing for the non-punitive nature of homicide, I mean to point up a certain historical myopia in Islamic legal historiography. It is too easy, when comparing Islamic law to the legal regime we live in today, to come across something like requital and classify it as part of Islam's "penal law," and from there to assess the seeming anomaly of private involvement in the state's rightful administration of punish-

[196] John H. Langbein, "The Origins of Public Prosecution at Common Law," *American Journal of Legal History* 17 (1973): 315–35.

[197] John D. Lawson and Edwin R. Keedy, "Criminal Procedure in England," *Journal of Criminal Law and Criminology* 1, no. 4 (1911): 595–611 at 606–7.

[198] Robert M. Ireland, "Privately Funded Prosecution of Crime in the Nineteenth-Century United States," *American Journal of Legal History* 39 (1995): 43–58.

[199] It may or may not be that public prosecution is as it should be; I am not prepared to advance a normative position. However, Robert M. Ireland and John Langbein (see previous notes) show that the main drivers of private and public prosecution, respectively, had to do with the availability of funding and expertise. Private individuals and organizations that mounted prosecutions did so in part because of the perceived incompetence of the public prosecutor. And states that have statutorily abolished private prosecution (which nearly all have) are supported by the concern that the criminal justice system be operated by professionals who have the funding and expertise—and, through elections, the theoretical accountability—that private prosecutions usually do not have. The converse problem, which continues to affect the American prosecutorial system, is runaway discretion. See, e.g., John H. Langbein, "Controlling Prosecutorial Discretion in Germany," *University of Chicago Law Review* 41, no. 3 (1974): 439–67.

ment. Such a view, apart from being substantively wrong, reflects the commitments more of those analyzing Islamic law than of Islamic law itself.

THE ECONOMIC LOGIC OF INJURY

It is now the purpose of this chapter to show affirmatively that compensation, rather than punishment, is the fundamental remedy for homicide in Islamic law's civil jurisprudence. This is indicated prima facie by the fact that homicide is folded into the related chapters on damages (*diyāt*) and injuries (*jināyāt*), which we will examine in turn, rather than given a separate treatment as a crime. In these two chapters, compensation is the guiding principle behind the continuum of remedies that include not only pecuniary damages but also requital. Moreover, although we discuss requital primarily in the context of homicide, it is important to remember that requital is equally available for nonfatal bodily injuries as well. Talionic requital, therefore, should not be equated with the punishment of death, but rather viewed as a complete form of compensation.[200] It is a half-truth, furthermore, to suggest that damages are a derogation from requital, which suggests that requital is the ideal form of justice for homicide and lesser injuries.[201]

Because compensation is the guiding principle in Islamic homicide law, there is a strong economic logic to the whole scheme. Both requital and damages, to be sure, are restrained by the principle of proportionality announced in the Equivalence Verse. But they are principally motivated, not by the desire to make the offender suffer an equal measure of *pain* in the way punishment does, but by the desire

[200] For an analogous interpretation of the Old Testament's contribution to the *lex talionis*, see Morris J. Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment," *Oxford Journal of Legal Studies* 28, no. 1 (2008): 57–71, who cites rabbinic interpretations that view "an eye for an eye" in compensatory terms in addition to, or instead of, punitive terms.
[201] See, for example, E. Tyan, "Diya," in EI2.

to make the victim whole. Seen in this light, requital, which entails paying back the taking of another's life or limb with the surrender of one's own life or limb, is the fullest and most proportionate form of compensation. However, we have already seen that jurists regarded forgiveness as normatively superior to requital, and that, at least in the sixteenth-century Ottoman Empire, requital was rarely applied. And we will see later in detail that, because it is only available for injuries intentionally inflicted and reciprocally compensable, requital is barred in the majority of homicide scenarios to begin with.

The law therefore turns to a large schedule of *diyāt* (sg. *diya*), or fixed payments to be transferred (in cash or kind) to the victim for an injury to one's life or to any part of one's body. In volume and tone, these payments form the heart of Islamic homicide and injury law. The schedule values out these payments as either the full or fractional measure of a life. In rather literal terms, then, the schedule of compensation puts a price on human life and limb. Most payments are predetermined. For mutilations to discrete limbs of the body, the sums vary depending on which part it is and how many of them the body has (e.g., a nose versus a finger). And for serious wounds that do not damage a discrete limb, jurists have put composed a list of wounds and valued the damage based on the severity of the wound. Finally, for injuries that do not match easily with any of those described in the schedule, jurist direct legal officials to rely on the discretion of a reliable expert (*ḥukūmat ʿadl* or *ḥukm ʿadl*).

The economic logic of injury compensation in Islamic jurisprudence may be explained in three ways. First, the schedule of payments influences the structure of incentives. The imposition of predetermined sums of money implicitly recognizes that perfect compensation is impossible in most cases but that the wronged parties would be better off receiving the imperfect satisfaction of money than

receiving nothing at all. Moreover, by remaining available even when requital is legally warranted, damages create an incentive to forgo that option and signal that taking money in place of blood is the more socially desirable, if not also the morally admirable, course.

Second, in presenting a value-neutral way of resolving homicide and injury, the schedule of payments reduces the considerable cost of evaluating damages and thereby increases the efficiency of the judicial system. To simply thumb through any Ottoman judicial register, one gets an immediate sense of just how much business the limited staff of just one court had to process in a single day. In resolving serious injuries, a longer and more subjective process could possibly produce a better and more accurate assessment, but what is better is itself extremely subjective. The court's need for a determination, as well as the plaintiff's likely demand for a speedy response, may reasonably outweigh the abstract desire for perfect and elusive accuracy. How you compensate someone for loss of life or limb lends few obvious responses that are not subject to the whims and passions of the parties involved. Therefore, by reducing the amount of discretion in assessing damages, the schedule of payments provides a regular, reproducible, and practicable solution to abstract and potentially intractable problems. It is a touching cliche to say that life is priceless, but that does not help offer concrete redress in the event of wrongful death or severe injury. Economics solutions offer the bluntest but perhaps the most effective, if not perfect, way of settling emotionally fraught legal questions that involve human suffering. They do so because they are, by design, value-neutral.

Third, the schedule of compensation in Islamic injury law spreads the loss among members of society. This is especially evident in the doctrine of corporate oath-taking (*qasāma*), which we will discuss in the next chapter. But it is also present in the schedule of fixed payments. By predetermining the price

of life and limb, the doctrine of course compels injurers to make reparative payments. However, the fixed sums might frequently fail to match the full extent of the injury's damage, in which case the victim and victim's family are forced to absorb some of the loss as well.

This economic logic of compensation further strengthens the proposition that Islamic injury law is civil rather than criminal in nature. In particular, the value-neutrality of the compensation schedule serves to detach this doctrine from an assessment of blameworthiness. The identification and sanction of blameworthiness is the basic function of criminal law.

To illustrate these claims about Islamic injury law's valuation of life and limb, I will review part of the chapter on compensation (*kitāb al-diyāt*) from Muḥammad b. Al-Ḥasan al-Shaybānī's *Aṣl*, one of the oldest comprehensive works of Islamic jurisprudence. This sketch will put the fuller examination of homicide doctrine, which I will turn to in the next chapter, into better historical perspective.

A GENEALOGY OF HANAFI JURISPRUDENCE

The brief look here at al-Shaybānī's *Aṣl* is one of a few short departures in this dissertation from what is otherwise an exclusive focus on Ottoman-era jurisprudence. As mentioned in the introduction, the purpose of concentrating mostly on Ottoman texts, apart from keeping this study within a manageable scope, is to facilitate a coherent picture of legal precept and practice within a single Islamicate polity. Nevertheless, law is naturally conservative. It is important, therefore, to demonstrate as well how Ottoman jurists viewed themselves within the tradition of the Hanafi school even as they adapted that tradition to their political institutions, in quite the same way that American jurists view themselves within the stream of the English common-law tradition without compromising their political commitment to

American legal institutions. Therefore, I presented in Chapter Two a sampling from a pre-Ottoman text in order to demonstrate how major medieval texts of the Hanafi school were built into the education, and from there presumably into the practice, of Ottoman judges. Here I wish to show, with respect more specifically to homicide and injury, how the basic structure and substance of the Hanafi doctrine was set down in the school's earliest writings. The strong economic logic that accompanied this doctrine was conserved along with the text. My argument, which I will elaborate as this study progresses, is that the distinction between the private and public dimensions of homicide were established early. The rules on compensation in the *Aṣl*, which is principally concerned with the norms governing civil relations rather than political institutions, furnish a rough-and-ready set of private remedies for the essentially private act of personal injury. Before surveying that doctrine, it is important first to get acquainted with al-Shaybānī and his work. The *Aṣl* in particular has certain idiosyncrasies that make it both an unusual and important.

Muḥammad b. al-Ḥasan al-Shaybānī was one of the junior students of Abū Ḥanīfa (d. 150/767), barely reaching eighteen when his master died after having studied directly under him for only a couple of years.[202] He studied the *Muwaṭṭa'* of Mālik b. Anas (d. 179/795) under Mālik himself. He also read for some time with his senior Hanafi colleague, Abū Yūsuf (d. 182/798), although some later biographers reported that the relationship between the two men cooled later in life.[203] His scholarly career consisted primarily of teaching and writing, but he also served for some short but unspecified time in the Abbasid judiciary under Caliph Hārūn al-Rashīd. Al-Shaybānī died in Rayy (part of modern Tehran) in 189/805,

[202] E. Chaumont, "al-Shaybānī," in EI2.
[203] Muḥammad Zāhid al-Kawtharī, *Bulūgh al-amānī fī sīrat al-Imām Muḥammad ibn al-Ḥasan al-Shaybānī* (Cairo: Dār al-Hidāyah, n.d.), 35–9.

before reaching the age of sixty, and was buried in the same city.

What most made al-Shaybānī's impact enduring, despite his relatively short direct association with the school's eponym, were the products of his pen. Nearly all the works that have been reliably ascribed to him were in law, although in this early period the discipline of legal science as such had not been as self-consciously distinguished from theology and Hadith. The shared genealogy of these disciplines is evident in most works of jurisprudence, if in nothing more than the arrangement of topics. Al-Shaybānī's recension of Mālik's *Muwaṭṭaʾ*, as well as his own transmitted Hadith collection, titled *al-Āthār*, primarily have questions of law at heart. In any case, the main collection for which al-Shaybānī would eventually become most known consisted of six titles: *al-Aṣl* (also called *al-Mabsūṭ*), *al-Jāmiʿ al-ṣaghīr*, *al-Jāmiʿ al-kabīr*, *al-Siyar al-ṣaghīr*, and *al-Ziyādāt*.[204] These six works vary considerably in length, and their contents overlap a good deal. But they soon came to be recognized as the primary early statement of Hanafi jurisprudence, being collectively dubbed the school's "Definitive Recension" (*Ẓāhir al-riwāya*). Here the "recension" refers as much to the totality of the doctrine as to a particular text or set of texts. The Definitive Recension is to be distinguishes from a series of texts collectively called the "Mélanges" (*Nawādir*). These collections of opinions, generally named after a primary narrator (e.g., the *Kaysānīyyāt*, *Hārūnīyyāt*, *Jurjānīyyāt*), are often known only by name, with such content as survives coming to us through citation in later medieval sources. Because of this fragmentary transmission, the Mélanges is regarded within the school as normatively unreliable, especially on issues already addressed in the Definitive Recension.

The Definitive Recension presents Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī himself as the locus of

[204] For descriptions see editor's introduction to Muḥammad b. al-Ḥasan al-Shaybānī, *al-Aṣl*, ed. Mehmet Boynukalın, 13 vols. (Beirut: Dār Ibn Ḥazm, 2012), 1:32–5.

authoritative opinion in the school—not discounting their peers but not giving their view central attention—and this triad became known as such in the later history of the school. Later Hanafi nomenclature uses "three imams" to refer to the whole triad and a set of dual terms to refer to any group of two when one of them holds a dissenting opinion. Abū Yūsuf and al-Shaybānī are referred to as "the two colleagues" (*ṣāḥibayn*) when they disagree with their master; Abū Ḥanīfa and Abū Yūsuf as the "two masters" (*shaykhayn*) when al-Shaybānī dissents; and Abū Ḥanīfa and al-Shaybānī as the "two ends" (*ṭarafayn*) when Abū Yūsuf dissents. The structuring of the basic doctrine around these three figures became so standard in Hanafi discourse that jurists often simply used *qālā* (a single word meaning "the two of them said") to refer to Abū Yūsuf and al-Shaybānī. The development of such terminology is prima facie evidence of the significance of al-Shaybānī's written legacy.

It is not necessary to summarize each to the six works of the Definitive Recension. What is worth mentioning here, though, is that together, view together, the works have a kind of work-in-progress character. The titles, free of the ornament that came into fashion a bit later, point transparently to the contents of each work. The *Siyar al-ṣaghīr* and the *Siyar al-Kabīr* are shorter and longer works on the law of war and sovereign relations; and the *Jāmiʿ al-ṣaghir* and the *Jāmiʿ al-kabīr* are both digests of Hanafi jurisprudence, with the latter furnishing slightly more analysis than the former. The *Aṣl* is an extended exposition of Hanafi doctrine, largely but not entirely comprising the content of the shorter works. And the *Ziyādāt* provides supplements to each of the previous works. The cumulative quality of al-Shaybānī's oeuvre meant that none of the works entirely superseded another, and Hanafi jurists attended to all of them individual or in combination. What makes the *Aṣl* noteworthy is its length, detail, and comprehensiveness. It covers, more or less systematically, the bulk of the subject matter of Islamic

jurisprudence. Unlike the shorter digests, however, the *Aṣl* frequently works through legal questions, presenting arguments in favor and against, in dialectical fashion. A common formula in the *Aṣl*—"Don't you see that…?" (*a-ra'ayta*)—frequently leads off a rhetorical counterargument in response to an objection raised by al-Shaybānī's real or imagined interlocutor.[205] This rhetorical formula reflects the way that the "publication" of early legal treatises followed patterns of oral debate, which was naturally less polished than a work carefully written and revised in private before being put out for more public consumption. It took time for authorship to take the latter form. During al-Shaybānī's time, learned writing was as much more a process of classifying (*taṣnīf*) a large body of material than it was the exposition of one's personal opinion.[206] The benefit, in the case of the *Aṣl*, is that, in addition to finding a generally well-organized body of doctrine, one can almost see al-Shaybānī hammering out that doctrine piece by piece.

Given the breadth and comprehensiveness of this work and the centrality of its author to Hanafi jurisprudence, one may rightly wonder why the *Aṣl* has received fairly spotty attention from scholars. One straightforward reason is the work's limited availability in print. Until a complete critical edition was published a few years ago by Mehmet Boynukalın,[207] only a few chapters of the *Aṣl* had been printed

[205] Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (New York, NY: Cambridge University Press, 2013), 22–28. El Shamsy also hypothesizes that the formula *a-ra'ayta* may have contributed to the labeling of the dialectically minded jurists in the formative period of Islamic law as *ahl al-ra'y*, which is commonly translated as the Partisans of Reason. El Shamsy's hypothesis is supported by early references to the group as *ahl a-ra'ayta* (the Partisans of "Don't You See"). Even if the phrase is not the origin of the label, it nevertheless suggests that *ra'y* referred more to techniques of reasoning through an argument than to a particular disposition about the normative merits of reason as such. On *ra'y* generally, see Jeanette Wakin and A. Zysow, "Ra'y," in EI2.

[206] On the early phase of learned Islamicate writing, see Gregor. Schoeler, *The Genesis of Literature in Islam: From the Aural to the Read*, trans. Shawkat M. Toorawa, The New Edinburgh Islamic Surveys. (Edinburgh: Edinburgh University Press, 2009), chap. 5.

[207] See El Shamsy, review of *al-Aṣl*, by Muḥammad b. al-Ḥasan al-Shaybānī, ed. Muḥammad Būynūkālin, *Journal of Near Eastern Studies* 75, no. 1 (2016): 194–96.

as part of a series on early Hanafi writings under the editorial supervision of Abū al-Wafāʾ al-Afghānī.[208] Still, given the immense efforts since the beginning of the twentieth century to publish the Arabo-Islamic tradition, by both Muslim and Orientalist scholars, it seems odd that so important a work would have had to wait as long as it did. It is not necessary to make too much of this anomaly—no one, to my knowledge, necessarily downplayed the *Aṣl*'s significance—but it is worth considering an explanation. Two come to mind.

One explanation is that the *Aṣl* itself, though never forgotten, fell out of regular circulation as a work to be copied and transmitted. This cannot be true, however. In his volume-long editorial introduction, Boynukalın documents seventeen core manuscripts used for producing his critical edition, as well as twenty-five supplementary manuscripts.[209] Whether partial or complete, these copies are dated, either explicitly in the text or through codicological indicators, to various centuries. To take just one example, there is a two-volume manuscript containing, among others, the chapters on injury and compensation. The colophon mentions that it was collated[210] in 959 a.h. (1552 c.e.) by one Yūnus b. Aḥmad al-Fayyūmī. This extensive and consistent attention suggests that the *Aṣl* was an active part, as it were, of the Hanafi editorial repertoire.

Against this conclusion, however, is the valid concern that the earliest extant manuscripts dates only to first half of the thirteenth century c.e., a full four centuries after al-Shaybānī's death. The absence of earlier manuscripts has rightly given textual scholars some pause.[211] It also explains why it took so

[208] Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-aṣl*, ed. Abū al-Wafāʾ al-Afghānī., 4 vols. (Hyderabad: Maṭbaʿat Majlis Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1966).
[209] Al-Shaybānī, *al-Aṣl*, 1: 139–70.
[210] Here collation refers to textual collation (*muqābala*), the process of comparing the copy against the original, rather than physical arrangement of the leaves and quires of the codex.
[211] Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), chap. 3, esp. 39–55.

long for the *Aṣl* to be edited. The task would have entailed not simply to create a critical edition but, as Boynukalın suggests, the more difficult and hazardous task of reconstructing the original work.[212]

The *Aṣl*'s reception history is one of its great idiosyncrasies. The absence of early manuscripts, somewhat counterintuitively, explains why the *Aṣl* is such a reliable and important statement of early Hanafi jurisprudence. The *Aṣl*, by most historical indications, was written as separate topical treatises, and it is not clear at all that al-Shaybānī necessarily intended it to be a single, integrated work. Its transmission followed the same piecemeal pattern. Early references to al-Shaybānī's mentioned the *Aṣl* neither by this name nor the alternative name for which it became known, the *Mabsūṭ*. Ibn al-Nadīm, in his *Fihrist*, instead mentions al-Shaybānī's "books" on by one according topic. This was in the late tenth century. It was not until the late eleventh century, among the great Hanafi scholars of Central Asia, that we see the *Aṣl* consistently called such.[213] The *Aṣl*, then, has the unusual distinction of being known in its early life primarily through its commentaries before eventually being put together into an integrated work. This explains why there seems to be no clear canonical selection or order to the various manuscripts produced over time, as these later editors (or, better, these compilers) likely saw each book as a standalone work whose integrity was not compromised by being paired with others.[214]

It may have been because the *Aṣl* was composed of various topical threads that it became woven into the tissue of early Hanafi legal writings. There are two primarily lines along which this process took place, and both lines led to Central Asia. The first was through Muḥammad b. Muḥammad al-Marwazī,

[212] Al-Shaybānī, *al-Aṣl*, 1:175.
[213] Al-Shaybānī, *al-Aṣl*, 1:44.
[214] Boynukalın, nevertheless, identifies three patterns of later compilation. One set of manuscripts contains mostly devotional subject matter, a second with mostly commercial subject matter, and a third with the remaining portions of the *Aṣl*. See Al-Shaybānī, *al-Aṣl*, 1:170–2.

or al-Ḥākim al-Shahīd ("the Martyred Magistrate"), as he came to be widely known. Al-Ḥākim al-Shahīd (d. 334/945) came to prominence under the Samanids, the Central Asian dynasty that, on behalf of the Abbasids, governed Khorasan and the Transoxanian frontier in the latter half of the ninth century and throughout the tenth. A distinguished jurist, al-Ḥākim al-Shahīd was appointed first to the judgeship of Bukhara, site of the Samanid court, then by al-Amīr al-Ḥamīd Nūḥ b. Naṣr to a ministerial position in Khorasan. This position was probably short-lived. In 945, al-Ḥākim al-Shahīd was killed in the midst of a series of uprisings by the palace military that severely threatened and, but he end of the century, put an end to the Samanids.[215] The slain jurist's lasting contribution was to produce a coherent compendium of the six books that made up the Definitive Recension. This work, titled *al-Kāfī*, refers to the various parts of the *Aṣl* not by this name but as "extended books" (*kutub mabsūṭa*), distinguishing those longer treatments from their counterparts in the shorter *Jāmiʿ* works. The *Kāfī* was in turn the basis a century later for the magisterial *Mabsūṭ* by the Transoxanian jurist Shams al-A'imma al-Sarakhsī (d. 490/1096).[216] Al-Sarakhsī does refer to the *Aṣl*, possibly to distinguish between his own work and the alternate title to al-Shaybānī's original.

The second major line of the *Aṣl*'s medieval reception ran through Burhān al-Dīn al-Marghīnānī (d. 593/1197), the author of the *Hidāya*. Al-Marghīnānī spent his primary years of scholarly activity in Samarkand. Samarkand in the last half of the twelfth century sat at the western edge of the small empire that the Qara Khitai, a sinicized non-Muslim dynasty, had carved out in Transoxania after defeating the

[215] Abū Muḥammad ʿAbd al-Qādir al-Qurashī, *Al-Jawāhir al-muḍiyya fī ṭabaqāt al-ḥanafiyya*, ed. ʿAbd al-Fattāḥ Muḥammad al-Ḥulw, 2nd ed., 5 vols. (Jeddah: Hajr li-l-Ṭibāʿa wa-l-Našr wa-l-Tawzīʿ wa-l-Iʿlān, 1993), 3:313–15. For a summary of the Cliffor Edmund Bosworth, *The New Islamic Dynasties: A Chronological* Samanid dynasty's rule and a list of its members, see *.and Genealogical Manual* (Edinburgh: Edinburgh University Press, 1996), 170–1

[216] For al-Sarakhsi, see N. Calder, "al-Sarakhsi," in EI2.

Qara Khanids and Seljuks at the Battle of Qatwan in 1141. The Kara Khitai, whose rule only lasted about seventy years, took a largely hands-off approach, and the learned activity in the historical Islamic centers continued seemingly without major interruption.[217] The *Hidāya* was a product of this period. This work, though often read on its own, was a commentary by al-Marghīnānī himself titled *Bidāyat al-mubtadī*. This base text was a pastiche of al-Shaybānī's writings and the *Mukhtaṣar* of Aḥmad b. Muḥammad al-Qudūrī (d. 428/1037).[218] Over the course of the following four or five centuries, the *Hidāya* was the subject of repeated commentaries, including one by the Ottoman chief jurisconsult Saʿdī Çelebi (d. 945/1539).[219]

As this commentarial activity continued to swell around the Definitive Recension, a number of prominent medieval jurists produced compendia of their own seeking to provide a fresh and coherent restatement of Hanafi jurisprudence. Al-Qudūrī's was one of them, as was Abū al-Barakāt al-Nasafī's *Kanz al-daqā'iq*. To these may be added, notably, *al-Wiqāya* by Tāj al-Sharīʿa ʿUmar b. Aḥmad (d. 673/1274) and *al-Mukhtār* by ʿAbdullāh b. Maḥmūd al-Mawṣilī (d. 683/1284). One of the reasons expressed for producing fresh works was that, as time passed, longer works were becoming increasingly cumbersome to read and keep track of.[220] There are certainly other notable compendia, but these in

[217] Michal Biran, *The Empire of the Qara Khitai in Eurasian History: Between China and the Islamic World* (Cambridge: Cambridge University Press, 2005), 180–91.

[218] For a study of al-Qudūrī and his compendium, see Talal Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbughā's Commentary on the Compendium of Qudūrī* (Leiden: Brill, 2017).

[219] His commentary was in fact a super-commentary on the earlier commentary, titled *al-ʿInāya*, by Akmal al-Dīn al-Bābarti (d. 786/1384). On Saʿdī Çelebi himself, see Mehmet İpşirli and Ziya Demir, "Sâdî Çelebi," in TDVIA.

[220] Abū 'l-Barakāt ʿAb Allāh b. Aḥmad al-Nasafi, *Kanz al-daqā'iq*, ed. Sā'id Bakdāsh (Beirut: Dār al-Bashā'ir al-Islāmiyya, 2011), 137. In his own compendium, titled *Tanwīr al-abṣār*, the late-sixteenth-century Ottoman jurist, Muḥammad al-Tumurtāshī (d. 1004/1596) cited the cumbersomeness of longer works as well, but added that this made such works unusable as reference handbooks for judges and jurisconsults. See Muḥammad b. ʿAbd Allāh al-Tumurtāshī, *Matn Tanwīr al-abṣār wa jāmiʿ al-biḥār* (Cairo: Al-Maktaba al-Nabawiyya, n.d.), [7].

particular constituted the four "seas" in *Multaqā al-abḥur* ("The Meeting of the Seas"), a synthetic compendium by Ibrāhīm b. Muḥammad al-Ḥalabi (d. 956/1549). The *Multaqā* became an extremely important Ottoman textbook, and it served in turn as the basis for a significant commentary by Dāmād Efendi (d. 1078/1667).

This short genealogy of Hanafi jurisprudence points up the interconnections between al-Shaybānī's early works and the productions of jurists in the medieval and early modern periods, right into the sixteenth-century Ottoman Empire. It is not surprising, even in the compendia independently authored over time, to encounter the terminology and conceptual framework of injury compensation as it had been articulated in al-Shaybānī's *Aṣl.* Let us now turn to a review of al-Shaybānī's exposition.

AL-SHAYBĀNĪ'S DOCTRINE OF COMPENSATION

In broad strokes, the chapter on compensation (*kitāb al-diyāt*) breaks down as follows. It starts with an intent-based typology of injury, which in part determines the remedy available to the victim, and then proceeds from least to most intentional forms of injury. The first long section details the specific costs of accidental injury to different parts of the human body as well as the persons responsible for paying it—rules that articulate several major doctrines of compensation. After that the chapter covers corporate compensation (*qasāma*), a doctrine that presumes an accident when someone is found killed in a locality with no known assailant and then apportions liability upon the residents or whoever else can rightfully be deemed socially responsible to prevent such killings. Only then does the chapter move on to requital (*qiṣāṣ*) for injuries, first the nonfatal and then the fatal ones, that can be proved intentional.

The chapter then concludes with the doctrines that govern the pardoning (*ʿafw*) of intentional and accidental injuries. In each of these sections al-Shaybānī addresses the appropriate rules of evidence, which vary depending on the type and degree of injury. Here I will sample the first long section, that is, the one detailing the costs of accidents. I will revisit the other parts of the doctrine in the next and final section of this chapter.

Al-Shaybānī begins, as mentioned, with the typology that frames the substance of the entire chapter:

> Homicide has three types: intentional (*ʿamd*), accidental (*khaṭaʾ*), and quasi-intentional (*shibh ʿamd*). INTENTIONAL HOMICIDE is to purposely strike the victim with a weapon. This entails requital unless the victim's heirs pardon or agree to a settlement. QUASI-INTENTIONAL HOMICIDE is to purposely strike the victim with a cane, whip, stone, or piece of clay. This entails heavy compensation to be paid by the killer's social group (*ʿāqila*), and the killer must also offer expiation (*kaffāra*). ACCIDENTAL HOMICIDE is to intentionally aim at one thing but accidentally strike the victim. This degree entails expiation for the killer and carries a remedy of [light] compensation upon the killer's kin. This position has reached us from Ibrāhīm al-Nakhaʿi.[221]

There is a lot to unpack here. One thing that we will see is that the three types of intent, well before Ottoman times, expanded to a five-part typology. The specific parts of this typology will have to wait till the coming section for elaboration. For now there are a few of salient points.

First, it would seem reasonable to conclude that, because al-Shaybānī leads the discussion of injury compensation with a discussion of homicide and the possibility of death as recompense, requital was

[221] Al-Shaybānī, *al-Aṣl*, 6:547. I have added the small caps as a visual aid.

viewed in Islamic law as the optimal remedy. But we are too easily misled by such a superficial reading. There are other reasons why al-Shaybānī start with homicide. The most straightforward reason is that it serves the organization of the doctrines in the chapter. The typology of intent applies fully only to homicide; the law does not recognize quasi-intent for nonfatal injury. Al-Shaybānī is able later on to simply say that the concept is inapplicable to bodily injuries rather than backtrack and introduce a new concept. A more subtle reason is to point up a disagreement between Hanafis and other schools. For Hanafis, intentional homicide entitled the heirs either to requital or to a settlement, not to a choice of either requital or fixed compensation. If the heirs waived requital, they could ask for a settlement, but the final amount had to be mutually agreed upon by the heirs and the killer. In other schools, requital and fixed compensation were alternatives. The significance of this difference may not be clear, but I will elucidate it below. The main point here is that mentioning requital in the beginning serves functions other than signaling that homicide deserves death but to provide a coherent overview of the typology of injury. It is not insignificant that al-Shaybānī does not even discuss the specific doctrines of requital until much later in the chapter. He begins the chapter, by contrast, with the detailed rules of compensation.

Second, this opening section draws a distinction between what homicide legally entails and what it morally deserves. Were it not for our earlier discussion of penal theory, this might seem like a hair-splitting distinction. But Islamic law, as al-Shaybānī summarizes, has separate provisions for what the injurer owes the aggrieved party and what the injurer owes God. This point, too, we will discuss further in the coming section.

Third, this opening section introduces the *diya*, not simply as a concept of compensation, but also

as a definable sum to be paid by the injurer to the victim or the victim's heirs. The *diya* assigns, as it were, a price tag to a human life—a notion that, though vulgar when said out loud, is far less so when we consider that all legal systems with civil remedies for injury do the same thing in one way or another. The purpose of doing so is eminently practical. When alternative remedies for injury fail, including the option of arriving at a settlement with the offender, Islamic civil jurisprudence presents a schedule of payments that complainants can sue for. This schedule is depersonalized and more or less fixed and, as we shall see, to be borne not only by the injurer but by the injurer's kinship or other social group. The *diya* therefore serves not simply as a crass calculation of the value of a person's blood. Instead, it serves as a benchmark that, by significantly easing the cost and complexity of evaluating damages, facilitates the availability of *some* remedy when the parties are unable to arrive at a better one.

My calling the *diya* a "benchmark" bears emphasis. In calling it such, I mean that the *diya* is not the price of a life alone but the price of all significant bodily injuries. The nomenclature of injury law suggests that the compensation for homicide was always greater than the compensation for other bodily injuries. It became common in the jurisprudence to use *diya* strictly to mean "property that stands in replacement for a life" (*al-māl alladhi huwa badal al-nafs*)[222]—in other words, for fatal injuries—and to use the term *arsh* (pl. *urūsh*) for compensation paid for nonfatal injuries. This usage also appears in the *Aṣl*. However, the *arsh* was calculated against the *diya* and, if the injury was to a major organ, could be equal to the *diya*.[223] When full compensation is due, al-Shaybānī simply says that the *diya* is due.

[222] ʿUmar b. Muḥammad al-Nasafī, *Ṭilbat al-ṭalaba fi al-iṣṭilāḥāt al-fiqhiyya* (Beirut: Dār al-Nafāʾis, 1995), 327 (in *kitāb al-diyāt*). Cf. ʿAlī b. Muḥammad al-Sharīf al-Jurjānī, *Kitāb al-taʿrīfāt* (Beirut: Dār al-Nafāʾis, 2003), 174–75 (s.v. *diya*).

[223] In his lexicon, Ibn Manẓūr defines *arsh* as the "compensation for wounds" (*diyat al-jirāḥāt*), suggesting that the two words were defined in terms of each other. See Muḥammad b. Mukarram Ibn Manẓūr, *Lisān al-ʿarab*, 15 vols. (Beirut: Dār Ṣādir, n.d.), s.v. A-R-SH.

What constitutes a "major" injury entailing full compensation is, stated thus, quite vague. Al-Shaybānī, immediately after his opening exposition, explains the basic doctrine for assessing full compensation:

> Injury to one's life entails full compensation. Injury to the nose [if injured entirely] entails full compensation, as does injury to the soft tissue of the nose, that is, everything below the bridge. Injury to the whole tongue entails full compensation, and injury to part of it also entails full compensation if it impairs the faculty of speech. Injury to the penis entails compensation in full, and injury to the head of the penis entails full compensation as well. Injury to the spine carries full compensation if it destroys the ability to have intercourse or causes deformity.[224] If, however, the victim returns to former health and shows no sign of injury except for an exterior mark, just compensation shall be determined by a reliable expert (*ḥukm ʿadl*).[225]

The doctrine announced here holds that, if an injury does permanent damage to the entirety of a limb, such that it destroys the function of that limb, the compensation shall equal that assessed for doing "injury" to the whole life. This is most easily applicable to the external limbs that people have only one of. Al-Shaybānī mentions the most obvious of them (the nose, the tongue, the spine, and the male genitalia), but he clarifies that the same standard applies to any blow that render any major faculty inoperable, including faculties, like cognition, that are not tied to a visible organ. For example, if someone is struck on the head and "loses his mind," this injury entails full compensation.[226] It also does not matter

[224] The word used for the spine is *ṣulb*. Etymologically related to words denoting rigidity (*ṣalb* and *ṣalāba*), the word, when associated with the human body, came to denote the back, which was simultaneously seen as the locus of bodily strength and, by extension, sexual health. A broken back therefore could impair the ability both to stand up and to have sexual intercourse. See Ibn Manẓūr, *Lisān al-ʿarab*, s.v. Ṣ-L-B.
[225] Al-Shaybānī, *al-Aṣl*, 6:548.
[226] Al-Shaybānī, 6:548.

whether one can live without the organ; the doctrine is blind to how important one limb is compared with another. If a man's "beard is shaved such that it never grows back," he is entitled to full compensation.[227]

It seems cruel to award the same sum to someone who has suffered permanent brain damage and to someone to who has lost the ability to grow back his flowing facial hair after an aggressive shave from one's barber. This parity of compensation, however, highlights one of the most important features of the injury compensation scheme: its value neutrality. The relative valuation of the body's limbs, based a subjective feeling of which are more important than which, is arbitrary in the extreme. It is useful to remember the context. While most visits to the barber today are bloodless, barbers historically (and many even today) would use straight razors to shave their customers' hair, and an unskilled hand could have had seriously unfortunate results. The victim of such an injury may rightly feel that he should get the full compensation available. The doctrine of injury compensation therefore clearly favors a standard that, though producing seemingly unfair outcomes, enables as value-neutral and consistent an assessment of damages as possible. More significantly, the assertion that a cut-up face should receive less compensation than a brain injury rests on the premise that the latter is more blameworthy than the former. Such blameworthiness lies at the heart of criminal, not civil, liability. Yet blameworthiness is clearly not relevant to this set of doctrines. Therefore, the value neutrality of this compensation scheme—that is, that the assessment of damages does not necessarily, and often not at all, correspond with either the intent of the injurer or the nature of the injury—further highlights that Islamic injury law stands properly outside of the criminal domain.

[227] Al-Shaybānī, 6:549.

It bears emphasizing that the doctrine addresses the problem of permanence. Does the injury have to be permanent, and if so exactly how permanent is permanent? Only the injured limb that never returns to its former functionality is subject to fixed compensation. But what if, though the limb's function return, the injury leaves a permanent mark on the body? In such cases, the law does not allow the injurer to cite the victim's recovery in order to escape liability. But the law recognizes that such cases are so situation-specific that no single bright-line rule will adequately determine how much the injurer ought to pay. This is therefore a necessary entry point for discretionary decision-making into the system of assessing damages, as people often do recover from their injuries.

Al-Shaynānī then pushes the mathematical logic of this compensation scheme further:

> Half compensation should be paid when one leg or one hand is severed. Ten camels should be paid for any of the fingers or toes, and all fingers and toes are valued equally. Half compensation should be paid when an eye is put out or an ear is destroyed. Full compensation should be paid when the penis is severed. One-third compensation should be paid for a head wound that reaches the dura mater (*ma'mūma*) or a body wound that penetrates the torso (*jā'ifa*). Fifteen camels [or three-twentieths damages] should be paid for a wound that goes to the marrow of the bone (*munaqqila*) and five camels [or one-twentieth damages] for one that exposes bone. Permanent injury to teeth carries [one-twentieth] compensation of five camels, and all teeth are valued equally. Permanent injury to both buttocks carries full compensation and half compensation for injury to one of them.[228]

In particular, the doctrine covers two categories of compensation. The first is compensation for external limbs that are found in multiples. Here compensation is calculated fractionally according to the

[228] Al-Shaybānī, 6:548–49.

quantity of the limb in question. Irreparable injury to organs that come in twos, such as hands, arms, feet, legs, eyes, and ears, are assessed half compensation. If both members of a pair are injured, of course, full compensation is due. The same goes for the buttocks, which are taken as a pair rather than a unit, as well as the eyebrows, lips, female breasts, female nipples,[229] and testicles and[230]. No consideration is given to whether one member of the pair is larger or more prominent than the other, or whether one person has a larger organ than another person.[231] Eyelids, which are unusual in that they come in fours, are, by the same logic, assessed a quarter compensation per lid. Injury to fingers and toes, which ordinarily number at ten,[232] entail one-tenth compensation each if a whole finger or two or damaged. Teeth are valued each at one-twentieth.[233] The fingers and toes are further evaluated bone by bone. Those with two bones (the thumb and big toe) are assessed one-half of the finger's worth, which comes out to one-twentieth compensation; and those with three bones (the rest of the fingers and toes) are assessed one-third of the finger's worth, which comes out to one-thirtieth compensation.[234]

The second topic is compensation for wounds (*shijāj*). Evaluating these is naturally open to far greater subjectivity, and thus requires relatively greater discretion, since their severity cannot be measured in terms of the loss of a particular limb or organ. We have already seen that, for injury to limbs that

[229] The doctrine specifies female breasts and nipples. See Al-Shaybānī, 6:550. Injury to a man's pectoral area is turned over to an expert for an assessment of damages (*ḥukm 'adl*). The logic seems to be that female breasts and nipples serve a nursing function, while their male counterparts are not a "functional" organ. See Al-Shaybānī, 6:555.

[230] Al-Shaybānī, 6:549–50.

[231] For example, al-Shaybānī specifically mentions that women with larger or smaller breasts are viewed equally by the law of injury.

[232] I saw ordinarily because it is possible for someone to have an additional finger or toe on each hand or foot, a condition called polydactyly. I have not come across any opinion addressing injury to the finger of someone with polydactyly, which is not surprising given how contrived and unlikely this scenario is. However, it is interesting to consider whether jurists would rely on the one-tenth compensation rule that ordinarily applies or take the unusual case as it is and award one-twelfth compensation.

[233] Al-Shaybānī,-*Aṣl*, 6:549.

[234] Al-Shaybānī, 6:551.

heal but leave a mark, assessment is turned over to expert appraisal. The same is true for a superficial wound that only draws blood (*dāmiya*).[235] But what about more serious wounds that breaks the skin's surface? Here the doctrine, on the strength of reports ascribed ultimately to ʿAli, presents a list of common wounds that are susceptible to reasonably objective description along with the amount of damages they would fetch. Each wound has a descriptive name (See Table 2.1). For instance, the *mūḍiḥa* (literally, a "revealing" wound) is a relatively minor one that is deep enough to "show the bone." Relatively minor, this wound is assessed one-twentieth compensation. On the more serious end is the *jāʾifa*, a wound that "reaches the cavity" of the body, as from a stabbing. This wound is assessed one-third compensation if it merely penetrates but two-thirds if the passes through the body cavity.[236] Listing the remaining wounds here would be cumbersome to read. For easier reference, I have placed all of these enumerated wounds, along with descriptions and damages, in the accompanying table. In each of these cases, it should be noted, the wound must heal without causing the permanent impairment of a major organ, or else the full compensation would be due. This is suggested by al-Shaybānī's note that a serious head wound, if it causes permanent cognitive impairment, entails payment of full compensation. Lesser wounds—or wounds that do not fit within this rubric—are turned over for expert appraisal.[237]

There is a final important doctrine to review, and this concerns what form of payment the compensation was to be made in. The basic form of payment was in kind rather than in cash. This is unsurprising. Animals have historically been one of most important repositories of rural wealth, particularly for those who raise animals in order to subsist off them rather than to trade in their meat and other parts.[238]

---

[235] Al-Shaybānī, 6:554.

[236] Al-Shaybānī, 6:550.

[237] Presumably, greater wounds are too unless, as one would expect, they are fatal.

[238] For the many of us (including me) who live in cities, it is easy to forget how much, even today, animals are the primary

In an economic setting without regularly available liquidity, the primary form of movable property could serve as a suitable and sensible currency. The camel being a main source of animal wealth in Arabia, it is not surprising that full injury compensation was originally denominated at one hundred camels.

Table 2.1. Compensation fractions and sums for common wounds (*shijāj*) in Hanafi doctrine.

WOUND NAME	DESCRIPTION	COMPENSATION			
		FRACTION	CAMELS	DIRHAMS	DINARS
mūḍiḥa	exposes bone.	1/20	5	500	50
hāshima	"crushes" bone	1/10	10	1000	100
munaqqila	fractures bone	3/20	15	1500	150
āmma/maʾmūma	reaches brain	1/3	33	3333	333

Because camels were valued differently by age and sex, the compensation scheme that was ratified by Islamic law was more complex than the one prescribed for those living in an economy with money or other forms of currency. This complexity of the camel payments appears in two respects. First, the hundred-camel payment was broken down into groups of animals, with each group consisting of a differently "denominations" of camels. Second, a distinction was drawn between the lighter compensation (*diya mukhaffafa*), which was payable for accidental injuries, and the heavier or "intensified" compensation (*diya mughallaẓa*), which was payable for semi-intentional injuries. "Intensified" compensation

source of wealth for people, such as cattle ranchers, who earn their livelihoods in animal husbandry. Of course, those who raise animals sell their animals in exchange for currency, but until they go to market the animals hold enormous amounts of wealth. One need only observe farmers whose animals have been killed in a natural disaster to be reminded how, despite global urbanization, old ways of storing wealth persist.

consisted in paying larger numbers of more valuable animals, even though the total number of camels was still one hundred.[239] For accidental injuries, therefore, the hundred were broken down into five groups of camels, with twenty camels in each group. These camels, in descending order of value, consisted of the following: (1) twenty female four-year-olds (*jadhaʿa*),[240] (2) twenty female three-year-olds (*ḥiqqa*), (3) twenty female two-year-olds (*bint labūn*), (4) twenty female yearlings (*bint makhāḍ*), and (5) twenty male yearlings (*ibn makhāḍ*). For quasi-intentional injuries, the heavier compensation of a hundred camels was to be paid in four groups of twenty-five: (1) twenty-five female four-year-olds, (2) twenty-five female three-year-olds, (3) twenty-five female two-year-olds, and (4) twenty-five female yearlings.[241]

What about people who did not traffic in camels? The early Hanafi masters disagreed on this question. Al-Shaybānī and Abū Yūsuf, following a precedent set by Caliphs ʿUmar, held that damages should be assessed in the currency, whether in cash or kind, of the society to which the injurer belongs. Specifically, ʿUmar was reported to have assessed "upon those who deal in silver, 10,000 dirhams; upon those who deal in gold, 1,000 dinars; upon those who deal in sheep, 2,000 mature sheep; upon those who deal in cattle, 200 cows; and upon those who deal in textiles, 200 two-piece garments."[242] Abū Ḥanīfa, by contrast, held that, because silver and gold currency had become universal, damages could only be assessed in cash when they were not paid in camels. He argued that ʿUmar, after bringing the population

[239] Al-Shaybānī dissented from Abū Ḥanīfa and Abū Yūsuf in defining the intensified compensation for quasi-intentional homicide. For him it consisted in the following: thirty female four-year-olds, thirty female three-year-olds, and forty pregnant she-camels between the ages of five and nine. The intensification of the compensation, according to this opinion, lay in the requirement of forfeiting camels that were about to give birth to new offspring.

[240] These ages were defined as having complete the specified number of years. Therefore, a four-year-old animal was one that that had completed four years and entered the fifth, not an animal in its fourth year.

[241] Al-Shaybānī, *al-Aṣl*, 6:551–52.

[242] Al-Shaybānī, 6:553. The two-piece garment, called a *ḥulla* (pl. *ḥulal*), consisted of either a top and bottom or two top garments that went together. See Ibn Manẓūr, *Lisān al-ʿarab*, s.v. Ḥ-L-L.

under a formal military census (*dawāwīn*), had prohibited all forms of in-kind payment for taxes and damages apart from camels, and that the other forms of payment, such as cattle or textiles, no longer applied. In any case, for most later cases, full compensation was evaluated as either 10,000 dirhams or 1,000 dinars as a flat sum, with no possibility of intensification.

Though perhaps not applicable in many latter-day economies, including that of the Ottomans, the original denomination in camels, however, helps us better understand the fractional schedule of payments for injuries that do not merit full compensation. Notice that there is no fraction smaller than one-twentieth (or multiples thereof, such as three-twentieths). This is most noticeable with the compensation for teeth. Even though people ordinarily have thirty-two teeth, the compensation for injury to one tooth is still set at one-twentieth. Ṣadr al-Sharīʿa puzzles over this problem in his commentary, noting rightly that each tooth ought to be valued at one-thirty-second. He surmises that the smaller fraction takes into consideration that not all teeth are equal in their function, but his explanation of how the fraction comes out to one-twentieth, by his own admission, is a bit contrived.[243] My own guess, if not necessarily better than Ṣadr al-Sharīʿa's, appeals to the principle of parsimony. One-thirty-second is simply not a friendly fraction in a decimal currency system, especially when the currency is an animal. Full compensation of one hundred camels cannot be neatly divided into third-seconds, which would put the cost of a single tooth at 3.125 camels. Given the compensation schedule's seeming inclination toward simplifying the calculation of injury payments, it seems sensible to set the lowest fraction at one-twentieth.

[243] Qāsim ibn Quṭlūbughā, *al-Taṣḥīḥ wa-l-tarjīḥ ʿalā Mukhtaṣar al-Qudūrī*, ed. Ḍiyāʾ Yūnus (Beirut: Dār al-Kutub al-ʿIlmiyya, 2002), 388.

Before moving on to the next chapter, in which we survey the doctrine on homicide in Ottoman-era jurisprudence, it is useful to consider briefly whether the Ottomans calculated and civil damages awards against the ancient standard in Islamic jurisprudence of 10,000 dirhams. The most obvious challenge to adapting the old regime was adjusting the full compensation amount to account for variations in the value of currency. Such fluctuations generally took place in form of the twin phenomena of depreciation and inflation. Monetary systems based on currency struck from actual gold and silver, because of the intrinsic value of these metals, were generally more stable over a long period of time and not as readily susceptible to the kind of overnight runaway inflation that may occur with the fiat currency in circulation in most places of the world today. To depreciate the currency, the mint of a given political entity had to physically reduce the quantity of bullion in the coinage. Under certain circumstances, a state might be forced to vary the bullion content in its currency.

As the Ottoman polity transitioned from a principality to a bureaucratized empire, it increasingly tightened its regulation of money circulating in the Ottoman domains. Amid budget deficits and repeated shortages of silver, the sultan, beginning notably with Meḥmed II in the middle of the fifteenth century, began to implement a series of official debasements of the asper, usually followed by official devaluations of the exchange rate.[244] Additionally, when the empire absorbed huge swathes of territory in the sixteenth century that law outside of its home domain of western Anatolia and the Balkans, its

[244] Şevket Pamuk, *A Monetary History of the Ottoman Empire* (Cambridge: Cambridge University Press, 2000), chap. 3.

more or less unified monetary system shifted rapidly into one with a series of largely independent monetary zones.[245] Disparities in the bullion content of regional currencies created opportunities for arbitrage and other disruptions in the balance of trade. In response, the Ottoman government undertook to standardize the currency by resorting to further debasements, but doing so only served to turn the monetary problem into a monetary crisis.[246] The crisis was only worsened by the resumption of costly hostilities with the Safavids in the latter part of the sixteenth century, which left the treasury in continuous need of cash.

The chronic debasement and depreciation touched off a series of problems among both officialdom and the commonalty. Salaried Ottoman servitors (*ulu*s), with increasing frequency, agitated in protest against being paid their fixed nominal salaries in debased currency.[247] Perhaps the most notorious such episode, in part because it was a harbinger of future similar events, was the Beylerbeyi Incident of 1589. The Janissaries secured the execution of the Rumelian governor-general and the empire's chief finance minister, whom they blamed for the most recent—and most severe—debasement several years earlier.[248] The repeated debasement and depreciation also opened up the opportunity for common folk to clip coins and strike counterfeit currency. Because not all old coins were summarily withdrawn from circulation when the new depreciated ones were struck, clever people could put together a lucrative operation. With the knowhow and the right materials, they could clip silver or gold off the edges of the

[245] Pamuk, *Monetary History*, chap. 6.
[246] Baki Tezcan, "The Ottoman Monetary Crisis of 1585 Revisited," *Journal of the Economic and Social History of the Orient* 52 (2009): 460–504.
[247] On the increasing rebelliousness of the Ottoman servitors, with particular reference to the question of Ottoman decline, see Cemal Kafadar, "Janissaries and Other Riffraff: Rebels without a Cause?," *International Journal of Turkish Studies* 13, no. 1–2 (2007): 113–34.
[248] Tezcan, "Ottoman Monetary Crisis Revisited," 497–98.

higher-value coins, boil the metal down, and then strike new coins at something approximating the value of the lower-value currency. The danger of such an operation, as with any instance of counterfeiting, was that it threatened the integrity of the money economy by flooding the market with bad currency.[249]

These monetary issues also complicated the problem of keeping injury compensation at a fair and consistent rate. Full injury compensation, in line with the ancient Hanafi doctrine, remained at 10,000 dirhams. But the legal dirham (*dirhem-i şerʿī*) had to be officially set and reset at higher rates as the Ottoman currency was correspondingly devalued. In the fourteenth century and most of the fifteenth century, the rate was set at 4 aspers per dirham. At the end of the sixteenth century, it had risen to 8 aspers. Not long after that, it rose to 9.5 aspers, and it continued to rise over the course of the seventeenth century, until it reached about 20 aspers in the early eighteenth century.[250] The evidence for these rate hikes comes from official legal rescripts sent out to the judicial and administrative officials of the several provinces, ordering them to fulfill civil claims, such as injury, arising from Islamic law. For example, a 1595 rescript of justice (*ʿadāletnāme*) addressed to the governor-general (*beġlerbeġi*) of Anatolia, as well as to the district governors (*sancaq beġleri*) and judges (*quḍāt*) under his administration, states that "the current value of one dirham shall be eight Ottoman aspers" and, furthermore, that "if there be counterfeiters, you shall deal with them according to the upright law."[251]

The four-to-one conversion rate would have put the full compensation for injury at 40,000 aspers, and the eight-to-one rate at 80,000 aspers. Were these roughly the amounts awarded? Because relatively

[249] On this particularly turbulent period in Ottoman monetary history see, Pamuk, *Monetary History*, chap. 8.
[250] Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Ménage (Oxford: Clarendon Press, 1973), 308–9.
[251] Halil Inalcik, "Adâletnâmeler," *Belgeler* 2, no. 3–4 (1965): 49–142 at 108.

few (and often no) recorded cases exist in any given register that state the awarded amounts, a comprehensive combing of the register would be required to determine whether the injury awards tracked the rate changes. Preliminary data points, however, suggest that they did. Such few cases as actually state the amount of damages awarded suggested in the middle of the sixteenth century, when the rate was at four to one, the amount assessed was at about 40,000 aspers. In 1535, for example, when a surgeon in Bursa who performed circumcisions accidentally cut off a boy's glans penis, his father recovered 42,000 aspers in damages.[252] Incidentally, this case also highlights the sensibility of including such parts of the body in what seems, as we saw in al-Shaybānī's schedule, to be a fairly haphazard list. Trips to the surgeon and barber, though routine and presumably uneventful in most cases, were not without danger of serious injury, and the law of compensation provided a protection against accidental damage and a corresponding incentive for people in those professions to take due caution.

Nevertheless, there are some major discrepancies. An opinion by Ebussuʿūd, in answering how many aspers full damages would be calculated at, stated that, "according to the new asper (*cedīd aqçe*) struck by sultanic decree, it comes out to 100,000 aspers."[253] No date is provided in the opinion, but given that Ebussuʿūd died in 1574, this estimation could be no later than that year. If we calculate backward, this sum of damages would put the conversion legal dirham conversation rate at ten to one, which is significantly higher than it would be set, twenty years later, in the 1595 degree cited above. It is not clear that this unusually high figure requires an explanation. It could be that Ebussuʿūd's figure was simply an estimation of damages, meant to guide setting the official rate, rather than a precisely calculated sum. It is not necessary, for our purposes here, to resolve this problem. What is important to note is that

[252] Heyd, *Studies*, 309
[253] Ebussuûd Efendi, *Maʿrûzât*, ed. Pehlul Düzenli (Istanbul: Klasik, 2013), 187 (no. 226).

Ottoman jurists and courts were attentive to the problem of calibrating civil damages for homicide and injury to the fixed sum established in the classical civil doctrine.

CONCLUSION

The formal doctrines that we have just reviewed may appear callous in the way they blithely assign price tags to the life and limb of human beings. Such rules take things of immeasurable value—our precious lives and limbs—and reduce them to cold economic figures. We should remember, however, that this is a common feature of injury law, which, despite variation in the particulars from one legal tradition to another, shares the object of making as whole as possible those who suffer injury to person or property. Our sensibilities naturally draw a distinction between making restitution for property damage and making restitution personal injury. Property is bought to begin with, and the payment of its value seems to be a replacement that we are comfortable with. Although nothing can truly replace, for example, the expensive watch your grandfather left you after his death, it is not considered an affront to make one who destroys it pay only for its market value, without consideration of the sentimental value attached to that object. Our sensibilities generally falter, however, when we speak of paying for irreparable injury to a person's life or body. Suppose you are working a field and a fellow farmhand, wielding a scythe, fails to mind your position and sends the implement hurtling at your arm, permanently mangling it. How much would it take to satisfy your loss? Or if luck had it that the scythe struck a more vital part of your body, how much should your heirs receive in compensation for your death, and how does one assess such compensation?

Scenarios like this, whatever dark humor they offer on paper, are not far-fetched at all. Freak accidents happen all the time. Folk adages tell us that what can go wrong will go wrong, and recorded legal cases suggest that no scenario is too outlandish to happen.[254] We read a moment ago about a case of a circumcision gone awry. Traditions of jurisprudence that propose civil solutions to these unfortunate events—that is, solutions meant to replace other solutions, like combat or outright vengeance, that are deemed socially destructive or morally objectionable—cannot fall back on the pricelessness of human life and limb. Many of us have an intuitive sense that courts today put a value on life in the form of money judgments. But it is still sobering for many nonlawyers to learn that governmental agencies and legal scholars, using statistical tools like mortality tables and different theories of measurement, attempt to empirically assign a dollar value to a human life.[255] The Environmental Protection Agency, for instance, currently recommends $7.3 million as the "value of a statistical life" when conducting a cost-benefit analysis of proposed regulatory policies.[256] In this respect, then, Islamic law is fundamentally no different from any other developed system of injury law.

The Islamic regime of injury compensation, in sum, seems to operate on a couple of brute economic

[254] Of course, the cases that get recorded in law reports, at least in American case law, tend to be those that are most unusual, and casebooks, being textbooks, select and popularize the strange ones to facility instruction and memory. For example, *Palsgraf v. Long Island Railroad* (1928) is a famous case in large part because its farcical details illustrate the problem of determining who has caused and is therefore legally liable for an injury. (Fortunately, no one died in this case.) I therefore don't mean to inflate the likelihood of improbable scenarios, only to say that over time they occur with enough regularity that any jurisprudence of injury must come up with practicable if imperfect solutions.

[255] For an excellent overview of how this works in American law, see W. Kip Viscusi, "The Value of Life in Legal Contexts: Survey and Critique," *American Law and Economics Review* 2, no. 1 (2000): 195–222. To be clear, most such scholars do not explicitly prescribe a dollar amount for juries and courts. Instead they try to measure a life's value by averaging jury awards, which furnish quantitative data about how much payment ordinary members of society believe is warranted to make up for wrongful injury or death. Nevertheless, this work also has potential normative force in informing practitioners, both judges and attorneys, of the range of awards that can be expected for wrongful death suits. I should also add that this concern for valuing life may likely be quite different in Europe, especially on the Continent, but I am not competent to comment on those legal systems.

[256] https://www.epa.gov/environmental-economics/mortality-risk-valuation (accessed March 7, 2018).

principles. First, it holds that some satisfaction, even if such satisfaction is imperfect, is better than none at all. It bears emphasizing here that the *diya* compensation serves in principle not as the primary remedy, but as the backstop for when settlement negotiations between the parties fails. By attempting to award something to the victim, it signals to injurers that their reckless behavior will generally not go without sanction, but by not awarding an exorbitant amount, it signals to victims that negotiation is preferable and possibly more advantageous than legal action. Second, the compensation regime recognizes that, when assessing damages is involved, avoiding arbitrariness altogether is impossible and therefore puts a cap on damages to begin with. This cap is itself arbitrary, strictly speaking, yet it has the advantage of being value-neutral. The value-neutrality of damage assessment further encourages the parties to negotiate how much the injurer should pay and clears up the resources of the legal system for more pressing administrative matters, such as preserving safety and order in society.

With this reappraisal of compensation in mind, it is now time to pull back and understand the doctrine as a whole. In the following section, we will review the salient parts of the doctrine the further illustrate the civil nature of homicide.

CHAPTER THREE

The Substantive Doctrine of Homicide

The work on which I primarily rely here for the substantive doctrine of homicide is called *Majmaʿ al-anhur*, a commentary on *Multaqā al-abḥur*.[257] I mentioned both of these works in passing above. The *Majmaʿ* was written by ʿAbdurraḥmān b. Gelibolulu Meḥmed (d. 1078/1667), who was known alternatively by the Turkish epithets Şeyhizāde and Dāmād Efendi. (I will use Dāmād Efendi.) The *Multaqā* was written by Ibrāhīm b. Muḥammad al-Ḥalabī (d. 956/1549).

The two works' ornamental titles—*Majmaʿ al-anhur fī Multaqā al-abḥur*—are worth paying attention to. Such rhyming titles are ubiquitous in the Islamic intellectual tradition, to the point that their connection to the substance of the book is unclear or perhaps nonexistent outside the mind of the author. Here, however, the titles have some significance. Al-Ḥalabī's *Multaqā al-abḥur*, or "Meeting of the Seas," is a critical digest that self-consciously places itself, as it were, in the deep waters of Hanafi jurisprudence. The "seas" to which he refers are four of the most significant compendia of Hanafi substantive doctrine. I discussed these compendia earlier when outlining the genealogy of the Hanafi school, but they bear repeating here: al-Qudūrī's *Mukhtaṣar*, al-Mawṣilī's *Mukhtār*, al-Nasafī's *Kanz al-daqāʾiq*, and Tāj al-Sharīʿa's *Wiqāya*.

The *Multaqā* was well received throughout the old and new Ottoman lands and, within about a

[257] ʿAbd Allāh b. Muḥammad Dāmād Efendi, *Majmaʿ Al-Anhur: Sharḥ Multaqā Al-Abḥur*, 2 vols. (Istanbul: Maṭbaʿa-i ʿĀmire, 1901).

hundred years of al-Ḥalabī death, yielded some dozen commentaries.[258] Eventually, after perhaps a century or so, the *Multaqā* was included as a textbook in the law colleges alongside the older classics. But the rapid emergence of many commentaries suggests that, probably within decades of being written and certainly by the late sixteenth century, it had been picked up as an important reference for jurists and judges.[259]

Ibrāhīm al-Ḥalabi himself was known, if we may rely on Taşköprizāde's biographical notice, as a somewhat retiring figure. As his epithet indicates, he was born in Aleppo, and he received his education there and in Cairo. He eventually settled in Istanbul, though it is not specified when, and lived the last fifty years of his life there, dying in 1549 at about ninety years of age. He held a post as preacher at the Mosque of Mehmed II, then took up a teaching position in the adjacent Quran school (*dār al-qurrā'*) established in 1538 by the chief jurisconsult Sa'dī Çelebi. He composed the *Multaqā* long before, completing it in August 1517, just months after the completion of the Ottoman conquests in Syria and Egypt.[260] The colophon does not mention where he was when he finished the work, let alone what was going on around him at the time. This fits his seemingly apolitical character. After settling in Istanbul, al-Ḥalabī was "hardly seen outside of his house and the mosque," where he mostly devoted his time to teaching and writing.[261] Still, his inclusion in Taşköprizāde's dictionary signals his firm acceptance, despite his foreign birth, as an Ottoman scholar.

---

[258] Muṣtafā b. 'Abdullāh Kâtib Çelebi, *Kashf al-ẓunūn 'an asāmī al-kutub wa-l-funūn*, ed. Muḥammad Sharaf al-Dīn Yaltqaya and Rif'at Bilge al-Kilīsī, 2 vols. (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 2:1814–16. The entry for the *Multaqā* is a little unusual in that it includes commentaries by people who died after Kātib Çelebi himself died in 1657. This includes Dāmād Efendi, who finished his work and died about a decade after Kātib Çelebi.

[259] Şükrü Selim Has, "The Use of *Multaqā'l-Abḥur* in the Ottoman Madrasas and in Legal Scholarship," *Osmanlı Araştırmaları* 7–8 (1988): 393–418.

[260] See colophon in Dāmād Efendi, *Majma' Al-Anhur*, 2:782.

[261] Taşköprüzāde, *al-Shaqā'iq al-nu'māniyya fī 'ulamā' al-dawla al-'uthmāniyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 1975), 295–6.

Dāmād Efendi, for his part, spent his whole life in the thick of Ottoman legal officialdom. His father, who hailed from Gallipoli, was known as Gelibolulu Şeyhi, whence comes the patronym Şeyhizāde. He himself was brought up and spent most of his life in and around Istanbul. He earned the moniker Dāmād Efendi for being the son-in-law, or *dāmād*, of the chief jurisconsult Hoca ʿAbdurraḥīm Efendi. After completing his education, he was granted candidacy by the chief jurisconsult Zekeriyyāzāde Yaḥyā Efendi, and thereafter he occupied a number of professorships, then judgeships, including at the Court of Istanbul, and was later appointed twice as chief judge of Anatolia and once as chief judge of Rumelia, before being pensioned off in the last year of his life.[262] The *Majmaʿ* was the work of a mature jurist and a seasoned judicial officer. He finished writing it at Edirne in December 1666, just a few months before he died, while serving his short term as Rumelian chief judge, and he dedicates the work to then-sitting Sultan Meḥmed IV.[263] We may hope, then, that the work will subtly reflect the experience he gained in the practical sphere. On its face, though, the work shows the typical conservatism of legal commentary, which was constrained by the content of the subtext, the prior body of doctrine, and other age-old conventions of the genre. He aims, he tells us in the introduction, to fix the shortcomings of previous commentaries, which were either too short to be useful or too long to be readable, by allowing the best of them to flow into this single work.[264]

OVERVIEW OF THE CHAPTERS ON INJURY (*JINĀYĀT*) AND COMPENSATION (*DIYĀT*)

It is not my purpose, lest this chapter wear on unnecessarily, to exhaustively examine the homicide

[262] Tahsin Özcan, "Şeyhîzâde," in TDVIA.
[263] Dāmād Efendi, *Majmaʿ Al-Anhur*, 1:3–4.
[264] Dāmād Efendi, 1:3.

doctrine in the *Majmaʿ*, but instead to highlight its salient parts. However, because the parts that bear most heavily on homicide as such fill up the earlier portions of the chapters on injury and compensation, it is easy to lose sight of the doctrine's organizational logic. A simple overview of the contents of these chapters, therefore, will serve to further demonstrate that homicide was a species of injury, and that the chief animating principle of Islamic homicide law was therefore not criminal culpability, but civil liability (*ḍamān*). Dāmād Efendi makes this point more than implicitly, which I will explain shortly, but an annotated summary of the chapters' contents can begin to drive the point home.

CHAPTER ON INJURIES (*KITĀB AL-JINĀYĀT*).

Section. *Five-part typology of homicide.*

Section. *When requital is binding and when it is not.*[265]

Section. *Requital for nonfatal injuries.*

· Detailing the ways in which requital is precluded for fatal injuries.[266]

· Detailing the circumstances under which requital is precluded for nonfatal injuries.[267]

Section. *Testimony for homicide and the rules pertaining thereto*[268].

CHAPTER ON DAMAGES (*KITĀB AL-DIYĀT*).

Section. *General part.*

· General exposition on quantifying full compensation (*diya*) and on methods of expiation (*kaffāra*).[269]

· Compensation for injury to limbs (*jināya ʿalā al-aṭrāf*).[270]

· Compensation for wounds (*shijāj*).[271]

· Compensation for causing miscarriage of a fetus (*janīn*).[272]

Section. *Accidents on public roads.*

· Determining liability (*ḍamān*) for death or bodily injury caused by objects placed in

[265] Dāmād Efendi, 2:618–26.
[266] Dāmād Efendi, 2:626–29.
[267] Dāmād Efendi, 2:629–632.
[268] Dāmād Efendi, 2:632–36.
[269] Dāmād Efendi, 2:636–40.
[270] Dāmād Efendi, 2:640–42.
[271] Dāmād Efendi, 2:642–49.
[272] Dāmād Efendi, 2:649–50.

the public way.[273]

· Liability for a wall that collapses into the public way and causes injury.[274]

Section. *Injury caused by one's animal* (*jināyat al-bahīma*) *and injury to one's animal.*[275]

Section. *Injury caused by one's slave* (*jināyat al-raqīq*) *and injury to one's slave*[276]

· Liability and forms of compensation for injury by a slave who may be sold.

· Compensation for injury to a slave.[277]

· Injury by a slave who may not be sold.[278]

Section. *Corporate oath* (*qasāma*)[279]

CHAPTER ON SOLIDARITY GROUPS (*KITĀB AL-MAʿĀQIL*)[280]

· Literal and legal definition of solidarity group

· Term of payment by solidarity group and other rules pertaining thereto.

THE TYPOLOGY OF HOMICIDE

Dāmād Efendi begins, following the old pattern already seen with al-Shaybānī, with a typology of homicide. Homicide being the most complete form of bodily injury, this typology covers the full range of injury doctrine and determines the structure of the entire discussion that follows.

Injury as a general class is called *jināya*. The inclusion of homicide within this term is not incidental. In its broadest sense, Dāmād Efendi tells us, *jināya* means to do any evil to another, but that it came in customary usage to mean the perpetration of some harm upon another's life (*nafs*) or property (*māl*). Jurists then narrowed the term's technical scope to refer specifically to "unlawful action against life (*nafs*) or limb (*ṭaraf*), the first being called homicide (*qatl*), which has five categories … and the second

[273] Dāmād Efendi, 2:650–57.
[274] Dāmād Efendi, 2:657–59.
[275] Dāmād Efendi, 2:659–65.
[276] Dāmād Efendi, 2:665–71.
[277] Dāmād Efendi, 2:671–74.
[278] Dāmād Efendi, 2:674–77.
[279] Dāmād Efendi, 2:677–87.
[280] Dāmād Efendi, 2:687–691.

being called injury to less than life (*jināya fīmā dūn al-nafs*)."[281] The fact, however, that all forms of injury against someone's person, including homicide, are understood to be analogous to injury against someone's property is an early indication that homicide is principally a question of civil liability.

The first type of homicide is INTENTIONAL (*'amd*). Intentional homicide is defined as "seeking to strike someone with a deadly weapon."[282] The assumption, which needs not be elaborated, is that the one be legally responsible (*mukallaf*), which primarily means that one be of age, of sound mind, and conscious when performing the action. The definition of intentional homicide given by Dāmād Efendi is deceptively simple. There are two components to assessing what makes a homicide "intentional." The first is defining intent. On this point, the condition of "seeking to strike someone" is quite significant. The verb used, *qaṣd*, suggests that the action causing death must be originally aimed at the victim rather than at someone or something else. The importance of this condition will become clearer when we discuss the other types of homicide below.

Then there is the problem of figuring out whether one had such an intent, since such an assessment usually has to be made after the fact. To do so, Hanafi jurists focused on the weapon used. "Intent," Dāmād Efendi tells us, "is a matter of the heart and may not be ascertained without a clear indicator (*dalīl*)," namely, the use of a deadly implement.[283] Hanafi jurists came up with two subtly different standards for determining what makes a weapon "deadly." The first, held by Abū Ḥanīfa, is that the weapon be capable of dismemberment (*tafrīq al-ajzā'*), usually by being sharpened (*muḥaddad*). This includes such blade-bearing weapons of war as a sword or dagger, which are ordinarily sharpened, but also a rock

[281] Dāmād Efendi, 2:614.
[282] Dāmād Efendi, 2:614–15. I have taken slight liberty with this translation.
[283] Dāmād Efendi, 2:615.

(*ḥajar*), a piece of wood (*khashaba*), or even a hollowed cane (*līṭa*) that has been sharpened to the point of being able to sever limbs. Included in this list as well is to burn someone to death, since fire, strictly speaking, dismembers the body. The other standard, preferred by Abū Yūsuf and al-Shaybānī, is that the implement must be of a character, usually be being large and heavy, as to ordinarily cause death (*yaqtulu ghāliban*).[284] This difference in standards is important in drawing the line between intentional and quasi-intentional homicide.

QUASI-INTENTIONAL (*shibh ʿamd*) homicide is defined similarly as seeking to strike but with mitigating factor, namely, using an implement that would not elevate it to an intentional homicide. Here again, jurists who disagree say that the standard should be a large and heavy implement. This, according to them, would allow discretion in borderline cases where, say, the killer used a small wooden stick, which under the list might count as a deadly implement suggesting intent. In any case, this category is unique to homicide. Nonfatal injuries may be intentional or accidental, but not quasi-intentional. The effect of this additional grade, and possibly also the moral intent behind it, is to elevate the burden of establishing it and reduce the possibility that one could face death by requital.

The third type of homicide is ACCIDENTAL (*khaṭaʾ*). The vague word "accident" somewhat masks what this form of homicide entails. Perhaps it may be better to think of it as homicide "in error" (although "errant" homicide lacks both clarity and euphony). The word *khaṭaʾ* in Arabic, when used in the context of marksmanship, means literally to miss one's target. This type of homicide therefore involves aiming with deadly force at a lawful target and striking an unlawful one in error. Such error may either mental or physical. The context of hunting illustrates both. If Tom aims at and shoots a figure in the distance,

[284] Dāmād Efendi, 2:615.

thinking it an animal, only then to discover that it is his friend Harry, this is accidental homicide by mental error (*khaṭa' fī al-qaṣd*). By contrast, if Tom aims at a figure, knowing it to be an animal, but misses and strikes Harry, which happens to be hidden in the bushes, this is accidental homicide by physical error (*khaṭa' fī al-fi'l*).[285]

The fourth type of homicide is QUASI-ACCIDENTAL (*mā ujriya majrā al-khaṭa'*). This is a killing that, as the Arabic phrase suggests, amounts to accidental homicide, resembling it in effect while failing to satisfy its formal definition. The distinction between the two is that, in an accidental killing, the defendant affirmatively undertakes some action that then goes wrong, while here the perpetrator does no such thing. The example given is of a sleeping person who rolls over onto and suffocates someone else while still asleep.[286] Because the sleeper does not aim at anything as such, there is no mental or physical missing of the mark. However, because the victim does as a direct result of the sleeper's action, liability still attaches as though it were a genuinely accidental homicide.

The fifth and final type is homicide BY CAUSATION (*bi-sabab*). In all types of homicide, of course, the killer is responsible for causing death. But here the causal chain—unlike in the previous types, where causation is accompanied by some intentional action—is the only thing linking the action of the perpetrator to the death of the victim. Defining the degree of causation that triggers liability, however, requires a standard, or else anyone at any point on the chain of causation could be liable for causing death.

---

[285] Dāmād Efendi provides both of these examples (though without Tom and Harry). See MAJMA 2:617. The same rule also applies when the lawful target is a human being. For example, if one strikes at an enemy in battle, or at an outlaw (*ḥarbī*), but instead strikes one who is legally protected, whether Muslim or non-Muslim, this would count as an accidental homicide. An outlaw in Muslim-ruled lands was classically defined as a foreigner who was neither a Muslim; nor a protected non-Muslim (*dhimmī*); nor someone (*musta'min*) who, for commercial, diplomatic, or other business, had been granted legal permission to enter Muslim lands. To kill an outlaw would not necessarily have gone unpunished if the polity had deemed it necessary to punish those who do so, but, in line with the doctrine being described here, it would not have been subject to civil liability.

[286] Dāmād Efendi, 2:617.

The basic standard Hanafi jurists set down was that the killer must be responsible for laying some object in the victim's path. The examples given are to place a rock that the victim stumbles over or to dig a well that the victim falls into. They further qualified this standard with the conditions that, first, the perpetrator must place these things on property not his own without the owner's permission; and, second, that the victim not know (or presumably be expected to know) that the obstruction is in the way. Therefore, if one digs a well on his own property, or digs a well with permission on someone else's property, he is not liable if a trespasser stumbles into it and dies. Also, if he digs a well without permission (such as on a public road) but does so in plain sight of passersby, he is similarly not liable if someone falls into it.

What is important to note in Dāmād Efendi's typology of homicide is that it has expanded to five categories from al-Shaybānī's original three. The first three are the same as al-Shaybānī's. The substance of the other two exist in substance in the *Aṣl*, but al-Shaybānī does not explicitly connect it up to the typology as Dāmād Efendi does.[287] It was not till sometime after al-Shaybānī—at least as early as al-Qudūrī's *Mukhtaṣar* and possibly earlier[288]—that jurists formally expanded the typology. Why the final two categories were at first not included, then later included, we can only speculate. My suspicion is that they were at first not included because the original typology was focused around degrees of intent. As the description above shows, the first three types of homicide are all caused by some action, intentionally undertaken, whose agent may reasonably be expected to know can cause death. The last two types of homicide, though connected to the first three through some form of causation, lack the consideration of intent. Even the hunter who misses the mark takes the shot with the intention to kill,

[287] Al-Shaybānī, *al-Aṣl*, 6:433 546.
[288] Aḥmad b. Muḥammad al-Qudūrī, *Mukhtaṣar al-Qudūrī*, ed. Kāmil ʿUwayḍa (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 184.

whereas one who rolls over onto someone while asleep or digs a well without permission on someone else's property ostensibly does not. Homicide by causation, as should be evident, has a miscellaneous quality to it. This may have led al-Shaybānī simply to create a catch-all category of homicide for everything that did not properly fit within the categories of intentional, quasi-intentional, and accidental. However, in time the number of such scenarios seem to have grown to the point of warranting a formalized expansion of the typology.

INTENT AND CAUSATION

Whatever the motivation of jurists, the new typology reveals something about the nature and function of intent in Islamic homicide law that I believe scholars have either overlooked or misapprehended. Notably, Rudolph Peters identifies intent in Islamic law with *qaṣd*, and from the writings of medieval Muslim jurists he extracts an Islamic theory of mental culpability that he analogizes to *mens rea*. In the common-law tradition, *mens rea* (literally, "guilty mind") is the culpable state of mind that must be proved, in addition to the guilty act itself (called the *actus reus*), in order to warrant a reprobative punishment. In order to be punished for homicide, in other words, one must be proved not only to have committed the offensive conduct but also to have had the mental state necessary to elevate that conduct to a criminal act deserving of punishment rather than a lesser penalty. In Islamic law, Peters explains, Muslim jurists set down three requirements for the application of punishment: "the offender must have had the power to commit or not commit an act (*qudra*); he must have known (*ʿilm*) that the act was an offence; and he must have acted with intent (*qaṣd*)."[289]

[289] Rudolph. Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2005), 20.

On a superficial level, Peters is not wrong. The effect of a culpable state of mind on the nature of an action, and accordingly on whether and how that action is sanction, is something rather intuitive. As Oliver Wendell Holmes wrote, "even a dog distinguishes between being stumbled over and being kicked," and most ordinary people would probably agree that the latter deserves greater sanction than the former.[290] So there is indeed an unmistakable resemblance between *qaṣd* and *mens rea*. The former involves taking an affirmative action with deadly means, and Dāmād Efendi suggests that the type of weapon may serve as a reflection of the state of one's heart.

Intent, however, is a notoriously slippery concept, and Peters severely oversimplifies the meaning and controversy around *mens rea* among common-law jurists. The old common-law definition of murder, for example, was the unlawful killing of another human being "with malice aforethought."[291] But this definition presented huge conceptual and evidentiary problems. What exactly is malice? May it be inferred from the bad relationship of perpetrator and victim, or does it refer strictly to something in the perpetrator's state of mind? How does one determine this state of mind and, furthermore, whether the perpetrator possessed it at the time of committing the homicide? A person's state of mind lies generally beyond definitive proof, and the potential for unrestrained discretion in making such determinations in real criminal cases is obvious. Furthermore, because *mens rea* is a general principle of criminal liability, applying equally to homicide and all other crimes, the same kinds of questions arise all across the criminal law of common-law legal systems.

In the United States, such lack of clarity in this and other basic legal concepts lay at the heart of

[290] Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, and Company, 1881), 3.
[291] Holmes, 51.

reform efforts in the twentieth century.[292] A product of these efforts was the establishment of the American Law Institute in 1923, whose members consisted of lawyers, judges, and other legal professionals.[293] The American Law Institute sought to give greater scientific clarity[294] to the general principles of law, and it did so primarily in the form Leiter, Brian. "Legal Realism and Legal Doctrine." *University of Pennsylvania Law Review* 163 (2015): 1975–84.

of treatises called restatements. These restatements of doctrine, though not legal enactments of the state and therefore not enforceable as such, have nevertheless been highly influential in the teaching of law at American law schools and in the rewriting of statutes in numerous states. Despite occasional criticism of these restatement efforts, these treatises have come to form a recognizable doctrinal point of reference. Even American judicial opinions cite the restatements with some regularity. One such treatise, begun after World War II, was the Model Penal Code. Since its completion in 1962, most American states have followed the MPC's language to a great extent when redrafting their criminal codes. Unlike the old and somewhat scattershot doctrinal formulations, which were the result of slow accretion, the MPC is an intentionally and carefully drafted distillation of ancient doctrine, and it therefore serves as a fairly good analogy to manuals and commentaries at the heart of Islamic legal writing.

With respect to *mens rea*, the Model Penal Code adopts a four-part hierarchy that attempts to shift

[292] By reform I refer not only to the rewriting of statutes but—more to the point here—to the active clarification of legal rules and principles.

[293] On the American Law Institute, perhaps the best source for general information on the institute and its publications is its own website. See https://www.ali.org/ (accessed March 10, 2010).

[294] What "scientific" entails has, as one might expect, been a matter of great controversy. In the coming chapter, in the context of procedural law, I briefly discuss the American Legal Realism movement, which had a particular idea of legal science that stood at odds with that of the ALI. On the push-and-pull relationship between Legal Realists and the American Law Institute, see Brian Leiter, "Legal Realism and Legal Doctrine," *University of Pennsylvania Law Review* 163 (2015): 1975–84..

the focus more toward interpreting observable actions and circumstances than upon divining the wickedness of the defendant's state of mind. The four levels of culpability, in descending order of severity, are as follows: (1) PURPOSE, wherein the defendant has an underlying conscious object to act; (2) KNOWLEDGE, wherein the defendant is practically certain that the conduct will cause a particular result; (3) RECKLESSNESS, wherein the defendant consciously disregards a substantial and unjustified risk, and (4) NEGLIGENCE, wherein the defendant was not aware of the risk, but should have been aware of the risk.[295]

One of the objectives of the Model Penal Code's drafters was not to supersede the Anglo-American common law, but to restate in clearer and more coherent terms what the common law had in mind with phrases like "malice aforethought" and "wanton and willful." Despite the Code's influence, legal scholars have long been skeptical about whether it actually managed to make the notion of criminal intent more coherent.[296] In any case, in adopting the approach of inferring one's state of mind from one's action, the Model Penal Code at least attempts to narrow the scope of subjective assessments to the extent possible.[297] More to our purpose, in adopting this approach, the Model Penal Code seems to resemble the Islamic doctrine of inferring the object of a deadly blow from the implement used to deal it.

This resemblance, however, is superficial. For one thing, as I have argued at some length earlier in

[295] The exact wording, paraphrased here, may be found with all of its detailed qualifications at Model Penal Code §2.02 (2).
[296] On the history and influence of the Model Penal Code, as well as a commentary on its content, see Markus D. Dubber, *An Introduction to the Model Penal Code*, 2nd ed. (Oxford: Oxford University Press, 2015).
[297] Of course, subjectivity cannot be altogether eliminated. The Model Penal Code's restatement unavoidably retains a great deal of subjectivity. For example, in order to prove that one has committed an offense "purposely," how else does one determine that it is the defendant's "*conscious object* to engage in conduct of that nature or to cause such a result"? See Model Penal Code §2.02(2)(a)(i). The Model Penal Code, therefore, serves not to eliminate conclusions about people's states of mind, but to focus the attention on adjudging specific mental states rather than the relative wickedness of the defendant.

this chapter, the purpose of the Islamic remedies for homicide, including requital, are chiefly compensatory, not condemnatory. The Model Penal Code's typology, though facilitating a relatively more objective assessment of intent than its common-law predecessor, presupposes the existence of offenses that the legal system has formally deemed to deserve condemnation and punishment. Indeed, the Code was written with guiding the drafting of criminal statues in mind. Its hierarchy culpability aims specifically at ensuring the one's punishment is commensurate with the degree of mental culpability they had at the time of committing the crime. Furthermore, the intent-based gradation in Islamic law, in contradistinction to the Model Penal Code, only applies to homicide. It is not a general principle for determining one's criminal desert.

Most significantly, the full five-part typology suggests that the real determining factor in grading homicide in Islamic law is not culpability but causation. Intent, in other words, serves as a legal index not of one's culpable state of mind—even if one had it at the time of commission—but of the causal proximity between the action and the effect of the action. When one purposely aims at a human target, using an implement that ordinarily causes death, one is subject to a higher penalty in Islamic law not so much because of the greater wickedness of the agent, but because of the smaller distance between cause and effect. The full range of homicide suggests this internal logic of causation. At the lowest end of the typology, the distance between cause and effect is far greater, and the penalty is accordingly smaller.

Intention, as philosophers have discussed at some length, may take a variety of guises.[298] For our purposes, we may reduce standards of intent to two basic types. The first is an external intent. One may

[298] See generally Kieran Setiya, "Intention," *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), https://plato.stanford.edu/archives/fall2018/entries/intention/.

undertake an external action without necessarily thinking about or desiring to bring about an evil outcome. The second is an internal intent. One may possess an internal desire to bring about an evil outcome by means of the action undertaken. The definition of intentional homicide in Islamic law, I argue, applies the first kind—an external standard of intent—and uses external indicators to prove that intent. In other words, *A* is held liable for intentional homicide simply for having purposely struck *B* with a fatal blow. This outward purpose may be reasonably inferred from the use of a deadly implement, as a deadly implement ordinarily causes death. Importantly, it makes no difference whether *A* believed or hoped that his actions cause *B*'s death.[299] The simple use of deadly force is sufficient to trigger the remedy for intentional homicide. Take the following example. If I draw my sword and playfully (and foolishly) swing it at you, mistakenly thinking that you will draw yours and parry my mock attack, would I be liable for intentional homicide if I strike and kill you? I suspect that, at a trial and under the doctrine described, I would be liable. After the event of the killing, the only thing that can be confidently established is that I struck you with a sword, from which may be reasonably inferred that I meant to deal you a deadly blow. The law, in deciding which remedy to award, is indifferent about one's internal state.

Here I must admit that my interpretation of intent as indexing causation rather than culpability, though based on a reading of the doctrine, is somewhat hypothetical. I have not yet found any statement by Muslim jurists to this effect, and perhaps none exists.[300] Nevertheless, the centrality of causation,

[299] Compare this with the two requirements for the highest level of *mens rea*: "A person acts PURPOSELY with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his *conscious object* to engage in conduct of that nature or to cause such a *result*; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or *he believes or hopes* that they exist." Italics mine. For homicide, under this definition, one must be shown to have the *result* of killing another human as one's *conscious object*. Note that this definition seeks to apply to so-called inchoate offenses, that is, offenses that entail conduct of a particular nature and do not require the completion of any act. For example, in the United States, possession offenses (e.g., of controlled substances) do not require that one bring about a particular result.

[300] Still, it seems equally speculative, absent supporting statements by jurists, to equate "intent to strike" with "intent to kill."

rather than culpability, in homicide and other seemingly "penal" matters is supported elsewhere. In describing Islamic law's supposed framework of criminal intent, Rudolph Peters relies on the *Furūq*, a brilliant treatise on conceptual distinctions in the law by Shihāb al-Dīn al-Qarāfī (d. 684/1285), the early Mamluk jurist of the Maliki school.[301] In this work, al-Qarāfī does indeed list the three elements of capacity (*qudra*), knowledge (*ʿilm*), and intent (*qaṣd*) as predicates for requital in intentional homicide and for the various fixed penalties (*ḥudūd*). However, Peters's reading strips these elements out of their context, which, if brought back into the picture, yields a wholly different conclusion.

These elements are listed in al-Qarāfī's distinction between two basic categories of legal rules (*aḥkām sharʿīyya*): the rule of obligation (*ḥukm taklīfī*) and the objective rule (*ḥukm waḍʿī*).[302] Although al-Qarāfī was a Maliki jurist, this distinction is common, if not to all schools of jurisprudence, then certainly to the Hanafi school.[303]

Rules of obligation are founded on the moral responsibility (*taklīf*) that follows from belief in God and assent to the divine commands communicated through revelation. They seek to set the standard of upright moral conduct for Muslims through prescriptions that come in the form of do's and don'ts. Rules of obligation therefore assign every act one of five well-known "legal" values: mandatory (*farḍ*/*wājib*),[304]

The slip it easy, but the difference between the two is big. See, for example, Ḥusayn b. ʿAbd Allāh al-ʿUbaydī, "al-Ṣulḥ fī al-qatl al-ʿamd aw al-khaṭaʾ," *Majallat al-Jamʿiyya al-fiqhiyya al-saʿūdiyya* 13 (2012): 77–134 at 87.

[301] On al-Qarāfī's life and career, see Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfī* (Leiden: E.J. Brill, 1996), chap. 1.

[302] Aḥmad b. Idrīs al-Qarāfī, *al-Furūq al-musammā bi-Anwār al-burūq fī anwāʾ al-furūq*, repr., 4 vols. (Saudi Arabia: Wizārat al-Shuʾūn al-Islāmiyya wa-l-Awqāf wa-l-Daʿwa wa-l-Irshād, 2010), 1:161–69. I have chosen to follow Mohammad Fadel's translation of these terms. See Fadel, "Adjudication in the Mālikī *Madhhab*," 15. Jackson, *Islamic Law and the State*, 116–23, prefers to call the *ḥukm taklīfī* a prescriptive rule and the *ḥukm waḍʿī* a descriptive rule. Both translations have merits and shortcomings, and there is probably no perfect rendering. "Prescriptive rule" is slightly problematic because, strictly speaking, all rules are prescriptive, while "rule of obligation" is a bit clunky. For now, I prefer Fadel's simply because it has some resonance with the law of obligations in other legal traditions.

[303] For the Hanafi school, see Muḥammad b. ʿAbd Allāh al-Tumurtāshī and Muḥammad Sharīf Sulaymān, *al-Wuṣūl ilā qawāʿid al-uṣūl* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000), 123–25.

[304] The Hanafis make for a sixth category by distinguishing between *farḍ* and *wājib*, where *wājib* is a slightly lesser mandatory

recommended (*mandūb*), permissible (*mubāḥ*), detestable (*makrūh*), and prohibited (*ḥarām*).[305] For example, to pray five times a day is mandatory upon every individual, to bury the dead mandatory upon the general community. Mundane things like eating with the right hand, by contrast, is recommended because such was the conduct of the Prophet. Al-Qarāfī further explains that, in order for these rules to be operative, the moral subject (*mukallaf*) must have the mental capacity (*ʿilm*) to know them and the physical capacity (*qudra*) to perform them. Children and the mentally ill (in different ways) lack the mental capacity, and often the physical capacity, to abide by rules of moral obligation. And if an adult of sound mind and body is afflicted with incapacitation of one kind or the other, obligations and prohibitions drop for as long as that state continues. A poor person, for example, is not obligated to perform the Hajj pilgrimage.

Objective rules, by contrast, are by definition amoral and founded on a principle of cause and effect. They articulate the causes (*asbāb*) of legal obligations, the conditions (*shurūṭ*) under which they may be fulfilled, the impediments (*mawāniʿ*) because of which they may not be fulfilled, and the quantities (*taqādīr*) at which they must be fulfilled.[306] They are usually expressed in if-then format. Inheritance illustrates this regime neatly. If one dies, then his or her heirs inherit the estate. Death is the cause of inheritance. Possession of wealth is a condition, such that if one is penniless, then no on will inherit anything from this person. Murder is an impediment, such that if an heir murders the benefactor, for former forfeits inheritance from the latter. And the inheritance is distributed in certain quantities, such

obligation than *farḍ*. This distinction is meant to accommodate for variations in the strength of transmission. However, both are, properly speaking, mandatory, so it is not necessary to quibble about the enumeration of values here.

[305] An obligation that is recommended, permissible, detestable, or prohibited seems to be a contradiction in terms. Here an obligation may be seen more as a duty, which may be positive, negative, or neutral. Therefore, a prohibited obligation simply means a duty not to do something, while a permissible obligation simply means the absence of a duty to do or not to do.

[306] Al-Qarāfī, *al-Furūq*, 1:161.

that if one has a particular relationship to the decedent (varying from one case to another), he or she will inherit a particular amount. To the extent that these rules assign a value to actions, it is in binary terms: an action is either valid, or *jā'iz*, or not valid. Al-Qarāfī explains that objective rules, in direct contrast to rules of obligation, do not require mental and legal capacity to be applicable. So long as the conditions are present and impediments absent, the obligation arises, at the determined quantities, whenever the cause occurs. Therefore, one is entitled to inheritance even without knowing one's lineage; if he discovers that a legal benefactor of his has died, he is entitled to the share. Liability for property damage is also not conditioned on mental or physical capacity. This is why children and the mentally ill are liable for their damage to someone else's property, except that (because of a separate objective rule) the fulfillment of this obligation transfers to their guardians.

It is hard to overstate how great the implications are of the distinction between prescriptive and objective rules. Though previous scholars have highlighted the distinction's importance in different contexts,[307] it seems generally to escape the attention of most legal scholars. Ignoring it, however, is cause for extreme confusion when discussing different aspects of Islamic law. Because many Islamic rules of conduct, especially those concerning worship and other devotional matters, do not fall into what most people today consider the legal domain, the full implications of these rules are bound to be misconstrued by the present-day observer. What does it mean, for example, to say that performing the prayer is "the law"? Does this mean that positive legal institutions may be used to compel people to perform the prayer? Or what does it mean, to take another example, to say that it is strongly disliked, when a man divorces his wife, to pronounce the divorce three times? Does this mean that such a divorce is

[307] Jackson, *Islamic Law and the State*, chap. 4. See also Mohammad Fadel, "Adjudication in the Mālikī *Madhhab*: A Study of Legal Process in Medieval Islamic Law" (PhD diss., University of Chicago, 1995), 114–18.

judicially unenforceable?

It is important, then, to clarify how prescriptive and objective rules interact with one another. In general, the two classes of rules operate on different planes. Rules of obligation reflect the absolute moral character of performing or failing to perform certain actions. In assigning actions the moral values listed above, these rules reflect the divine recompense, good or bad, that one may expect to receive in the hereafter. Objective rules, by contrast, address the practical worldly performance of those actions. Take again the example of prayer. The rule of obligation says that act of prayer itself, barring mental or physical incapacity, is mandatory (*farḍ/wājib*). That is all. The descriptive rule (or set of rules) says how and under what conditions the prayer is to be performed. For example, when dawn enters, the dawn prayer, consisting of two units (*rakʿats*), is to be performed in a state of ritual purity, and rising of the sun impedes the timely performance of that prayer.

Rules of obligation and objective rules frequently move in different, sometimes opposing, directions. There are many acts that are prohibited (*ḥarām*) and thus risk incurring divine punishment but nevertheless have little or no way to be enforced. Fornication, for example, is prohibited under a rule of obligation. It may receive the fixed penalty (*ḥadd*) under the objective rule that requires this penalty if the evidentiary burden is met. However, the burden is so high as to effectively nullify the penalty in practice. This result—illicit sexual relations going unsanctioned—does seem to contradict the prohibitive rule of obligation. Jurists, in other words, do not seek to overcome the evidentiary burden in order to ensure that people comply with the rule of obligation against illicit sex. There are other objective rules, for example, that instruct judges to urge those confessing fornication to withdraw their confessions and repent instead of undergoing the worldly penalty. Prayer provides another example. As we

have seen, it is mandatory by rule of obligation. But the individual failure to perform prayers has generally not been a justiciable matter, and one generally does not find legal opinions or legal cases involving the adjudication of things like prayer.[308] Divorce is a further example. The threefold utterance of divorce is severely disliked by rule of obligation, yet the objective rule is that, once uttered, it is valid and enforceable. That an act is disliked or prohibited does not necessarily mean that it is legally invalid.

From these examples we may further conclude that, on the whole, rules of obligation tend to address the domain of private conscience and may or may not be subject to interference from positive legal institutions. Whether they are subject to institutional enforcement depends entirely on the existence of an objective rule enabling such enforcement. Importantly, an objective rule of enforcement does not necessarily follow from a mandatory or prohibitive rule of obligation. Indeed, for some rules of obligation, such as that prohibiting fornication, there are counterbalancing rules of obligation, such as the prohibition of spying and otherwise prying into people's private misconduct.[309]

Although the two classes of rules operate independently, it is also possible for objective rules to give rise to new rules of obligation. This occurs primarily in the domain of civil law (*muʿāmalāt*). For example, entering into a contract, by rule of obligation, is merely permissible (*mubāḥ*); one may choose to enter or not, and no civil authority may compel one to do one or the other. But once one enters into a contract—be it a formal contract like a sale of goods or a quasi-contract like marriage—it is mandatory

[308] There was some allowance, however, for the public authority to discipline local Muslim communities that failed or refused to establish regular congregational prayer. In his *Maʿrūżāt*, for instance, Ebussuʿūd approved the enforceability of a 1533 edict that instructed provincial governors to have mosques built in Muslim localities that had none, even if the localities refused, in order that the establishment of public prayer services not go interrupted. Ebussuûd Efendi, *Maʿrûzât*, ed. Pehlul Düzenli (Istanbul: Klasik, 2013), 59–60. Even still, such opinions authorized the government apparatus to take measures for maintaining the major public rites of Islam (*shaʿā'ir al-islām*). They did not furnish grounds for policing and adjudicating individual belief and worship.

[309] Mohammad H. Fadel, "Public Reason as a Strategy for Principles Reconciliation: The Case of Islamic Law and International Human Rights Law," *Chicago Journal of International Law* 8 (2007): 1–20 at 7–9.

(*wājib*) to fulfill its terms. Questions of "legality" are often determined by objective rules. Objective rules determine whether a contract is valid or not as well as whether one may seek a judicial remedy for a breach by the other party. Indeed, because objective rules are responsible for most legal relationships, it is these rules that make up the primary substance of the positive legal system.

What does all this have to do with intent in homicide? First of all, we have new clarity on why civil penalties for fatal and nonfatal injuries are as they are. These penalties rest on objective rules that say, quite straightforwardly, that if *A* is found to have committed injury *X* against *B*, *A* will be liable in the specified amount. As we have seen, the remedies have an economic logic that is value-neutral and therefore not necessarily correlated with the moral culpability of the act. The compensation for permanent injury to someone's hand carries the same damages as accidental and quasi-intentional homicide, even though the moral culpability of each scenario is apparently different. Because the morality and legality of homicide are measured by different rules, we should not expect the legal remedy to always correspond with the moral opprobrium incurred by an act of killing.

Furthermore, the rules of obligation and objective rules imply different basic requirements for responsibility. An act of homicide is, by rule of obligation, prohibited for the moral subject. Rules of obligation, as we have seen, require soundness of mind and body at the time of killing. This is why a person is not morally responsible for suffocating someone while asleep, nor an unauthorized well digger for someone who stumbles into the well and dies. All forms of homicide, however, are "unlawful." What makes it "unlawful"—that is, the causes and conditions of its illegality—are objective rules, which spell out the different grades of homicide. Objective rules do not require mental or physical capacity to be effective. This would mean that those who are legally incapacitated—minors, the mentally ill, or the

unconscious—would be subject to civil sanction for committing a homicide while in a state of incapacitation. Apart from being disturbing, this conclusion directly contradicts the doctrine of homicide, which *by definition* deems homicide by such people nonintentional.

Al-Qarāfī is addressing this very contradiction. In positing a framework of criminal liability, then, Peters omits the crucial point that al-Qarāfī is trying to make and simultaneously overstates its implications. Al-Qarāfī is explaining the exceptional nature of homicide. Even though the law's definition of homicide is governed by objective rules, homicide and other acts that carry potentially serious penalties *do* require knowledge and physical capacity in order to trigger liability. And, unusually among legal acts, they additionally requires intent. "This is why," he writes, "there is no requital for in accidental homicide. This is also why, in the matter of illicit sex, the fixed penalty may not be imposed upon one who is coerced to commit nor upon one who does not know that his partner is unlawful for sex. Indeed, if he merely believes that this partner is his wife, the fixed penalty is inapplicable because he lacks awareness (*li-ʿadam al-ʿilm*). Similarly, one who drinks wine, believing it to be vinegar, is not subject to the fixed penalty because he lacks awareness.... The secret to this exception from this general principle of objective rules—[that is, that liability attaches without physical capacity or knowledge]—is that the mercy of the legislator refuses to sanction one who does not aim at wrongdoing or set about doing it with his mental and physical capacity."[310]

Al-Qarāfī's introduction of intent (*qaṣd*) into the equation therefore comes in the context of explaining the causes and conditions of liability for something. It is not, contrary to Peters, a general Is-

[310] Al-Qarāfī, *al-Furūq*, 1:162.

lamic principle of *mens rea*. I admit readily that an outward intent to perform an unlawful action frequently dovetails with an inward intent to do evil. Yet that is not necessarily the case. Internal motivations are not fundamentally at issue. The objective rules of homicide, in order to determine the correct remedy, merely look to external indicators of the appropriate degree of causation. Peters's overstatement is suggested further by the fact that the graded typology of intent is peculiar to homicide. Unlike *mens rea*, which is a general principle of culpability in the criminal law, the intent-based gradation for homicide in Islamic law exists only for homicide.

If intent in Islamic homicide doctrine may be usefully analogized to concepts in the Anglo-American tradition of criminal law, it would be more accurate to include it under the *actus reus*, the other key component of finding someone guilty of a crime. In plainer terms, intent seeks to establish details more about what the agent did than about what the agent was thinking when doing it.[311] That said, there are better reasons not to think of Islamic homicide doctrine in criminal terms at all. These reasons have to do with remedies.

REMEDIES LEGAL AND MORAL

Dāmād Efendi himself introduces the chapter on injury with words that echo the same typology of rules.[312] "Injury is an act performed by moral subjects … that carries one of the five values…. There is no

[311] I am grateful to Gideon Yaffe for this insight on the distinction between the *acts reus* and *mens rea* inquiries. If my analogy of Islamic intent proves to be wrong, however, the error is entirely mine.

[312] He does so in explaining the thematic connection of the current chapter to the preceding one, which is on pledges (*rahn*). He admits that the connection is somewhat tenuous, consisting only in the fact that "pledging is lawful and homicide is unlawful." See Dāmād Efendi, *Majmaʿ Al-Anhur*, 2:614. The by-product of this comment is to provide a nice illustration of the difference between rules of obligation and objective rules.

doubt that injury is prohibited. That is enough on this point."[313] What follows, Dāmād Efendi suggests, are the objective rules that define the types of injury and the legal remedies to which they give rise.

A legal remedy is the law's formal response to the violation of a right. Remedies form a broad category. Any means by which a violation is prevented, compensated, or otherwise redressed, whether it be judicially imposed or mutually agreed upon by the parties, is a remedy.[314] Remedies are extremely important because they reflect how the law classifies a legal act, sometimes even more than the positive definition of the act itself. A salient example will illustrate this point. Take the term *crime* in Anglo-American law. This term, as the American jurist Max Radin wrote in his memorable style, "includes both murder and overparking." The penal codes of American jurisdictions, furthermore, enumerate both crimes in a single document. However, Radin continues, "the law has for centuries recognized that there are more serious and less serious crimes,"[315] which the Anglo-American tradition respectively calls felonies and misdemeanors. How have felonies and misdemeanors been distinguished? The answer is remedies. The original definition of a felony at English common law was an offense that occasioned the forfeiture of property to the crown; misdemeanors (which were archaically called transgressions) were those that received a lesser punishment. Today in the United States, a felony is generally defined as a crime punishable by death or imprisonment for more than a year.[316] Therefore, a key way that more serious crimes are substantively distinguished from less serious crimes, as well as crimes from non-crimes, is the remedy that each one is assigned by the law. This is precisely why we spent considerable

[313] Dāmād Efendi, 2:614.
[314] See *Black's Law Dictionary*, s.v. "remedy."
[315] Max Radin, *The Law and You* (New York: New American Library, 1948), 91.
[316] See *Black's Law Dictionary*, s.v. "felony."

time earlier in Chapter 1 examining theories of punishment and the potentially punitive (or nonpunitive) nature of requital. For if requital could be shown to be nonpunitive, that would be evidence of the civil nature of homicide in Islamic law.

Before explaining the legal remedies, it is useful to begin with the "moral" remedies mentioned in the title of this section. For each grade of homicide, the doctrine makes two assessments: first, whether the homicide carries legal liability (*ḍamān*) to the victim's family and, second, whether it carries moral liability (*ithm*) before God. The distinction between these two types of liability may be explained in part by the division of legal rules, as discussed in the previous section, into rules of obligation and objective rules. The application of the terms "legal" and "moral" is my own, but the distinction between law and morality is more than implied in the language of Islamic jurisprudence.[317] The *sharīʿa*, like any tradition of law, grapples with a basic tension: Law is fundamentally intertwined with morality, seeking to effect a moral vision of the world. That is why we penalize murderers and robbers. Yet in order to function, law must at times act out of step with morality. That is why we often penalize those who cause death wrongfully, even though their action is not necessarily a moral affront. Generally speaking, however, criminal actions are those that are punished because they offend the moral principles of society. Wrongful death is therefore not regarded a crime but a civil wrong carrying civil remedies.

For homicide, Islamic jurisprudence assesses legal and moral liability separately. The legal remedy, as we will detail momentarily, comes in the form of requital or monetary compensation. The moral remedy for killing another human being, when it is imposed, is to offer expiation (*kaffāra*), usually in the form either of manumitting a slave or of paying a sum of money to the poor. Expiation is required

[317] On the distinction and tension in Islamic jurisprudence between law and morality, see, for example, Khaled Abou El Fadl, "Qur'anic Ethics and Islamic Law," *Journal of Islamic Ethics* 1 (2017): 7–28.

for the three medial grades of homicide—that is, quasi-intentional, accidental, and quasi-accidental homicide. Intentional homicide and homicide by caution are excluded. This is therefore one of the ways that the doctrine grades the moral liability of homicide alongside its legal liability. In the case of intentional homicide, jurists regarded it as so severe as to beyond the curative power of paying expiation without active repentance to God. In doing so, they drew on scriptural evidence, including a Hadith narration stating that no expiation can suffice for intentional homicide.[318] In the case of homicide by causation, the actor bears the moral responsibility of creating a dangerous obstruction in a public path but not the moral responsibility of killing the decedent.

If the moral remedy for expiation may be taken as an index of the moral responsibility attached to homicide, it is suggestive that is uncorrelated with the degree of homicide. Were homicide a crime, we would expect expiation to be prescribed only for homicide deemed serious enough to warn punishment. Yet expiation is mandated not only for both greater and lesser forms of homicide. This disjunction between the moral and the legal is an initial indication that the doctrine of homicide is not viewing the act through a criminal lens.

The civil nature of homicide comes into even greater focus when we turn to the legal remedies themselves. To see this, let us start with intentional homicide and step our way down the ladder. Intentional homicide, al-Ḥalabī's text states, "entails liability" (*mūjib li-l-ḍamān*)—and therefore gives rise to the specified remedies—when it is committed against someone who is entitled to legal protection. The language here is deliberate and carefully chosen. Dāmād Efendi comments that al-Ḥalabī's works "marks a distinction from killing such people as brigands (*quṭṭāʿ al-ṭarīq*), unprotected foreigners

[318] Dāmād Efendi, *Majmaʿ Al-Anhur*, 2:615–16.

(*ḥarbī*), and apostates (*murtadd*)." It is easy to infer from these words a kind of doctrine of outlawry, whereby anyone would have been permitted to kill such people on sight without any kind of process.[319] It could well be that jurists did not permit ordinary people to kill those thought to be in some way outside the protection of the law, but this specific topic lies outside our present discussion. What we can say here is that it a stretch to conclude that Dāmād Efendi is talking about the pursuit of criminals. The term he uses—*ḍamān*—means a guarantee that one will make restitution for causing damage, and in law it is always used to refer to cases of civil liability, usually those involving the loss of property. Dāmād Efendi is therefore saying that such people as the brigand, unprotected foreigner, and apostate lie outside the *civil* protection of the law. Those who kill them, though possibly sanctionable if they do so without executive authorization, do not bear the burden of paying damages to the victim's family.

Because *ḍamān* is effectively the Islamic equivalent of civil liability, it is not surprising that jurists devote considerable attention to rules surrounding its imposition (*taḍmīn*).[320] Indeed, there is a unique work by one of Dāmād Efendi's contemporaries, Ibn Ghānim al-Baghdādī (d. 1030/1620), titled *Majmaʿ al-ḍamānāt*. This work essentially restates Islamic civil jurisprudence into rules about when civil liability attaches and when it does not. The rules of homicide that we are outlining here are all placed within the same framework of civil liability.[321]

For the lower grades of homicide, it is not stated explicitly that civil liability is entailed. Why, then, does Dāmād Efendi, following al-Ḥalabī, see the need to specify that intentional homicide does entail

[319] On outlawry, particularly with reference to the English common law, see Melissa Sartore, *Outlawry, Governance, and Law in Medieval England* (New York: Peter Lang, 2013).
[320] See, for example, 'Alā' al-Dīn 'Alī b. Khalīl al-Ṭarābulusī, *Muʿīn al-ḥukkām fīmā yataraddadu bayn al-khaṣmayn min al-aḥkām* (Beirut: Dār al-Fikr, n.d.), 200–213.
[321] Ibn Ghānim Baghdādī, *Majmaʿ al-ḍamānāt fī madhhab al-Imām al-Aʿẓam Abī Ḥanīfah al-Nuʿmān*, 2 vols. (Cairo: Dār al-Salām, 1999), 1:381–401.

civil liability? The reason, I strongly suspect, is that the legal remedy for the lower grades is invariably monetary damages. Intentional homicide, as we already know, carries the possibility of requital, which is likely to put one in mind of criminal punishment. There are, after all, hardly any private acts that carry the possibility of death as a penalty. Therefore, calling requital *ḍamān* leaves no confusion that jurists conceived it to be a civil remedy.

Precisely what remedy or remedies were available for intentional homicide was a matter of some dispute between schools. The primary question was whether the heirs could either impose or waive requital or whether they had the option to choose between requital and damages. The Hanafis held that intentional homicide entailed requital invariably. They were required either to impose requital or pardon the killer. Other schools, notably the Shafiʿis,[322] argued that, if the heirs pardoned, they still had the option to take compensation. Though these two positions are substantively different, the reasoning in both revolves, as it were, around the appropriate replacement cost for a life taken. The Shafiʿi position suggests this rather straightforwardly. The option to replace a penalty with a payment is money is entirely out of step with penal theory, which admits no such replacement. The Hanafis argued that, for this level of homicide, "wealth does not suffice as a remedy because wealth, both in form and meaning, has no equivalence with a human being."[323] This is not a sentimental statement, but rather a restatement of the equivalence principle behind requital. Intentional homicide calls for a higher "payment" than the ordinary damages, and when requital is warranted, it cannot be substituted with a lesser payment. This doctrine also reveals the utility of distinguishing between intentional and quasi-intentional grades of

[322] The Shafiʿi view forms the most frequently cited counterpoint in Hanafi works of jurisprudence. Since my purpose here is not to exhaustive analysis of all opinions, I suffice with the Shafiʿi position as representing "other schools."
[323] Dāmād Efendi, *Majmaʿ Al-Anhur*, 2:616.

homicide in the Hanafi school.

Quasi-intentional homicide entails the legal remedy of damages. This damages for this grade of homicide are distinguished from those of accidental homicide, as seen previously, by being due in its intensified amount when paid in kind. Accidental and quasi-accidental homicide, by contrast, only carry the remedy of ordinary damages.[324] Homicide by causation, too, carries ordinary damages.

Does the definitional gradation correspond to the remedial gradation? That is, does each step down the ladder of homicide give rise to a slightly less serious remedy? In quantitative terms, it seems not. There are a couple of qualitative ways, however, that the doctrine adjusts the remedy to the type of act. The first is by specifying who is responsible for paying the victim's heirs. In all cases below intentional homicide, damages are not to be paid by the killer alone but by his or her solidarity group (*ma'qula*). Assessing the solidarity group relieves the burden slightly from the individual killer and, not insignificantly, incentivizes people to keep those within their solidarity groups in line. Second, in the case of homicide by causation, unlike in all higher grades, the one who causes death is not deprived of inheritance.[325]

Throughout this section, I have used the word "entailed" advisedly when referring to legal remedies: intentional homicide entails requital, and lower grades of homicide entail damages. To express this "entailment," Dāmād Efendi and nearly all other jurists use the term *mūjab*. This term, which literally means mandatory (more or less synonymously with *wājib*), does not mean that the specified remedy must mandatorily be imposed. This is obviously not so, since for an intentional homicide the heirs have the

[324] For those societies that had a currency-based economy, this would have meant that, in effect, the legal remedy would have been same both for quasi-intentional and for accidental and quasi-accidental homicide.
[325] On this point as well, the Shafi'i position was different from the Hanafi one. See Dāmād Efendi, 2:618.

unimpeded right to pardon. What *mūjab* means, rather, is that the specified remedy is both the minimum and maximum that the heirs are entitled to impose on the killer. If they do not wish to impose this remedy, they must either pardon the offender (in the case of intentional homicide) or arrive at a settlement.

Settlement (*ṣulḥ*) is the only mechanism for adjusting the remedy for homicide. That settlement is even an option is suggestive of the civil logic of homicide. But what lays this point bare is the full deployment of the economic vocabulary that settlement entails. The rules for intentional and non-intentional homicide are slightly different. In the case of intentional homicide, the heirs and the killer may come to a mutual agreement (*bi-l-tarāḍī*) on a sum of money. This payment is seen as a substitution (*badal*) for the penalty of requital, and it may be either greater or less than the fixed sum for damages. This payment, furthermore, must come from the killer's own wealth and may not be charged to his or her solidarity group.[326]

In the case of lesser homicide, the rules of settlement are far more restrictive. Dāmād Efendi explains:

> By contrast, accidental homicide may not be settled out for a sum that is greater than the damages. The reason, suggested by Q 4:92 (*damages paid to* [*the victim's*] *family*), is that these damages are a debt obligation of a predetermined amount. To take more than this would therefore constitute a form of interest (*ribā*).[327]

The general rule, then, is that the fixed amount of damages may not be substituted. The reasoning, ra-

[326] Dāmād Efendi, 2:616.
[327] Dāmād Efendi, 2:628.

ther strikingly, is borrowed from property rules pertaining to the giving and taking of interest. A settlement may be substituted for requital because requital is not regarded, strictly speaking, to be property (*māl*). But substituting a settlement payment for a damages payment, given that it would usually involve substituting property of the same genus (cash for cash or kind for kind), is disallowed because it resembles interest, which is the exchange of the same currency in unequal quantities. Following the same reasoning, jurists found a way around this problem. If the settlement payment is made in terms different from those of the damages, then such a settlement would be allowed. For example, if the parties agreed to a settlement in grain in place of the ordinary form in which damages were paid (gold or silver), this settlement would be permissible.[328] It is hard to tell whether this kind of settlement was meant only hypothetically, but it is certainly possible that social groups that put value in such commodities would have agreed to such a settlement.

In sum, there are two basic remedies for homicide: requital and damages. The latter is an explicit payment of money. However, given the possibility of substitution through settlement, requital too may rightly be seen as a kind of payment in kind. Such terms are no doubt alien to what most people think of when they think of homicide. What matters most here is that they are certainly alien to crime and punishment.

BOUNDARIES OF LEGAL LIABILITY

It is important, in addition to defining what kind of legal liability is entailed by homicide, to define as well what the boundaries of that liability are. That is, where may we draw the line between a homicide

[328] For an excellent summary of the rules concerning settlement in homicide, see, Ḥusayn b. ʿAbd Allāh al-ʿUbaydī, "al-Ṣulḥ fī al-qatl al-ʿamd aw al-khaṭaʾ,"

that gives rise to liability and a homicide that does not? This question may be broken down into the following two stylized questions: First, what kind of *person* must someone kill in order to be liable? Second, what kind of *act* must a person perform in order to be liable. These two questions are not doctrinally related, at least not explicitly so, but I have grouped them thus because I believe this to be a useful way of understanding where Islamic jurisprudence draws a line between liability and nonliability. More specifically, these two questions explore the upper and lower limits of liability. They therefore correspond, respectively, to the intentionally homicide and homicide by causation. To each of these questions, Dāmād Efendi devotes a subsection of the chapter on injury.

The first question, concerned with what kind of *person* (i.e., victim) triggers liability, asks when intentional homicide entails requital. This returns to our brief discussion, in the previous section, about those not protect by the law's regime of liability. We also encountered this concept in passing in Chapter 3 while discussing the exegesis of the Deterrence Verse. This legal protection, called *ʿiṣma*, was central to limiting liability for intentional homicide. Dāmād Efendi defines a legally protected person, at least in connection with civil liability incurred through injury, as "one whose life [literally, whose blood] is permanently inviolable" (*maḥqūn* or *maʿṣūm al-dam ʿalā al-taʾbīd*)."[329] This is a technical way of saying that, within a polity that administered Islamic civil law, you could not kill such a person without incurring liability that possibly entailed the strongest remedy.

What does Dāmād Efendi mean by "permanent" inviolability? This phrasing alludes to the general premodern Islamic regime of international jurisdiction. In broad terms, a state of hostility was presumed to exist between territories ruled by Muslims and those ruled by non-Muslims. This gave rise to

[329] Dāmād Efendi, *Majmaʿ Al-Anhur*, 2:618. The terms *maḥqūn* and *maʿṣūm* are used interchangeably to mean protected or inviolable.

the well-known general division of these territories, respectively, into the so-called Domain of Peace (*dār al-islām*) and Domain of War (*dār al-ḥarb*).[330] To the extent that this dichotomy was a statement of the actual state of affairs in the formative centuries of Islamic political history, this simple division grew rapidly anachronistic. Not all Muslim and non-Muslim states were engaged militarily, particularly between those that did not share a border or other clear political interests, and the examples of hostilities between Muslim states are legion. The simple binary division is further complicated by the fact that it was lawful to conclude treaties with hostile non-Muslim territories, and that such treaties did take place with great frequency.[331]

The premodern Islamic law of war, and more generally the Islamic law of nations, has yet to receive a thoroughgoing treatment among modern legal scholars and historians.[332] This dissertation is unfortunately not the place to undertake it. What is relevant here, however, is the following: For most matters in Islamic jurisprudence, and certainly for homicide, it is probably more precise to regard the *dār* as a division of political *domicile*, with practical implications for the law's jurisdiction,[333] than to interpret it

[330] My decision to translate *dār al-islām* as "domain of peace" is not meant to be polemical. I do not argue that the premodern division of territory was not inflected by confession. However, translating it this way not only balances out the translation of the two terms, but it is also supported by related terminology. In the legal literature, one domiciled in non-Muslim territory is called *muḥārib* (combatant), while one domiciled in Muslim territory is called *musālim* (ally), not *muslim*. See MAJMA, 1:619. This makes sense, given that the laws of liability and guarantee of protection extended to both Muslim and non-Muslim residents of Muslim lands.

[331] For a general work on domicile in Islamic jurisprudence, see ʿAbd al-ʿAzīz b. Mabrūk al-Aḥmadī, *Ikhtilāf al-dārayn wa āthāruhu fī aḥkām al-sharīʿa al-ilāmiyya*, 2 vols. (Medina: Al-Jāmiʿa al-Islāmiyya, 1424).

[332] The exception is Wahbah al-Zuḥaylī, *Āthār al-ḥarb fī al-fiqh al-islāmī*, 2nd ed. (Beirut: Dār al-Fikr, 1966). Majid Khadduri's analytical translation of al-Shaybānī's *Siyar* make available an important early work—perhaps *the* earliest work—on the Islamic law of nations and war. See Muḥammad ibn al-Ḥasan Shaybānī, *The Islamic Law of Nations: Shaybānī's Siyar*, ed. Majid Khadduri (Baltimore: Johns Hopkins Press, 1966). In his excellent recent study, Joshua M. White, *Piracy and Law in the Ottoman Mediterranean* (Stanford, CA: Stanford University Press, 2018), employs insights of early modern European law-of-nations jurisprudence. However, to my knowledge no Western scholar has yet undertaken a sustained study of the law of nations in Islamic jurisprudence.

[333] Muhammad Mushtaq Ahmad, "The Notions of Dār Al-Ḥarb and Dār Al-Islām in Islamic Jurisprudence with Special Reference to the Ḥanafī School," *Islamic Studies* 47, no. 1 (2008): 5–37.

as a prescription for international relations. One's primary political domicile—in which one primarily resided, paid taxes, or offered military service—determined whether one received the fullest protection of the legal institutions, including the right to seek restitution for injury. Therefore, the lives of the Muslim resident (*muslim*) and the taxpaying non-Muslim resident (*dhimmī*), who enjoyed this full protection, were regarded as permanently inviolable. A resident from a hostile territory (*ḥarbī*) was guaranteed no such protection. In between these two ends, the foreigner who was granted temporary security (*musta'min*), whether by general truce or special permission, enjoyed protection but to a slightly lesser degree than the Muslim and protected non-Muslim. The secured foreigner's status, even if in fact lasting indefinitely, was presumed to have an expiration date. This temporary security (*amān mu'aqqat*) stands in contrast to the perpetual security (*amān mu'abbad*) enjoyed by permanent non-Muslim residents. What suggests most strongly that the *dār* was a jurisdictional category, particularly in the Hanafi school, is that Muslims residing in non-Muslim territories did not automatically, by virtue of their Islam, come under the protection of the laws of Muslim territories.[334] Moreover, if permanent residents of Muslim territories traveled without permission to non-Muslim territories and were, say, killed on foreign soil, their families back home, as a general rule, could not petition the Muslim government for restitution. In such cases, restitution had practical barriers, but these practical barriers were strengthened by the difference in jurisdiction.[335]

---

[334] Abū Bakr b. Masʿūd al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ*, 2nd ed., 7 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1986), 7:52.

[335] Zayn al-Dīn Ibrāhīm b. Muḥammad Ibn Nujaym, *Al-Baḥr al-rāʾiq: Sharḥ Kanz al-daqāʾiq*, 7 vols. (Cairo: Al-Bābī al-Ḥalabī, n.d.), 3:102. It is important to stress that this jurisdictional barrier existed as a general rule. It could have been, and indeed did happen, that Muslim and non-Muslim countries agree to making good injuries done to foreign visitors. For example, in the early seventeenth century, Aḥmad b. Qāsim al-Ḥajarī, a Morisco who served as the translator in the Saʿadid court, was sent on a mission to France to recover goods stolen from Muslims fleeing to the Maghreb from Spain. According to al-Ḥajarī's own account, the goods were eventually recovered. While he does not comment extensively on the legal process, the whole venture rested on the presumption that the French courts would honor the foreign petition for restitution. See Aḥmad b.

Legally protected status therefore ran along two key axes: one's confessional group (*dīn*) and one's primary political domicile (*dār*). With respect specifically to intentional homicide, the remedy of requital required an equivalence of protected status (*musāwāt fī al-ʿiṣma*) between killer and victim.[336] Jurists disagreed, however, on whether confession or domicile was the controlling factor for protected status, and this disagreement yielded some noteworthy doctrinal differences. The Shafiʿis defined protected status primarily by confession. They held, therefore, that a protected Muslim was not subject to requital for intentionally killing a protected non-Muslim. The killer would, however, have been subject to paying damages.

The Hanafi position defined protected status on the basis primarily of domicile. All other considerations of status, whether religious or social, were subordinated to this principle. Requital could take place between permanent residents and permanents residents, and between temporary residents and temporary residents, but not between permanent residents and temporary residents.[337] Therefore, any permanently protected resident of the Muslim polity, whether Muslim or non-Muslim, would have been subject to requital for intentionally killing another permanent resident, whether Muslim or non-Muslim. By the same token, any permanently protected resident, including non-Muslims, would not have been subject to requital for intentionally killing a temporary resident. Temporary residents were protected, but not equally so. Therefore, intentionally killing one of them would still have been subject to

Qāsim Al-Ḥajarī, *Kitāb nāṣir al-dīn ʿalā 'l-qawm al-kāfirīn* (*The supporter of religion against the infidels*), ed. P. S. van Koningsveld, Q. Samarrāʾi, and Gerard Albert Wiegers, 2nd ed. (Madrid: Consejo Superior de Investigaciones Científicas, 2015).

[336] Dāmād Efendi, *Majmaʿ al-anhur*, 2:618.

[337] Dāmād Efendi is silent on whether temporary residents may be requited for intentionally killing permanent residents. I suspect, strictly speaking, that it was not allowed, since the temporary resident fell at least in part under the jurisdiction of his home territory.

a payment of damages.[338]

The principle of protected status on grounds of confession or domicile was extended, by analogy, to protected status on other grounds. In other words, certain natural or social disparities gave rise to legal inequalities deemed sufficient to bar requital for intentional homicide. Again jurists disagreed. We saw earlier that, on textual grounds, Shafiʿis held that a freeman was not subject to requital for intentionally killing a slave, nor a man for intentionally killing a woman.[339] Hanafis, by contrast, generally maintained a narrower standard of status inequality. Therefore, differences in gender or freedom did not bar requital. Similarly, differences in age and soundness of mind and body did not bar requital. Therefore, an able-bodied adult of sound mind could be requited for intentionally killing a minor, an mentally ill person, or an invalid.[340] Where Hanafis did bar requital, however, was in the case of specific relationships that could gave rise to a conflict of interest. For example, while a child could be requited for killing his or her parent, a parent could not be requited for killing his or her child.[341] As before, this did not mean that the parent would not be liable. Indeed, as Dāmād Efendi makes clear, not only would damages be mandatorily due, but they would be due out of the offending parent's own wealth rather than from the solidarity group.[342]

---

[338] Dāmād Efendi, 2:619.

[339] Dāmād Efendi notes, however, that the latter position, though ascribed to al-Shāfiʿī, was contested by his writings. See Dāmād Efendi, 2:619.

[340] The reverse, however, was not true for a minor or an insane person, as both of these were not considered morally responsible (*mukallaf*). We saw earlier that their families would be liable for damages. Dāmād Efendi is silent about whether a blind, deaf, or otherwise seriously ill person would be liable for an intentional homicide. I suspect so, though it is also possible that their physical defect could furnish a mitigating factor against intentional homicide.

[341] The language is gender neutral. The rule is that an "ascending relation" (*aṣl*) may not be requited for killing a "descending relation" (*farʿ*). See Dāmād Efendi, 2:619.

[342] This is a departure from the normal rule, which we saw earlier, that intentional homicide entails requital alone, which may be pardoned or settled out but not substituted with the fix damages payment. Here the severity of the intentional homicide is retained by making the parent pay out of his or her own wealth. The Shafiʿi opinion goes further to say that the payment is due immediately. The Hanafis, by contrast, require the payment over three years, which is the ordinary term for paying damages. See Dāmād Efendi, 2:619.

There are many rules of liability, as well as exceptions, pertaining to special relationships.[343] It is not necessary to catalog the one by one. The key point is that jurists rigorously applied a doctrine of equivalence as a way of determining who would be subject to the highest form of liability—and consequently the strongest remedy—for committing homicide. They even debated about whether to extend this principle to the method of execution when requital was to be imposed. Shafiʿis, with some internal disagreement, held that one should generally be executed with the same implement and in the same manner that he or she killed the victim. For example, someone who killed by bludgeoning with a block of wood or by pouring liquid down the victim's throat, if found liable and requited, should have the same done in return.[344] It is not clear, given the absence of a customary deadly weapon, whether Hanafis would have even classified such homicides intentional. But even if they would have, they drew a line here. For Hanafis, the equivalence doctrine did not reach the question of how to requite someone for intentional homicide. They held that one could be requited only by a sword or other customary weapon (*silāḥ*) of execution.[345]

We may move now to the second question: what kind of *act* triggers liability? What, in other words, is the minimum act that triggers liability? This question, opposite to the previous one, probes the lower limit of liability. Conceptually, it is concerned with causation and therefore covered doctrinally in Islamic jurisprudence under homicide by causation.

Homicide by causation covers most of what we colloquially and loosely call accidents. Unlike the

[343] Dāmād Efendi, 2:619–24.

[344] The exception to this rule was when the method of killing would involve an unlawful act. One example given is when the killing occurred by rape, such as by violently penetrating a young girl or sodomizing a young boy. In such cases, as Dāmād Efendi reports the Shafiʿi position, the offender would be requited by customary execution.

[345] Dāmād Efendi, 2:619.

"accident" we encountered in Islamic accidental homicide, which entailed missing an intended target, an accident here embraces all manner of misadventure. For example, you pick up a large rock on the side of the road and place it in the path of oncoming traffic, and someone then smashed their car into it. It seems intuitive that you be held liable for causing this accident through your recklessly dangerous behavior. It is similarly intuitive that we not hold liable the person who put the rock on the side of the road for you to pick up in the first place, even if we could identify who that person was. By furnishing the rock, that person contributed to causing the accident. Most ordinary people are content, however, to draw the line between proximate causation and causation in its cosmic sense. But how proximate is proximate enough? Jurists in many legal traditions have realized that, when sensible rules meet borderline cases scenarios, the idea of proximate causation often fails to provide satisfying answers. What if the rock falls off the back of your truck bed, unbeknownst to you; or what if you place the rock off road, where you think people do not ordinarily drive their cars? If someone crashes their car into the obstruction in either case, can you be said to have sufficiently "caused" the injury to be held liable? Muslim jurists like Dāmād Efendi similarly acknowledged that causation requires some workable standard to determine where to cut liability off. Otherwise anyone along the causal chain—such as a merchant who sold you the deadly weapon or (absurdly but illustratively) the parents who gave you birth—be held liable for anything resulting from your actions.

Dāmād Efendi addresses such matters of causation primarily in the subsection on "things placed along pathways" (*mā yuḥdath fī al-ṭarīq*).[346] "After concluding the rules of homicide carried out directly,"

[346] Dāmād Efendi, 2:651–57. The act of *iḥdāth* seems to have the neutral meaning of introducing something into the pathway. While it may be tempting to translate this term as "creating accidents," related to the modern Arabic term for a road accident (*ḥāditha*), this seems to me anachronistic. One can introduce both useful and harmful things into a roadway. This act alone does not give rise to liability.

he writes, "[al-Ḥalabī] follows it up with a discussion of the rules of homicide caused by indirect means (*tasabbuban*)."[347] In this section, the rules of liability for injury to person explicitly cross over with rules of liability for injury to property, strengthening even more the civil logic of homicide law. Recall from the earlier typology that the Hanafi standard for liability at this grade of homicide is to create an obstruction without permission from the owner of the property. Accordingly, the standard is refined to address a couple of broad questions. First, what constitutes an offending obstruction? Second, who is authorized to give permission, particularly when property is publicly owned and used?

The latter question may be better answered first. The source of permission depended, sensibly, on who owned the property on which the path is located. For a private path (*ṭarīq khāṣṣ*)—that is, one falling on or serving a private residence—one had to seek permission from the owner before building anything or placing any kind of obstruction. If the path was shared by multiple private residences, the individual owners had the right to refuse, and one had therefore to secure permission from all of them.[348] If one built without permission, the owners could sue to have him or her remove the offending obstruction. And he or she would furthermore have been liable for any resulting injury or death, with his or her solidarity group shouldering the cost.

The rules for a public path (*ṭarīq ʿāmm*) are slightly different and more involved. Because no individual had a special claim of ownership, the public authority (*sulṭān*) stood in as the source of permission for building on the public thoroughfares. However, because these thoroughfares were held and used in common, one did not necessarily require such permission to begin with. This is particularly true when the obstruction is placed on a wide street in a way that is is not likely to cause harm, and even

[347] Dāmād Efendi, 2:651.
[348] Dāmād Efendi, 2:651.

more so when this "obstruction" is beneficial to the public, such as a privy, storefront, or drainage pipe.[349] This general permission therefore had certain benefits. One did not have to seek public authorization, for example, to set out some food on the side of the road to feed the cats and other street animals.

However, the general permission to put things in the public pathway came with a couple of big drawbacks. First, other members of the public were equally entitled to remove or formally seek removal of the obstruction if they deemed it a nuisance. There was some disagreement among Hanafi jurists on what measures one could take. Abū Ḥanīfa held that, because "administration of public affairs was left to the decision of the public authority," the absence of a public mandate put everyone, "whether Muslim or protected non-Muslim," on an equal footing. People could therefore compel others to remove their obstructions without a formal petition. Abū Yūsuf and al-Shaybānī apparently found this view to be a potential cause of public chaos. Abū Yūsuf held that one could try to stop the obstruction beforehand but, after it was placed, had to formally sue for its removal. Al-Shaybānī held that people were not permitted to privately stop the nuisance before or after it was set in place. They had to take formal measures in either case.

The second drawback of the general permission to put things in the public pathway, and perhaps the more important one, is that those who did so assumed all liability for any resulting injury. For example, if someone built a drain pipe (*mīzāb*) extended out from the wall of their home, and if the part of the pipe that extended into the street fell and killed a passerby, the owner would be liable. One would also be held accountable for recurring liability. For example, if someone slipped on the cat food you placed on the side of the road, then bumped into a second person, and both of those people fell in front

[349] Dāmād Efendi, 2:651.

of an oncoming horse and buggy, the one who placed the obstruction would be liable for causing injuries to both victims.[350] The reason is that, when one does not seek authorization from "those who have jurisdiction (*wilāya*) over the rights of the public," one assumes the full burden for one's independent action (*taṣarruf*). The potential for major liability, therefore, would presumably have created an incentive to seek public authorization even for socially beneficial projects.

A final observation to make here is that homicide and injury by causation are explicitly analogized to property damage. An obstruction in the road may cause irreparable ruin (*itlāf*) either to human beings or to such property as one's animals. The remedy for both is the same: one must make restitution. However, in the case of an animal, the injurer must pay the price of the animal out of his own wealth; whereas in the case of the human being, one's solidarity group undertakes the cost. The property logic of injury is strengthened by the rest of the chapter, which Dāmād Efendi spends discussing liability rules for various common scenarios in which some reckless placed item causes serious injury.[351]

In sum, jurists outlined a working set of standards that sought to limit liability. Because accidents can happen in potentially limitless ways, these standards serve better than bright-line rules that attempt to definitively and consistently address all possible scenarios. The standards for assessing liability turned primarily on permission from the owner of the property on which the obstruction was place.

CORPORATE LIABILITY

There is one other salient feature of the doctrine that forcefully points to the civil nature of homicide.

[350] Dāmād Efendi, 2:652. Dāmād Efendi, I regret to say, does not give the cat food scenario. He simply provides the schematic case of someone who trips and then causes someone else to trip.
[351] Dāmād Efendi, 2:652–57.

This feature may be summed up in what I will call corporate liability. By corporate liability I mean that the full consequences of liability for homicide are usually not borne by the individual alone but by also members of the individual's social group. As I will summarize, there are several ways in which this corporate liability gets expressed doctrinally.

Before doing so, I must briefly address what seems to be a contradiction to something asserted, at some length, earlier in this dissertation. Recall that, in Chapter 3, we saw how exegetes, in light of the Equivalence Verse, argued that the Islamic reframing of requital served to move responsibility away from the killer's tribe or social group and onto the killer himself. Therefore, a tribe could not requite the killing of one of their own by killing any member of the killer's tribe. Rather, the victim's life would be matched off with the killer's life, and all other indiscriminate killing was banned. This individualized scheme of responsibility seems, on its face, to against the notion that a killer's social group must share in that responsibility.

The answer to this problem lies in a further functional distinction between law and morality in Islamic jurisprudence. Specifically, a distinction is to be drawn between the moral *responsibility* and the legal *liability* for homicide. The individualization discussed in the context of the Equivalence Verse pertains to the moral responsibility for the unlawful killing. Because the agent is alone responsible for the act, the law bars displacing that responsibility onto a third party, that is, one who has no legal connection either to the killer or the victim. A third party may therefore neither gain satisfaction for the wrong nor suffer its consequences. This principle of individual responsibility, therefore, does not necessarily limit the legal liability for the act to the killer alone. Both the victim's heirs and the killer's social group are implicated by law in the assessment of liability even when the responsibility as such lies at the feet

of the killer alone. As we will see, this is a huge departure from the accepted modern theory of criminal culpability, which rather rigidly aligns legal liability with individual moral responsibility.

Corporate liability in Islamic jurisprudence involves two groups, representing opposite sides of the liability scheme. One group, the victim's heirs (*waratha*), has the right to impose or forgo liability. The other group, the killer's solidarity group (*ʿāqila*), has the obligation to bear that liability.

Let us first discuss the victim's heirs. Because the right to impose liability is intangible, unlike physical property (*māl*), its heritability is slightly unusual. However, the logic that governs both—the transferring of ownership, whether actual or constructive, from one party to another—sharply distinguishes these doctrines from criminal homicide. Within the Hanafi school, there was a difference of opinion about the legal mechanism by which the transference of this right would take place after the victim's death. According to Abū Ḥanīfa, the heirs' right to impose liability for intentional homicide is original (*ibtidāʾan*), transferring to them by succession (*khilāfa*); whereas, according to Abū Yūsuf and al-Shaybānī, it transfers by means of inheritance (*wirātha*) as such. Abū Ḥanīfa's argument is that inheritance proper only applies to those things that the decedent previously owned. The heirs therefore inherit the decedent's wealth after death. But they do not inherit the decedent's rights and obligations, because these are not subjective to ownership as such. For this reason, after one's death, the obligation to pay off debts or execute bequests transfers to the heirs by succession. Because the decedent did not "own" the debt or bequest, neither can the heirs. They simply "succeed" to the obligation, which simply means that satisfying it falls to them on behalf of the departed.[352] By the same reasoning, the heirs also do not acquire ownership of the right to impose liability upon the decedent's killer because such a right

[352] Dāmād Efendi, citing Ṣadr al-Sharīʿa, defines succession as "one person's standing in another's place in the performance of the latter's action" (*an yaqūm shakhṣ maqām ghayrih fī iqāmat fiʿlih*). Dāmād Efendi, 2:633.

was not owned by the decedent in the first place.[353]

This is a highly technical distinction no doubt, but, as Dāmād Efendi explains, it has important implications. The main one is that, because the heirs do not have individual ownership over the right to impose liability, no single one of them may bring a unilateral claim of intentional homicide against the killer on behalf of the others. To establish intentional homicide, by this rule, all of the heirs must be present, and they must unanimously lay the same claim. If some of the heirs lay this claim, but other known heirs are absent, they must be summoned and the evidence must be heard again. And if some of the heirs claim intentional homicide but others of them claim nonintentional homicide, the claim is automatically reduced and the option of requital is dropped. For nonintentional homicide, by contrast, Hanafi jurists agreed that the right to impose liability, carrying the remedy of monetary damages, transfers by inheritance proper. In this instance, a single plaintiff among the heirs, in order to recover his or her share of the damages, may bring the claim and furnish the evidence.[354]

There seem to be two practical reasons why, for intentional homicide, the law is cautious about honoring the say of each heir. The first is that, as has been mentioned earlier, the pardon of a single heir trumps the decision by the rest to impose requital. For this reason, even if the killer provides evidence that an absentee heir pardoned the killing, the remedy is automatically reduced to the payment of damages. The second reason is a little more subtle. If the heirs who are present testify that the heirs who are absent have forgiven the killer, this testimony is not accepted. Given the preference for pardon, this seems odd. The reason, as Dāmād Efendi explains, is that the law does not wish to allow those who are present to benefit themselves, in the form of taking money damages, at the expense of those who are

[353] Dāmād Efendi, 2:633.
[354] Dāmād Efendi, 2:633

absent, who still have the right at least to have their demand for requital recognized.[355]

Let us now move to the other side of the liability equation. Just as the imposition of liability, as well as the receipt of damages, was divided among those closely connected to the victim, so too the payment of liability is borne by those closely connected to the killer. The latter is made up of one's "solidarity group" (*ʿāqila*, pl. *ʿawāqil*; *maʿqula*, pl. *maʿāqil*),[356] as scholarship has come to call it. This group is called *ʿaqila* in Arabic because it "stems the further shedding of blood."[357] The purpose of joining the solidarity group (*taḍmīn al-ʿāqila*) in the liability, Dāmād Efendi, explains is to "restrain their fellow member [who committing the killing] from further heinous deeds."[358] Furthermore, joint liability had the additional purpose of making payment of damages more feasible. The formal rule was that the solidarity group pay the damages to the heirs over the course of three years, and that no single member of the group could be assessed more than three or four dirhams.[359]

The solidarity group bore liability for all nonintentional injury to human life (*ḍamān al-nafs*) and major nonintentional injury to human limbs.[360] They were therefore not responsible for intentional homicides.[361] We saw above that, if the family decided to forgo requital in favor of a settlement, the payment of this settlement fell upon the killer alone. Two practical reasons for this rule come to mind. First, putting the payment on the killer's shoulders served to match the greater severity of the intentional act. Second, because the settlement amount could far exceed the fixed damages, the heirs may

[355] Dāmād Efendi, 2:634.
[356] These two terms are used interchangeably, but *ʿāqila*/*ʿawāqil* seems to be used more.
[357] Dāmād Efendi, 2:687.
[358] Dāmād Efendi, 2:687. The phrase *taḍmīn al-ʿāqila* may be found at 2:652.
[359] Dāmād Efendi, 2.688.
[360] I add this qualification because the solidarity group did not bear liability if the injury incurred less than one-tenth damages, as in the case of a minor wound. This rule, Dāmād Efendi explains, reflects the law's desire not to unduly burden those who commit very minor injuries. See Dāmād Efendi, 2:690.
[361] Dāmād Efendi, 2:689–90.

have had an incentive to demand an exorbitant amount if they know that the killer's solidarity would be responsible for paying. In addition to intentional homicide, the solidarity group was not responsible for paying damages for the loss of nonhuman life, such as beasts, because nonhuman life was legal considered, as it has been and today is considered in most legal systems, to be property (*māl*). Paying damages for destruction of property fell alone upon the one who caused it.[362]

Who made up a given person's solidarity group? The scholars use the term "solidarity group" because, as Dāmād Efendi explains, it consisted of those who, in addition to preventing their members from committing mischief, could provide mutual aid (*tanāṣur*) to one another when they did.[363] In effect, this amounted to the social group that was best positioned to pay off the damages, both because they would have the wherewithal to do so and because they would be socially amenable to assuming the burden. Still, the determination of the solidarity group depended heavily on the polity's social structures.

Several general principles were developed. If someone was on the military rolls (*ahl al-dīwān*), drawing a salary, damages would be collected by garnishing the salaries of his fellow soldiers. Dāmād Efendi cites the precedent for this in the practice of Caliph ʿUmar.[364] If one was not in the military, damages would fall upon one's tribe (*qabīla*). There was some recognition that, unlike the many soldiers in a large army, the members of a tribe might not be able to pay the damages at three or four dirhams each. If one belonged to a small tribe, liability would be extended to the next closes agnatic tribe or tribes. Of course,

[362] Dāmād Efendi, 2:652. The case of injury to slaves was slightly more complicated. Slaves, because they had the potential to be freed, were not considered permanent property. Therefore, if a freeman injured a slave, the killer's solidarity group would share liability if the injury was fatal, but the killer would bear the full liability if it was not. See Dāmād Efendi, 2:671–74.
[363] Dāmād Efendi, 2:689.
[364] Dāmād Efendi, 2:688.

in a society with weak or undefined tribal affiliations, there were other standards. If one belonged to an established profession (*ḥirfa*), members of that profession would be one's solidarity group. A manumitted slave, as in other legal matters, would be attached to his or her former master and therefore the former master's solidarity group. These general principles of identifying an individual's solidarity group apparently applied to both Muslims and non-Muslims. Between Muslims and non-Muslims, however, solidarity groups could not be shared. Non-Muslims were in principle to be taken as one large solidarity group or, if there existed animosity among them, to be divided according to confession. Finally, if one had no solidarity group, one had to pay damages from one's own wealth. If there was a functioning treasury (*bayt al-māl*), damages could be paid for the Muslim (but not the non-Muslim) who had no solidarity group.[365]

It is unclear whether, in Ottoman courts, these elaborate rules about solidarity groups were put into practice when assessing exactly who would pay the damages.[366] An opinion by Ebussuʿūd states that "there is no solidarity group in these lands."[367] Furthermore, I have found no recorded case using the term *ʿāqila* or placing the payment of damages upon the killer's relatives or other community members. However, there is indirect evidence that these general principles were translated, at least in precept if not in practice, into Ottoman terms. The author of a 1692 treatise, one Mollā Şeyḫ el-Ṣihrānī, writes that, after much insistence, he decided to put down some of the basic doctrines on injuries (*cināyāt*) into Turkish.[368] On solidarity groups, el-Ṣihrānī describes who the *ahl al-dīwān* would be, since in the Ottoman case the "military" class on public payroll extended beyond the soldiery He writes:

[365] Dāmād Efendi, 2:690–91. The caveat of the functioning treasure is found in a note on the margins of p. 691.
[366] I have not yet been able to find a case that makes reference either to the *ʿaqila* or describing precisely who would pay.
[367] Colin Imber, *Ebu's-Su'ud: The Islamic Legal Tradition* (Stanford, CA: Stanford University Press, 1997), 247.
[368] MS Millet Kütüphansei, Ali Emiri Şer'iye 816-04, fols 73b–115b. It is not clear whether Mollā Şeyḫ el-Ṣihrānī is the author

> Those on the military roll consists of those whose names are written in the imperial registers (*defter-i pādişāhī*) and who receive their pay (*vażīfe*) from the treasury (*beytü 'l-māl*). If [a member of the soldiery (*'asker*)] commits a quasi-intentional or accidental homicide, the decedent's damages will fall to his regiment (*bölük*).... If the killer is on the scribal pay register (*defter-i küttābdan vażīfeḫor*), the scribes will be his solidarity group. If the killer is on the cavalry pay register (*defter-i sipāhiyān vażīfeḫor*), the cavalrymen will be his solidarity group. If the killer has the rank of commander (*beġ*), the members of the commander roll will be his solidarity group. The victim's damages shall be taken from each group's pay over three years at one-third each year. If their normal pay is advanced such that they receive three year's pay in one year, and the victim's damages are to be paid in that year, the full damages will be withdrawn during that year. If their normal pay is extended into a fourth year, the victim's damages will likewise be extended and removed in that year.[369]

El-Ṣihrānī only generally addresses those who do not belong to the military class as having a solidarity group consisting of their "tribe," without explaining who the solidarity group would be if one did not have a solid tribal affiliation. This short treatise may well have been just a didactic work. There is nothing to indicate that this treatise had a life beyond the miscellaneous manuscript in which it is found. Still, its specificity, particularly concerning what would happen if official pay was advanced or delayed, suggests that it may have reflected practice somewhere sometime. In any case, it gives us an indication that liability for homicide was, at least in principle, still considered binding not on the killer alone but on the killer's primary social group.

---

or the copyist. His name is in the colophon, but it says "drafted by" (*sawwadahū*) rather than "written by." Also, the short Arabic introduction is written in the third person. It could therefore be that Mollā Şeyḫ el-Ṣihrānī is the author or the work, referring to himself in the third person out of humility; or it could be that he served as an amanuensis for whoever wrote or dictated the work. For the present purpose, it makes no functional difference. In any case, the manuscript is a miscellany, and there is nothing to indicate that this treatise made it to wider circulation beyond this draft.

[369] MS Millet Kütüphansei, Ali Emiri Şer'iye 816-04, fols 103b–104a.

We can see from these principles that corporate responsibility sought to ensure that social groups take an interest in the behavior of their members. It also sought to ensure, as far as possible, that the heirs of a homicide victim receive their damages. It is quite likely that an individual killer would be judgment-proof and therefore unable to pay the damages alone. The solidarity group was, in a sense, a backstop built into the liability structure. Perhaps the biggest backup of all, however, as well as the biggest manifestation of corporate solidarity, was the procedure of corporate oath-taking called *qasāma*. Making the solidarity group pay could only work when the killer is known. But what if, as may likely happen, a body was found with signs of foul play but no killer could be identified? In such a case, the victim's family would no doubt have demanded restitution, but no single person could arbitrarily be held accountable. The corporate oath was meant to offer the best solution possible. Its purpose was to allow the individual members of locality to maintain their innocence while still preventing blood from being shed in vain (*ihdār*).[370] Moreover, the knowledge that they would be collectively liable if someone showed up dead in their midst would supposedly have given them a strong incentive to monitor their locality and stop people from committing such wrongdoing.

The Hanafi procedure for the corporate oath was as follows. The locality in which, or closes to which, the decedent's body was found would be subject to liability. The heirs of the victim would choose fifty members of the locality to take a formal oath before a judge that "did not kill him and did no know who killed him."[371] Dāmād Efendi adds that the heirs could pick anyone they wished, regardless of character, including either those suspected of wrongdoing, like young ruffians, or those known to be virtuous. This freedom allowed the heirs to strategically choose those who they thought, depending on the situation,

[370] Dāmād Efendi, *Majmaʿ al-anhur*, 2:677.
[371] Dāmād Efendi, 2:678.

would be likeliest to turn over the killer if they know who he was.[372] If the fifty duly took their oath, they would be judged collectively liable for damages. If the heirs claimed intentional homicide, the judge also had the option of putting the oath-takers in detention (*ḥabs*) for some time before having them take the oath.

It is worth noting that the other schools differed from their Hanafi school in one very big way. In the other schools, the corporate oath could be taken by heirs, rather than the members of the locality, against a single suspect when there was known or attested animosity (*lawth*) between that suspect and the victim. This animosity was taken as reasonable enough circumstantial evidence (*qarīna*) to warrant an oath-taking. If they formally took this oath, then the suspect would be liable. However, if no such animosity was known or attested, the members of the locality would take the oath as in the Hanafi procedure.[373] In the Hanafi school, known animosity was not regarded as valid grounds for holding someone liable for the homicide.

Unlike the solidarity group, the corporate oath procedure is attested, albeit infrequently, in the case record.[374] Its infrequency may be explained by two factors, both indicated by opinions written by Ebussuʿūd. First, it may have happened that a corpse showed up not in town but out of town. If someone was found killed on a highway, for example, the nearest town was to be held liable.[375] But there was no sure-fire way of fairly attaching liability to a particular town when the body was as close to one town as

[372] Dāmād Efendi, 2:678.
[373] Dāmād Efendi, 2:678–79.
[374] See, for example, Rasim Erol et al., eds., *Istanbul mahkemesi 12 numaralı sicil* (*H. 1073–1074 / M. 1663–1664*), İstanbul Kadı Sicilleri 16 (Istanbul: İSAM Yayınları, 2010), 657–58 (no. 883). See also Eyal Ginio, "Perceiving French Presence in the Levant: French Subjects in the Sicil of 18th Century Ottoman Salonica," *Südost-Forschungen* 65–66 (2007 2006): 137–64 at 147.
[375] Mehmet Ertuğrul Düzdağ, *Şeyhülislâm Ebussuud Efendi Fetvaları Işığında 16. Asır Türk Hayatı*, 2nd ed. (Istanbul: Enderun Kitabevi, 1983), 155–56 (no. 764).

to another. Ebussuʿūd therefore held that, if a body was found farther than a rooster's crow from a town, that town could not be held liable.[376] Second, townships likely took precautions to keep unsolvable homicides from taken place, and these precautions probably kept them safe, but they also absolved them in certain cases of liability. Ebussuʿūd held that, if a body was found in an endowed caravanserai within a town, the town would only be held liable if they did not assign a guard to keep watch.[377] In such cases where no township could be held liable, no corporate oath procedure would take place, and the treasury was to cover the damages for the wrongful death.[378]

These additional opinions by Ebussuʿūd suggest that corporate liability embodied a standard analogous to what in the common-law tradition is known as a reasonable duty of care. Within a given township, the residents were more or less strictly liable for a body that showed up in town or reasonably close to town. If it showed up far from any town (*baʿīd yollarla*), such as on a highway (*ṭariq-i ʿām*) close to nowhere in particular, the death would be concluded to have occurred on state lands (*arż-ı mīrī*), and liability would therefore have fallen to the state treasury. In between, townsfolk were expected to take reasonable measures, such as providing for a guard, to ensure that anyone committing a homicide would be duly apprehended.

The rules of corporate liability therefore served both to soften the defendant's load but spread loss and incentives the taking of reasonable precaution. Furthermore, to the overall argument of this study, corporate liability strongly establishes the dominantly civil nature of homicide. A basic principle of criminal culpability, as typically understood today, is that it falls squarely on the shoulders of those who

[376] H. Necati Demirtaş, *Fetvâları ile Şeyhülislâm Ebüssuʿûd Efendi* (Istanbul: Akıl Fikir Yayınları, 2016), 592
[377] Demirtaş, *Fetvâları ile Ebüssuʿûd*, 593.
[378] Düzdağ, *Ebussuud Fetvaları Işığında 16. Asır*, 155 (nos. 761–63).

commit the blameworthy act. What makes a punishment a punishment, in other words, is that it is borne exclusively by the culprit, and no one may be substituted in his or her place. What we see with Islamic homicide law, by stark contrast, is that the responsibility is more often than not shared by people other than the agent. Although jurists, as we discuss later, gave space to the temporal authorities to punish the offender, their main and abiding doctrinal concern was to outline rules of civil liability.

CONCLUSION

As can be seen from the overview at the beginning this chapter, there are other aspects of the doctrine that I have chosen not to review. For instance, because the focus is on homicide, I did not discuss doctrine particular to personal injury. Nor did I discuss liability for causing miscarriage of a fetus. But providing an exhaustive examination would be both exhausting and beside the point. The purpose has been to show that, so far as the doctrines of legal science were concerned, homicide was a matter of legal liability (*ḍamān*). It was regarded as an extension of injury to one's person. The primary remedy was the payment of damages. Requital, in the case of intentional homicide, had the appearance of punishment because it involved the death penalty. However, jurists theorized this remedy too as a form of compensation rather than punishment.

This thesis has one important caveat, which I wish to register here but will be revisited later in this dissertation when we discuss the political dimension of homicide. While the compensatory aspect of requital is dominant, this remedy simultaneously expresses the satisfaction of a public interest that bars it from being a *purely* private remedy in the way that payment of damages is. The private characteristics of requital, as Hanafi jurists have put it, are greatly preponderant (*rājiḥ*). Nevertheless, the inroad for

public interest, as I will argue later, creates a juridical basis on which the temporal authority may sanction killers in ways not permissible for exclusively civil conflicts.

This first part of the dissertation has shown how the substantive rules, formulated by jurists to be applied by judges, were geared toward private civil restitution rather than public criminal sanction. However, substantive doctrine is only half the story. In this doctrine, we see how jurists valued, as it were, the price of life, as well as how they devised remedies intended, as far as possible, to enable the heirs of a homicide victim to balance between their desire for vengeance and their need for restitution. However, whether the law viewed homicide as a civil or criminal matter may be determined just as much from the doctrine governing the procedure by which such restitution was secured. Procedure determines who—the private wronged parties or the agents of the public—is primarily competent to pursue the remedies available in the substantive law. We therefore turn now to see whether procedural law further confirms the thesis of civil homicide or calls it into question.

Part II

The Procedural Law of Homicide

This part follows a general format similar to that of the previous one and serves to expand and strengthen the same core argument made there: that homicide was theorized in Islamic jurisprudence principally as a civil wrong with civil remedies designed to redistribute the social harm committed by the offender. Like Part I, this one also examines the reception by Ottoman jurists of Hanafi legal doctrine connected with homicide and the instantiation of that doctrine in the Ottoman legal system. In content and contour, however, this part is different. Whereas previously we dealt with the substantive definition of homicide in Islamic jurisprudence, we will now look at the modes of adjudicating homicide. These modes of adjudication are filed under procedural law (alternatively called adjectival law), a category that, as we will see shortly, is problematic.

I functionally equate procedural law with what we find in Islamic treatises on the judicial discipline (*adab al-qāḍī*). However, this equation requires some justification. One of the methodological aims of this dissertation, it bears repeating, is to interrogate classifications of law that are frequently secreted into Islamic law without being properly interrogated. As I have shown, to regard homicide as crime and requital as punishment in Islamic jurisprudence, without further qualification, introduces a nexus of faulty assumptions about how Muslim jurists conceptualized the act of unlawfully killing a human being and the appropriate legal remedies. In the same fashion, to import the notion of procedure, together with the conceptual language that comes with it, does some violence to the internal organization of Islamic jurisprudence. Muslim jurists did not broadly divide law into substantive and procedural branches the way Western jurists now do. How, then, can I deploy the language of procedural law to

translate Islamic judicial treatises after having spent an entire chapter arguing against the unthinking use of the language of criminal law to describe homicide in Islamic jurisprudence?

The short answer is that the substance/procedure distinction is a largely functional classification in Western law too. Unlike crimes and torts, which have a long and traceable history of distinction in the civil and common law traditions, the distinction between substance and procedure, at least in Anglo-American law, is practically a new one. As scholars have shown, the dichotomy was articulated at the earliest by jurists in the late eighteenth century, notably Jeremy Bentham, amid the Enlightenment impulse for bringing conceptual order to things and ideas. This development happened early enough to be out of sight for most legal practitioners and even most legal academics, but it is quite late in the greater span of legal history. Yet even though substantive law and procedural law have become firmly entrenched in legal thought, education, and practice, those legal scholars who have plumbed their origins have not arrived at a clear consensus about what exactly defines and distinguishes the two categories. Most seem either to have despaired of any such consensus or, more often, just ignored the problem, contenting themselves with an impressionistic sense of what issues are substantive and what issues are procedural. If such is the case for modern law, I am content to operate similarly by feel in placing Islamic judicial treatises in the broad vessel of procedural law.

Islamic procedural law is conventionally boiled down to the norms governing the presentation of evidence on whose basis the judge may make findings of fact that lead to a decision. The standard account puts the acceptable forms of evidence (*bayyina*) at three: testimony (*shahāda*) by a reliable witness in behalf of the plaintiff's claim, an admission (*iqrār*) by the defendant to the plaintiff's claim, and a decisory oath (*yamīn*) taken by the defendant in the absence of testimony. Under the final category

also falls the defendant's refusal to take the oath (*nukūl*), which could furnish grounds for finding in favor of the plaintiff. The required number of witnesses, as well as the gender of the witnesses, depends on the type of claim brought against the defendant and on the strength of presumption in favor of one party or the other. In any case, these three categories are, for all intents and purposes, direct forms of proof. All others are circumstantial, labeled with a series of terms in the juristic literature, such as *amarāt* (signs), *dalālāt* (indications), *qarā'in* (contextual cues). Though such forms of subsidiary evidence are occasionally mentioned, there are no precise rules or standards laid out in works of jurisprudence.[379]

There are two problems with this conventional account. First, to the extent that procedure may be equated with the law's evidentiary regime, it severely oversimplifies the rules of evidence, overlooking the extensive discussion among Muslim jurists about the various problems that arise when considering what testimony to exclude because of a concern about the witness's reliability. This is true not only of Islamic jurisprudence. In American evidence law, hearsay is generally inadmissible. Hearsay is defined as an out-of-court statement made in court to provide the truth of the matter asserted. A simple example is when *A*, a witness in court, says that *B*, a person not present in court, claims to have seen the defendant kill the victim.[380] The inadmissibility of such evidence has a fairly sensible and straightforward logic: a witness cannot be allowed adduce evidence that the finder of fact cannot verify. In its plainly stated form, nonlawyers who first encounter this rule (myself included) may be excused for

[379] Abdul Rahman Mustafa, "Standards of Proof," in *Oxford Encyclopedia of Islam and Law.*

[380] Hearsay, as this simple example shows, is very similar to the Islamic evidentiary concept of *al-shahāda 'alā al-shahāda* (lit. testimony about testimony), which is also strictly invalid but which the law accommodates under certain conditions in order not to exclude claims when a primary witness is unable to present in court. See Fadel, "Procedure and Proof," in *Oxford Encyclopedia of Islam and Law.*

thinking it rather simplistic, and popular legal dramas, in which attorneys bark their objections to hearsay evidence, perhaps reinforce the perception that there isn't much to evidence law. Yet there are dozens of exceptions to the hearsay rule, each of them constituting a rule on its own, and the complexity of evidence law lies in identifying when these exceptions apply. For experts these exceptions are neither simple nor uncontroversial.[381] Like hearsay in its plainly stated form, the simple Islamic rule that a witness must be reliable masks a considerable field of discussion that is similarly complex and controversial.

Second, procedure is not simply about what transpires in the courtroom and therefore goes beyond the rules of evidence. In many legal traditions, the Islamic one included, some of the most important aspects of procedural law concern what happens *before* any evidence can even be entered and indeed often determines whether a plaintiff's grievance even gets a hearing, let alone a decision, from a judge. Procedural rules also concern claims that get a hearing but go to settlement before a decision, something that is commonly observed in modern legal systems and is an important procedural mechanism in Islamic law as well. And for claims that do manage to get a hearing and a decision, procedure encompasses what happens after the process is over as well, including the documentation of the case. Muslim jurists had much to say about what happened before, during, and after a judicial proceeding. To restrict procedure to the rules of evidence, then, presents a lopsided version of how jurists structured their discussions of procedure.

The purpose in this part is not to provide a comprehensive breakdown of the norms of adjudication,

[381] See, for example, Liesa L. Richter, "Posnerian Hearsay: Slaying the Discretion Dragon," *Florida Law Review* 67, no. 6 (2015): 1861–1908.

which has been provided by other scholarship,[382] nor to offer a diachronic review of all jurisprudential writings from any period on the subject. Instead I will concentrate on the procedural jurisprudence in works by sixteenth-century Ottoman figures and by such prior Hanafi jurists as inform the Ottoman perspective. Topically, I will focus on three salient procedural issues that I believe best help illuminate the nature of homicide in Islamic jurisprudence. These are (1) the basis of a valid legal claim, (2) circumstantial evidence, and (3) the documentation of claims that have reached judicial disposition.

As we will see, these aspects of procedure further emphasize the judge's fundamental role as a resolver of private disputes and the primarily private nature of homicide. This is not meant to suggest that the adjudication itself was a purely private matter. The reader does not need to be reminded that the judge is not simply a private mediator charged with resolving people's disputes but also an agent of the state whose job is ostensibly to promote commonly recognized public interests. Some aspects of procedural law, such as jurisdiction, concern this public capacity of the judge. The final part of this dissertation will address head-on the public dimensions of homicide in Islamic jurisprudence and Ottoman law, including how the law seeks to correct the harmful effects of unlawful killings that go beyond the immediate costs to the victim and victim's family. The present part is something of a bridge to that discussion, as judicial procedure is the link between the private and public dimensions of law.

[382] Mohammad Fadel, "Adjudication in the Mālikī *Madhhab*: A Study of Legal Process in Medieval Islamic Law" (PhD diss., University of Chicago, 1995), chap. 2.

CHAPTER FOUR

Procedure: Definitions, History, and Literature Review

One may reasonably ask what light the rules of procedure, unlike those of the substantive law discussed in the last three chapters, can really shed on the ontological conception of homicide within Islamic jurisprudence. Put in more casual terms, how can things like evidence and documentation tell us anything about what the law thinks of acts like killing another human being? What does procedure have to do with substance, and how does the former inform the latter?

These related questions apply equally of modern law and of premodern Islamic law. It is commonly accepted today, even among many lawyers, that substantive and procedural law are different things, making up the whole of the law but representing clearly distinguishable areas of doctrine. With respect to Islamic law in particular, recall that, in the introduction, I broadly identified the *furūʿ* of Islamic jurisprudence with substantive law. I also commented in passing that the secondary scholarship has tended to focus disproportionately on this facet of Islamic jurisprudence to the exclusion of procedure. On its face, this lacuna seems justified because there appears to have been no discrete area in premodern Islamic legal doctrine carved out for and identified as procedural law. Apparently not until the twentieth century, when the modern states of the Middle East legal institutions and usages patterned on those of European legal systems, did jurists of the Islamic tradition adopt the category and label of procedural law, which in arabophone countries is typically called *qānūn al-ijrāʾāt* (the "law of procedures") and less commonly *al-qānūn al-waṣfī* (a literal translation of "adjectival law").

Before moving on to the actual jurisprudence of procedure, which I will discuss in the next chapter,

several preliminary issues are necessary to address. I will begin first by presenting a serviceable definition of substantive and procedural law, which are commonly regarded as two necessarily distinct facets of law. Second, I will interrogate the relationship between substance and procedure, demonstrating, with the aid of research by other legal scholars, that the two categories are conceptually intertwined and that the distinction between them in Western legal traditions (particularly in the Anglo-American tradition) is of decidedly recent historical vintage. The purpose of historicizing the categories is not only to justify my talking about Islamic procedural law; it is also to caution the modern reader, who may be familiar with European legal traditions through study or experience, against assuming that Islamic jurisprudence failed to make a basic ontological distinction between substance and procedure and that procedural law may therefore be passed over with little or no comment, as it has generally been done by most Islamic legal scholarship. Third, I will explain why this scholarship, in my assessment, seems generally to avoid procedural law, giving it only the most truncated treatment, and why such neglect cannot stand if we are ever to provide a historiographical account of how Islamic legal systems functioned. This lacuna has more to do with scholarship's inability to reconcile the temporal and religious facets of Islamic law. It has little to do with the perceived absence of procedural doctrine, which does not exist under that name but is built into and plainly available throughout the writings of jurists.

DEFINING SUBSTANTIVE AND PROCEDURAL LAW

Substantive law, as traditionally defined in European and European-influenced legal systems, comprises the principles and rules that lay down people's rights, duties, liberties, and powers.[383] If we put

[383] *Garner's Dictionary of Legal Usage*, 3rd ed., s.v. "procedural law; substantive law." Cf. "adjective law."

last chapter's discussion in these terms, we might say that the legal heirs to the victim of a proven intentional homicide hold the right to demand retribution as well as the liberty to decline it in favor of pardon; and that the duly constituted official with jurisdiction over the matter holds the power to carry out the retributive penalty and the duty to do so if bidden by the entitled claimant. By contrast, procedural law, sometimes also called adjective law or remedial law, is the body of rules by which people's rights, duties, liberties, and powers are established. The sentence above contains words that hint at conditions that enable the right and liberty of the victim's heirs and the power and duty of the judge: the intentional homicide must be *proven*, and the legal official, whose jurisdiction must be *duly constituted*, has the duty to enforce *if bidden* by the claimants. Put differently, substantive law deals with the *what*, addressing the definition of people's respective rights, duties, liberties, and powers; while procedural law deals with the *how*, addressing the practical mechanisms by which they are established and enforced. In practice, then, procedural law implicates courts or whatever agent or institution opposing parties submit their dispute to for resolution.[384]

In legal systems of most industrialized states today today, substantive rules and procedural rules seem to address straightforwardly different matters. Substantive rules declare what acts constitute a wrongdoing according to the criminal law, and what arrangements trigger rights and duties according to the civil law, and procedural rules outline the steps by which violation may be punished or compliance enforced by judicial and other organs of state. If you want to sell plot of land along with the house

[384] It is important to emphasize that the judicial function, though primarily performed by, extends beyond the bodies we call courts. In most legal systems, important judicial powers are awarded to bodies that are ordinarily associated with nonjudicial functions. Arbitration, furthermore, is the remnant of a putative time when people would have their disputes settled by a private decision-maker, who had no coercive power and whose decision's force was based entirely on the willingness of the parties to comply. For a classic exposition of the archetype of courts, see Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, IL: University of Chicago Press, 1986), introduction.

and lemon orchard that sit on it, you draw up a valid contract with the buyer, defining the property to be made over and the price to be paid. The elements of a valid contract—such as an offer, acceptance, and consideration—are defined by the substantive rules of the legal system. If the buyer fails to pay the agreed-upon amount, or if you decide to uproot the lemon trees and move them to another property of yours, the injured party may sue for breach of contract, initiating the lawsuit with a formal complaint and filing it (or, more often, having it filed by an attorney) with the clerk of the appropriate court. Such matters—the kinds of documents to be prepared, whom to give it to, when to deliver it by, and all that transpires afterward—are governed by procedural rules.

However, as legal scholars have shown, and as I will summarize shortly, the dichotomy between substance and procedure is, conceptually speaking, far from obvious. The dichotomy also has a fairly short history, having been self-consciously devised by jurists in the late eighteenth century during the intellectual and legal ferment of the Enlightenment. No sooner had the dichotomy been created than it became embedded in both Anglo-American and Continental jurisprudence, pervading all Western legal systems and the legal systems around the world that came under Western colonial control. The substance/procedure dichotomy's introduction into modern jurisprudence, therefore, is recent enough to be traceable yet distant enough that few lawyers today, apart from a handful of historically minded legal scholars, question its functional validity for the organization of legal rules and the disposition of legal cases.

The main paths to its widespread use have been codification and education. Most modern legal systems have implemented codes for both substantive and procedural law. Civil-law countries generally

have discrete codes for commercial law, civil law, civil procedure, penal law, and criminal procedure.[385] These codes reflect the legislative backbone of their respective legal systems, aspiring to be clear and comprehensive articulations of the rules that citizens were to obey and judges to apply. Common-law countries have also promulgated numerous codes, not with the same purpose in mind as in civil-law countries, but nevertheless in a quantity and form that reinforce the conceptual distinction between substance and procedure.[386] In the United States, most states have a penal code, a criminal procedure

[385] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed. (Stanford, CA: Stanford University Press, 2007), 14. The term *civil law*, as this sentence shows, is ambiguous and requires some clarification. It may denote either a type of legal system or an area of law. Civil-law countries, as distinguished from common-law ones, are those implementing a legal system that is descended from Roman law of Rome and structured around codes that purport to the entire range of legal issues. Here "civil law" captures a historical reference: the civil law (*jus civile*) in antiquity was the law of the city of Rome, applicable only to its citizens, and was distinguished from the law of nations (*jus gentium*) that, in the view from Rome, comprised the collective laws and customs of all non-Romans. Civil-law jurisdictions include most of Continental Europe and Latin America but also a number of former European colonies in different parts of the world, including the US state of Louisiana, whose mixed legal system reflects its history of being passed among several European colonial powers. For a primer on this history, see Leonard Oppenheim, "Louisiana's Civil Law Heritage," *Law Library Journal* 42, no. 2 (1949): 249–54. As an area of law, civil law generally refers in both legal traditions to private law, that is, legal matters not involving the state as one of its principle parties. At the same time, there are some subtle but practically significant differences between how civil law is categorized in the civil-law and common-law countries. One of them is that, in the former unlike the latter, civil law is distinguished from commercial law. For an overview of how civil law is categories in the civil-law tradition, see Merryman and Pérez-Perdomo, *Civil Law Tradition*, chap. 14.

[386] Codes are extremely common in the United States, Canada, and England. But the civil-law tradition possesses a particular history and ideology that distinguishes its codification, both conceptually and functionally, from codification in common-law systems. This ideology has in part to do with the more robust heritage in Continental Europe of continuing the Justinian *Corpus Juris Civilis*, which fell into severe competition with and eventually lost out in England to the king's courts, which gave use the historically misty thing that we call the English common law. The civil-law ideology of codification also bears the imprint of the French Revolution's reaction to *gouvernement des juges*, a brand of judicial lawmaking that was deemed out of step with the rational principles of the Enlightenment and at worst a cause of tyranny at the hands of judges. Beginning in the early nineteenth century, then, formally promulgated codes in civil-law countries became *the* formal expression of the law and a statement that the role of making law lay with the legislature.

By great contrast, codification in the United States, as well as in other common-law countries, has been more of an organizational tool, designed to bring the diversity of common-law rules and any jurisdiction's statutory laws into a single package for easy reference and use by lawyers and judges. The United States Code, for instance, is more of an index of all federally enacted laws than a code as such. Codes in the United States are not meant, by precept or practice, to take power out of the hands of judges. Indeed, although the Federal Rules of Civil Procedure are formally enabled by an act of Congress, the rules themselves are written and promulgated by a commission of senior federal judges. The Uniform Commercial Code, which was drafted only in 1952, has been formally adopted in most American jurisdictions, but there too the purpose of the drafters seemed to be to improve the quality of judicial decision-making rather than to tie judges' hands with inflexible rules. See Gregory E. Maggs, "Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code," *University of Colorado Law Review* 71 (2000): 542. At the state level, California has enacted numerous codes, but these reflect more the

code, and a civil procedure code. This basic categorization has in turn been built into modern legal education. Law students of either legal tradition are trained to think in terms of substance and procedure not only through repeated exposure to codes and statutes that use this language, but also through separate courses for substantive and procedural areas of law. The use of these categories in both laws and law school curricula, therefore, has produced a mechanical sense that that substance and procedure are essentially distinct.[387] Through education and repeated exposure, then, many people, including many lawyers, see substance and procedure as constituting a natural rather than artificial classification of law.

THE SUBSTANCE OF PROCEDURE

The trouble is that the distinction is far from a natural one. The definitions and illustration just provided for substantive and procedural law, upon further scrutiny, reveal that the two categories, far beyond being simply connected in practice through courts and other judicial bodies, are so conceptually enmeshed that it is unclear where one ends and the other begins. A simple analogy might help illustrate the problem: If the law were a car, we might say that all the features that most drivers see and touch—the body style, the number of doors, the interior furnishings and gadgets, the color of the paint job, the exterior embellishments, and so forth—constitute the substance, while the all the mechanical pieces that make the car go, hidden under the hood or otherwise out of view, constitute the procedure. But many people regard the size, type, and power of the engine not simply as trivial details about what

character of California's political history than anything resembling a European ideology of codification. See Lewis Grossman, "Codification and California Mentality," *Hastings Law Journal* 45 (n.d.): 617–39.

[387] D. Michael Risinger, "'Substance' and 'Procedure' Revisited with Some Afterthoughts on the Constitutional Problems of 'Irrebuttable Presumptions,'" *UCLA Law Review* 30 (n.d.): 189–216 at 201–2.

makes the car move from one point to another but as distinguishing features that make the car substantively different from other cars. The obvious imperfection of this analogy helps to make my point: it is hard or impossible to draw an agreeable line between the things that make the car a unique object and the things that make the car operate. In similar fashion, legal procedure, which is what make the institutions of law go, is not easily separated from what makes a given legal system different from another.

Recall my breakdown of the definition of homicide. The procedural requirements of proof and of a duly constituted legal official who makes findings of fact do indeed constitute the mechanism by which the victim's heirs acquire a legal remedy; but, importantly, they also embody normative values that can materially affect the substantive outcome of a case. To say that, in order to acquire a remedy, the heirs must bring a claim to a judge with recognized jurisdiction and furnish evidence of a particular variety and strength, and that they may not use self-help to take revenge against the accused killer without the intervention of a legal official, is to say what the law thinks about the nature of the act and about when and how it is appropriate to sanction someone for committing it. Put differently, procedure signals not only how the law does operate but how it *ought* to operate.

To illustrate this point with a modern example familiar to most readers, consider the jury trial. Trial by jury, which took hold almost exclusively in Anglo-American legal systems but has been rejected almost entirely by the Continental tradition, has a rigid structure and an elaborate set of rules. Because the jury trial is not a universal institute, these procedures cannot simply be viewed as the means of carrying a rule into effect. Rather, it represents a normative opinion, namely, that the optimal way to administer court justice is to balance out the professional element by entrusting key findings—such as

the decision to proceed with a legal process or the establishment of general and specific facts[388]—to a group of lay assessors. Ordinary people, because they lack a special loyalty to the judicial hierarchy and because they are untutored in the law, are thought to be better capable of making an impartial and plain statement of the truth than a professional judge or panel of judges, whose position as agents of the government make them liable to privilege the interests of the state over those of the defendant and whose specialized legal knowledge gives them the capacity to manufacture (by legally acceptable means) a desired outcome.

This normative position has historical roots. The jury's *verdict*, which originates from an Anglo-Norman (and ultimately) word meaning "to say the truth,"[389] is an etymological vestige of a medieval shift in the epistemology of judicial decision-making, namely, from one based on appeals to divine intervention to one based on the rational assessment of proof by human beings. The rise of the trial by jury in twelfth-century England was accompanied by the decline or abolition of other forms of trying a defendant's guilt, such as trial by battle, trial by compurgation,[390] and trial by ordeal.[391] Each of these has its

[388] In the Unites States, decisions about whether sufficient evidence to proceed with a criminal indictment are made by a larger body of people (the number varies in different states) called by a grand jury. This grand jury, which exists in most American states, has been abolished in most of England, and it plays no role in civil cases. Members of the more familiar jury (called a petit jury to distinguish it from the grand jury) try the facts under dispute in both criminal and civil cases, hearing evidence and privately tendering individual votes before returning a collective verdict. A general verdict is a statement about who wins (guilty or not guilty, liable or not liable). In more complex cases, the jury may be asked to return a specific verdict, which contains answers to specific factual issues. Strictly speaking, the verdict only contains the jury's opinion about the *facts*; the court's decision, which may be rendered against the verdict under certain circumstances, is the final statement of law that determines the rights of the parties. See *Garner's Dictionary of Legal Usage*, s.vv. "grand jury," "jury," "special verdict; special interrogatory; special issue," "judgment," "judgment *non obstante veredicto*."

[389] *Garner's Legal Usage*, s.v. "verdict."

[390] Compurgation was a process in which a defendant swore an oath to the falsity of the charge and called upon a group of compurgators (or "oath helpers" as they were called in the English common law) to swear to their belief in the defendant's oath. It is distinguishable in form from the derisory oath (*yamīn*) in Islamic jurisprudence in that the latter did not require oath-taking by the defendant to absolve him of the claim. Compurgation took slightly different paths in English and Continental law, and medieval jurists over time attempted to restrict its use and resolve its deficiencies. See R. M. Helmholz, "Compurgation," in *Oxford International Encyclopedia of Legal History*.

[391] For an overview, see Thomas P. Gallanis, "Ordeal in English Common Law," in *Oxford International Encyclopedia of Legal*

own history, but each was deemed by medieval jurists as an irrational procedure for deciding innocence or guilt.[392] In the trial by ordeal, conceived as a way of invoking the judgment of God (*judicum Dei*), the accused was subjected to some painful or life-threatening event and judged innocent if he escaped the trial unharmed or healed from his injuries. For its own part, the jury trial has faced the charge in modern times, including from a fair number of American lawyers, not so much of being an irrational way of arriving at the truth as of being highly unreliable by comparison with a bench trial. This has led to significant empirical studies of jury error rates.[393] It also raises the normative question whether jury's role is to tell the truth or simply to find the best resolution possible. In any case, the jury's history and theory demonstrate that rules of legal process embody substantive values and drive substantive outcomes. And the fact that Continental legal systems have almost entirely rejected[394] the jury trial does not simply mean only that they do procedure differently on the Continent, but also that Continental legal systems have a different set of substantive values when it comes to how the law ought to be administered.

Scholars have puzzled at length over the substance/procedure dichotomy for at least a century. In the American legal academy, there is an extensive scholarly literature interrogating the dichotomy and its practical implications for the administration of law. The discussion is ongoing, but its general conclusion is that the dichotomy, for both conceptual and historical reasons, is a tenuous one.

History. Cf. Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon Press, 1986).

[392] For an excellent assessment of such medieval forms of proof on their own terms, see H. L. Ho, "The Legitimacy of Medieval Proof," *Journal of Law and Religion* 19 (2003): 259–98.

[393] Harry Kalven, Jr. and Hans Ziesel, *The American Jury* (Boston: Brown, Little and Co., 1966); cf. Neil Vidmar and Valerie P. Hans, *American Juries: The Verdict* (Amherst, NY: Prometheus Books, 2007).

[394] There was a period in France, as part of the law reforms that succeeded the French Revolution, during which a jury-like element, imported from England, was injected into the judicial hierarchy. The reaction to this reform was quick, as the professional judiciary endeavored to "expel or at least to neutralize the foreign body," and no effective lay jury exists in France or any other Continental legal system. See Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), 36.

Conceptually, scholars have made sense of the dichotomy in different ways, but no one has offered a satisfying way of distinguishing between substantive and procedural rules. This categorical uncertainty strengthened the largely critical position of the American school of Legal Realism, which enjoyed its heyday in the 1920s and 1930s but has profoundly influenced legal scholarship since.[395] The Realist program, generally speaking, was to articulate a predictive theory of adjudication[396] that was not simply based on formalistic classifications of law and therefore more useful to the practice of law. In so doing, they took an instrumentalist approach to substance and procedure, seeing them as one of a number of functional distinctions devised by lawyers over a long time to serve the needs of their profession. Karl Llewellyn wrote, for instance, that "procedural regulations are the door, and only the door, to make real what is laid down by substantive law."[397] The reason we need a set of agreed-upon procedural rules is that, in a complex legal culture with numerous disputes, it is necessary to "economize time and make

[395] For an excellent overview of American Legal Realism—its core claim, its internal variation, and its legacy in legal education and scholarship—see Brian Leiter, "American Legal Realism," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson (Oxford: Blackwell Publishing, 2005), 55–66. It should be noted, as Leiter does in this and other essays, that legal realism was not a unified movement, and that *American* Legal Realism was related to but distinct from cognate movements in Europe, including Scandinavian Legal Realism and the German Free Law Movement.

[396] Even though the Realists attended mostly to the question of how courts decide cases (and slightly less so how courts ought to decide cases), I hasten to add that it is *not* correct to say, as the passages quoted here suggest, that the Realists believed that the law was just whatever the courts said. Both popular and expert critics have read Realism with some degree of cynicism. See, for example, Edgar H. Ailes, "Substance and Procedure in the Conflict of Laws," *Michigan Law Review* 39 (1941): 392–418 at 393–5. (Popular legend says that, in the Realist view, judges decide cases based on what they ate for breakfast, but no such statement or suggestion is found anywhere in Realist writings.) If Realists believe that law is whatever the courts say, they would not possess any concept of legality. Legality, in short, entails the belief that it is possible to articulate meaningful laws beforehand such that people's disputes can be adjudicated fairly according to them. The Realists, however, were closely involved in modern restatements of American law, such as Llewellyn's role in drafting the Uniform Commercial Code, which suggests that Realism presupposed a concept of legality. A closer reading of Realism reveals that such a concept existed even though the Realists devoted their scholarly energies to addressing more "practical" concerns. See Leiter, "American Legal Realism," 61–64.

[397] Karl Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (New York: Oxford University Press, 2008), 11. *The Bramble Bush* is the publication of a series of lectures that Llewellyn delivered in 1929 and 1939 to incoming students at Columbia Law School. In a forward written two decades later, Llewellyn admits to the youthful exuberance of his tone. But the basic thrust of Llewllyn's views on the categories of substance and procedure seem not to be out of step with his more mature jurisprudence.

regular and fair the presentation of the case"[398]; and the reason procedural rules are studied separately in law schools is "not because they are really separate, but because they are of such transcendent importance [for the purpose of lawyering] as to need special emphasis."[399] In a similar vein, Walter Wheeler Cook wrote that if we define "as 'substantive' the law which determines what facts give rise to legal obligations"—which would include many things, like evidence, that are usually classed as procedural—"all rules of law may be classified as 'substantive'."[400]

The Realists, as these statements suggest, were concerned with the problematic nature of logical classifications. But their objective, viewed in the most favorable light, was not so much to willfully tear down long-cherished classifications of law as to reveal its limitations. Their primary target was the "mechanical jurisprudence" that dominated legal thinking and led, in their view, to perverse outcomes. On the matter of substance and procedure, they showed, rather usefully, that procedural rules have clear effects on substantive outcomes. Cook illustrated this amply through causes of action in the Anglo-American tradition. For instance, the tort of conversion, which, like *ghaṣb* in Islamic jurisprudence,[401] involves the wrongful dispossession of another's personal property. Two types of legal action were created in the English common law to enable recovery of the property: one (called replevin) that sought to

[398] Llewellyn, 10.

[399] Llewellyn, 10. Although these statements suggest that Llewellyn took a purely nominalist view of substance and procedure, he writes elsewhere that although the differentiation between substance and procedure is an "illusion," it is an "illusion (as any other) that results in human behavior, and must be taken account of." See Llewellyn, 88.

[400] Walter Wheeler Cook, "'Substance' and 'Procedure' in the Conflict o Laws," *Yale Law Journal* 42 (1933): 333–58 at 336.

[401] *Ghaṣb* is frequently rendered in the scholarship as "misappropriation." This rendering, however, carries different legal connotations. *Ghaṣb*, defined by al-Jurjani as "the unlawful taking of another's valuable property without the owner's permission and without the use of stealth." See ʿAlī b. Muḥammad al-Sharīf al-Jurjānī, *Kitāb al-taʿrīfāt* (Beirut: Dār al-Nafāʾis, 2003), s.v. *ghaṣb*. In this definition, "valuable" means that it is of legal cognizable value (e.g., wine possessed by a Muslim is not regarded as having legal value and is therefore not subject to recovery); and "without the use of stealth" distinguishes this act from larceny (*sariqa*), which is potentially subject to a punitive sanction. *Ghaṣb* and conversion are very similarly defined, and they both give rise to a claim to recover either the property or its value.

restore the item itself to the owner and another (called detinue) that allowed the defendant the option either to restore the item or to pay its value. The two actions, however, were not interchangeable. Replevin was only available to someone whose property was wrongfully (or "trespassorily") taken, which excluded cases where the defendant had lawfully taken the property in safekeeping but then refused to return it to the owner after an appointed term. In the later form of dispossession, only an action of detinue was available. This meant, in effect, that the law in such instances permitted a kind of forced sale: someone who took hold of another's property lawfully could keep it and pay the value to the owner. Cook's point was that this "procedural" regime was tied up with a particular view of "substantive" property rights.[402]

The intuitive sense that Cook and other Realists had about the interconnectedness of substance and procedure resolved into a kind of conceptual agnosticism, if not outright despair, about articulating any meaningful difference between the two. Since then the prevailing position on the matter has been one of "organized confusion."[403] However, the Realist challenge also spurred scholars either to defend or further refine the substance/procedure distinction. One approach has been to invoke the distinction's deep historical roots. On this point, one influential view held that the distinction arose in medieval Europe to resolve a problem of legal forum: when the matter under dispute (e.g., a contract or injury) and the litigation took place in different jurisdictions, it needed to be determined which rules from which jurisdictions should be applied in the case at hand.[404] The choice of rules in such conflict-of-laws

[402] Cook, "'Substance' and 'Procedure,'" 349–50.
[403] D. Michael Risinger, "'Substance' and 'Procedure' Revisited," 202.
[404] Ailes, "Substance and Procedure," 396–41. Cf. Albert Kocourec, "Substance and Procedure," *Fordham Law Review* 10 (1941): 157–86. Although Ailes explicitly attacks the views of Llewellyn and other Realists (see previous note), he later concludes the following: "In opposition to the contemporary attitude, I venture to urge that the lawyer's concepts of substance and procedure, although not 'inevitable,' are *tools of value in legal thinking*." See Ailes, 405–6 (emphasis mine). This looks very

cases was obviously not trivial, and categories were thus formed and defined to distinguish between substantive law, which would be taken from one forum, and procedural law, which would be taken from the other.[405] This distinction, according to this narrative, was first articulated by Continental jurists in the thirteenth century and then later on by English courts sometime in the eighteenth. If this divergent chronology is true, it raises the obvious question why the conceptual distinction should have arisen far later in England than on the Continent,[406] As recent scholarship has shown, the answer lies, first, in the peculiarities of the Anglo-American system of courts and, second, in the effects of the Enlightenment.

The English judicial system for centuries had two types of courts that operated side by side: the courts of law (more precisely, the courts of the common law) and the courts of equity (also known as chancery courts).[407] Each had different rules and principles for defining and redressing civil wrongs.[408]

---

similar to what Llewellyn said. It seems, in the end, that Ailes's article is more a reaction to Realism itself than to Realism's specific claims about the substance/procedure distinction.

[405] The most common rule, under the rubric of *lex fori*, was to apply the procedural rules of the forum in which the litigation was initiated but the substantive rules of the forum in which the issue arose. See Ailes, "Substance and Procedure," 392.

[406] By way of explanation, Ailes writes that, in addition to its procedural idiosyncrasies, "England, being a legal unit, naturally had no internal conflicts of law of the sort which commonly arose" in the various nations of the Continent. See Ailes, "Substance and Procedure," 399. I lack the specific expertise to assess this historical claim, but it seems implausible that England, over the course of five centuries, *never* had any internal conflict-of-laws issues that would call for a procedural doctrine on legal forum. In any case, by focusing on conflict of laws alone, Ailes looks only for a narrow range of cases to support his historical argument and thus overlooks the analytical project of eighteenth-century English jurists to effect a total conceptual reworking of law.

[407] Also known as the chancery courts, so called because they were originally overseen by the Lord Chancellor and his staff, the Chancery. Incidentally, the English chancellor, both etymologically and functionally, was analogous to the Ottoman *nişancı*. Both were so named because they kept the royal seal and as such had the function of overseeing the scribes who prepared official royal correspondence. Both officials were also members of their respective royal councils (the English Privy Council and the Ottoman *Dīvān*). Each of them, within the framework of his respective systems of government, had both executive and judicial functions. The Ottoman chancellor, as the chief authority over the *kanun*, had oversight over bureaucratic appointments and participated in adjudicating special issues, like official misconduct, that were referred to the Imperial Council. on the Ottoman chancellor, see F. Babinger, "Nishandji," in EI2; Erhan Afyoncu, "Nişancı," in TDVIA.

[408] I specify civil wrongs, thereby excluding criminal matters, for two reason. First, the process of initiating criminal cases in the English system was quite different from that of bringing civil actions, and so the comments made here about the courts of law don't necessary apply to the criminal courts. Second, the criminal courts did not develop the same equity venue that the civil courts did. The criminal analog to the chancery courts was the short-lived Star Chamber, which was established in the sixteenth century to punish certain high crimes. It was abolished in 1640.

The courts of law, in its idealized form, maintained the greater appearance of applying formal justice, that is, justice according to preset rules. Here the trier of fact (whether judge or jury) made findings based on evidence adduced by the parties, and the judge's role was mainly to ensure that the trial proceed in a controlled fashion. The courts of law, as suggested above, were governed by a rigid and highly elaborate system of pleadings, forms of action, and writs that appeared to reduce the judge's discretion; and their primary remedy for a finding of liability was an assessment of damages that purported to be the objective monetary value of the harm done. By constraining the way lawyers could argue cases and the way judges could decide them, the procedural peculiarities in the courts of law significantly defined substantive rights and thus greatly determined the outcome of litigation. Filing the claim under the wrong action could lead a failed claim even when a cognizable harm was done. Partly in response to this rigidity, the courts of equity arose and took on none of the "bewildering rules as to the name or classification of the particular suit."[409] Under the equity courts' far simpler procedural regime, legal counsel was "saved the problem of wasting brain-sweat in deciding whether he shall sue in debt, *assumpsit*, or covenant, in trover or replevin, in trespass *vi et armis* or trespass on the case. He [would] simply file a "bill of equity."[410] Plaintiffs in such cases sought direct relief in the form of a judicial order that the defendant perform or cease some particular action. This relaxation of procedure, however, came with costs. Equity courts had no juries, and judges had a broad mandate to apply substantive principles of fairness that were not always clearly defined. These courts also had the extraordinary power to hold defendants in contempt for refusing to comply with the court's order, which essentially

[409] William Minor Lile, *Equity Pleading and Practice, with Forms*, ed. Edwin B. Meade, 3rd ed. (Charlottesville, VA: Michie, 1952), § 94 at 59.
[410] Lile, § 94 at 59. For each of these forms of action, see s.vv. in Garner, *Legal Usage*.

amounted to the power to summarily throw intransigent defendants in jail. It was in the eighteenth century that, in both Great Britain and the United States, these two court systems began to merge, with each taking on features of the other, and their formal unification took place beginning in the middle of the nineteenth century.[411]

This merger between the law and equity was the context in which the substance/procedure dichotomy took form. Substance and procedure, at least in the Anglo-American tradition, is in many ways an artifact of this relatively recent process.[412] Each is a vestige of different judicial settings, procedure of the common-law courts and substance of the equity courts. In any case, scholars have since shown that it was during the late eighteenth century, not sometime in the medieval period, that the categories were consciously articulated at the hands of Enlightenment thinkers.

The first to do so seems to have been Jeremy Bentham, who undertook an elaborate analysis of the conceptual workings of law. In *Of Laws in General* (1782), he presents law as a layered concept. Specifically, Bentham devised a distinction between substantive and adjective law. Substantive law was so called because it was conceptually self-subsisting, that is, entirely intelligible without reference to other laws. For example, the rule *Do not injure* stands on its own. Adjective law, by contrast, was so called because it appeared to be substantive but was auxiliary to truly substantive law. For example, *Make the injurer pay the injurer* is intelligible only with reference to the substantive prohibition against injuring.

[411] On equity courts and the merger with courts of law, see N. G. Jones and William G. Ross, "Equity," in *Oxford International Encyclopedia of Legal History*. The placement of law and equity under one roof caused new problems concerning when remedies of one type or the other would be available. See, generally, Douglas Laycock, "Remedies," in *Oxford International Encyclopedia of Legal History*. For further reading, see Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking about the Law* (Chicago, IL: University of Chicago Press, 2007), chap. 20.

[412] Thomas O. Main, "The Procedural Foundation of Substantive Law," *Washington University Law Review* 87 (2010): 801–41 at 808–9.

The specific procedures of judicial practice were part of, but only a narrow part of, the adjective law.[413]

Bentham self-consciously presented this conceptual organization as something new. Indeed, in Bentham's time, and apparently for some time afterward, the terms "substantive law" and "adjective/procedural law" were not part of the anglophone legal vocabulary.[414] However, the immediate reception of Bentham's analysis was somewhat confused. Prominent nineteenth-century English jurists, including notably John Austin, seemed to miss that Bentham was not simply putting new names on old ideas, but in fact pointing out that between substantive and adjective law, "distinguishable as they are, there cannot but be a very intimate connection and dependence,"[415] thus anticipating the Realist observations of a century and a half later. Legal remedies (or sanctions, to use Bentham's preferred term), such as monetary damages for an injury, were adjective with respect to the law prohibiting injury but also possessed some substantive content on their own law.[416] Therefore, a single instance of injury to person or property violates the plaintiff's right not to have been injured in the first place and further gives rise to the right, conditioned upon following certain rules of procedure, to pursue recovery under certain conditions. Later jurists, however, filed all adjective law, including such remedies as damages that have a substantive quality, under procedure.[417]

---

[413] See Jeremy Bentham, *Of Laws in General*, ed. H. L. A. Hart, Collected Works of Jeremy Bentham (London: Athlone Press, 1970), 140–42.

[414] Risinger, "'Substance' and 'Procedure' Revisited," 192–93. Bentham himself noted that in "the language of English law the word *procedure* is not much in use; questions which arise in the courts with relation to laws of this stamp are styled *questions of practice*." See Jeremy Bentham, *Of Laws in General*, 142 note k.

[415] Bentham, 142.

[416] Citing a different passage, Risinger, "'Substance' and 'Procedure' Revisited," 191–92, suggests that Bentham would have classified legal remedies under the substantive law. This does not seem correct, but the difficulty in Bentham's analysis further shows the connectedness of substantive and adjective law. In any case, Risinger makes the important point that the "organized confusion" in scholarship arose from mistaking Bentham's substance/procedure distinction for the right/remedy distinction. Whether or not Bentham would have classified remedies as adjective, they have a strong substantive quality and cannot be reduced to mere procedure.

[417] Risinger, 194–6.

In the end, then, *substantive* and *procedural*, which were consciously devised in a new legal distinction, were incorporated into widespread legal usage in the nineteenth century, but the nuance of Bentham's original analysis did not accompany them. Instead substance and procedure became viewed as two more or less mutually exclusive parts of one category. Lacking further scrutiny, such dichotomous thinking had two significant consequences. The first was to give rise to the organized confusion that the Realists eventually addressed with such force as they did. The second was that, partly as a perverse outcome of this Realist assault, dichotomy gave way to hierarchy: procedural law became, and to some extent remains, subordinated to substantive law. Scholars have spoken of procedure as the "handmaid" of the law or with a variety of other metaphors that suggest that procedure is the mere bridge to the execution of the law's substantive dictates.[418]

Perhaps in response to this demotion of procedure, scholars in recent decades have worked to uncover the problems, both theoretical and concrete, of viewing procedural law as the quiet servant of the substantive law. Many have demonstrated the substantive content of procedure, such as by showing that procedure is the often actual repository of substantive values,[419] let alone the driver of substantive outcomes, and that procedure can accommodate a host a substantive political objectives.[420] Conversely, it has also been shown that procedure informs the content much substantive law. Because substantive laws, particularly those that are meant to be institutionally enforced, require procedure for their enforcement, they are usually structured with a "specific procedural apparatus in mind to vindicate the

[418] Main, "Procedural Foundation," 811.
[419] See, for example, Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russel Sage Foundation, 1979).
[420] Main, "Procedural Foundation," 818–22.

rights created or the responsibilities assigned by the substantive law."[421]

Although modern legal nomenclature is stuck with *substance* and *procedure*, scholars have tried to recover a version of Bentham's insights by refining the connections between the categories. Substantive law, as Michael Risinger shows, is the primary well-spring of law. Pure procedural law, in its ideal form, seeks to produce perfectly efficient outcomes—that is, those outcomes that rationally follow upon facts verified with perfect accuracy. Since this ideal is rarely attained,[422] the majority of procedural rules are based on substantive values that seek to approximate it. In other cases, perfect efficiency and rational accuracy may do violence to some other interest that the law values.[423] This in turn gives rise to further procedural rules based on substantive values. "Whenever out choose of procedure is not motivated solely by considerations of rational accuracy or time efficiency, but selects protection of some other value which would be injured by maximized accuracy or time efficiency, or both, we are making a substantive decision, though one of a different sort than" those expressed in the core substantive law.[424] The choice of an adversarial or inquisitorial regime of adjudication (or some combination of the two) is one such decision. So are "all rules of testimonial privilege and assorted other rules of evidence based

[421] Main, "Procedural Foundation," 822.

[422] Risinger fashions a four-part typology of legal rules: (1) core substantive rules, (2) procedurally-based substantive rules, (3) core procedural rules, and (4) substantively-based procedural rules. He develops typology through a model that imagines an omniscient, omnipotent being capable of finding all facts precisely and applying all core substantive rules with perfect accuracy and efficiency. The core objective of procedure, therefore, is to serve efficiency and accuracy in the reconstruction of facts and application of substantive laws. Pure procedural rules, in turn, are those that would be replicate the work of such an omniscient fact-finder. Since such a scenario is an ideal, Risinger suggests, few truly procedural rules actual exist. What exist in their place are substantively-based procedural rules. Furthermore, there may be times when we do not want perfect efficiency and accuracy because of some substantive value (see next note), which in turn gives rise to further substantively-based procedural rules. See Risinger, "'Substance' and 'Procedure' Revisited," 204–7.

[423] For instance, rational accuracy may require that parties' privacy be exposed in order to reveal the facts necessary to yield a correct outcome. If the law privilege privacy, however, it may put rules in place that forbid the forcible exposure of evidence even at the expense of achieving a perfectly accurate outcome.

[424] Risinger, 205–6.

on policy grounds" and "many decisions concerning the allocation of the burden of introducing evidence and the burden of persuasion."[425]

In this section, I have unpacked and historicized the categories of substantive and procedural law, perhaps to a degree that may be deemed digressive. This analysis, however, makes tenable the broad claim discussed at the outset of this chapter: that procedural law can signal something about the basic civil nature of homicide in Islamic jurisprudence. Were procedure rigidly separate from substance, such a claim would make little sense. I have therefore sought to undo one of the persistent assumptions that, I presume, most readers (including many lawyers entrenched in their own legal traditions) have acquired about law either from observing or studying the legal systems we encounter today: that to be complete, law must have separately delineated substantive and procedural rules. As the foregoing paragraphs show, this rigidly dual conception of legal rules appears to be, if anything, a historical anomaly particular to law in the modern European tradition. Therefore, to say, as I have said earlier in this chapter, that the *furūʿ* comprised the rules and doctrines of Islamic substantive jurisprudence, is not to ignore procedure or to suggest that Islamic jurisprudence lacked a conception of this area of law. It is to recognize, as apparently most jurists over time naturally did, that procedure was an integral, not a separate, part of the substance of the law. But the integrated nature of substance and procedure cuts the other way: if the civil nature of homicide appears in the rules that we call substantive, it must also appear in the rules that we call procedural.

All this has not at all been to suggest, in neo-Realist fashion, that there is really no such thing as procedural law. Indeed, Bentham's analytical development of the terms *substantive* and *procedural*, and

[425] Risinger, 206.

their subsequent entrenchment in our modern legal vocabulary, suggest that rules are distinguishable, if not ontologically, then along some other categorical dimension; and, as we will see below, Muslim jurists too identified a certain class of rules with enough special relevance to adjudication to be awarded a separate genre of legal writing. Far from negating procedural law, my point is to urge that a comprehensive accounting of some matter of law encompass *both* its substantive and procedural aspects. It may be that we find procedure under a different label or interspersed within the "substantive law," but it is in substance and procedure together that we may identify the values embedded in the law. A comprehensive examination, in other words, must account not only for the core rules (*Do not commit homicide*) but also for the various subsidiary rules that give meaning and effect to those core rules, which include rules that determine the available legal remedy (*The victim's heirs are entitled to retaliation or compensation*) as well as the rules that explain how the claimant may gain access to that legal remedy. For premodern Muslim jurists, as indeed for many modern Western jurists, these questions were interconnected.

THE DEARTH OF PROCEDURE IN ISLAMIC LEGAL HISTORIOGRAPHY

If a full accounting of law must include elements that we now consider substantive and procedural, it is surprising to see that the bulk of Islamic legal historiography either ignores the procedural aspects of Islamic jurisprudence or, to the extent that it mentions them, gives them only the most passing treatment. Joseph Schacht's schematic overview, published in his general work on Islamic law, remains one of the few direct treatments of procedural doctrine and, despite occasional criticisms on the margins,

continues largely to define the state of the field on the subject.[426] The matter having been addressed, most subsequent commentary more or less agrees with the assertion that "the Sharīʿa … suffered from practical weaknesses, such as rigid rules of procedure."[427] The criminal law, in particular, "was the obvious sphere where political interests could not tolerate the cumbersome nature of Sharīʿa procedure."[428] Islamic legal procedure, to the extent it has ever existed, "fails to provide for cross-examination of witnesses or rebuttal testimony by the accused and narrowly limits admissible evidence."[429] Its rigidity makes Islamic judicial procedure doubly at fault, for its impotence in providing substantive justice, even as it apparently provided formal justice, led the temporal rulers in Islamicate societies to establish Courts of Grievances (*maẓālim*), which combined "the power of the sovereign's authority with the justice of the cadi's judicature."[430] These "*extraordinary* jurisdictions," as Uriel Heyd wrote long ago in his study on Ottoman criminal law, "were free from the rigid rules of the *sharīʿa* penal law and criminal procedure, and were guided in the main by customary law (*ʿurf*), the public interest (*al-maṣlaḥa al-ʿāmma*), and, in particular, the consideration of administrative and political expediency (*siyāsa*)."[431]

---

[426] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), chap. 25. This statement is not meant to discount the critical work by scholars, which I will discuss below, who have offered a more sophisticated picture of legal procedure. The rudimentary outline in Schacht's book remains durable and seems still to define what many scholars think about Islamic procedural law, namely, that there wasn't very much of it.

[427] Jørgen S. Nielsen, "*Maẓālim* and *Dār Al-ʿAdl* under the Early Mamluks," *Muslim World* 6, no. 2 (1976): 114–32 at 114.

[428] Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 127.

[429] Matthew Lippman, "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law," *Boston College International & Comparative Law Review* 12, no. 1 (1989): 29–62 at 58. This citation illustrates the penetration of this notion of practically nonexistent procedure into mainstream legal studies.

[430] Uriel Heyd, Studies in Old Ottoman Criminal Law, ed. V. L. Ménage (Oxford: Clarendon Press, 1973), 111, citing Ibn Khaldūn's *Muqaddima* (internal quotations omitted).

[431] Heyd, 1. I have italicized *extraordinary* here to highlight the language commonly used when describing jurisdictions other than those of the so-called "ordinary" judge. In his work on the Islamic judiciary, which long served as the go-to reference on the subject, Tyan uses the same language of ordinary and extraordinary jurisdictions. See Émile. Tyan, "Judicial Organization," in *Law in the Middle East*, ed. Majid Khadduri and Herbert J. Liebesny (Washington, DC: The Middle East Institute, 1955), 236–78 at 259, where he writes that the "qāḍi basically represented ordinary justice, in contrast to the other magistrates and to officials of other categories, who exercised extraordinary justice." In this context, therefore, "extraordinary" refers not to unusual cases but to the use of procedures *extra-ordinem*, as in not within the accepted system of law. See Tyan, 268.

More recent legal scholarship, although taking exception to such summary dismissals of Islamic judicial procedure, nevertheless seem unable to make more of it than a serious impediment to applying the law. The point is that, unlike with substantive law, scholars have generally ended their discussion of legal procedure with statements like these, which in the end amount to a repurposing of Schacht's introductory overview and give the strong impression that procedure carried the weight of history but was something largely to be ignored or circumvented.

There are a couple of issues that immediately stand out in such statements. The first is the suggestion, as Heyd makes, that such legal principles as custom (*ʿurf*), public interest (*maṣlaḥa ʿāmma*), and administrative policy (*siyāsa*)[432] either derive from or find their best elaboration in something other than the writings of Muslim jurists. Neither is the case. The second is that these statements make little effort even to try and suss out whether jurists themselves were conscious of such procedural strictures and, if so, what the internal logic of those strictures was. Jurisdiction, also not a concept foreign to premodern Muslim jurists, is a major key to understanding the internal logic of procedure but because of its connection to political jurisprudence will be left to the coming chapter. Even if we leave jurisdiction aside, the doctrines of procedure are no less elaborated by jurists, yet the scholarship seems largely to pay little attention to them.

[432] I have chosen, with respect to Heyd's translation, to render this term in a more neutral fashion. Given that the formal theory of *siyāsa* was developed by jurists themselves, it is wrong to suggest, as does Heyd's phrase "administrative and political expediency," that this term embodies measures deemed legally or morally illegitimate. Administrative *policy* need not always involve the privileging of practical over moral considerations the way *expediency* suggests. And there are times, even within the framework of Islamic jurisprudence, when a law may be morally suspect yet still legitimate. An obvious example is refraining from punishing someone accused of illicit sexual relations or larceny, both of which are considered public offenses entailing fixed penalties (*ḥudūd*), because of a failure to meet the high burden of evidence or because of the presence of any kind of mitigating doubt (*shubha*). See Intisar A. Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt," *Islamic Law and Society* 17 (2010): 63–125. In such cases, immoral conduct may be overlooked because of some superior aim of the law. On the compatibility of morality and legitimacy, see Sherman A. Jackson, "Islamic Law, Muslims and American Politics," *Islamic Law and Society* 22 (2015): 253–91 esp. 256.

Why does so great a lacuna continue to exist? If procedure gives life to substantive rules, should it not be of just as much interest as, say, the elements of a valid marriage or the shares of inheritance? Given that the concept and the science of law, and even to a great extent the discipline of legal philosophy, are closely associated today with what courts do, shouldn't the Islamic legal historian be as concerned with how judges decided cases, whether actually or ideally, as with how jurists articulated substantive doctrine in their manuals and commentaries? Why does the *qāḍī*, despite being so central a figure in Islamic legal thought and practice of any era, continue to seem like a mechanical functionary rather than an active participant in the legal process? These interrelated questions, given the growth of Islamic legal historiography in the fifty years since Schacht, warrant some closer attention here. It is not so simple as saying that Schacht and his successors put the matter of procedure to rest, since many of Schacht's other conclusions, as one would expect from an active scholarly discourse, have been strongly contested.[433] I can identify three reasonable explanations for the field's general failure to examine procedure more seriously. I will look at each of these in turn.

The first explanation is that, till now, most scholars who study Islamic law have not been all that concerned with norms and applications of judicial procedure, preferring to focus solely on pure jurisprudence, that is, the formalistic aspects of Islamic legal reasoning. This includes much of the scholarship ostensibly concerned with courts, which tends to approach the topic of adjudication from the perspective of abstract doctrine. The problem with this explanation is that very little scholarship is in fact

[433] The ability of Schacht's work to generate such enduring attention from both defenders and detractors, even as his views become dated or superseded, attests to its cogency. For an overview of how Islamic legal scholarship, particularly as pertains to the earlier periods, developed around Schacht's work, see Mariam Sheibani, Amir Toft, and Ahmed El Shamsy, "Classical Period."

of the narrowly theoretical variety of hermeneutic jurisprudence.[434] Most scholarship, even when it purports to focus only on abstract doctrine, has evident and important implications for the practice of law. The reason, as most scholars no doubt intuit, is that law does not exist in a social vacuum. Legal rights and duties are not self-executing but require active compliance. Compliance very often does occur voluntarily, such as when most people (one hopes) stop at a red light even when no cars are present, but when not forthcoming it must be secured either by institutional or social coercion. The most salient source of institutional coercion is the legal tribunal. (I will return to social coercion shortly.) Therefore, even though law as such may be understood in nonjudicial terms, courts lie quietly in the background.

We may use the marriage and inheritance examples from two paragraphs above to observe the connection between legal doctrines and judicial institutions. On the one hand, conjugal and inheritance rights and duties can be expressed and understood without the involvement of a court. In other words, rights and duties can be understood in substantive terms and do not require a judicial decision to have meaning for those to whom they apply. It is easily apprehended by ordinary people that spouses are entitled to sexual enjoyment and that children are entitled to certain shares of their parents' estate after death. Nor do these entitlements necessarily rely on a judicial decision to go into effect. They come into existence, respectively, following the conclusion of a marriage contract and the death of an estate-holder.[435] In many or most instances, people willingly honor their legal obligations: spouses grant each

[434] Probably the most notable such work is Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Atlanta, GA: Lockwood Press, 2013). Generally regarded as one of the finest contemporary pieces of scholarship on Islamic law, this work is still regarded by many as the best work in English on Islamic hermeneutic legal theory (*uṣūl al-fiqh*). A more recent example of what I refer to here as pure jurisprudence is Talal Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbughā's Commentary on the Compendium of Qudūrī* (Leiden: Brill, 2017). These works narrowly define themselves as theoretical, having little concern for the legal administration as such, and therefore cannot be faulted for failing to address the procedural aspects of law.

[435] This sentence, for the sake of the present argument, simplifies a more complex theoretical question of law: What gives rise to legal obligations? Put differently, are legal rights and duties intrinsically binding or do they require a determination

other sexual access and children allow their fellow heirs to collect their allotted shares of inheritance. At the same time, however, such obligations are frequently backed up by some arbitral apparatus to sort out the messy details when disputes arise. However rudimentary or sophisticated, this apparatus serves to clarify rules that are unclear[436] or to secure compliance when one or more parties refuse to offer it voluntarily. Therefore, even when a private legal matter seems purely substantive, not involving a dispute to be resolved, the *possibility* of a dispute, followed by the judicial process that the dispute sets in motion, often influences the way people are likely to behave and the way lawyers advise people in their private affairs. Jurists, too, when formulating legal rules, frequently look to how they may be applied by courts. The law as it is, in other words, reflects the law as it could be.

This subtle effects of courts on the operation of law is supported by a large body of scholarship, coming mainly out of the American legal academy, which argues that essentially private social arrangements are often fashioned "in the shadow of the law"—not only in contract and property issues like marriage and inheritance but also in modern criminal matters that get resolved out of court.[437] This

from a recognized external authority like a judge? To use the examples of marriage and inheritance once again, do conjugal obligations apply simply by virtue of concluding the marriage contract or only once a judge (or a notary or some other legal official) ratifies the contract? Similarly, are the heirs to an estate entitled to their respective inheritance immediately upon the decedent's death or only once an appropriate official has formally divided the estate and delivered each recipient's shares? The answers to these questions have broad implications for the functioning of a legal system, as they dictate whether someone can claim a right privately or must first secure judicial or executive authorization. See Sherman A. Jackson, "From Prophetic Actions to Constitutional Theory: A Novel Chapter in Medieval Muslim Jurisprudence," *International Journal of Middle East Studies* 25, no. 1 (1993): 71–90, esp. 77–8 (two concrete examples in property where the source of legal rights and duties influences the potential substantive outcome).

[436] When I say that judges have the capacity to clarify law, I am not referring to the technical matter of judge-made law, wherein judges effectively create new rules in response to cases that are not addressed by the existing doctrines. In the present context, rather, I refer to the function of explaining, through the process of deciding cases, known legal rules to laypeople who are not aware of them. For example, an heir may know that she is entitled to a share of inheritance but may not know what fraction she is owed, how big the estate is, or how to calculate her fraction. The judge therefore may not only serve the legal function of deciding cases but also the social function of disseminating legal knowledge.

[437] The modern plea bargain is the primary modern means by which crime is effectively prosecuted through private arrangement. The first prominent use of the phrase "in the shadow of the law" in scholarly literature seems to be Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (1979): 950–97,

literature is the product of the long and somewhat bumpy union in the twentieth century between law and the social sciences, beginning in the first half with the American legal realist movement and evolving into the two exceptionally successful legal subfields of law and economics and law and society. Despite sharing an intellectual heritage and many basic premises, such as the ability of the social sciences to explain many phenomena of law, scholars of both schools often manage to come out on opposing sides. And although for these historical reasons the two subfields are decidedly Americentric in scope, they are not bound conceptually to American, Western, or even modern law. Their approach, in fact, is to view legal activity as a species of human behavior, affected but not determined by historical or political factors, and to develop explanatory models useful for any legal system.[438]

One important point of disagreement between economic and sociological analysis of law is whether people order their private affairs in the shadow of public legal institutions. This idea, though probably not the phrase, was argued most enduringly by Ronald Coase, one of most influential early figures in law and economics.[439] The Coase theorem, as it is now called, proposes that, in the absence of transaction costs, people will bargain their way to the most economically efficient outcome, such that things

---

though it was probably in use much earlier. Cf. Robert Cooter, Stephen Marks, and Robert Mnookin, "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior," *Journal of Legal Studies* 11 (1982): 225–51. On plea bargaining, see, e.g., Malcolm M. Feeley, "Plea Bargaining and the Structure of the Criminal Process," *Justice System Journal* 7 (1982): 340–54. The idea also echoes the ongoing modern debate among legal philosophers over whether people obey the law with or without force from officials of the legal system. A recent notable contribution to this debate is Frederick Schauer, *The Force of Law* (Cambridge, MA: Harvard University Press, 2015), who directly challenges H. L. A. Hart's durable argument in *The Concept of Law* (1961) that coercion is not a necessary feature of law, even though it is a common feature of most legal systems. I do not wish to enter this debate, which I am not fully competent to do and which would in any case sidetrack the present inquiry. Instead, I would like to suggest a median view that I think most observers of legal traditions would accept: obligations themselves may arise without a judicial determination, as suggested by the commonly observed fact that most legal arrangements are not adjudicated, but many people are subtly persuaded to comply voluntarily by calculating that they would lose if the issue went before an arbiter.

[438] For an inventive attempt to apply an economic analysis of liability to ancient law, see Saul Levmore, "Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law," *Tulane Law Review* 61, no. 2 (1986): 235–87.

[439] Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960): 1–44. This is one of the most frequently referenced American law journal articles of the last half century, cited by both supporters and detractors. At the time of

end up in the hands of those who value them most.[440] Such things may be tangible items or, when this theorem is applied to law, legal entitlements. Transaction costs include any barrier, whether expressed in monetary terms or not, that stands in the way of bargaining. According to adherents of this school, courts and other judicial bodies, even when they couch their decisions in moral and legal principles, intuitively seek to encourage efficient (and deter suboptimal) behavior by compensating for transaction costs and helping parties reach the efficient outcome they would have arrived at without such costs.[441] To make this argument compelling, and to show that it is not simply applicable to modern court practice, Coase draws on old English caselaw, including, for instance, disputes between crop and animal farmers, to show how his hypothesis can illuminate both the behavior of people and the reasoning of judges.

The amorality that this conception of law can appear jarring.[442] Legal questions are placed within

writing it, Coase, a British-born and -trained economist, was a professor at the University of Virginia. He moved in 1964 to the University of Chicago, where he remained for the rest of his career. He died in 2013 aged 102.

[440] This is a somewhat casualized phrasing of the Coase theorem. For an exceptionally readable and jargon-free overview of the Coase theorem and its legal applications, see Farnsworth, chap. 8. Coase did not formulate his position as a "theorem" as such, something done by the many scholars who have received and applied his work.

[441] It should be mentioned that the assessment of economically efficient behavior, though itself amoral, is not necessarily separate from or unimportant to moral debates. For instance, a cost-benefit analysis of abolishing the death penalty may predict that doing so will lead to an increase in murders. This conclusion has clear moral implications, as people will then need to decide between the morality of ending state-sanctioned killings and preventing private killings. What economic analysts of law do that distinguishes them from their philosophical counterparts, however, is to present the argument in a model of "wealth maximization" that can produce quantifiable results. It tries to measure whether people will be better off (defined in both material and nonmaterial terms) in a society with capital punishment or in a society with more murder. This kind of amoral calculus has been frequently attacked by many philosophers and lawyers for being an apparent version of utilitarianism. Against this, see Richard A. Posner, "Utilitarianism, Economics, and Legal Theory," *Journal of Legal Studies* 8, no. 1 (1979): 103–140.

[442] According to an older, and perhaps more elegant, description, the economic interpretation conceives o law as a "social device to eliminate friction and to prevent waste … one of the means by which civilization conserves energy and conserves the goods of existence to meet human wants. See Roscoe Pound, "Juristic Science and Law," *Harvard Law Review* 31, no. 8 (1918): 1047–63 at 1559.

the seemingly cold logic of economics markets, wherein rights may effectively be bought by those willing to pay for them[443], and the notion of "duty" is either struck from consideration or restated in the same economic terms.[444] However, scholars of this school generally argue that economic models are more effective than deontological ones in explaining past court decisions and therefore predicting future ones. Deontological principles, that is, those centered around moral duties, fail on their own to furnish such explanations and predictions. To illustrate, consider the following well-known U.S. torts case from 1919. The court held that, if a sailor caught in a life-threatening storm moors his boat to a dock without permission, only to have the dock owner unmoor the boat and thus cause it to get destroyed, the boat owner may recover damages from the dock owner for injury to his person and property.[445] Why should the dock owner have to pay for trying to protect his own property from unlawful trespass? A deontological construction of this case (and the terms in which the court put its decision) holds that preserving life creates a necessity exception to the rules against trespass, and that the dock owner consequently had a duty to allow the sailor to moor his boat. But thorny questions arise that potentially render this standard useless for future cases: How does one measure when the risk to life is great enough to create such a duty? And how can one say that the dock owner actually caused the damage to the boat

[443] The economic approach is also frequently identified with political conservatism, in great part because of the University of Chicago's law school and economics department's close association with such a political orientation. However, this is not correct. Sufficient evidence may be taken from Yale law professor Guido Calabresi, another extremely important figure in the economic school of law. Calabresi is a longtime U.S. circuit court judge and well known to have liberal political views. One of the most important contribution to law and economics is Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," Harvard Law Review 85, no. 6 (1972): 1089–1128. Calabresi and Melamed's purpose is to make sense of the vast accumulation of American caselaw. Economic analysis can also yield morally opposing results. On the question of capital punishment (see previous note), many scholars, somewhat under the influence of economic analysis, have sought to buttress moral arguments with quantitative models that demonstrate capital punishment's failure to deter would-be killers. See, for example, Richard Berk, "New Claims about Executions and General Deterrence: Déjà Vu All Over Again?," *Journal of Empirical Legal Studies* 2, no. 2 (2005): 303–333.

[444] See, for example, Saul Levmore, "Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations," *Virginia Law Review* 72 (1986): 879–941.

[445] Ploof v. Putnam 81 Vt. 471 (1908); cf. Vincent v. Lake Erie Transportation Co. 109 Minn. 456, 124 N.W. 221 (1901).

simply by unmooring it from his dock?

An economic construction of this case, by contrast, seeks to avoid these questions by explaining what the court is intuitively, if not always consciously, doing. It imagines a counterfactual scenario in which the boat owner and dock owner could bargain without the "transaction cost" of the storm, reasoning that the boat owner, valuing his life and boat more than the dock owner values his dock, would be willing to pay for the right to moor his boat. The economically optimal outcome is therefore to allow the boat owner to moor his boat and pay for any damages to the dock should they occur. The court's ruling in this case, according to this analysis, aims to correct behavior that diverges from this optimal outcome. This is why the court makes the dock owner pay damages, effectively penalizing him for not permitting the sailor to moor the boat. Additionally, the ruling seeks to prevent future such behavior: you don't want boat owners dying because they fear not recovering for their boat, and you don't want dock owners privileging their docks over the lives of people caught in a storm. Therefore, the court tells future dock owners to let threatened sailors moor their boats and promises compensation if their dock gets destroyed. It is not necessary to assess the degree of the threat to life because the sailor will be strictly liable for any damage to the dock. In effect, the sailor buys the right to destroy the dock. Here, then, is where people act in the shadow of the law. If they are generally aware that a court will charge or award them with monetary damages, they will adjust their behavior according to these respective incentives.

The problem, of course, is that ordinary people are often unaware of or just as often indifferent to how courts would decide a potential case. Herein lies the core objection that sociolegal scholars raise to the notion that people order their private affairs in the shadow of formal legal institutions: people

often do not know or do not care what the formal legal norm is and therefore cannot be assumed to factor their chances in court when deciding how to organize their affairs. Economic analysis of law, as its critics point out, strongly supports a view of legal centralism, wherein the only norms that influence behavior are those set by officials of the legal system, while diminishing the role of norms informally created and applied by private persons. Compliance, in other words, is as or more often secured by social as it is by institutional coercion.

Robert Ellickson made this point when, in a direct response to Coase's thesis, he undertook an empirical study of a community of farmers and ranchers to assess how they assigned responsibility for and remedied damage to their property in cases of animal trespass.[446] He found that longtime residents of the community regarded legal action as an inappropriate way to settle disputes, being both financially and socially costly, and generally preferred to apply informal norms of neighborliness in settling their differences rather than invoke the legal norms of negligence and liability.[447] Because they were neighbors and knew each other well, the residents had few or no transaction costs and could therefore bargain more or less freely when, say, a rancher's steer burst through the fence and trampled the next-door farmer's crops. Nevertheless, as Ellickson found, the would-be disputants frequently arrived at resolutions that were at odds with what the legal system would have afforded them. In many instances, residents who were entitled by law, under a rule of strict liability, to recover damages preferred instead to

[446] Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1994).
[447] How long residents had lived in the community was a measure of whether they were likely to resort to legal action over informal resolution. Ellickson found that newcomers, many of whom were from urban settings with presumably weaker social networks, were more likely to use of the legal system to resolve relatively minor problems like animal trespass. Longtime residents looked upon such behavior as violating what it meant to be a good neighbor. For a case study of one such newcomer, see Ellickson, 33–9.

simply absorb the loss rather than press their claim in court.[448] Ellickson's critique of law and economics is compelling in part because he is sympathetic to the school's concern with efficient outcomes, which, under the Coase theorem, are what people would arrive at if allowed to bargain.[449] The case studies he presents show that people frequently value good relations over the money for a new fence that they could recover in court. The legal system is frequently off the mark in replicating how people would bargain if given the chance. Above all, Ellickson shows, people do not always bargain in the shadow of the law.

What does this brief excursus on legal bargaining tell us about the absence of procedure in Islamic legal scholarship? Ellickson's study purports to establish that the norms that regulate people's day-to-day lives do not always, or perhaps even often, align with the rules articulated and applied by officials of the legal system. This point alone is an extremely important reminder that the field of legal activity is far greater than the pronouncements jurists and decisions of judges. Ellickson and other sociolegal scholars remind us, first, that there are multiple normative orders operating simultaneously and, second, that the effectiveness of formal legal norms in prevailing over informal ones and affecting behavior depends significantly on the circumstances of a given social environment.[450] However, it would be

[448] This phenomenon of absorbing loss, somewhat inelegantly called "lumping" by sociolegal scholars, has been shown to be the typical, as well as the statistically dominant, way of responding to injury. See David Engel, *Myth of the Litigious Society: Why We Don't Sue* (Chicago: University of Chicago Press, 2016).

[449] A further difference between economic and sociological approaches to law, which merits mention but cannot be examined here further, is that the former traditionally assumes that people's behavior and decisions are rational. The obvious problem with this assumption—people often don't behave or make decisions rationally—has faced huge opposition from empirical researchers and has thus yielded in recent years to the modified assumption that people behave irrationally but that irrational behavior can be predicted. The replacement of perfect rationality with predictable irrationality, under the name behavior law and economics, has come in for similar pushback from sociolegal scholars. See Gregory Mitchell, "Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence," *Georgetown Law Journal* 91 (2003 2002): 67–168.

[450] One of the biggest points of attack by sociolegal scholars is against the notion that modern societies, because of the effects of industrialization on day-to-day life and correspondingly on the legal system, are plagued by runaway litigation. The litigious modern society, which for sociolegal scholars is (in empirical terms) a myth, can only be sustained by ignoring the

wrong to say that these scholars are claiming that people *never* act in response to formal legal norms or the prospect of coming before a court. Their claim is mainly that people do not respond to potential legal action in the kind of rationally predictable way that economic analysis would have us believe. A sizable proportion of people, they argue, ignore how the law wishes to apportion rights and duties and avoid judicial resolutions for one reason or another. Many simply eat their losses; others, like the community of ranchers and farmers, order their affairs upon an alternative set of informal norms.

These insights offer a general caution to modern Islamic legal scholars who view instances of institutional avoidance as evidence that Islamic law was ineffective in regulating the general behavior of society. If avoidance of institutions equals ineffectiveness, then such ineffectiveness, as sociolegal scholars show, seems to be a condition of any legal system, including modern ones with highly developed institutions. Viewed in a more positive light, the ineffectiveness of law may be interpreted instead as its willingness to accommodate social arrangements created by actual legal subjects that better serve their needs than to impose a paternalistic vision of how human affairs ought to be ordered.[451] Scholars who do genuinely empirical research on social norms in Islamic societies[452] may set aside the role of courts

numerous instances when people apply nonlegal norms to resolve their problems, thereby ignoring or consciously avoiding the legal system. See Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society," *UCLA Law Review* 31 (1983): 4–71; David Engel, *Myth of the Litigious Society: Why We Don't Sue* (Chicago: University of Chicago Press, 2016).

[451] Thus, as we observed in the last chapter, the option to pardon rather than exercise retribution may be interpreted as the law's recognition that not taking revenge may be in one's long-term social interest even if it is within one's immediate legal right.

[452] Empirical research of this variety is more feasible in contemporary Islamic societies, both because it is possible for researchers to visit them and document living subjects and because ordinary people are likelier now than in the past to write about their attitudes about law and the legal system. See, for example, Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* (Berkeley: University of California Press, 1993); Messick, *Sharīʿa Scripts: A Historical Anthropology* (New York: Columbia University Press, 2018). For historical societies, this research is trickier because of the familiar problem that virtually all surviving historical sources, legal or literary, were produced by members of the political or intellectual elite and therefore can inform us only of official views. However, some scholars have argued that legal anecdotes in literary sources may be read together as reliable, if not always literal, reflections of the social workings of law. For an of this approach, see, for example, Intisar A. Rabb, "The Curious Case of Bughaybigha, 661–883: Land and Leadership in Early

and thus any concern with legal procedure. However, those who study Islamic law through the lens of treatises and documents written by members of the legal class, as the majority of legal scholars do, cannot reasonably ignore the effects of procedural norms on how jurists articulated substantive law and on how legal officials produced substantive outcomes. In the eyes of the doctors of the law, people always behave in the shadow of the law; the legal compendia and commentaries they wrote must therefore be viewed with an eye to how the law would be translated to institutional practice. Ordinary people, even if they did not take all of their disputes to court, clearly behaved in the shadow of the law as well. In most Islamic polities, and certain in the Ottoman Empire, the judicial apparatus was sufficiently developed and visible that they knew that they had some recourse to a dispute-resolving authority should they wish, and they often did, to take it. The very existence of the vast Ottoman court records is prima facie evidence of a general legal consciousness among Ottoman subjects.

The second plausible explanation for the thin attention to procedure in the scholarship is that Islamic jurisprudence itself recognizes no explicit distinction between substance and procedure. Given that jurisprudential writings more or less all treat matters that we would class as substantive, and given that, apart from a few works on the judicial discipline (on which more shortly), there were comparatively few works dedicated to procedure, it follows that historians would give greater attention to substantive than procedural rules. It is true that premodern Muslim jurists did not distinguish between substantive and procedural law by those names. However, the legal compendia, more or less without exception, contain complete chapters on complaints, evidence, and remedies; and the comprehensive

Islamic Societies," in *Justice and Leadership in Early Islamic Courts*, ed. Intisar A. Rabb and Abigail Krasner Balbale (Cambridge, MA: Islamic Legal Studies Program, 2017), 23–246.

commentaries to those compendia examine these procedure-related matters with the same excruciating detail as the substantive ones. Extracting a doctrine of procedure, even if it does not fall under that name, is therefore quite possible. It would also require a low opinion of legal scholars, one that I do not adopt, to think that their analysis would be crippled by the apparent absence in medieval Islamic jurisprudence of categories that correspond one to one with our modern ones.

In my view, the best explanation for the procedural lacuna in Islamic legal scholarship is this: scholars have on the whole been unable to reconcile Islamic judicial practice with temporal government. Here we may observe a replay of the conflict between sacred and secular law. According to the conventional scholarly account, the sacred law of the Sharīʿa was quintessentially a regime of private law that directed how individuals ought to order their relationship with God and with each other, and the Muslim judge therefore adjudicated matters of private conduct that were far removed from the profane concerns of secular government. These private adjudications were concluded according to a simple, formalistic evidentiary regime that "did not permit judge

s to go beyond the use of testimony and oaths as evidence, and would not allow any modification or reform."[453] So long as their jurisdiction over such strictly private matters was recognized by executive authorities and their decisions implemented,[454] the jurists apparently had no need to articulate a comprehensive doctrine of procedure. But this procedural economy, which had the benefit of fast justice,

[453] Hossein Modarresi, "Circumstantial Evidence in the Administration of Islamic Justice," in *Justice and Leadership in Early Islamic Courts*, ed. Intisar A. Rabb and Abigail Krasner Balbale (Cambridge, MA: Islamic Legal Studies Program, 2017), 16–22 at 18.

[454] For example, Abu Bakr al-Jassas wrote, in commenting on whether a judge could serve under a corrupt ruler, that it was permissible so long as "he is left to rule freely. However, if he was not given the power to carry out rulings"—suggesting a ruler who is expected to refuse or otherwise undermine one's judicial decisions—"it is not permissible to enter the position." See Abū Bakr Aḥmad b. ʿAlī al-Rāzī al-Jaṣṣāṣ, *Sharḥ kitāb adab al-qāḍī li-l-Imām Abī Bakr b. ʿUmar al-Ḥaṣṣāf*, ed. Aḥmad Farīd al-Mazīdī (Beirut: Dār al-Kutub al-ʿIlmiyya, 2013), 7.

came at the significant cost of failing to deliver justice when evidence other than oral testimony pointed to a different outcome. Such failures apparently worried secular rulers, who instituted their own tribunals, notably the special courts of grievances (*maẓālim*), to compensate for the inadequacies of ordinary judicial administration. In any case, scholarship has had little need to closely examine judicial procedure because there simply isn't much of it to examine apart from the basic rules of procedure just described and some general guidelines on appropriate conduct for judges.

This account of judicial procedure falls short in two ways. First, it is usually grounded in anecdotal reports of apprehensions about corrupt rulers, not in any legal theory of jurisdiction to be found in Islamic treatises dealing with political jurisprudence.[455] This is not to discount the reports about judges preserved in the Islamic historiographical literature. But absent a coherent theory about government, reports about what the agents of government did serve little more than to reinforce preconceptions. Political jurisprudence in the Sunni tradition, which in the post-Mongol milieu came under the heading of *siyāsa shar'iyya*, is found in a number of major dedicated treatises but also in a variety of writings by jurists that outline their vision for government, including the norms governing temporal sovereignty, the rules for creating and delegating public office, and the effects of public officials on the obligations of ordinary people."[456] Jurists, by virtue especially of their role in staffing the judiciary, were either prominent holders of public office or had an interest in how public office was administered, which explains (if explanation be needed) why some political jurisprudence is often incorporated into comprehensive

[455] As a branch of legal philosophy, political jurisprudence has been in decline in the West since around the beginning of twentieth century and therefore seems to be generally underplayed, and its scope is therefore not always clear. Broadly speaking, political jurisprudence has to do with the way governmental authority is constituted and legitimized. On this discipline generally, see Martin Loughlin, "Political Jurisprudence," *Jus Politicum* 16 (2016): 15–32.

[456] Mohammad Fadel, "Political Legitimacy, Democracy and Islamic Law: The Place of Self-Government in Islamic Political Thought," *Journal of Islamic Ethics* 2 (2018): 59–75 at 61.

legal commentaries and treatises on adjudication. Because such writings on political jurisprudence, whether in standalone works or works of wider scope, form the core source material for the next chapter, we defer discussing them until then. The second failure of the conventional account of Islamic judicial procedure, and perhaps the more egregious one, is that it does not take seriously the literature on adjudication that specifically addresses, often at great length, rules that we would now associate with judicial procedure.

CHAPTER FIVE

Adjudicating and Documenting Homicide

LOCATING PROCEDURAL LAW

Islamic judicial procedure in practice may be inferred to some extent from court registers or, in the absence of these, legal responsa that reflect how claims have played out or might play out in a court.[457] Case records, however, are of extremely limited value here. As a rule, they rarely spell out the full process by which a case made its way to and through the judicial system of a given jurisdiction. We therefore have to exercise a hazardous degree of interpretive judgment in inferring the procedural rules that the judge was applying.[458]

Responsa (*fatāwā*) take us a step further. The jurisconsult, particularly if he had an official appointment, had a role that approximated a judge with respect to his contact with real cases.[459] A jurisconsult's statement on a matter of procedure would therefore likely reflect, if not exert persuasive influence

[457] The validity of substituting responsa for actual court records is supported by our earlier discussion of the courts operating in the shadow of the law. It is useful to remember that litigation, as it is deployed today, comprises not only the actual in-court encounter but also all the out-of-court steps leading up to it, and litigation routinely ends in abandonment or settlement before a judge has heard, let alone adjudicate, the claim. The many "incomplete" entries in the Ottoman court registers—those without information about how the court ruled—are likely examples of such cases. Legal responsa narrow the gap between theory and practice. They help fill in the missing pieces, as it were, of cases that were terminated before an adjudication by giving a sense of how the jurist on the bench would have ruled were the case to get that far. See, for example, Fadel Mohammad Fadel, "Adjudication in the Mālikī *Madhhab*: A Study of Legal Process in Medieval Islamic Law" (PhD diss., University of Chicago, 1995), 19, adopting a similar approach. While not necessarily furnishing empirical evidence of how actual cases played out in court, the responsa often provide a set of facts in the form of a query, and the answer embodies a ruling that attaches to that fact situation as well in some cases as an explanation of the legal reasoning or a reference to a legal authority. Contrary to conventional wisdom, legal responsa, including Ottoman responsa, are not always answer in yes-or-no fashion. See Uriel Heyd, "Some Aspects of the Ottoman Fetvā," *Bulletin of the School of Oriental and African Studies, University of London* 32, no. 1 (1969): 35–56 at 42.

[458] Modern legal systems are hardly different. For the general run of cases, the official record does not explain, for the benefit of the layperson, what procedural rules are guiding the process along, unless a procedural rule itself is the subject of litigation.

[459] Even jurisconsults who did not hold a formal appointment served a quasi-official role by advising judges or by providing authoritative opinions on hard fact patterns.

upon, the decisions made by the judiciary. For example, there is an Ottoman chief jurisconsult's opinion that goes as follows:

> After *A* relinquishes his claim against *B* concerning some matter, can *A* bring a new claim against *B* on the same matter? — Answer: No. *Written by the needy servant ʿAbdullāh* (*may he be pardoned*)[460]

This opinion addresses a subtle legal question concerning claim preclusion (also called *res judicata*). Claim preclusion ordinarily means that, when there is a judicial determination, the losing litigant cannot re-sue the other party for the same claim. But what if the claim does not go all the way to a decision? What if, as in this case, the claimant sues, then formally abandons the claim, then changes his mind and decides he wants to press on with the suit? Can he do so? The answer is no. This opinion helps explain the importance of recording both specific and general quitclaims (*ibrāʾ*), which we we find in abundance in the Ottoman registers.[461] Claim preclusion, like the one described in the responsum, is an example of a specific quitclaim (*ibrāʾ khāṣṣ*). A general quitclaim (*ibrāʾ ʿāmm*) is the renunciation, upon the termination of some legal relationship (e.g., a marriage or a business partnership), of any subsequent claim arising from that relationship.[462]

The legal responsa, however, are also of limited value. What is missing is the rule and reasoning behind the ruling. The formally issued legal responsa are a good place to find applied norms, but the

[460] Archives de la Mission des Capucins de Constantinople, Series V: *Billets et fetfas de divers Muphtis; letters de Caratch*, doc. 9. Currently located in Paris at the Archives des Capucins de France. I have not been able to determine which ʿAbdullāh wrote this opinion. On the basis of some superficial resemblance in the signature, one may speculate that this was Yenişehirli ʿAbdullāh Efendi, who served as chief jurisconsult from 1718 to 1730. See *İlmiyye sālnāmesi* (Istanbul: Matbaa-i ʿAmire, 1916), 508. I am grateful to Vanessa de Obaldia for finding the citation for this opinion and offering the suggestion about its author.
[461] See, for example, Kazan et al., *Üsküdar mahkemesi 56*, no. 199 (specific quitclaim after satisfaction of debt obligation), no. 287 (general quitclaim after a divorce by *khulʿ*).
[462] On quitclaims in Islamic jurisprudence, see *Al-Mawsūʿa al-fiqhiyya*, s.v. *ibrāʾ*, esp. §44.

norms themselves must be sought in works dedicated to their articulation.[463] There is no substitute, then, for the expository treatise that lays out the normative concepts and categories that operate behind the scenes. For further information about procedural law, we have to look to such normative writings, which, despite reflecting how jurists envisioned courts ought to, may still be reasonably read to suggest how they often did.[464]

Given that substance and procedure are so closely intertwined, it would appear that the place to look for procedural law would be in the interstices of legal commentaries. We can find procedure there, but this can be a tricky and time-consuming exercise. Fortunately, jurists largely spared us this task, realizing early on that processing claims was an area of law that needed special attention. They left behind an array of treatises. Such normative writings as I identify with procedural law, and upon which I will rely for the bulk of my evidence in this chapter, appear in two primary genres. The first is *adab al-qāḍī*, or the discipline of adjudication.[465] The second is *ʿilm al-shurūṭ*, or legal documentation. The former is rather well known, while the latter frequently gets overlooked. Although the two disciplines have generally been separately classified,[466] they were related and, I argue, should be viewed together as the repository of procedural norms.

Discipline of Adjudication (*Adab al-Qāḍī*)

[463] This division of labor, between jurist and jurisconsult, may help explain why it would be strange to find any elaborate legal reasoning in official legal responsa. The recipient usually has no need for it. Nonjurists did not have the competence to assess the quality of the reasoning, and trained jurists were capable of filling in the gaps or looking the issue up in an appropriate authority. To explaining why the ruling was as it was would only have been so much wasted time and ink.

[464] The gap between theory and practice, particularly in such institutional matters as adjudication, is a legal truism and a problem that all legal systems deal with. See Fadel, "Adjudication," 10–25.

[465] On this genre, see Muhammad Khalid Masud, "Adab al-qāḍī," in EI3. For a more extensive overview, see Irene Schneider, *Das Bild des Richters in der «Adab al-qāḍī»-Literatur* (Frankfurt am Main: P. Lang, 1990).

[466] Katib Çelebi, for instance, places them under distinct categories in his bibliographic encyclopedia. See Muṣṭafā b. ʿAbdullāh Kâtib Çelebi, *Kashf al-ẓunūn ʿan asāmī al-kutub wa-l-funūn*, ed. Muḥammad Sharaf al-Dīn Yaltqaya and Rifʿat Bilge al-Kilīsī, 2 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.), 1:46–48 (*adab al-qāḍī*), 2:1045–47 (*ʿilm al-shurūṭ wa-l-sijillāt*).

Adjudication stands out among specialized genres of legal writing for its long and somewhat unique history. During the early ferment of legal writing, from about the second half of the second century A.H. through the fourth (roughly 750–950 C.E.), Islamic legal doctrine was collected in comprehensive works organized into discretely labeled subject matters that with time became increasingly conventional both within and between juristic schools. Doctrines were broadly divided into devotional (*ʿibādāt*) and civil (*muʿamalāt*) categories, and under each there existed numerous chapters (*kutub*) and subchapters (*abwāb*). Jurists knew that there were interconnections between multiple areas of law,[467] but the conventional chapter organization had the obvious benefit of breaking down large areas of doctrine into their constituent parts and facilitating legal discourse. Homicide doctrine, as we saw earlier, was spread out between several chapters: a chapter on injuries (*jināyāt*), which defined the categories of injury to life and limb, on the basis of intent, as well as the various conditions under which retaliation would be permitted; a chapter on damages (*diyāt*), which quantified the monetary damages to be paid, in full or part, for various types of homicide and personal injury; and another chapter on solidarity groups (*maʿāqil*). This organization was a refinement over al-Shaybānīs *Aṣl* and other early works. Al-Shaybānī put most of the doctrine under "Damages," using "Injuries" more to address miscellaneous cases and hypotheticals involving injury. As the law became increasingly articulated, and as the rules in each of these swelled in volume and complexity, later jurists began to isolate them for study in dedicated works.

[467] Jurists were, if anything, fastidious about the internal organization of their treatises and manuals. For example, it was common, especially in commentaries on shorter works, to explain the relevance (*munāsaba*) between two adjacent chapters. Ibn Nujaym writes, at the beginning of his chapter on adjudication (*kitāb al-qaḍāʾ*), that "because most disputes about debt obligations and sale transactions, and most disputes generally, want for a decision, [al-Nasafi, the author the *Kanz*] follows up [the previous chapters on those transactional matters] with that which may resolve them, i.e., adjudication." See Zayn al-Dīn Ibrāhīm b. Muḥammad Ibn Nujaym, *Al-Baḥr al-rāʾiq: Sharḥ Kanz al-daqāʾiq*, 7 vols. (Cairo: Al-Bābī al-Ḥalabī, n.d.), 6:276.

With the discipline of adjudication, the development may have gone the other way: the discrete genre seems to have preceded its inclusion in comprehensive works of law. The *Aṣl*, for example, does not have a dedicated chapter on adjudication. Instead, questions about adjudicating rights are interspersed throughout the substantive chapters. This gives the impression that, at least for al-Shaybānī and perhaps for other early jurists,[468] the judicial function existed to serve the application of other areas of law and therefore did not merit its own separate and systematic exposition of doctrine. Procedure, as discussed earlier at length, was intimately intertwined with substance.

Nevertheless, it apparently did not serve the growing judicial profession well to have the rules pertaining to their work scattered throughout other chapters. The judicial genre thus emerged quite early in Islamic legal history as a distinct topic for extended written treatment. There are intuitive reasons for giving adjudication its own dedicated space in the legal literature. First, it examines a host of issues that likely did not concern private jurists, who either held no judicial post or had few dealings with judges, in much the same fashion that many legal academics today, though studying the work of courts, have little direct contact with them. By private jurists I refer, somewhat loosely, to those who performed some formal but nongovernmental function, such as teaching law in a college, or gained a reputation for their mastery of jurisprudence but made their living in a trade or some other profession. Private jurists probably did not have need for extended manuals on adjudication in perhaps the same way that lawyers today who neither litigate nor adjudicate cases in court probably have no need to remember the rules

[468] In the *Umm*, for example, al-Shafiʿi has a chapter on judicial rulings (*aqḍiya*); see Muḥammad b. Idrīs al-Shāfiʿī, *al-Umm*, ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib, 11 vols. (Cairo: Dār al-Wafāʾ, 2001), 7:487 ff. However, this chapter, although containing a wealth of issues that concern judges and judging, is not a systematic exposition of doctrine pertaining to adjudication.

of evidence that they learned back in law school. Issues discussed in judicial treatises include, for example, the structure of the judiciary, the ethical conduct of judges, and the process of hearing and resolving formal claims, which private jurists would have learned in summary but which judges had to know in greater detail. Second, adjudication is a specialized activity that turns heavily on social factors and that calls upon its practitioners to exercise a lot of discretion. Judicial treatises therefore tend to be a little less formalistic and quite a bit more idiosyncratic than legal compendia and commentaries. Many of their authors were themselves current or former judges, and often their experiences seem imprinted in the works they write. On the whole, their treatises are driven somewhat less by the abstract legal hermeneutical concerns of other doctrinal works of law and considerably more the sociopolitical environment and the practical necessities of resolving disputes.

Adjudication was an eminently practical activity, requiring its practitioners to manage unpredictable situations not always addressed in the doctrine, and the existence of an independent genre was a tacit recognition that the profession ideally called for a temperament and set of skills different from those required of an academic jurist. Jurists were conscious of what the *adab* in *adab al-qāḍī* suggested. A multivalent term, *adab* denotes the quality of cultural refinement, for which reason it was adopted by all Islamicate languages as the ordinary word for belletristic literature, which was the chief product of high culture. *Adab al-qāḍī* is therefore sometimes rendered plainly as the "etiquette of the judge."[469] This rendering, however, gives the impression that the genre's chief purpose was to instruct the judge on how to behave in and out of court, such as how to speak to the parties in case or whether to accept

[469] See, for example, Nahed Samour, "A Critique of Adjudication: Formative Moments in Early Islamic Legal History," in *Justice and Leadership in Early Islamic Courts*, ed. Intisar A. Rabb and Abigail Krasner Balbale (Cambridge, MA: Islamic Legal Studies Program, 2017), 47–66 at 54.

or decline a social invitation that could be construed as bribery. In the judicial context, *adab* has more the ring of a "discipline," implying not only that the profession called for the praiseworthy qualities of character necessary to adhere to the rules of judicial procedure and ethical conduct, but also that it required training, as well as some innate talent, to do the job well and avoid making a mockery of the office.[470] A broad reading of any treatise, it may be noted here, shows that the genre is about instructing judges on the specialized rules of their craft so that they can not only rule correctly but also think on their feet when presented with unexpected situations.

The history of writings on adjudication merits the kind of dedicated study that falls outside the scope of this work. However, a quick sketch, without any pretension to absolute completion or precision, will be useful to show where the genre stood in the sixteenth-century Ottoman Empire. Judicial treatises were written by members of each Sunni school,[471] but I focus here, as I do generally throughout this dissertation, on the Hanafi tradition.

The genre of adjudication did not produce a wealth of treatises. By some counts, major works, both those that have survived and those that have not, number in the twenties.[472] These lists are not complete,[473] and we can be fairly certain that more such treatises sit in manuscript libraries awaiting edition.

---

[470] Ibn Nujaym, *Al-Baḥr al-rā'iq*, 6:428.

[471] For a partial list, see Aḥmad b. Abī Aḥmad al-Ṭabarī Ibn al-Qāṣṣ, *Adab al-qāḍī*, ed. Ḥusayn Khalaf al-Jabūrī (Ta'if: Maktabat al-Ṣiddīq, 1989), 5–13.

[472] See editor's introduction in 'Imād al-Dīn Muḥammad b. Muḥammad al-Khaṭīb al-Ashfūrqānī, *Ṣinwān al-qaḍā' wa 'unwān al-iftā'*, ed. Mujāhid al-Islām al-Qāsimī, 2nd ed. (Kuwait: Wizārat al-Awqāf wa-l-Shu'ūn al-Islāmiyya, 2010), 13–14.

[473] The list given in the previous note, for example, lacks two titles that I can think of: Ibn Ghānim al-Baghdādī and 'Abd al-'Azīz Muṣṭafā al-Khālid, *Malja' al-quḍāt 'inda ta'āruḍ al-bayyināt* (Mecca: Jāmi'at Umm al-Qurā, 1986) and Muḥammad b. 'Abd Allāh al-Tumurtāshī, *Mus'ifat al-ḥukkām 'alā al-aḥkām*, ed. Sāmir Māzin Qubbaj (Amman: Dār al-Fatḥ, 2007). The editor, to be fair, does not claim his list to be exhaustive. However, the fact that substantial work probably awaits edition and dissemination means that this is a rich field for future study. The subject of the editor's work, for example, *Ṣinwān al-qaḍā'* by Muhammad al-Ashfurqānī, who was a judge under the Mu'izzi dynasty that ruled at Delhi for most of the thirteenth century. This work provides some insight into the judicial system there, which undoubtedly differed in certain respects from those in Central Asia or elsewhere in the Islamicate world. On the Mu'izzī and other Delhi sultanates, see generally Clifford Edmund Bosworth, *The New Islamic Dynasties: A Chronological and Genealogical Manual* (Edinburgh: Edinburgh University

Nevertheless, the genre was not so populous as to assume a standard form, in the way of, say, the compendia and the commentaries, and consequently we find each work to be rather idiosyncratic. Where the boundaries of the genre lie, then, is open to discussion. Still, we can make some general comments about the genre's historical development.

Viewed broadly, Hanafi treatises on adjudication before the Ottomans comprised two broad strains. The first was a commentarial tradition centering around a major early treatise, al-Khaṣṣāf's *Adab al-qāḍī* (discussed shortly below). The second was a tradition of self-standing judicial writing. The first strain prevailed, roughly speaking, in the pre-Mongol Abbasid period and in the learning centers in Iraq and Central Asia,[474] while the second prevailed in Egypt and Syria under the Mamluks. The role of the Mongols seems noticeable here, but their invasion can only mark a convenient historical division. It is certainly wrong to say that the Mongols put an end to legal learning in Central Asia, as the intellectual centers there continued to thrive under the post-Mongol dynasties. It is probably not so that the invasions *caused* what looks like a fallow period in judicial writing in the former Abbasid lands; but in any case it appears that no Hanafi judicial treatises of note originated from Central Asia after the twelfth century. From then on, the mantle of Hanafi judicial writing, as it were, was carried by Mamluk jurists.

The earliest Hanafi judicial treatises were reportedly produced by Abū Yūsuf and al-Shaybānī, who both died in the late second Islamic century. Al-Shaybānī's appears to have been lost fairly early,[475] but

---

Press, 1996), 300–305.

[474] I should emphasize that this is not meant to be a rough, not an exact, depiction of the literature. There were a number of independently authored pre-Mongol judicial treatises, including by such major figures as al-Qudūrī (d. 428/1037), author of the most famous compendium (*mukhtaṣar*) in the Hanafi school. It appears, however, that many of these treatises were lost. Some of their authors, including al-Qudūrī, themselves wrote commentaries on al-Khaṣṣāf's treatises. The point here is that the driving medium of the genre in this period was the commentary, not the self-standing treatise.

[475] Al-Ashfūrqānī, *Ṣinwān al-qaḍā'*, 13 (editor's introduction). The editor notes that that al-Shaybani's *Adab al-qaḍī* is referenced a couple of times in al-Ṣadr al-Shahīd's commentary on al-Khassaf's *Adab al-qāḍī* (on both of which see below in this section). These references suggest that al-Shaybānī's treatise was either unavailable to al-Ṣadr al-Shahīd or, more likely, lost

Abū Yūsuf's was commented on for centuries until it too was eventually lost. In his famous bibliographical encyclopedia, the Ottoman scholar and scribe Kātib Çelebi (d. 1657) only passingly mentions Abū Yūsuf's judicial treatise, which suggests that by Ottoman times the work was no longer around or at least so superseded by other work that it fell out of circulation.[476]

There were a couple of other judicial treatises written by Hanafis who belonged to Abū Yūsuf and al-Shaybānī's generation. The most famous and successful early Hanafi judicial treatise, however, was written in the following generation by Abū Bakr al-Khaṣṣāf (d. 261/847). To many modern scholars al-Khaṣṣāf is known for his pioneering writings on legal fictions (*ḥiyal*) and endowments (*waqf*).[477] By all biographical accounts, al-Khaṣṣāf was a prolific jurist who served in some capacity in the Abbasid caliphal court. Information on his public career is quite thin, but what little we have suggests that it was short and troubled.[478] He got swept up in the continuous tumult that consumed the Abbasid caliphate for most of the third Islamic century, which included a civil war, a social insurrection, and the capture of the caliphate at the hands of its Turkic soldiery. There was also the major episode of the Quranic Inquisition, and al-Khaṣṣāf was connected to the network of leading Hanafis jurists who played a prominent role on the side of the inquisitors.[479] He served briefly, probably as a judge, in the court of Caliph al-Muhtadī (d. 256/870), but when the latter was assassinated by his military, al-Khaṣṣāf's career was effectively over. His home was reportedly ransacked, and a number of his works were lost. He died a few

and only known through secondary sources.

[476] Kātib Çelebi, *Kashf al-ẓunūn*, 1:46.

[477] On legal fictions, see J. Schacht, "Ḥiyal," in EI2; cf. Satoe Horii, "Reconsideration of Legal Devices (*Ḥiyal* in Islamic Jurisprudence: The Ḥanafīs and Their 'Exits' (*Makhārij*)," *Islamic Law and Society* 9, no. 3 (2002): 312–57. On endowments, see Peter C. Hennigan, *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse* (Leiden: Brill, 2003).

[478] For a biographical sketch of al-Khaṣṣāf, see Hennigan, *Birth of a Legal Institution*, 4–7.

[479] On the Quranic Inquisition generally, see John Nawas, *Al-Ma'mūn, the Inquisition, and the Quest for Caliphal Authority* (Atlanta, GA: Lockwood Press, 2015).

years later. The later biographical works seem content to leave these episodes, along with al-Khaṣṣāf's public career, in the past and focus on his scholarly output.[480] His involvement with the state, however, explains why he produced so much work on public areas of law, including not only adjudication and endowments, for which he was probably best remembered, but also on taxation, legal contracts (*shurūṭ*), and judicial documentation (*maḥāḍir/sijillāt*).

Al-Khaṣṣāf's treatise may have had certain virtues above its peers in the early genre. In any case, it formed the basis of sustained attention from commentators for centuries afterward. Indeed, his work survives nowadays only thanks to his numerous commentators. Kātib Çelebi counts ten people who wrote commentaries, including Abū Bakr al-Jaṣṣās, Abū al-Ḥasan al-Qudūrī, Shams al-A'imma al-Ḥalwānī, Shams al-A'imma al-Sarakhsī, Shaykh al-Islām Khwāharzāde, and Qaḍīkhān. This is a who's who of pre-Ottoman Hanafism. The "most famous and widely circulated" commentary, according to Kātib Çelebi, was written by the Central Asian jurist al-Ṣadr al-Shahīd (d. 536/1141), or "the Martyr," so named because he was killed in 1141 at the Battle of Qatwan. At this battle, as mentioned above, the Seljuks were defeated by the Kara Khitai, who proceeded to be the overlords of Muslim Central Asia until the Mongol advent about eighty years later. Al-Ṣadr al-Shahīd's commentary had the distinction of being extremely thorough, "presenting under every heading ever subsidiary issue that the reader might need."[481] In view of the westward flow of Hanafi scholarship from Central Asia, it is not surprising that

[480] The later biographical sources ambiguously refer to him as merely holding a "preferred" (*muqaddam*) position in al-Muhtadi's court, which could mean either that he held a paid office, an unpaid office, or no office at all. The same sources report that he lived off his own earnings, possibly (though I only speculate) to distance him from an embarrassing chapter in Islamic religio-political history. They also transmit an anecdote of a man standing on the bridge at the gate of Baghdad and complaining that *Judge* al-Khaṣṣāf was asked a question and got the answer wrong. These reports, though admittedly thin, suggest that he stayed off the treasury payroll even while being involved in public matters. See 'Alā' al-Dīn 'Alī b. Amr Allāh Qınalızāde, *Ṭabaqāt al-ḥanafiyya*, ed. Muḥyī Hilāl al-Sarḥān, 3 vols. (Baghdad: Dīwān al-Waqf al-Sanī, 2005), 1: 303.
[481] Kātib Çelebi, *Kashf al-ẓunūn*, 1:46–47.

al-Ṣadr al-Shahīd's commentary found a secure place in Ottoman learning.

The other pre-Ottoman source of Hanafi writing on adjudication was Mamluk Egypt and Syria. Mamluk-era judicial treatises certainly draw on their Central Asian predecessors. However, because they were not confined to a primary text, as the commentaries on al-Khaṣṣāf's treatise obviously were, these latter-day works generally have greater internal coherence and tighter organization. In their tone and substance, they display the unique voice of their authors and seem to reflect issues of contemporary concern. And whereas earlier treatises often were simply called *Adab al-qāḍī* (or *Sharḥ Adab al-qāḍī*), Mamluk treatises have more distinctive, memorable titles.

Three such works from the Mamluk period stand out. The first was *Muʿīn al-ḥukkām fīmā yataraddad bayn al-khaṣmayn min al-aḥkām* by ʿAlāʾ al-Dīn al-Ṭarābulusī (d. 844/1440). The second was *Lisān al-ḥukkām fī maʿrifat al-aḥkām* by Lisān al-Dīn Ibn al-Shiḥna (d. 882/1477), and *al-Fawākih al-badriyya fī al-aqḍiyat al-ḥukmiyya* by Ibn al-Ghars (d. 894/1489).[482] As their death dates indicate, the lives of these three authors were staggered across the fifteenth century. The first two were scholars hailed from Syrian. Al-Ṭarābulusī served as judge of Jerusalem.[483] Lisān al-Dīn Ibn al-Shiḥna (one of many scholars to bear this name)[484] came from a notable scholarly family that had continuous roots in Aleppo and served the Mamluk sultanate, mostly in the judiciary, right till its last days. Lisān al-Dīn's grandfather and great-

[482] The correct death year is 849 A.H. as given here. See Muḥammad b. ʿAbd al-Raḥmān al-Sakhāwī, *al-Ḍawʾ al-lāmiʿ li-ahl al-qarn al-tāsiʿ*, 12 vols. (Beirut: Dār al-Jīl, n.d.), 9:221. Kātib Çelebi, *Kashf al-ẓunūn*, 2:1293, writes that he died in 923 (1517 C.E.), which seems not be a typographical error because the year is written out. The mistake is not really explainable, as Kātib Çelebi gives no supposed events that would have put his death date in the same year, incidentally, that Selim conquered Cairo. Al-Sakhāwī (d. 902/1497), on the other hand, was Ibn al-Ghars's contemporary and relates a couple of personal encounters.

[483] Kātib Celebi, 2:1745.

[484] *Shiḥna* meant something like "chief of police." The moniker Ibn al-Shiḥna, according to al-Sakhawi, harks back to a forefather named Maḥmūd b. al-Khatlū, who was the police chief of Aleppo. See al-Sakhāwī, *al-Ḍawʾ al-lāmiʿ*, 11:252.

grandfather were both Hanafi chief judges in Cairo. Lisān al-Dīn himself served for some time as a deputy secretary under his grandfather in Cairo, then as judge of Aleppo, before having his life was cut short by plague. He died in 1477 at age thirty-six.[485] His judicial treatise, too, was cut short by his untimely death, being completed in 1606 by one Burhān al-Dīn Ibrāhīm al-Khālifī.[486] Ibn al-Ghars was a Cairene scholar who served as a deputy to several chief judges in Cairo.[487]

These two strains of judicial treatises melded to inform the handful of Ottoman judicial treatises written after the Egyptian conquest. In the sixteenth century, only one treatise of note was written, or at least only one that has been edited and published to date. Called *Musʿifat al-ḥukkām ʿalā al-aḥkām*, or *The Judge's Aid*, it was written by Muḥammad b. ʿAbd Allāh al-Tumurtāshī (d. 1004/1596). We are fortunate to be able to date the treatise itself. According to the colophon, al-Tumurtāshī completed it on a Friday in mid August 1563 (latter portion of Dhul Hijja 970 A.H.).[488]

This treatise is significant for two reasons, apart from that fact that it seems to be the only such work written in its time by a Hanafi jurist. First, it is perhaps one of the most succinct and accessible surviving works on adjudication, reading more like a restatement than an exhaustive textbook. Despite its brevity, however, its topical coverage is extensive. So too are its references, with citations to over thirty previous Hanafi authorities. On nearly every page, al-Tumurtāshī's indebtedness to the full canon of Hanafi judicial jurisprudence is in evidence, including both the older Central Asian and the more recent Mamluk scholarship. al-Tumurtāshī cites, for example, Ibn al-Ghars's *Fawākih* several times, as well as work by

[485] Al-Sakhāwī, 6:194. Cf. Kātib Celebi 2:1549.
[486] See Ibn al-Shiḥna, *Lisān al-ḥukkām*, 279, 438. Printed along with al-Ṭarābulusī, *Muʿīn al-ḥukkām*. I have not yet been able to locate al-Khālifī in any biographical source.
[487] Al-Sakhāwī, *al-Ḍawʾ al-lāmiʿ*, 9:221–22.
[488] Al-Tumurtāshī, *Muʿīn al-ḥukkām*, 244.

Lisān al-Dīn Ibn al-Shiḥna's uncle, Sarī al-Dīn Ibn Shiḥna, who outlived his nephew by three decades, dying just a couple of years before the Ottoman conquest. The second reason for this treatise's significance has to do with the reputation of the author himself. al-Tumurtāshī served as a bridge, geographically and intellectually, between the Mamluk and Ottoman Hanafi traditions. Himself a Syrian scholar, he had connections within his lifetime to leading jurists in the Ottoman public service, and his jurisprudential writings gained full recognition by the Ottoman establishment after his death.[489] The reception of *The Judge's Aid* itself is hard to establish, but it was copied at least four known times, including once the year after the author's death. At all events, al-Tumurtāshī's treatise, like al-Tumurtāshī himself, offers a node of continuity in the normative principles of adjudication among pre-Ottoman and Ottoman Hanafi jurists.

Legal Documentation (ʿIlm al-Shurūṭ)

The second genre to which we may look for procedural norms, and an adjunct to the adjudication treatises, is that of the legal formulary. This type of work emerged to aid in the drafting of legal documents, mainly by providing samples for imitation that contain all of the legally essential information for the transaction concerned. The early history and the historical development of legal formularies have, to my knowledge, not yet been systematically mapped out. Generally speaking, however, early works fell into two strands. One of them, ostensible written to assist notaries drafting contracts between private parties, fell under the name *shurūṭ*, a term that literally refers to the "stipulations" or "terms" of the contract. The other strand, presumably written to assist judges or their clerks in creating a record of

[489] Guy Burak, *The Second Formation of Islamic Law: The Ḥanafī School in the Early Modern Ottoman Empire* (New York: Cambridge University Press, 2015), 192–204.

judicial proceedings and decisions, fell under the term *sijillāt* or *maḥāḍir wa sijillāt*. Because the documentary practices of notaries and judges varied substantially by region, and because pre-Ottoman examples of both contracts and judicial records are fairly sparse, it would be reckless to make broad generalizations about documentary practices in various periods and places of Islamicate history.[490] Both strands of the genre of legal documentation began life as a genre, and the genre of contract drafting appears to have maintained its independent status. Legal documentation in particular, like certain aspects of adjudication, eventually finds a consistent presence as a chapter in comprehensive legal works.[491]

In any case, by the time the Ottoman legal system had reached its maturity, the drafting of contracts and judicial documents were apparently consolidated under a single discipline of legal documentation. Kātib Çelebi, representing the perspective of the mid seventeenth century, calls the discipline *al-shurūṭ wa 'l-sijillāt*. He describes it in the following terms:

> It concerns the modes of recording rulings, established before a judge, in the logbooks and registers such that they may be used as legal proof (*yaṣiḥḥ al-iḥtijāj bih*) after the witnesses to the procedure (*shuhūd al-ḥāl*) have dispersed. The subject-matter of this discipline is the recording facet of judicial rulings. While some of its principles are taken from jurisprudence, some are also taken from prose composition and some from the sundry customs and conventions of rhetoric. It is a division of jurisprudence insofar

[490] See Lisān al-Dīn Muḥammad Ibn al-Khaṭīb, *Muthlā al-ṭarīqa fī dhamm al-wathīqa* (Rabat: Dār al-Manṣūr, 1973), as an example of the description of drafting practices by notaries in Islamic West. The biting criticism suggests that Ibn al-Khatib had a big ax to grind, so we must take his description with some skepticism. Nevertheless, we can glean what notary culture and practice was like in that time and place.

[491] A number of jurisprudential works have chapters on *maḥāḍir wa sijillāt*. In addition, the chapter on judicial correspondence (*kitāb al-qāḍī ilā al-qāḍī*), though not discussing what ought to be put down in the record, is related to documentation in that documents written by the judge of one jurisdiction had to be soundly phrased and witnessed to be enforceable by the judge of another jurisdiction.

> as it involves arranging its phraseology in a way that comports with the precepts of the law (*muwāfiqah li-qawānīn al-shar*ʿ), yet it might also be considered a division of literature in view of its attention to elegant diction.[492]

Kātib Çelebi here seems to recognize the genre's hybridity and lack of definition. Even his sampling of the genre's works suggests that it had unclear boundaries. The list is more of a smattering, ranging from Hilāl b. Yaḥya al-Baṣri (d. 245/859), reputedly the first to write such a work, to Shams al-A'imma al-Ḥalwanī, to the Ottoman jurist and man of letters Meḥmed b. Eflatun (d. 735/1334).

A significant early example of the Ottoman version of the legal formulary, which we will sample briefly below, is Ebussuʿūd's *Biḍāʿat al-Qāḍī*, or *Judge's Merchandise*. This work was specifically written to guide the drafting practices of Ottoman judges and their clerks.[493] The metaphorical title is apt. The work deals with the physical documents that judges were to prepare and hand over, signed and sealed, to those coming away from a court hearing with some entitlement. Copies of these documents were kept with the court, and these copies are what chiefly make up the contents of the Ottoman registers that survive. However, the original "merchandise" of the court, as it were, consisted in the documents that went to the parties, most of which, unsurprisingly have not survived. These documents were known, in the Ottoman context, as *ḥüccet*s, but within the formulary literature, including Ebussuʿūd's, they are commonly referred to as *ṣakk* (pl. *ṣukūk*). They certified that all legal requirements, depending

[492] Kātib Çelebi, *Kashf al-ẓunūn*, 2:1045–6.

[493] The full title according to several of the manuscripts is the somewhat awkwardly rhyming *Biḍāʿat al-qāḍi li-iḥtiyājihi ilayhi fī al-mustaqbal wa al-māḍī*. It translates (with a bit of license) to something like "The Judge's Merchandise, in View of His Need for It Now and Then." Presumably "it" refers to this treatise. The work is also attested under the name *Ṣināʿat al-qāḍī*, or the *Judge's Craft*, in MS Süleymaniye Kütüphanesi, Ali Emiri Arabî 4353, fols. 73a–95a. However, this copy, while exceedingly neat and clean, is an undated part of a miscellany (*mecmua*) that appears to be later than the copies dating to Ebussuʿūd's lifetime, which go under the *Merchandise* (*Biḍāʿa*) title.

on the case, had been satisfied for the concerned entitlement to attach. It assured its holder that the entitlement expressed therein would be honored by another judge should it be challenged. It was therefore imperative that the document's language not omit any essential information; and because there were many types of cases yielding as many entitlements, it was easy for an inexperienced or careless judge to get the basic elements wrong. This is where Ebussuʿūd's work intervenes, providing formulas upon which other judges could pattern their document-writing.

The evidentiary value of legal documents was a matter of some disagreement among jurists. While it was the established Ottoman practice to use such documents to record judicially awarded entitlements, ostensibly for the purpose of furnishing evidence in the event of a future dispute, jurists remained concerned about the probative strength of the documents unaccompanied by witness testimony. Several scholars have discussed the tension between the theory and practice of using written evidence.[494] This problem, however, lies outside the scope of the present study. For our purposes, *The Judge's Merchandise* offers further evidence—this time from the stage *after* adjudication—that Ottoman jurists considered homicide, as a procedural matter handled by the law courts, to be an essentially civil issue. When documenting homicide cases, jurists accounted for the same procedural and evidentiary information as they did in all other cases arising from a civil dispute.

[494] See, for example, Baber Johansen, "Formes de langage et fonctions publiques: Stéréotypes, témoins et offices dans la preuve par l'écrit en droit musulman," *Arabica* 44, no. 3 (1997): 333–76; Guy Burak, "Evidentiary Truth Claims, Imperial Registers, and the Ottoman Archive: Contending Legal Views of Archival and Record-Keeping Practices in Ottoman Greater Syria (Seventeenth–Nineteenth Centuries)," *Bulletin of the School of Oriental and African Studies* 79, no. 2 (2016): 233–54; Jessica M. Marglin, "Written and Oral in Islamic Law: Documentary Evidence and Non-Muslims in Moroccan Shariʿa Courts," *Comparative Studies in Society and History* 59, no. 4 (2017): 884–911.

About al-Tumurtāshī

I stated earlier that Muḥammad b. ʿAbd Allāh al-Tumurtāshī was a kind of bridging figure in the early modern Hanafi school—binding not only between pre-Ottoman and Ottoman Hanafism, but also between the old Hanafi establishment in Egypt and Syria and the emerging scholarly establishment centered around the Ottoman capital. The full acceptance of Ottoman scholarly authority in Egypt and Syria, which only decades earlier had been reduced to provincial status, was a gradual process that unfolded over the course of the sixteenth century.[495] This process moved in both directions: it involved both the development of an Ottoman system of Islamic legal and theological education that gained reputable status in Egypt and Syria and the absorption of Egyptian and Syrian scholars into the Ottoman scholarly hierarchy. Al-Tumurtāshī in a way represents the culmination of this process of assimilation. A short overview of his position within the Hanafi school, both during and after his life, is therefore warranted and will further justify why his jurisprudence can be taking as a normative reflection of Ottoman-era Hanafism.

Al-Tumurtāshī was a product of Egypt and Syria. Although his name indicates Central Asian heritage—Tumurtash was a small town in Khorezm—[496]his ancestors eventually made their way to Gaza, where he was born and received his initial education and where he eventually returned, achieving prominence as a jurist and dying in 1596 in his mid sixties.[497] In between he traveled several times to

[495] On the legal milieu of Ottoman Cairo, see James E. Baldwin, *Islamic Law and Empire in Ottoman Cairo* (Edinburgh: Edinburgh University Press, 2017), chap. 1.

[496] Yāqūt b. ʿAbd Allāh al-Ḥamawī, *Muʿjam al-buldān*, 5 vols. (Beirut: Dār Ṣādir, n.d.), s.v. *tumurtāsh*.

[497] There is some slight discrepancy in his death date, so it is hard to give his exact age at death. See editorial note in Muḥammad ibn ʿAbd Allāh al-Tumurtāshī, *Musʿifat al-ḥukkām ʿalā al-aḥkām*, ed. Sāmir Māzin Qubbaj (Amman: Dār al-Fatḥ,

Cairo, where he studied under the Ibn Nujaym (d. 1563), one of the leading Hanafis of postconquest Egypt.

There is no indication that al-Tumurtāshī ever traveled to Anatolia or to Istanbul. However, he was an Ottoman by pedigree, reputation, and reception.[498] One of his teachers was Qınalızāde ʿAli Çelebi.[499] Qınalızāde was a leading member of the Ottoman learned elite, having been trained formally in the imperial system of law colleges and then worked his way up through the ranks as both a law professor and judge. Although not all jurists of repute in the Ottoman Empire were trained in this manner, those who wished to have stable work and income in the Ottoman public service had to go through an increasingly regulated and uniform process of education and promotion.[500] The typical Ottoman judicial career entailed stints in multiple cities all around the empire, often on the way to higher position in the central government administration. Qınalızāde's career followed such a path. One of his posts was in Cairo, and it was here that al-Tumurtāshī studied with him.[501]

Al-Tumurtāshī's connection with the Ottoman learned class is also evident in his own writing. In *The Judge's Aid*, for example, he cites Yaʿqūb Paşa's *Gloss* on al-Ṣadr al-Shahīd's *Wiqāya*, a well-known jurisprudential text circulated especially among Ottoman and Indian Hanafis. Yaʿqūb Paşa (d. 891/1486) was a ranking member in the Ottoman service under Mehmed II and Bayezid II, the brother of the Sinan

2007), 30.

[498] For a discussion on what it meant to be an Ottoman scholar, as distinguished from simply an Ottoman-era scholar, see Cornell Fleischer, *Bureaucrat and Intellectual in the Ottoman Empire: The Historian Mustafa Âli (1541–1600)* (Princeton, NJ: Princeton University Press, 1986), esp. chap. 6.

[499] Qınalızāde, in Arabic works, is often referred to as Ibn al-Hinnāʾī , the Arabic equivalent of his moniker. He was so named because his father was known for applying henna to his beard.

[500] For an overview of this promotion process, see Abdurrahman Atçıl, "The Route to the Top in the Ottoman Ilmiye Hierarchy of the Sixteenth Century," *Bulletin of the School of Oriental and African Studies* 72, no. 3 (2009): 489–512.

[501] Muḥammad Amīn b. Faḍl Allāh al-Muḥibbī, *Khulāṣat al-athar fī aʿyān al-qarn al-ḥādī ʿashar*, 4 vols. (Cairo: Al-Maṭbaʿa al-Wahbiyya, n.d.), 4:18–20.

Paşa who, as we saw in Chapter 1, served for a short time as grand vizier before falling out with Mehmed II. Yaqub Paşa was a professor at the imperial college of Bursa, then at the Eight Courtyards college in Istanbul, and then was appointed judge of Bursa. He wrote a number of glosses—including the one mentioned on the *Wiqāya*—to major Hanafi commentaries in law and theology, and his work was received favorably within his lifetime or, at the latest, shortly after his death.[502] Al-Tumurtāshī, who was Yaqub Paşa's younger contemporary, obviously read his work, and we can expect that he was aware of scholarship by other members of central Ottoman scholars.

Al-Tumurtāshī probably achieved prominence too late to earn a spot in Qınalızāde's biographical dictionary of Hanafi jurists. Qınalızāde died in 1572. But his connection with Qınalızāde, Ibn Nujaym, and other important figures helped secure his reputation as a bona fide Ottoman jurist. In his hometown, as his biographers tell us, "people sought him out for legal opinion," though he never held any official role as jurisconsult. Al-Tumurtāshī wrote prolifically, most of which remains unpublished. Not surprisingly, given his activity answering people's questions, he compiled a collection of legal responsa. He also wrote many short treatises on sundry topics, of which *The Judge's Aid* is one, along with what might be a kind of companion work for jurisconsults called *Muʿīn al-muftī* (*The Jurisconsult's Aid*). Certainly his most enduring work was *Tanwīr al-abṣār*, a digest of Hanafi substantive law. He himself wrote a commentary to this work, as did some twenty others. By far the most famous commentary, however, was written by the official Syrian jurisconsult of his time, ʿAlāʾ al-Dīn al-Haṣkafī (d. 1088/1677), under the title of *al-Durr al-Mukhtār*. This work was in turn the basis of *Radd al-muḥtār*, frequently referred to by its informal title, *Fatāwā Ibn ʿĀbidīn*, after the well-known nineteenth-century jurist from

[502] Taşköprüzāde, *al-Shaqāʾiq al-nuʿmāniyya fī ʿulamāʾ al-dawla al-ʿuthmāniyya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1975), 109. Taşköprüzade says that he came across a gloss by him on al-Sharīf al-Jurjānī's *Sharḥ al-mawāqif*, a theological treatise.

Damascus. Al-Tumurtāshī's legal digest was significant not only for Damascene jurists, however. Among those to comment on it was the Ottoman chief jurisconsult Ankaralı Meḥmed Emīn (d. 1098/1687).[503]

Al-Tumurtāshī himself never served as a judge. We know this because he admits in the introduction to "having never practiced the trade."[504] But in the words immediately following, he tells us that he assisted the chief judge of Gaza in his capacity as a highly respected, though not an officially appointed, jurisconsult. Given his prominence as a nonofficial jurisconsult, al-Tumurtāshī likely assisted not just one judge, but many, and therefore had to lend his legal expertise on a considerable number of cases. These words of explanation by al-Tumurtāshī—his admission to no judicial practice, followed by his claim to service in a different capacity—suggests that he was aware of his formal limitations but also that in writing this treatise he was informed by actual judicial practice and had more than just theoretical inquiry in mind. Accordingly, *The Judge's Aid* hits on salient points of adjudication, presenting the state of the Hanafi school, and leaves more granular jurisprudential discussions to commentaries and other extended works.

Elements of a Valid Claim

As mentioned earlier, the Mamluk- and Ottoman-era judicial treatises, which were generally the original work of their authors rather than a commentary on a prior text, tend to be more internally coherent than their predecessors. With greater freedom of organization, these authors were able to manage the accumulating body of judicial jurisprudence. Moreover, they were able to devise typologies that furnish

[503] Al-Muḥibbī, *Khulāṣat al-athar*, 4:19. On Ankaralı Mehmed Emin, see Tahsin Özcan, "Mehmed Emin Efendi, Ankaravî," in TDVIA.
[504] Al-Tumurtāshī, *Musʿifat al-ḥukkām*, 66.

the reader with a bird's-eye view of the subject of adjudication before delving into the myriad of granular issues. Al-Khaṣṣāf's *Adab al-qāḍī*, along with its many commentaries, is not devoid of topical coherence, but the broader structure, as we would expect from the early stage of a genre, has to be figured out with careful reading. With time, writings on adjudication grew in their structural refinement.

It is common for most latter-day authors to begin their treatises with, or at least organize their contents according to, the six integral components of adjudication (*arkān al-qaḍā'*). These constitute the elements required for a judicial proceeding to be cognizable in Islamic jurisprudence. They are as follows:

(1) the judge (*qāḍī*)

(2) the basis of decision (*maqḍī bih*)

(3) the plaintiff (*maqḍī lah*)

(4) the subject matter (*maqḍī fīh*)

(5) the defendant (*maqḍī ʿalayh*)

(6) the process (*kayfiyyat al-qaḍā'*).[505]

This nomenclature is made memorable, in Arabic at least, by being placed under terms all derived from the root for adjudication (Q-Ḍ-Y). Al-Tumurtāshī adopts a similar basic structure but uses instead the synonymous root (Ḥ-K-M) from which we get the word arbiter (*ḥākim*).[506] Under each heading fall the

[505] Al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 13–89. Cf. "Adjudication in the Mālikī *Madhhab*," 28. I should add that this is not an exclusively Mamluk and post-Mamluk typology. I have found it as well in *Rawdat al-quḍāt* by al-Ṣimnānī, a unique instance of original Abbasid judicial writing by a Hanafi jurist, dedicated to Niẓām al-Mulk. See ʿAlī b. Muḥammad al-Simnānī, *Rawḍat al-quḍāt wa tarīq al-najāt*, ed. Ṣalāḥ al-Dīn al-Nāhī, 2 vols. (Beirut: Mu'assasat al-Risāla, 1984), 1:44–48.

[506] Thus the six elements in his case, in order, would be as follows: (1) *ḥākim*, (2) *maḥkūm bih*, (3) *maḥkūm lah*, (4) *maḥkūm fīh*, (5) *maḥkūm ʿalayh*, and (6) *kayfiyyat al-ḥukm*. Al-Tumurtāshī does not deploy all six terms systematically. Because he spends fairly little time discussing evidence, which would fall under *maḥkūm bih*, there is no dedicated section on that subject. He also includes a section on *ḥukm*, the ruling itself, to discuss special questions about when a judicial order is binding and when it is not, such as when a judge issues it after the disposition of a legal claim. All in all, however, al-Tumurtāshī

various rules of adjudication. Those governing the physical, ethical, and status-related requirements[507] to be eligible for judicial office, as well as such rules governing the appointment of judicial assistants (*aʿwān*), go under the heading of THE JUDGE. So do the familiar rules about in-court comportment that are commonly identified with the "etiquette" (*adab*) of adjudication. The rules of evidence, which forms THE BASIS OF DECISION, fall under the category so named. As I mentioned in the introduction, scholarship on Islamic judicial procedure commonly focuses on the figure of the judge and the regime of evidence. Yet the six-part typology expands the domain of procedure to include what happens before and after the trying of a claim. What happens after includes, for example, the norms governing the enforcement and reversal of decisions. I will touch on one facet of this question in the next section in connection with legal documentation. Here I will focus on the conditions of a valid legal claim (*daʿwā ṣaḥīḥa*) and its bearing on the classification of homicide in Islamic jurisprudence.

A valid claim in Islamic jurisprudence is analogous in Anglo-American law to a cause of action. Each of them comprises the set of primary factual conditions that justify the initiation of a judicial proceeding. Valid claims are generally easy to forget because we are conditioned to focus on the conflict itself and its ultimate resolution. However, understanding the conditions for a valid claim is important because it clarifies the normative limitations on the court's power. Such clarity has two results. First, it helps elucidate the "incomplete" cases that we find in the court records—those instances in which there

substantively organizes his treatises along the lines of this typology.

[507] Physical requirements required soundness of mind and body. This included, for example, that one not be blind or mute, as these two faculties were necessary to perform basic functions of adjudication, such as identifying witnesses and formally issuing rulings. Al-Tumurtāshī writes, however, that perfect hearing was not required, and one hard of hearing (*uṭrūsh*), but not one truly deaf, could sit on the bench if all that was necessary was for parties and witnesses to raise their voices. The basic ethical requirement was that one be qualified to give testimony, which consisted mainly in not having been found guilty of and punished for calumny (*maḥdūd fī al-qadhf*). Status-related requirements included being a free adult Muslim. See Al-Tumurtāshi, *Musʿifat al-ḥukkām*, 88–89.

is no apparent decision from the court. This is true of Ottoman cases and, analogously, American ones. In the case of Satılmış the Falconer, it seems frustrating not to know what became of Satılmış. After his admission, did life go on as before? Was he later made to pay damages? Why did the lawful heirs of the victim, ʿAlī bin Ömer, not press a claim on the basis of his admission? These frustrating questions, however, arise from our own unreasonable expectation of an end to the story. The judicial disposition of a case, properly speaking, is not a decision resulting in finding one party or the other but a determination *on the issue brought to its attention*. Here it was the head falconer, who was apparently not the victim's lawful heir, that brought the report of the homicide to the court, whose immediate investigation led to Satılmış's admission. If, as I suggest here, the head falconer was not a valid plaintiff vis-à-vis Satılmış, then he had no standing to bring a claim against him and the judge's hands would have been tied to do anything further on that particular issue. The Anglo-American tradition provides an analogous array of such "incomplete" cases. Because of the elaborate complex of causes of action, there exist innumerable cases that are significant not because they went to trial but because they did not. The case discussed above, which involved a sailor who was sued for mooring his boat to a dock that did not belong to him, is a good example. The court did not decide a claim there. Rather, it simply ruled that the dock owner did not have a cause of action to begin with, ending the case before it could reaching the stage of hearing evidence. Second, understanding the normative limitations placed on the court's authority further elucidates how the law classifies legal obligations. As we will see in a moment, the judge's competence to hear evidence, let alone render a decision, depended on the nature of legal interest.

The validity of a claim in Islamic jurisprudence simultaneously implicates four of the integral elements, listed above, for a cognizable judicial proceeding: the plaintiff, the defendant, the subject matter,

and the basis of decision. In the remainder of this section, I will unpack al-Tumurtāshī's exposition of what constitutes a valid claim. Toward the end, I will show what implications al-Tumurtāshī's exposition has for the classification of homicide in Islamic jurisprudence.

It is first necessary to begin with al-Tumurtāshī's discussion of the parties, in particular the plaintiff.[508] Who the plaintiff is determines whether a formal claim is necessary in the first place for the court to respond and hear evidence. According to al-Tumurtāshī, the plaintiff can be one of three types. (1) The plaintiff can be the law itself (*sharʿ*). That is, the law has its own exclusive normative domain (*ḥuqūq maḥḍa*) that does not overlap with the private entitlements of human subjects. Such interests do not require a formal claim to be vindicated by judicial action; rather, a judge who has been delegated the power to do so may independently investigate violations of such purely legal interests. This includes so-called "pure *ḥudūd*"—offenses entailing fixed penalties (*ḥudūd*) that do not implicate a specific private entitlement—such as fornication and brigandry. It is interesting that al-Tumurtāshī, following Ibn al-Ghars, refers to the pure legal right as the right of the law (*haqq al-sharʿ*), whereas most others refer to such rights as the rights of God. We will return to these pure legal rights in the next chapter. (2) Second, the plaintiff can be a mixture between the law and a human person (*sharʿ wa ʿabd*). In such a case, the prerequisite of a claim for judicial action depends on whether the legal interest or the personal interest preponderates. In general, when the personal interest preponderates, the court cannot intervene until a formal claim is lodged. (3) Third, the plaintiff can be a human person (*ʿabd*) alone. In such a case, judicial action can be triggered only by a private legal claim.

It may be apparent that the type of plaintiff is closely connected with the type of right at stake. Al-

[508] Al-Tumurtāshī, 141–45.

Tumurtāshī tells us, therefore, that "the judge's path to a decision depends on the subject matter. If it lies within the exclusive rights of people (*ḥuqūq al-ʿibād al-maḥḍa*), the path to adjudication consists in a legal claim."[509] This plain statement—that judgment must be preceded by a claim—is deceptively subtle. One the one hand, it suggests an adversarial norm in Islamic judicial jurisprudence: that the judge's authority on civil matters—that is, on matters in which the interested parties are human beings—remains dormant until prompted by a claim. This is why al-Tumurtāshī, speaking of the plaintiff, defines him or her as the party who may, "upon leaving [a claim alone] is himself left alone."[510] On the other hand, it implies that judicial action is possible without a claim. Al-Tumurtāshī addresses this issue later in the treatise, focusing in the present section on claim validity. "The path to decision" (*ṭarīq al-qāḍī ilā al-ḥukm*), as I literally translate it, refers to the basic question of judicial competence. In purely civil cases, the judge's competence is activated by a valid claim, upon which all the rules of evidence go into effect. But what is a claim, and what are the conditions for its validity?

Al-Tumurtāshī defines a claim as a "statement, cognizable by a judge, made by someone with legal standing in demand of an obligation against someone or in defense of his own right."[511] By this definition, a claim included legal actions asking both for the restoration of some right and for what today is similar to injunctive relief. In the latter case, the defendant is accused not of having seized the plaintiff's right, such as by taking his property, but of interfering with his free disposal of that right, such as by causing nuisance or some other difficulty. Such claims of interference (*daʿwā al-muʿāraḍa*) fall within the broad Islamic definition of a legal claim.

---

[509] Al-Tumurtāshī, 105.

[510] Al-Tumurtāshī, 143.

[511] Al-Tumurtāshī, 106–7. Original: *qawl maqbūl ʿind al-qāḍī, yuʿaddu bihi qāʾiluhu fī al-sharʿ, ṭāliban haqqahu qibala ghayrihi, aw dafʿan ʿan haqq nafsihi ghayr ḥujja*. The last two words remain somewhat opaque to me.

There was no consensus among Hanafi jurists on the exact number of conditions for a claim to be valid. Some jurists put them at six, others at eight.[512] However, the discrepancy may be resolved by considering that some of these conditions were omitted either because they were taken for granted or were regarded as pertaining to the parties rather than the nature of the claim itself. One of the conditions, for instance, was the existence of a court (*majlis al-qaḍā'*), such that an arbiter without recognized authority could not bind the parties with a decision enforceable by other judges. This is a constitutional issue that al-Tumurtāshī deals with partially—and other jurists in greater detail—in other sections of the treatise. In the present section, al-Tumurtāshī probably assumes that the plaintiff, within the Ottoman imperial realm, is bringing the claim to a recognized court. Another condition, not provided by al-Tumurtāshī, is that both plaintiff and defendant be of sound mind. This condition is not insignificant, as it generally barred recovery against minors and the mentally ill; but it does not pertain to the claim itself.

Al-Tumurtāshī, then, cites four conditions. The first is that the claim not have been preceded by a contradictory claim.[513] Such contradiction (*tanāquḍ*) could arise in two ways. One was that the claimant previously admitted, actually or constructively, that the claim did not lie. This comports with the Ottoman legal responsum observed earlier in this chapter on claim preclusion. That opinion articulates the norm that claim *X* cannot simultaneously exist and not exist. If *A* admits that *B* is not liable for something, *A* cannot subsequently claim that *B* is in fact liable for it. The other form of contradiction is that the claim rationally conflict with some rational prior statement or condition. For example, if *A* holds that *B* owes him 100 aspers by a loan contract, then subsequently claims that 101 aspers are owed or that

[512] Al-Tumurtāshī, 113n3 (editor's note).
[513] Al-Tumurtāshī, 113.

the money is owed by a hiring contract, the discrepancy between the two statements will bar the claim from being heard.

The second condition is that the claim entail an explicit demand (*muṭālaba*) against the defendant for a specific performance.[514] As al-Tumurtāshī explains, there is no precise formula in which the demand must be stated, but the *A* must not simply say "I am owed *X* by *B*" but something along the lines of "I want *X* from *B*" or "I demand that *B* pay me *X*." This appears to be a kind of ripeness provision intended to keep conflicts out of court before the court's coercive powers are actually needed. Ripeness means that the claim cannot be made before a substantial controversy exists that warrants judicial intervention. For example, if *A* agrees to buy something from *B*, *A* cannot go to court demanding that *B* turn over the item before he himself has turned over the price. Presumably this also means that *A* cannot sue *B* during the customary period of performance, such as when the item is held in storage and requires a grace period to get and turn over. In any case, requiring the claim to contain a specific demand amounts to requiring that the claimant try in good faith to gain satisfaction directly from the defendant and only to lodge a claim when the defendant fails or refuses to comply. Normatively, the court can only be called upon to take concrete actions against a recalcitrant defendant, not to encourage parties prospectively to make good on their agreements.

The third and fourth requirements, in al-Tumurtāshī's enumeration, are similar in that they both require the claimant to specify the essential details of the claim. What is essential depends on the nature of the object of the claim (*mudda'ā bih*), and was not without internal disagreement among Hanafis,

[514] See Al-Tumurtāshi, *Mus'ifat al-ḥukkām*, 116–17.

but the general standard is that the claimant provide such as much information as is necessary to adequately identify the object. In claims of immovable property (*daʿwā al-ʿaqār*), for example, the claimant must explicitly state its physical boundaries and "clarify what type it is—an open plot, a vineyard, a residence—and in which city or which village it lies." But it is not required, al-Tumurtāshī adds, "to state the name of the neighborhood, market, or street" by or on which it is located.[515] For movable property, the required information depends on the circumstances of the claim. To recover an item or items held in trust (*wadīʿa*), for instance, the claim must specify in what locality, and where in that locality, they are being kept, whether or not the items are ordinarily stored.[516] This is contrasted with a conversion claim (*ghaṣb*), in which the claimant is not required to specify the location if the misappropriated items are not storable.[517]

The requirement of specificity in the claim has an organizing logic that other jurists elaborated. Dāmād Efendi, in his *Majmaʿ*, distinguishes between basic types of claims for which a claimant could seek satisfaction: claims of debt (*dayn*) and claims of repossession (*ʿayn*). Claims of repossession sought

[515] Al-Tumurtāshī, 117–18. In not requiring the claimant to name the neighborhood, market, or street where the real property is located, al-Tumurtāshī appears to have departed from the opinion of most other Hanafis, who required more information than simply which city or village it was in. See Dāmād Efendi, *Majmaʿ*, 2:253. The Mejelle, art. 1633, adopts a position recognizing that the required degree of specificity depended on the situation. For real estate claims, "in both the claim and testimony, there must be stated [the property's] region and town *or* its quarter and street, along with its four or three boundaries, as well as the names of their neighboring owners, if there be any, and the names of their fathers and grandfathers. However, only for a man who is well known and famous, mentioning his name alone, without his father's and grandfather's name, is sufficient."

[516] Al-Tumurtāshī, *Musʿifat al-ḥukkāmi,* 118. Al-Tumurtāshī here is drawing a distinction between provisions (*muʾna*) and other items normally stored in preparation for later transport, and therefore normally kept in one place, as opposed to smaller items that can be moved around.

[517] Al-Tumurtāshī, 118–19. The distinction here turns equally on the items claimed and the type of claim. In claims on entrusted items, the only option is to recover the items themselves because the claimant had voluntarily put them in the care of the defendant and therefore assumes liability if they are lost or destroyed unless he can establish that the defendant acted negligently. In a claim of conversion, the claimant can either replevy the item or items themselves or, if the item has been lost or destroyed, recover their market value. The available remedy depends on the nature of the items. If they are stored items, the claimant must specify where they are being held; if they are not stored items, he is not required to do so.

to recover a physical object, whether movable or immovable, that still existed or, in the event of the object's loss or destruction, its replacement either in kind or in value. Claims of debt sought to recover a sum of money owed, such as the purchase price of a sale that the buyer has failed to deliver. The degree of possible specificity in identifying debts and objects claimed varied. Because money was fungible, for example, what had to be specified was the kind (*jins*) of money, such as gold or silver currency, and quantity (*qadr*). Where objects were concerned, however, "making [the object of the claim] known to the greatest extent possible [was] a condition" for the claim to be heard." Therefore, whenever possible, the object had to be physically brought to court "so that it may be pointed out … at the time of making the claim, rendering testimony, or taking the decisory oath."[518] This requirement was relaxed, of course, for immovable property, as well as for movable property that for some reason could not be presented. The examples al-Tumurtāshī gives, namely, of items held in trust or converted, being detained by the defendant, were outside the claimant's control. Therefore, the claimant had to supply as much information as could reasonably be expected. It could reasonably be expected that, for items kept in storage, unlike more portable items, the claimant would know where they were being kept. The purpose of this, Dāmād Efendi and others suggest, is to allow the judge to go see the object itself or to send a representative to do so.[519]

There are two other types of claims that al-Tumurtāshī mentions in connection with the specificity requirement. Each of them is clearly chosen to illustrate a separate point, and each, importantly for our purposes here, has an implication for homicide claims. The first is a claim of malfeasance (*daʿwā al-*

[518] Dāmād Efendi, *Majmaʿ*, 2:251.
[519] Dāmād Efendi, 2:251

siʿāya) against a public official.[520] The example he gives of such malfeasance is the taking of bribes. The circumstances of bribery must be specified for the very important reason that they determines whether the claimant is seeking to impose liability for injury and recover for injury to his own person or property or, alternatively, to call upon higher governmental authority to sanction the wrongdoing public official by way of a fine (*taghrīm*) or other punishment. What is important to note here is that a single action of malfeasance can generally trigger one remedy or the other but not both. This depends on the type of wrong claimed. If someone complained that a public official harassed his wife or misused his animals, without causing substantial injury to either, then this claim is to be interpreted as asking the administrative authorities to stop or otherwise punish that official. Such claims, al-Tumurtāshī implies, will not be heard as claims of recovery. However, if the claim is that the public official coerced him wrongfully out of his wealth, by bribery or other means, then such a claim will be heard with the purpose of restoring that taken wealth, and what happens to the official is a separate matter. Claims of malfeasance provide another area of the law where, like homicide, private and public interest intersect but are still clearly distinguished in terms both of the requirements for seeking a remedy and the remedies available to address them. Claims seeking recovery for liability are distinguished from petitions to sanction the wrongdoer.

The second claim al-Tumurtāshī mentions is a claim of damage to one's garment or beast (*kharq al-thawb, jurḥ al-dābba*). In either case, to be heard the claimant is not required to bring the damaged article of clothing or animal to court. This seems odd, given that the garment and animal are presumably

[520] Al-Tumurtāshī, *Musʿifat al-ḥukkām*, 119. On *siʿāya*, see *Al-Mawsūʿa al-fiqhiyya*, s.v. *siʿāya*.

still in the claimant's possession and can be physically presented. The reasoning offered by al-Tumurtāshī is that the real object of the claim is the part of the item that is absent, not what remains of it.[521] Here the standard of specificity for objects is relaxed presumably because requiring the claimant to produce the damaged item, which might be unavailable, could produce a barrier to having the claim even heard. This standard has implications for personal injury and homicide, in that the object of the claim, be it a lost limb or a lost life, is not available and therefore need not be produced for the claim to lie.

Let us summarize al-Tumurtāshī's exposition of the normative basis of a valid claim. First, claims involving the exclusive interests of human beings require a claim to be vindicated. Second, as the example of malfeasance shows, such exclusive human interests are further divided into those having to do with the private property interests, whose remedy is the recovery of the taken item or its equivalent, and those having to do with public welfare, whose remedy is a sanction directed as correcting the wrongful behavior itself. Third, claims for private property interests must specify the object of the claim and a particular remedy, and the court can decline to hear claims that fail to meet these standards. Fourth, specificity varies, but generally it depends on whether the object of a claim is a debt or an object. Debts under dispute, being claims of money owed, only have to be specified in type and quantity. Objects under dispute, by contrast, must be brought physically to court or, if that is not possible, described

[521] Though the reasoning is logical for why the damaged item does not have to be produced, the conclusion still seems unusual, as producing the item would provide prima facie evidence that damage was done in the first place. I continue without success to look for reasoning beyond the one provided by al-Tumurtāshī. My own intuition is that producing damaged items would demonstrate nothing more than that the claimant's property was damaged, which could have occurred by means other than the defendant's actions, and might therefore prejudice the proceeding by introducing something that the defendant cannot rebut. Therefore, requiring that only the actual object of the claim be produced, even when, as here, it results in seemingly strange conclusions, serves to focus the claim on what can actually be established and rebutted on an equal footing.

as far as the claimant can reasonably be expected to know.

Al-Tumurtāshī does not cite homicide as an example in this discussion, but we need not expect him to. The treatise is not meant to be exhaustive. The norms he summarizes, however, are clearly extensible to homicide. Homicide falls within the exclusive interests of human beings. These interests have a private and a public dimension. The private dimension of the wrong cannot be vindicated unless a claimant with standing brings a valid claim against the wrongdoer. In the jurisprudence on homicide, jurists at times refer to "claims of homicide" (*daʿwā al-qatl*)[522] in the same fashion that al-Tumurtāshī in his treatises refers to "claims of conversion," "claims of malfeasance," and "claims of injury to one's property." This language is not incidental. It suggests that homicide was, in the first instance, a private-law matter whose mode of recovery, initiated by the mechanism of the legal claim, was the same as that used in seeking recovery for the taking of physical property. Although it may offend a particular moral sensibility to compare the loss of human life to the loss of material things, analogizing the former to the latter served to keep legal satisfaction for a wrongful death within the control of victim's family rather than removing it to the exclusive jurisdiction of the state. This stands in contrast to other legal traditions. For most of the history of Anglo-American law, homicide, in all its forms, was a crime, and the common law afforded no right to recover civil damages. It has only been modern wrongful death statutes that have created a civil remedy in what was exclusively a criminal matter.[523]

The normative principles of claim validity that al-Tumurtāshī lays out would have applied equally

[522] See, for example, Dāmād Efendi, 2:678; cf. Faḫruddīn ʿUthmān b. ʿAlī al-Zaylaʿī, *Tabyīn al-ḥaqāʾiq: Sharḥ Kanz al-daqāʾiq*, 6 vols. (Bulaq: Al-Maṭbaʿa al-Kubrā al-Amīriyya, 1895), 6:124.

[523] Modern wrongful death statutes in the United States, enacted mostly in the twentieth century, lay out their own criteria for bringing a wrongful death suit and for assessing the damages. Damages are usually assessed in terms of pecuniary loss, such as medical expenses, loss of support, and prospective earnings. The process, however, is analogous to measuring the value of loss to property.

to homicide. The extension of such principles of claim validity to homicide is comparable to the extension of inheritance principles, as seen in Chapter 4, in transferring the right to sue for retribution or damages from the victim to the victim's estate, comprised of his or her legal heirs. A claim of homicide could get a hearing only if it was validly put. To be valid, the claim had to specify the object of the claim. The object of the claim here was the victim's life. To gain recovery, whether in the form of retribution or damages, as the case may be, the estate had the obligation to state the claim with the specificity that may reasonably be expected. The victim's life was, in procedural terms, a legal object (*ʿayn*), which would ordinarily have required being presented in court. However, because, like the injured animal or damaged garment, the object of the claim was "absent," the members of the estate were not required to produce the victim's corpse. Because they were not present at the time of the killing, they were also not required to specify where and how it happened in order for the claim to be heard.

The requirements for lodging a valid claim, therefore, constituted a preliminary step—before reaching the point of hearing evidence—in presenting claims of homicide in the same way as other civil claims. The implication of this analysis is that, unlike with other civil claims, whose original claimant is still alive, the original claimant in homicide is dead, which creates a particularly large procedural barrier to having claims of homicide heard for the purpose of recovering damages or exacting retribution. The problem with this argument, however, is that it is somewhat speculative. Neither al-Tumurtāshī nor any other jurist that I have come across, when discussing the basis of a valid claim, likens the value of human life, nor the procedure required for its recovery, to the value of damaged or destroyed property.

How may we then put homicide in the same class as other civil claims? Al-Tumurtāshī provides a

clue through his brief discussion on testimony, which comes immediately after this discussion on requirements of a valid claim.[524] Recall that Dāmād Efendi, as quoted a few paragraphs above, said that the object of the claim had to be identified to the greatest degree possible not only when making the claim, but also when "rendering testimony [and when] taking the decisory oath."[525] What this suggests is that, although each of these stages of a civil claim—stating the claim, hearing the evidence, and taking the oath—had special rules, each of them required a parallel degree of specificity. In the case of testimony, a witness statement was required to concord with the claim itself and, when there was more than one witness, as there often was, to concord with other witness statements.[526] The necessary degree of concordance was the subject of some minor disagreement, but in any case major discrepancies could void the testimony and thus defeat the plaintiff's claim. "It is incumbent upon you to know," al-Tumurtāshī writes, "that testimony must furnish proof that both contains and entails the object of the claim (*bi-ṭarīq al-taḍammun wa 'l-iltizām*), and that the statements of the two witnesses must agree in word and meaning."[527] For example, if a debtor claims to have paid the debt in installments, and his witnesses testify that he paid all at once, the testimony is invalid. So too if one witness claims that the debtor owes one thousand aspers and the other witness, two thousand.[528]

Al-Tumurtāshī outlines two dimensions along which a discrepancy in the witnesses' statements are evaluated. One dimension is whether the object of the claim, to which they were testifying, is an action

[524] Al-Tumurtāshī, *Musʿifat al-ḥukkām*, 119–39.
[525] Dāmād Efendi, *Majmaʿ*, 2:251.
[526] How precisely the witness's statement had to accord with the stated claim was a matter of some small disagreement. See al-Zaylaʿī, *Tabyīn al-ḥaqā'iq*, 4:229–30.
[527] Al-Tumurtāshī, *Musʿifat al-ḥukkām*, 131. For an extended discussion of conflicting witness statements, see the section titled "Discrepancy in Testimony" (*bāb al-ikhtilāf fī al-shahāda*) in extended works at, e.g., Dāmād Efendi, *Majmaʿ*, 2:205–10; cf. Ibn Nujaym, *al-Baḥr al-rā'iq*, 7:103–20.
[528] Al-Tumurtāshī, *Musʿifat al-ḥukkām*, 131–2.

(*fiʿl*) or a statement (*qawl*). The other dimension includes three types of discrepancy: discrepancy in time (*zamān*), discrepancy in place (*makān*), and discrepancy in description (*inshāʾ wa iqrār*).[529] Actions, al-Tumurtāshī writes, include "such things as physical injury, conversion, and homicide." For such actions, a discrepancy between the witnesses in any of the three listed respects would invalidate their testimony. Dāmād Efendi explains, for example, that "if one claims conversion or homicide, and one of the witnesses testifies to the action itself, while the other witness testifies that [the defendant] admitted [to doing it], these testimonies are unacceptable."[530] Discrepancies about where or when the homicide occurred would have the same affect, as would salient discrepancies about how the defendant performed the action, because statements with such discrepancies cannot possibly be simultaneously true. Discrepancies about the implement used to kill are particularly salient, especially given the weapon's impact on grading the homicide, as discussed in Chapter 4. For example, if one witness claims that the defendant used a staff, while the other claims that he used a sword, this discrepancy would invalidate their testimony.[531]

Al-Tumurtāshī's discussion of the rules for a valid claim and valid testimony, viewed in its totality and supplemented by extended treatments of the subject, suggests that the same normative principles that applied to other civil claims on property applied similarly to homicide. Homicide, insofar as it caused material harm to the victim and the victim's heirs, had to be remedied, like any other civil harm,

[529] The terms *inshāʾ* and *iqrār* form a distinction in Islamic evidence law with important implications. See Fadel, Fadel, "Adjudication in the Mālikī *Madhhab*." 104–117. Here they refer to the the implications embedded in the wording of a witness's testimony. The most basic distinction offered by jurists is between testimony to witnessing an action or statement itself and testimony to witnessing the defendant's admission to the action or statement. For example, one witness could say "He killed the victim," and the other could say "He said he killed the victim." Such a discrepancy would render the testimony invalid.

[530] Dāmād Efendi, *Majmaʿ* 2:206.

[531] Burhān al-Dīn Maḥmūd b. Aḥmad al-Bukhārī, *Al-Muḥīṭ al-burhānī fī al-fiqh al-nuʿmānī*, ed. ʿAbd al-Karīm Sāmī al-Jundī, 9 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 2004), 8:474.

through a claim lodged before a judge, which then had to be appraised by the same rules governing testimony and other evidence. Both the claimant, in getting the claim to stand, and the witness, in furnishing testimonial evidence, were required to provide the maximum degree of information that they could respectively be expected to provide. In a homicide claim, the claimant was not required to produce the victim's body for the reason that I have already posited (speculatively) by extension from the injured animal: the object of the claim, the victim's life, was no longer available. However, Dāmād Efendi suggests that information about where the body lay, to the extent possible, had to be provided. In cases involving movable property that was too large to transport (e.g., a flour mill), he tells us that describing the item and where it is would enabled "the judge to go himself to inspect it or to send a trusted officer" in his place.[532] While no jurist to my knowledge requires that the claimant state this information for a valid homicide claim, it seems to have been a normal practice to say where. In the case of Satılmış, the head falconer reporting the killing stated where the event happened, and the judge sent a court officer to verify. The claimant was furthermore relieved of stating when and where the killing happened for the obvious reason that such information was likely impossible to know. However, witnesses, for the similarly obvious reason that they were claiming to have direct or near-direct knowledge of the event, had to specify where, when, and how it happened and to not to conflict in any of these details.

What is striking is the way al-Tumurtāshī and other jurists, on the subject of the requirements for a valid claim, casually juxtapose homicide with conversion and other forms of injury to property. This clearly suggests that, when claimants were bringing their claims of homicide to a court and seeking either retribution or damages, they were primarily invoking the court's civil jurisdiction. This does not

[532] Dāmād Efendi, *Majmaʿ*, 2:251, citing Ibn Nujaym's *al-Baḥr al-rāʾiq*.

mean that a court could not simultaneously possess a separate criminal jurisdiction to punish an offender—a matter that we will attend to in the next chapter. Certain actions could certainly give rise to more than one remedy. Official malfeasance, as we saw above, is one of them, and homicide was another. However, when the primary concern of the homicide claim was to gain recovery for the injury, jurists examined it in terms of civil liability, not in terms of criminal culpability.

Admissibility of Circumstantial Evidence

When the requirements of a valid claim were satisfied, the judge was then permitted to hear evidence. The trial is the stage of litigation that is most closely associated, and naturally so, with Islamic procedural law. Scholars have generally depicted this stage as consisting more or less in the evaluation of oral testimony (*shahāda*), which, apart from a confession (*iqrār*), was effectively the only basis on which a judge could rule in favor of a claimant. As a general rule, a plaintiff had to present two adult male witnesses or, alternatively, one male and two female witnesses. This scheme of oral testimony, in turn, seems at first glance to be a direct extension of the Islamic scholarly practice of evaluating the reliability of oral narration (*riwāya*) that forms the basis for transmitting the Hadith. This oral heritage, it would appear, accounts for the formalism that is thought to afflict Islamic procedural law, rendering written and circumstantial evidence inadmissible and disallowing the judge from exercising a reasonable measure of discretion. Indeed, in many reported Ottoman cases, judges look somewhat robotic, first asking the defendant whether the claim is true, then upon denial asking the plaintiff for evidence, which seems invariably to be oral testimony. The mechanical appearance of hearing evidence is in part a function of record-keeping practices by Ottoman legal clerks, who followed a protocol that boiled cases down to their essential information in a way that made writing and reading the record easier. Still, on its face, it

is easy to conclude, from both precept and practice, that Islamic evidentiary procedure was extremely rudimentary. On a number of fronts, however, this account of Islamic evidence law is faulty.

First of all, it is useful to consider, by way of comparison, that adjudication today still relies hugely on oral testimony, often made under oath before a judge, by direct witnesses to an event. The event could be the primary substance of the claim, such as the sale of a property, or a secondary event, such as the signing of a document. It is still customary, for example, to have witnesses sign a contract in addition to the contracting parties; and a written affidavit (which in Latin means "he is strengthened by the fact that someone authorized to prepare and certify such documents, like a notary, has directly witnessed the affiant's signature. Direct oral testimony often grounds the probative value that documentary and circumstantial evidence may otherwise lack.[533] On its own, then, orality is not a symptom of unsophisticated evidentiary procedure.

Furthermore, the two types of oral reportage—testimony (*shahāda*) and narration (*riwāya*)—were consciously distinguished by Muslim jurists. Not only did each have different standards by which it would be deemed valid, but each also served a different primary purpose within its respective discipline.[534] The formalism of Islamic evidentiary rules, therefore, was too intentional to be located in some vague notion of oral culture. These rules sought to address problems peculiar to adjudication. In particular, the immediate real-world stakes of adjudication, unlike in matters established by narration, called for a clear decision in favor one party or the other. Abstention was not an option. And because judges

[533] For a conceptual and theoretical overview of evidence, see Hock Lai Ho, "The Legal Concept of Evidence," *Stanford Encyclopedia of Philosophy* (Winter 2015 Edition), https://plato.stanford.edu/archives/win2015/entries/evidence-legal/.

[534] Fadel, "Adjudication in the Mālikī *Madhhab*," 127–36 (discussing the epistemological and functional distinction between *shahāda* and *riwāya*). One of the important implications of the *shahāda/riwāya* distinction concerns the gendered dimension of testimony. See Fadel, "Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought," *International Journal of Middle East Studies* 29, no. 2 (1997): 185–204.

usually operated, as judges always do, under conditions of imperfect information, they had to exercise some measure of discretion in making findings of fact on which the decision would be based. This discretion would undoubtedly have involved the assessment of circumstantial evidence.

Islamic evidence law, to the extent that it elevated the status of oral testimony above all other forms of evidence, implicitly acknowledge the inevitability of judicial discretion and circumstantial decision-making. This inevitable discretion shows up repeatedly in Islamic procedural jurisprudence. One area of enduring contention was whether a judge could base a ruling on prior knowledge (*al-qaḍāʾ bi-ʿilm al-qāḍī*) about the case or the parties, particularly if he had acquired that knowledge before being appointed judge.[535] Within this issue lay a deep tension between arriving at the truth and opening the door to severely prejudicial forms of discretion. A second area in which the judge may have had to exercise some discretion was in excluding certain types of testimony. For instance, two people with great enmity toward each other were generally not permitted to testify against each other.[536] Even though witnesses could testify to their mutual dislike, what constituted "great hatred" was ultimately a subjective matter that the judge would likely have had to decide. A third example of judicial discretion concerned the use of testimony by experts (*ahl al-maʿrifa*). In general, if a case involved something that lay outside the judge's expertise, such as medicine, the judge was required to call upon an expert to make an evaluation of some key fact in the claim upon which he would then base the decision.[537] On the one hand, this rule was intended to keep judges from making judgments about things they had no knowledge of. On the other hand, the judge exercised a considerable degree of discretion in deciding not only which expert

[535] Al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 121–22.
[536] Al-Ṭarābulusī, 73.
[537] Al-Ṭarābulusī, 130–31.

to appoint but in deciding whether the expert had made a convincing evaluation.

It is highly misleading, therefore, to say that Islamic evidence law, as a rule, refused to admit circumstantial evidence or to accept a decision based on anything other than the defendant's admission or the oral testimony of two upright witnesses. Judicial knowledge and expert testimony only begin to suggest how much is wrapped up in the words "proof" (*bayyina*) and "testimony" (*shahāda*). In his judicial treatise, for example, ʿAlāʾ al-Dīn al-Ṭarābulusī gives a long exposition of fifty-one "types of proof and things that have the status of proof."[538] As his own wording suggests, these are not quite separate types of evidence as such but rather scenarios in which different types of evidence in different quantities and combinations could be used to decide a claim for or against the claimant. A number of these scenarios show how circumstantial evidence and discretion are formally built into the structure of Islamic evidence law. Testimony to matters of public knowledge (*shahādat al-samāʿ*), in the absence of direct witnesses, is acceptable to establish marriage, lineage, and death, because such matters are ordinarily known by numerous members of a community.[539] In certain cases, witnesses cannot testify to a fact, but they can testify to circumstances that support the belief that something is more likely than not (*ghalabat al-ẓann*). For example, if a woman's husband leaves her for a long time with no maintenance, testimony to these facts may be taken to as evidence of abandonment and therefore as grounds for dissolving the marriage.[540] Indeed, there are numerous instances in which known circumstances (*qarāʾin al-aḥwāl*) establish a presumption that need not be proven once again.[541] In instances of necessity (*ḍarūra*), where no documents or witnesses of verified reliability could be found, the judge was permitted to make do

[538] Al-Ṭarābulusī, 90.
[539] Al-Ṭarābulusī, 108–111.
[540] Al-Ṭarābulusī, 113–14.
[541] Al-Ṭarābulusī, 166–68.

with questionable witnesses if he was satisfied that they were more likely than not telling the truth. This, al-Ṭarābulusī says, was the going practice and the accepted view "even if jurists often say otherwise."[542] In such dire cases, the cost of having rights go repeatedly violated was deemed higher than allowing some bad evidence.

Apart from addressing different kinds of judicial scenarios, what is the underlying logic of these elaborate rules of evidence? In the judicial context, procedural rules are often thought to be devices meant to bind the litigant. This is true. As we saw above, a litigant that failed to satisfy the requirements of a valid claim would be barred from moving on to trial and having evidence heard. As much or more than binding the litigants, however, procedural rules are meant to bind the judge. This is equally true of both substantive and procedural rules. Thurman Arnold, an American lawyer and another important figure in American Legal Realism, described the function of substantive law as putting distance between the discretionary decisions of the judge and law itself. When viewed as a science, the substantive law becomes reified. "It gives the court the atmosphere of impersonal and inevitable justice which compels respect. It shifts criticism of the result away from the judge or the court to some body which is supposed to have the power to change the 'law.'"[543] A reified law helps to preserve the perception of the rule of law by making the "results of disputes more logical and predictable"[544] and by locating errors in an "untutored judiciary"[545] who failed to reason correctly rather than in the law itself. Given the conceptual over-

[542] Al-Ṭarābulusī, 117.
[543] Thurman Arnold, "The Role of Substantive Law and Procedure in the Legal Process," *Harvard Law Review* 45, no. 4 (1932): 617–47 at 635 (internal enumeration omitted).
[544] Arnold, 630.
[545] Arnold, 637.

lap between substance and procedure, as we discussed earlier at length, it is not surprising that procedural rules have a complementary effect. If substantive law served to insulate the law from the judiciary's errors, procedural law could serve to keep the judiciary from making errors in the first place. In both cases, however, substantive and procedural rules are not only devices of social control; they also embody an acknowledgement that those who administer the law are prone to error of judgment and discretion that may call their legitimacy into question.

Mohammad Fadel has argued compellingly that the rules of evidence served a similarly legitimizing role in Islamic legal procedure. The function of adjudication, he shows, may be mapped out on a continuum of coercion. The more a judicial act is viewed as serving a publicly recognized norm, such as preventing known killers from walking the streets, the more the judge may use coercion and lower evidentiary standards without being seen as acting arbitrarily. A modern analog is the common-law practice of holding someone in contempt of court for misbehavior, which often results in being put temporarily in jail. This is an remarkable judicial power, as judge are generally authorized to hold someone in contempt without trial or findings of fact. When adjudication occurs between private persons, by contrast, the legitimacy of the court's decision is far more vulnerable because compliance in such cases relies not on a public norm but on the assent of the two parties. The adjudication of private rights, put differently, is simply a formalized version of arbitration, which relies through and through on the parties' agreement to abide by the arbitrator's decision. In such cases, the judicial decision must rely on something other than coercion lest it be seen as illegitimate.[546]

[546] Fadel, "Adjudication in the Mālikī *Madhhab*," 61–75.

The replacement for coercive fact-finding techniques in Islamic law was to turn to a largely predetermined set of evidentiary rules that were calculated to exclude as much evidence as possible that did not meet a certain objective threshold. These exclusionary rules covered various types of oral testimony, the establishment of presumptions, the probative value of oaths, and so forth.[547] Together the rules served to do two related things in a fashion that produced rationally consistent, if not always rationally determinate, outcomes. First, the rules contained the judge's discretion, which, as we have seen, was likely to slip through the cracks anyway. Second, in limiting the judge's discretion, the rules of evidence sought to minimize outcome error. As we saw from the samples above, a certain allowance for circumstantial decision-making was also baked into the rules.[548] This regime of evidence, Fadel argues, had the salutary effect of bolstering judicial legitimacy. The heightened standards of admissible evidence, though not eliminating the error, would likely have made the balance of decisions more often correct than not. Judges, by appearing bound by the rules of evidence, could be viewed as mostly impersonal arbiters, and unhappy results could be ascribed to the system of rules rather than to the figure on the bench. Furthermore, the exclusionary rules had the important additional effect of shifting the burden of producing good evidence upon the parties, for whom informational costs would have been far lower than for the court,[549] and therefore also reducing the cost and efficiency of litigation.[550] In other words, if the court only had to adjudicate cases in which the parties could produce strong evidence, it could save valuable and limited resources.

It is in light of the foregoing analysis that we may read al-Tumurtāshī's discussion of evidence, and

[547] See generally Fadel, 121–83.
[548] Fadel, 142–43.
[549] Fadel, 157.
[550] Fadel, 183.

especially his discussion of circumstantial evidence in connection with homicide. The elaborate rules of Islamic evidence law are not a feature of all judicial procedures, which have varying evidentiary standards, but of civil judicial procedures. Legal issues may therefore be identified as primarily civil in nature if they are subject to these rules, whose cumulative effect is to limit the ability of the judge to act on discretion. Homicide is a particularly significant area in which we might expect the judge to adopt more subjective decision-making. Because homicide is usually done in secret and thus not in the presence of witnesses, this is a particular area in which judges, seeking to vindicate the victim's rights, could seek to exercise discretion in granting the victim's family an award of damages or permitting them to take lawful retribution. We have already observed the rules of the communal oath (*qasāma*), whose purpose was to offset the likely problem that most homicides would go without any remedy at all when no likely killer could be identified.

Al-Tumurtāshī begins his brief discussion of evidence with a basic typology of proof. It is notably more inclusive than the three-part typology that is conventionally given. "Proof (*ḥujja*)," he writes, "may take the form of a clear evidence (*bayyina*), a confession (*iqrār*), a decisory oath (*yamīn*) or the refusal (*nukūl*) to take it, a corporate oath (*qasāma*), the judge's knowledge in favor one of the parties, or circumstantial cues (*qarā'in*) that so clearly point in favor of the claim that they place it in the realm of certainty."[551] One thing to note is that proof goes under the term *ḥujja*, not under *bayyina* as it appears elsewhere. In al-Tumurtāshī's typology, *bayyina* is one type of proof. He also does not provide witness testimony (*shahāda*), which would normally be listed as the first and strongest kind of proof. The reason

[551] Al-Tumurtāshī, *Musʿifat al-ḥukkām*, 105–6.

for this, as al-Tumurtāshī suggests later in the chapter, is that not only witness testimony, but also written documents that had been witnessed and verified, were to be considered clear evidence.[552] The admissibility of written documents in the various periods of Islamic jurisprudence is an important question but one that I will not discuss here.[553] However, al-Tumurtāshī's acceptance of written documents was in line with the Ottoman practice of issuing signed and sealed certificates to the winning party of a claim presented in court and of keeping a corresponding record of the certificate in the judicial register.

When al-Tumurtāshī turns to circumstantial evidence, he provides a standard for its admissibility. Specifically, circumstantial evidence may be admitted when it is so clear that it points to only one reasonable interpretation. To illustrate, he also gives the following hypothetical:

> It is said that if *A* emerges from a house, with a knife in his hands, stained with blood, moving quickly in a clear state of fright; and then some people immediately enter the house and find *B* there and then slain and covered in his own blood, with no one else in the house in the same condition as *A*, this may be taken as clear evidence against the latter, since no one would doubt that he is the killer. To say that *B* killed himself, or that someone other than *A* killed him and then scaled the wall and fled, is a proposition so far-fetched as to have no merit, because it does not arise from any plausible indication, like the possibility of a mistaken witness.

From at least al-Tumurtāshī's time on, this lurid hypothetical became a ready illustration for circumstantial evidence. It or some version of it is quoted in numerous sources, such as a treatise by Ibn ʿĀbidin

[552] Al-Tumurtāshī, 130–31.
[553] See references above in note 494.

on legal custom (*ʿurf*) the nineteenth-century Ottoman civil code, or Mejelle.[554] Al-Tumurtāshī does not take credit for it, but he does not cite its origin either, simply saying "they say" but without specifying who said it. What is likely is that this hypothetical, in one form or another, was in such wide circulation that no single jurist knew who first used it. It echoes a Hadith narration that other jurists had used as the basis for the corporate oath procedure.[555] It also recalls an early episode, which reportedly took place during the rule of ʿAlī b. Abī Ṭalib, in which a man was found standing over a stabbed body, holding a knife and covered in blood. The man initially found to have committed the homicide and was set to be executed by requital, when another man spoke up admitting to the act. It turned out the that first man was a butcher and that the blood did not come from the deceased but from animals that they had been butchering earlier that day.[556]

It is easy, however, to get distracted by the gore in this hypothetical from considering the point it seeks to make. Its purpose, in line with other exclusionary rules of civil litigation, is to present in memorable terms a standard by which circumstantial evidence may be admitted. What al-Tumurtāshī is saying is that circumstantial evidence, as a general rule, may not be accepted to overcome a presumptive state of affairs unless that evidence admits of no other reasonable conclusion. The fact that, of all examples, homicide is used to illustrate the point suggests that homicide was regarded as being chiefly subject to civil litigation. My argument here, it bears emphasizing, is not that that judges and other legal

[554] For Ibn ʿĀbidīn's treatise, see "Nashr al-ʿarf fī binā' baʿḍ al-aḥkām ʿalā al-ʿurf," 128, in Muḥammad b. Muḥammad Amīn Ibn ʿĀbidīn, *Majmūʿat rasā'il Ibn ʿĀbidīn*, 2 vols. (Damascus: Al-Maktaba al-Hāshimiyya, 1907), 114–47. For the Mejelle, article 1741, defining "decisive circumstantial evidence" (*qarīna qāṭiʿa*). For a commentary with applications, see ʿAlī Ḥaydar, *Durar al-ḥukkām: Sharḥ Majallat al-aḥkām*, trans. Fahmī al-Ḥusaynī, 4 vols. (Riyadh: Dār ʿĀlam al-Kutub, 2003), 4:484–86.

[555] See, for example, Muḥammad b. Abī Bakr Ibn Qayyim al-Jawziyya, *al-Ṭuruq al-ḥukmiyya*, ed. Nāyif b. Aḥmad al-Ḥamd, 2 vols. (Mecca: Dār ʿĀlam al-Fawā'id, 2007), 1:12–13.

[556] On the implications of this episode, see Rabb, *Doubt in Islamic Law*, 1–5.

officials were barred from pursuing and sanctioning homicide on grounds of public policy. We will discuss this public dimension of homicide in the upcoming chapter. However, to the extent that homicide implicated private rights, the same exclusion rules of evidence applied as they did in any other civil matter.[557]

DOCUMENTING HOMICIDE

Documentation in Islamic judicial practice was more than a mere adjunct to adjudication. In the numerous surviving Ottoman records, whether the proceeding concerned a contentious trial or simply the registration of a contract, the legal document that recorded that proceeding would usually describe the issue at stake, identify the parties, indicate what evidence was adduced, and state how the court concluded the matter. Even inconclusive proceedings, such as in the case of Satılmış the Falconer, sought to put down whatever legally salient information was brought to the court. In preserving a witnessed written record, documentation not only marked the disposition of a judicial proceeding but also served to protect the entitlements awarded to the parties. The specific contents of written records, therefore, were not arbitrary or incidental. The many surviving legal formularies, both Ottoman and pre-Ottoman, were at pains to instruct judges and clerks on how to prepare clear documents that captured all the necessary details while leaving out the superfluous ones. We may therefore take additional clues about how jurists classified legal issues from the way that they desired them to be recorded.

One of the first notable Ottoman legal formularies was Ebussuʿūd's *Judge's Merchandise*. The proximate cause for writing this work, as Ebussuʿūd says in the introduction, was a request from colleagues.

[557] Fadel, "Adjudication in the Mālikī *Madhhab*," 126.

Specifically, they asked him to "produce for them a collection on this subject in which I clarify the basic and ancillary guidelines of [drafting] documents and write out models of legal instruments, using the specific and general modes of expression observed in actual cases that arise in a court of law while still maintaining an economy of words and a clarity of meaning."[558] Ebussu'ūd's reasons for writing this work, however, go beyond an academic desire to help his judicial colleagues be better drafters of documents. For a long time, he tells us, he had observed irregularities in the documentary practices of Ottoman judges, and these irregularities had potentially severe legal consequences:

> Most judges in our time, except for some select notables, are either neglectful or simply ignorant of this distinguished discipline. The consequence is that their instruments do not get accepted by seasoned experts, ridden as they often are with flaws, gaps, and other shortcomings—and especially poorly transcribed testimony that comes from afar, which affords the witness nothing more than a good deal of wasted energy.[559]

Additionally, Ebussu'ūd's colleagues were apparently not happy with whatever drafting guides were available. "A learned master before my time wrote a work that is of some benefit to students, but its style, laboriously longwinded from start to finish, leaves much to be desired. Its profusion of sample phrases and terms has left drafters exhausted and readers weary."[560] Unfortunately, we don't know who this other author was, though it was possibly one of the several people who are known to have written legal formularies in the fifteenth century.[561]

---

[558] Azar Abbasov, "Taḥqīq *Biḍā'at al-qāḍī li-iḥtiyājihi ilayhi fī al-mustaqbal wa al-māḍī* al-mansūba ilā Shaykh al-Islām Abī al-Su'ūd Afandī," *İslam Araştırma Dergisi* 35 (2016): 127–83, 145.
[559] Abbasov, 145.
[560] Abbasov, 145.
[561] Süleyman Kaya, "Mahkeme Kayıtları Kılavuzu: *Sakk Mecmuaları*," *Türkiye Araştırmaları Literatür Dergisi* 3, no. 5 (2005): 379–416 at 394–98.

In any case, Ebussuʿūd's major concern was that documents containing a judgment or a ratified contract not be rejected if brought to the court of a different jurisdiction simply because they contained vague language or lacked basic information that the new judge required in order to uphold whatever right the bearer of the document was claiming to have. Such concerns, in judicial treatises, fell generally under the heading of judicial correspondence (*kitāb al-qāḍī ilā al-qāḍī*).[562] According to Ebussuʿūd, a properly drafted, signed, and sealed document would be enforceable without having to rehear the testimony. The new judge might formally record this enforcement (*imḍāʾ*), for example, by saying, "I find what is contained in this document—it having been established by witnesses whose testimony is acceptable to me—to be in accord with the law, and I therefore accept and enforce it."[563] If the judge was not satisfied with the document's authenticity or clarity, he could decline to enforce it. One can imagine that shoddy documentation, particularly for more complex rulings with a lot of detail, could leave the receiving judge with little recourse but to reject the petitioner's request for enforcement. Ebussuʿūd's formulary sought to ensure that documents would not be rejected because they were poorly drafted.

Ebussuʿūd begins the substance of the treatise with a short first chapter defining the terms *ṣakk*, which he uses generically for any legal document. Thereafter, the nine topically organized chapters present samples for what were presumably the commonest issues for which judges had to prepare documents. Each chapter has several samples, each one headed as an "illustration (*ṣūra*) of what is to be written." For example, under the chapter titled "Marriage, Divorce, and Maintenance," there is a sample document for the marriage contract itself; another for legally establishing a husband's impotence; and another deeming a marriage void after it was established that the spouses had both been nursed by the

[562] Al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 118–21.
[563] Abbasov, "Taḥqīq *Biḍāʿat al-qāḍī*,", 147–48.

same woman.[564]

Although the samples are written in template-like fashion, as by using placeholders (*fulān b. fulān*) in place of real names, each one contains quite a bit of detail according to the issue at hand. Nevertheless, there are certain recurring elements, however, that we can take from the models that Ebussuʿūd provides. One element has to do with the parties themselves. All of the documents describe the parties as specifically as possible, usually by providing the given name, father's name, place of residence, and any other information that could be used to uniquely identify each party. Furthermore, all of them specify who the rightful bearer of the document is (*ḥāmil hādhā al-kitāb*), indicating thereby who held the right specified therein. For example, one of the models covers a case where a woman asks the court to record the stipulation to her marriage contract, offered by her husband, that if he failed to return from a journey for six months, their marriage would be annulled. At the end it is written that "this document has been drafted and put into [the woman's] possession for her to present as proof (*iḥtijāj*) in the event that she should need it."[565] Not mentioning who had the right to carry the document could, in certain instances, give rise to ambiguity about who held the entitlement. In the same case just mentioned, if the document had simply said that the husband offered the travel provision but not specified that the court had accepted the provision and granted the right to the wife, a later court could have trouble discerning who was entitled to what.

Another recurring element is to specify precisely what the claim entailed with as many salient facts as would remove potential ambiguity if read by a future judge who was not familiar with the specifics of the case. This information would of course vary widely depending on the type of claim brought to

[564] Abbasov, 152–53.
[565] Abbasov, 154.

the court. In endowment cases, for instance, it would include a detailed description about the exact thing or space to be put in mortmain.[566] If the case involved the immediate exchange of money, such as in a sale or rental agreement, the document must specify, as the case demands, the amount of money payable, the specific type of currency, and the time at which it would be due.[567] For example, one sample document involves the leasing to a merchant of a stall in an endowed market by the endowment supervisor, the term of the lease being twelve months, and the rent to be paid at the end of each month in "silver currency of current denomination."[568] The endowment supervisor here is named as the bearer of this document, suggesting that in a future dispute over the terms of the lease the merchant would enjoy the presumption and the lessor would need the document to uphold his claim.

The first eight of the nine formulary chapters cover topics—such as endowments, marriage and divorce, guardianship, lease, manumission, sale, and settlements—that are immediately recognizable as private civil issues. All of these areas of law are unified in that they carry property implications, and all of the modeled documents are, in effect, contracts that secure the property rights of the parties involved. The content and topical arrangement of these first eight chapters therefore seems sensible.

What may seem odd, however, is that the ninth and final formulary chapter (and tenth overall) of the *Judge's Merchandise* concerns homicide and injury, carrying the title "On Judgments for Damages and Requital."[569] There are four models, concerning the following types of cases: (1) damages assessed against the solidarity group for accidental homicide, (2) waiver of requital, (3) admission to homicide and subsequent submission of the killer to the heirs, (4) damages assessed against the residents of a

[566] For endowment samples, see Abbasov, 149–51
[567] For leases and gifts, see Abbasov 161–64. For sale and debt, see Abbasov, 168–69.
[568] Abbasov, 164.
[569] Abbasov, 178–79.

village or neighborhood after they are made to take the corporate oath. Here, for example, is Ebussuʿūd's model document for the third heading:

> Whereas *A* son of *A'*,[570] being capable of making valid admissions,[571] has made a legally valid admission that he struck *B* son of *B'* in the back with a pen knife, and the latter immediately died because of it; and whereas *C* son of *C'*, the heir of the decedent, being the latter's cousin and sole heir, confirmed the admission and demanded [he be turned over]—accordingly, [this court] has ruled that he be turned to the decedent's heir, who may then decide whether to pardon or requite him. So it has transpired.

The inclusion of this chapter makes perfect sense if we view homicide as the civil matter that jurists primarily viewed it as. Like the issues that precede it, homicide implicated the property interests of those involved.

These samples therefore suggest that the substantive doctrine, which we reviewed earlier in this dissertation, had a practical effect on the way judges prepared, and instructed other judges to prepare, real court documents after the conclusion of a judicial proceeding. The *Judge's Merchandise* was not an idle academic work. As suggested by Ebussuʿud's introduction, it sought to address real concerns with imperial judicial practice, which could only work as an integrated system if judges were able to produce clear documents in a unified legal idiom. The model documents probably grew out of real cases that Ebussuʿūd himself presided over. Internal evidence—specifically, the names of mosques and neighborhoods—suggests that he wrote the treatise while or shortly after serving as judge at Bursa.[572] Therefore,

---

[570] All of the placeholder names are "So-and-so son of So-and-so" (*fulān b. fulān*). For clarity in translation, I prefer to use letters with the prime symbol (') to indicate parentage.

[571] I presume this phrase (*ḥāl ṣiḥḥat aqārīrihi sharʿan*) means that the one making the admission was of sound mind and otherwise lacked qualities that make him legally incompetent to render an admission.

[572] For example, he refers to Kız Yaʿqūb (today's Kızyakup), one of the "neighborhoods of the guarded city of Bursa" (*maḥallāt Bursa al-maḥmiyya*). See Abbasov, 162.

although the work has a normative tone, it simultaneously reflects the practice of legal drafting at the time.

CONCLUSION

In this chapter, building off the theoretical analysis in the previous one, I have argued that the procedural doctrine surrounding homicide strengthens the classification of homicide in Islamic legal science as a private civil wrong. Jurists who discussed how a homicide claim is to be filed, how it is to be proven, and how it is to be documented all applied the same doctrinal structure that they would for any other civil wrong. In order to be heard, homicide claims that sought restitution by one private party (the victim's heirs) against another private party (the accused killer) were subject to the same standards for filing a valid civil claim and to the same exclusionary rules of evidence devised to ensure that the outcomes of such claims were more often correct than not. These constraints of civil procedure, when added to the substantive law described in the last part, force us to look elsewhere for "criminal" homicide in Islamic jurisprudence. It is not in the civil jurisprudence. For criminal homicide, and indeed for crime as such, we must look instead to the jurisprudence on government and public law.

Part III

Homicide in Islamic Criminal Law

So far in this dissertation, I have argued that Hanafi jurists, as well as their interlocutors from other schools, fundamentally conceived of homicide as a civil wrong. By civil wrong, it bears repeating, I mean simply that homicide was above all a wrong committed by a private individual against another private individual rather than against God or against an imagined public. Cumulative evidence, drawn from both substantive and procedural doctrine, points to the conclusion that, in this civil guise, homicide was simply an extension of personal injury and, as such, was to be remedied in the same way that other civil wrongs were to be remedied: compensation. Compensation served a number of purposes. Most immediately, it gave the victim or victim's family some recovery for their material loss. Compensation also mediated the natural and legitimate desire for revenge (*tashaffī al-ṣadr*)[573], especially when requital was not an option (which often it would not have been), by providing an alternative to more the socially destructive remedy of actual private retaliation.

Less obviously, compensation had an economic logic that served to spread loss, to deter misbehavior, and to encourage private resolutions. Because in most cases one's solidarity group would have been accountable for paying the compensation, this naturally would have attenuated the burden placed on the individual wrongdoer. By spreading the loss in this way, it would also have guaranteed that victims receive their payment, particularly in the event that the killer was broke. At the same time, the imposi-

[573] Dāmād Efendi, *Majmaʿ*, 621.

tion of liability on the solidarity group (*taḍmīn al-ʿāqila*) would likely have led them to sanction miscreants in their midst or otherwise prevent them from misbehaving. Finally, because the compensation schedule was fixed, this would have transferred the burden of assessing the real cost of the harm from public institutions (especially courts) to private individuals. Particularly in the case of intentionally homicide, where the heirs could have requital or fixed compensation but not both, opposing parties had an incentive to settle the matter out of court for an amount that would spare the killer's life and give the heirs a sum of money that they found satisfactory.

What compensation did not serve, however, was to condemn the wrongdoer. Although it would have been chastening to part with a large sum of money and incur the anger of one's social group, paying compensation did not amount to an authorized imposition of deprivations for the chief purpose of expressing public condemnation. In other words, paying compensation was not criminal punishment. I do not claim that any scholars have said so. Nearly everyone has recognized that homicide is in one sense a tort.[574] However, because the remedies for homicide seamlessly combined requital with compensation, scholars have puzzled over how to reconcile these two seemingly alien kinds of sanctions. The general tendency has been to regard requital as the defining remedy and compensation as a kind of civil derogation from it.[575] I have argued so far, however, that the opposite is true. The notion of requital, in both its literal and jurisprudential senses, revolves around repayment rather than reprobation. Requital ought, therefore, to be seen not apart from monetary compensation but on a continuum with it—itself a form of compensation, not a replacement to it. That requital possesses an element of deterrence and equivalence is not at all decisive in making it a criminal punishment. Indeed, all sanctions,

[574] J. N. D. Anderson, "Homicide in Islamic Law," *Bulletin of the School of Oriental and African Studies* 13, no. 4 (1951): 811–28.
[575] For example, Rabb, *Doubt in Islamic Law*, 34–35.

civil and criminal, aspire to be proportional and to deter someone. It would be similarly unfair and excessive to make someone pay a million dollars for causing a fender bender as it would be to put that person in prison for life.

There is a question that, I hope, follows obviously from the foregoing discussion. If the definitions, procedures, remedies, and other doctrinal components of homicide are all set on a foundation of civil liability, does this mean that Islamic jurisprudence made no allowance for homicide to be criminally punished? In other words, if no one with standing sought a remedy of requital or compensation by bringing a private claim of homicide, was the public authority then barred from pursuing the suspected wrongdoer and applying its own sanctions? The short answer is no: the failure of the private process did not necessarily hamstring the public authority. Elaborating this answer is the purpose of this final part of the dissertation.

The two chapters that make up this final part examine the public dimension of homicide. They seek to answer, in broad strokes, what prerogative the sovereign and the sovereign's delegates had to establish and execute rules in the service of the public welfare, especially those that seek to pursue and punish killers and other wrongdoers. Chapter 6, by examining the broad and somewhat amorphous genre of political jurisprudence, examines the related concepts of jurisdiction and discretion in Islamic jurisprudence. These concepts formed the juridical basis of positive legal enactments by the sovereign that are not found within the explicit doctrines of Islamic legal science. This chapter also serves to round out the methodological thesis of this dissertation, namely, that the failure to adequately account for Islamic political jurisprudence explains why scholars have located criminal law within Islamic civil jurisprudence.

Chapter 7 then offers an interpretive conclusion to this study. In place of simply recapping my argument, I apply the framework developed in this study to homicide in Ottoman criminal law. By looking at relevant provisions in the sixteenth-century Ottoman Criminal Code and a some sample cases, I offer an interpretation of how the Ottoman legal system mediated the doctrines of Islamic civil jurisprudence with the public mandate given to those holding public authority. I show that Ottoman law, in both its substance and practice, contained the normative imprint of Islamic jurisprudence, but it also embraced policies that may nor may not have been acceptable within the traditional normative framework of that jurisprudence. What I argue is that such tensions do not amount to a fundamental conflict between Ottoman law and Islamic jurisprudence, but are rather the natural result of placing a legal discourse into a real political environment.

CHAPTER SIX

Political Contingency and Islamic Law

The civil nature of homicide goes a long way in explaining why we should generally see so few cases of homicide in the Ottoman court records and, when we do see them, in a format that often resembles other civil cases. As with other fundamentally private wrongs, the judge could in principle only take notice of such cases of injury, let alone adjudicate them, when they were raised to the court in the form of a claim. Procedural rules, such as those discussed in al-Tumurtāshī's treatise, sought to reduce the judge's discretion as far as possible, including in homicide claims, by limiting the use circumstantial evidence only to such cases where no reasonable conclusion could be made other than to hold the defendant liable for the act of homicide. Furthermore, by subjecting homicide to the same process as other civil claims, in which the aggrieved party had to lodge a private claim and come up with quality evidence, the procedural rules seemed to greatly restrict the independent investigative powers of the judge.

There is a problem, however. In the case of Satılmış the Falconer, the judge did in fact send a court official to investigate the information that the head falconer brought to court. As the record notes, the head falconer does not state claim (*daʿvā*) but rather makes a report (*taqrīr*) and requests an investigation. Having seen the attention that Ottoman jurists gave to the careful drafting of documents, we cannot suppose that this choice of words was incidental. No one, according to this record, was lodging a claim for recovery against Satılmış. Yet without such a claim, the court immediately swung into action with an inquiry. One way to explain this case is that the judge was not conducting the inquiry with the aim of laying charges against the alleged killer, but simply to fulfill a general responsibility of verifying

a report with potential legal ramifications. Nevertheless, the judge still had Satılmış brought to court, which he did willingly, and asked him about the head falconer's statement, which he confirmed. Such instances are not rare in the Ottoman records, in which judges, without having a specific dispute to settle, undertook to look into an issue brought to their attention. A natural question then arises: On what basis could a judge look into a matter with seeming proactive concern rather than in response to a formal claim? Was investigation and interrogation, according to the jurists who wrote on adjudication, a valid function of the judge, or did the Ottomans depart from the norm?

These questions bring us more firmly into the political dimension of the law. The judge, as noted before, was not simply a resolver of private disputes but also an appointed official of the political authority. The first of these two roles, as we have seen already, is reflected in the law's attempt to constrain the judge's discretion in civil disputes by regulating the kinds of evidence that could be admitted in such cases. The second role, however, tugs in the opposite direction. As an extension of the sovereign, the judge acquired a less constrained, and therefore more coercive, form of discretion that could be put to use in furthering the general interests of the polity. We saw in the last chapter, for instance, that a judge's ability to respond to a claim of malfeasance depended on whether that complaint was seeking monetary recovery for civil harm or redress for the corrupt official's public harm.

In this chapter, then, we will discuss the juridical underpinnings of this public judicial discretion. The basic validity of discretion, as well as the allowable scope of discretion in any given case, was a function of jurisdiction (*wilāya*). In addition to abiding by the terms of the claim, the judge also had to have the appropriate jurisdiction. As we will see, the specific jurisdiction of a judge was not predetermined by Islamic jurisprudence. Rather, jurisdiction was a function of political authority (*siyāsa*).

The legal political authority of temporal rulers is a matter of contention among Islamic legal historians. A particularly durable and influential position among scholars is that classical Islamic jurisprudence drew a sharp divide between *legal* authority, which was the exclusive domain of the jurists, and *political* authority, which was to be either circumvented or tolerated.[576] We see traces of this thesis throughout Islamic legal scholarship. It is reflected, for example, in the presumed conflict between the Islamic *sharīʿa* and the Ottoman *qānūn*. The implication of this division is clear: any legal act undertaken by the sovereign or the sovereign's delegates was ipso facto extralegal. The act had to be predetermined by jurists as lawful. Therefore, any decision made by a judge, invoking a general principle of public interest but not a concrete legal rule, necessarily stepped outside the bounds of Islamic law. Similarly, any sanction adopted and imposed by the political authority without having been predetermined in Islamic law, such as fines for criminal offenses, were repugnant to Islamic law.

The Trope of the Reluctant Judge

Numerous scholars have been at pains to point out that there existed a deep and long-standing resentment, or at very least an attitude of extreme caution, on the part of pious Muslim jurists toward serving under temporal rulers, particularly as judges. Noel Coulson, for instance, relates a dramatic early anecdote, about ʿAbdullāh b. Farrūkh, who was appointed as the judge of Kairouan in 787.[577] Ibn Farrūkh, as

[576] See, for example, Wael B. Hallaq, "Juristic Authority vs. State Power: The Legal Crises of Modern Islam," *Journal of Law and Religion* 19, no. 2 (2004 2003): 243–58.

[577] N. J. Coulson, "Doctrine and Practice in Islamic Law: One Aspect of the Problem," *Bulletin of the School of Oriental and African Studies* 18, no. 2 (1956): 211–226. Coulson mistranscribes the name, corrected here, as Ibn Farūk. I cannot explain his transcription, as the name appears as Ibn Farrūkh in all available biographical references, including the one used by Coulson.

the narrative goes, initially refused to accept the position but relented when he was set in chains and threatened to be hurled from a rooftop. Wael Hallaq, though qualifying the historical situation better than most previous scholarship, has nevertheless similarly accepted and reinforced the picture of judicial reluctance, if we may call it that, drawn from such stories in the medieval chronicles and similar literary sources.[578]

What is odd about this position is that it abandons the kind of critical scrutiny that medieval literary sources are ordinarily subjected to. Historians, particularly of the early Islamic period, are for the most part extremely skeptical of narrative tropes.[579] Look on such reports with caution, they nevertheless seek to extract the kernel of truth amid the embellishments in the sources.[580] When it comes to the early Islamic judiciary, however, the tropes seem to be taken almost at face value, and extreme anecdotes like the torture of Ibn Farrūkh are taken almost as exemplifying the actual state of affairs among early jurists rather than as vivid illustrations of a moral point. It seems more consistent to interpret these reports as an admonition about the moral perils of assuming a judicial position, particularly if one is tried with serving under a corrupt ruler. It seems farfetched, given the number of high-status jurists who had notable careers as judges, to conclude that Muslim jurists regarded such forms of public service as repugnant to Islamic law. One may reasonably ask why scholars seem to have bought in to this trope in the narrative sources.

I suppose that the reason, to which I alluded last chapter, is that these anecdotes confirm an existing

[578] See, for example, Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), chap. 8.
[579] See, for example, Chase F. Robinson, *Islamic Historiography* (New York: Cambridge University Press, 2003), 152–53.
[580] For a summary of the main approaches to source criticism adopted in Western historiography on Islam, see Fred M. Donner, *Narratives of Islamic Origins: The Beginnings of Islamic Historical Writing* (Princeton, NJ: Darwin Press, 1998), 5–31.

suspicion about Islamic law. Most salient among such suspicions is that Islamic law, as a supposedly religious law whose essential functions as to realize the "ideal relationship between man and his Creator," with only incidental concern for regulating the "position of the individual vis-à-vis the temporal authorities in the state."[581] Indeed, because the forces of worldly power were as such a barrier to the individuals' attainment of numinous perfection, they were a thing to be dealt with and, if possible, entirely avoided. This theme of the consummately other-worldly character of the *sharīʿa*, essentially opposed to the degrading concerns of earthly life, pervades Islamic legal historiography, and the trope of the reluctant judge fits neatly within it. It is seen, as I mentioned in the conflict between *sharīʿa* and *qānūn*. It is seen similarly in the pitting of the "extraordinary" Grievance Courts against the "ordinary" Lawcourts and all such other instances in which the holy law was forced to encounter the administrative apparatus of government.[582] Islamic law continues to be seen by many or most scholars as a totalizing normative order. In other words, because Islamic law already comprises all prescriptions, both for private conduct and for the ordering of political life, it therefore cannot coexist with an exogenous normative order in anything other than a begrudging and conflictual arrangement.[583] This is why, it is supposed, many jurists have historically struck an oppositional attitude toward temporal rulers.

The severe problem with this analysis, in addition to being somewhat unimaginative, is its determinism. Because Islamic law is assumed to be a closed and unitary legal tradition, it will necessarily fall into conflict when let out into the wild. The reluctance or hostility of Muslim jurists to judicial practice

[581] Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 123.
[582] Émile Tyan, "Judicial Organization," in *Law in the Middle East*, ed. Majid Khadduri and Herbert J. Liebesny (Washington, DC: The Middle East Institute, 1955), 236–78.
[583] This fundamental incommensurability greatly underpins the thesis of Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2012).

can therefore only be interpreted in one way: the inevitable result of placing one legal tradition in the same political matrix as another. Such dead-end conclusions, moreover, short-change the work of legal historiography. By largely rejecting the political contingency of Islamic law, scholarship has by and large turned its attention away from the evolving institutional dimension of Islamic jurisprudence and restricted its analysis to the more elaborate, stable, and concrete doctrines found in the books of legal science. These doctrines are important and convenient—for which reason I have spent most of this dissertation discussing them—but they do not tell us they whole story.

When law moves off the parchment and into the world, it necessarily operates in a political environment. In real political environments, the law is administered in society by some form of government. Governments, in turn, have different structures and changing practical needs. To address these needs, governments assign roles to different officials, each with a scope of practical authority. This practical authority is called, among other things, jurisdiction. The substantive and procedural doctrines of law, such as those that we have reviewed, "can make no sense if one fails to consider the jurisdictional environment in which these rules were meant to operate."[584] Jurisdiction and political authority is therefore the link between the doctrines of Islamic legal science and their operation within a real legal system.

Fines and the Definition of Crime

Examining the political contingency of law also helps to explain specific legal practices that are hard to square with the view that Islamic law was a closed system of sacred law. A good example is the Ottoman imposition of fines payable to the state as a punishment for wrongdoing. "Monetary fines," Heyd states

[584] Fadel, "Adjudication in the Mālikī Madhhab," 119.

peremptorily, "are unknown to the criminal law of the *sharīʿa*."[585] In an article on the use and abuse of fines in the Ottoman Empire, Coşgel et al. remark that fines were "originally unrecognized in the criminal sections of Islamic law (*shariʾa*), and some religious scholars disapproved of them as dangerous innovations (*bidʾat*)."[586] Abū Yūsuf, the formative Hanafi jurist, disagreed with the position against fines, and other early dynasties of Turkic background, notably the Seljuks, were able to help overcome the "early legal hesitation."[587] The authors imply that the Ottoman Empire, which was at once a Hanafi and Turkic dynasty, had both a legal and customary precedent upon which to justify their widespread policy of using fines to enforce the law and punish its offenders. In so doing, however, they also imply that fines lacked legitimacy in Islamic law and that the only way to impose them, as with other criminal sanctions, was to work around or simply ignore Islamic law's supposed proscription.

There are two problems with these implications. First, they regard as extralegal what was in fact an area of legitimate legal disagreement within the discursive tradition of Islamic jurisprudence. The very fact that fines were a matter to legal controversy (*ikhtilāf*) means that this sanction fell within, not without, the ambit of Islamic law. Second, the narrative that underpins the extralegality of fines assumes that the written doctrines of Islamic jurisprudence exhaust the legitimate domain of legal norms in the applied political order. To say, in other words, that a criminal sanction was unrecognized by Islamic law suggests that Islamic law books must explicitly name it for it to be an Islamically legitimate practice. Such a suggestion has no foundation.

[585] Heyd, *Studies*, 280.
[586] Metin M. Coşgel et al., "Crime and Punishment in Ottoman Times: Corruption and Fines," *Journal of Interdisciplinary History* 43, no. 3 (2013): 353–76 at 355. See also Peters, *Crime and Punishment*, 33.
[587] Coşgel et al., 355.

The basic position that scholars take on fining amounts to following: fines were basically illegitimate in Islamic law, but brute political necessity, aided by clever and influential jurists willing to devise a workaround, forced an effective abandonment of the law's prohibition. This view fails to appreciate the possibility that opposing views could simultaneously occupy the field of *legitimate* legal opinion even when only one of them can win out in practice. Such multivocality is true of any major legal tradition. When a portion of the U.S. Supreme Court justices dissents on a given case, as happens in nearly all cases, their opinion is not held to be any less justified within the framework of the law than the majority opinion that constitutes the operative holding of the law. Why, then, do scholars feel forced to say that the Ottoman practice of fining, as well as the juristic opinion that favored it, was somehow out of step with the sacred law? If scholars have to explain away the legal opinion of someone like Abū Yūsuf, one of the most important formative jurists, this points to some unresolved apprehension about Islamic jurisprudence. I argue that this apprehension concerns the political contingency of law.

The crux of the problem here, as in almost any matter of Islamic criminal law, is that virtually no one has articulated a definition of criminal law that is cognizable within the framework of Islamic law itself. Why would fining be "illegal" in Islamic law? To say that fines are not mentioned in the criminal chapters of Islamic law, and are therefore illegitimate, is highly unsatisfactory. For one thing, exactly which chapters would those be? Presumably they would be the chapters containing things that "look" like criminal law from our vantage point today, because they involve the application of some sanction by the state—in other words, because they involve punishment. On this definition, things like homicide, illicit sex, larceny, and brigandry would be deemed crimes in Islamic law because they all carried a particular sanction (*ʿuqūba*) for the respective offender. But sanctions, as we have seen in this dissertation,

are a thin criterion by which to distinguish criminal from noncriminal wrongs. Recall my earlier example of tickets and boots for parking violations. Although there is no aggrieved party, and although the penalty can be a crushing financial burden, we are hesitant to say that overpacking is a crime in anything other than a technical sense. Similarly, requital for homicide, though amounting to capital punishment and validating the desire for vengeance, was one grade on a scale of remedies that ultimately sought to spread the social cost of killing another human being. We must therefore look for other criteria.

Another way that we distinguish today between criminal and noncriminal wrongs is by looking to who pursues rectification of the wrong. Criminal wrongs are typically those that are pursued by the state, which has both the mandate and prerogative to pursue such wrong in view of its role as representative of an imagined public; conversely, noncriminal wrongs are voluntarily pursued by individual or groups of wrong parties who wish to recover some compensation for the harm they have suffered. Therefore, murder is deemed to be, within the modern legal imaginary, an offense against the body politic, and the state, as its representative, is justified, whether the public wishes or not, to initiate proceedings and bring its full resources to bear against the suspected offender.

This criterion gets us closer to the crime/noncrime distinction, but it also falls somewhat short. I mentioned previously that, although more or less a dead letter today, private prosecution was the usual method of initiating criminal proceedings. It is therefore not a universal fact that criminal complaints are pressed by the state while civil ones are pressed by private individuals. Furthermore, it is unhelpful to identify whether the state plays a more active role, as when it prosecutes crimes, or a more passive one, as when it adjudicates civil claims. In either case, it is still the state's delegated officials that mediate

the administration of justice. A unified apparatus of legal administration—in other words, a government—creates a natural overlap between civil and criminal matters. When someone commits a homicide, for example, it is ultimately the same set of authorities that handle both the civil and criminal implications of the act.[588] The involvement of the public authorities in what are essentially private matters is precisely one of the things that throws ambiguity onto homicide and other things that straddle the line between private and public.

It is this notion of a "public" space, I argue, that is the most theoretically coherent way to distinguish crime from noncrime. Crimes are crimes not simply because they are pursued by public authorities but because they themselves are conceived as offenses against the public. The trouble we run into, of course, is that the "public," apart from being highly abstract, is not uniformly conceptualized across legal traditions. Pinning down the legal meaning of "public," and therefore of "crime," is as much a historical problem as a conceptual one. What constitutes crime is tied to the history and usage of a given legal tradition.

Take Anglo-American law. Today crime is defined, somewhat recursively, as "any act or omission in violation of a law prohibiting the action or omission."[589] This essentially means that a crime is a violation of anything the state deems a crime by enacting a statute. As such, crime "involves the idea of injury to the state of collective community," which may "avenge itself on the author of the evil which it had suffered."[590] However, the problem with defining crime as the violation of one of the state's statute is that,

[588] Muhammed Selim El-Awa, "Approaches to *Sharĭa*: A Response to N. J. Coulson's *A History of Islamic Law*," *Journal of Islamic Studies* 2, no. 2 (1991): 143–79, esp. 158–61. El-Awa makes this important observation as part of a general critique, with which I agree, of Noel Coulson, who depicted Islamic criminal law as narrow and impracticable. However, El-Awa sees public administration of requital (*qiṣāṣ*) as signaling the criminal "nature of the legal response to homicide" in Islamic law. On this specific point, as I explain in the body of the text, I disagree.

[589] "Criminal Law," Legal Information Institute, https://www.law.cornell.edu/wex/criminal_law.

[590] Henry Sumner Maine, *Ancient Law* (London: J. M. Dent & Sons, 1917), 226.

in the Anglo-American tradition, many crimes were so-called common-law crimes, deemed and defined as criminal not by discrete legislative enactment, but by the cumulative decisions of judges. Moreover, the idea of the reified, depersonalized state is a historical latecomer. In former times the state was located in the person of the sovereign. Crime in Anglo-American law therefore has its roots, at least in part, in the idea of breaching the king's peace. By around the twelfth century, the king of England reserved to his exclusive jurisdiction both the prosecution and the punishment of "all serious offenses against the person other than open manslaying, and also highway robbery, besides breaches of the king's special protection, false moneying, and other contempts of his authority."[591] In this he was supported by his judges, who, by deciding cases, fashioned what became the English common law. What constituted an affront to the public authority in medieval England, and therefore what constituted a crime, was thus anything deemed to fall within the contempt of the king and his courts.

Similarly, in order to come closer to a coherent conception of Islamic criminal law, it is necessary to account for the historical conception of the public sphere in Islamic jurisprudence. Fortunately, previous scholars have laid much of the groundwork for this analysis.

Regime of Rights and Political Discretion

Among classical Muslim jurists, a well-known and well-studied conceptual paradigm for classifying legal rights and obligations was to divide them broadly into two categories: the "rights of God" (*ḥuqūq Allāh*) and the "rights of persons" (*ḥuqūq al-ʿibād*). The widespread use of this rights paradigm is borne

[591] Pollock, "King's Peace," Harvard L. Rev. 1899, 177. Notice that "open manslaying," as distinguished from secret killing (such as by poison), was originally excluded from this medieval list. Redress for homicide, according to Pollock, remained one of the exercisable rights of the victim's kin and was therefore delayed in its inclusion among the king's crimes.

out by its application to numerous contexts.[592] We have encountered it in passing once already. In the last chapter, we saw al-Tumurtāshī make use of it to show when a claim is necessary for the courts to intervene. Recall that, generally speaking, a claim is necessary when a personal right preponderates but not when a divine right preponderates.

That short overview, however, somewhat reduces how important this paradigm is in Islamic jurisprudence, particularly when trying to get at the theoretical underpinnings for political discretion and criminal law. As Anver Emon writes:

> Muslim jurists utilized the *huqūq Allāh*/*huqūq al-ʿibād* heuristic across legal issues and across the Sunnī *madhāhib* in order to illustrate that, in their arguments and rationales for certain rules, the jurists engaged in naturalistic reasoning about the individual and the social good.[593]

This "naturalistic reasoning" is something that we have already observed. Recall once again that al-Tumurtāshī labeled divine rights as "the right of the law" (*ḥuqūq al-sharʿ*), suggesting a normative domain that lies naturally outside that of human beings. Although they frequently deployed the term "rights of God," jurists were aware that the ascription to the divine was, from a practical perspective, metaphorical. The practical function of this paradigm—that is, its effect on the administration of temporal affairs—was to assign discretion to private and public actors and to define the limits of that discretion. We saw, for example, that al-Tumurtāshī, in the matter of adjudicating malfeasance, distinguished between vindicating a private right and vindicating a public one. In making this distinction, al-Tumurtāshī

[592] For example, in classifying sexual violation in Islamic law. See Hina Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure* (New York: Cambridge University Press, 2015), 93–98.

[593] Anver M. Emon, "*Ḥuqūq Allāh* and *Ḥuqūq Al-ʿIbād*: A Legal Heuristic for a Natural Rights Regime," *Islamic Law and Society* 13, no. 3 (2006): 325–91 at 333. Typographical error corrected ("engaged" for "enaged").

was therefore implicitly invoking the rights paradigm. Judicial discretion—and the discretion of legal officials more generally—depended entirely on which right the judge was being asked to vindicate. It is therefore essential to parse out this paradigm a little further. Also, as we will see, this paradigm sheds special light on the combined civil and criminal dimensions of homicide.

In the simple typology that we have seen, rights are divided into purely divine rights, purely personal rights, and mixed rights. Given that mixed rights may preponderate in favor of the divine or the personal, this list may be refined further to the following: (1) purely divine rights, (2) purely personal rights, (3) mixed rights in which the divine right preponderates, and (4) mixed rights in which the personal right preponderates. In all cases, "rights" entailed both the entitlement to perform action and the entitlement to have something performed. This classical Hanafi typology, as we will see, revolved specifically around who had discretion to dispose of a particular benefit (*nafʿ*).

Going in order, let us start with purely divine rights (*ḥuqūq Allāh al-khāliṣa*). These were specifically defined as "that which entails a common good (*nafʿ ʿāmm*) for the world."[594] Jurists clarified the common good further as meaning that "which no individual alone possesses" to the exclusion of anyone else.[595] The Central Asian jurist ʿAlāʾ al-Dīn al-Bukhārī (d. 730/1330), in his commentary on al-Bazdawī's *Uṣūl*, explains the metaphorical ascription of these rights to God:

> These rights are ascribed to Him in deference (*taʿẓīman*). For God Almighty is above taking actual benefit from anything. In view of this, it is not right to say that something is the right of God. Nor is it right to say

[594] ʿAlāʾ al-Dīn al-Bukhārī, *Kashf al-asrār ʿan Uṣūl Fakhr al-Islām al-Bazdawī*, 4 vols. (Istanbul: Şirket-i Saḥāfiye-i Osmāniye, 1892), 4:134.
[595] Al-Bukhārī, 4:134.

> that it is God's right because He created it, since everything is equally God's creation. Rather, the ascription is meant to highlight those things that are such widespread harm or benefit that their prohibition or prescription redound to the benefit of all people.[596]

The "public" in this formulation, to be sure, does not map seamlessly onto the ultra-reified notion of public that we so commonly and casually use today. Many of the purely divine rights involved both individual obligations (such as prayer) and collective obligations (such as military service). However, jurists displayed a recognition that these actions, whether falling upon the individual or the collective, entailed a general benefit for society that was worth defending. For example, the individual prohibition of fornication was designed not only to preserve the lineage of children born to lawful unions, but also to "stay the sword of family feuds that would result from disputes among fornicators."[597] In the same vein, Dāmād Efendi wrote that the juridical basis (*sharʿiyya*) of the rules protecting divine rights was "deterrence against those things from which human subjects (*ʿibād*) suffer harm. Knowledge of the fixed penalties serves to prevent before the fact and to deter from doing it again after the fact.[598]

The purely divine rights were in turn divided into subtypes, all of which need not be spelled out here in detail. The exhaustive list, comprising eight subtypes, was composed of permutations of three basic types of rights: ritual (*ʿibāda*), tax provisions (*maʾūna*), and sanction (*ʿuqūba*).[599] For example,

---

[596] Al-Bukhārī, 4:135.

[597] Al-Bukhārī, 4:135.

[598] Dāmād Efendi, *Majmaʿ Al-Anhur*, 1:584.

[599] The permutations produce the following eight subtypes (1) a pure ritual (*ʿibāda khāliṣa*), such as the daily prayers; (2) a ritual resembling a tax provision (*ʿibāda fihā maʿnā al-maʿūna*), such as the Ramadan charity; (3) a tax provision resembling ritual (*maʾūna fihā maʿnā al-ʿibāda*), such as agricultural taxes on Muslim-held lands; (4) a tax provision resembling a sanction (*maʾūna fihā maʿnā al-ʿuqūba*), such taxes assessed on treaty lands; (5) a mixed ritual and sanction (*ḥaqq dāʾir bayn al-ʿibāda wa-l-ʿuqūba*), such as expiation by fasting or charity; (6) a complete sanction (*ʿuqūba kāmila*), such as the fixed penalties; (7) a deficient sanction (*ʿuqūba qāṣira*), such as denying killers inheritance from their victims; and (8) an independent divine right (*ḥaqq qāʾim bi-nafsih li-Allāh*), such as the disposal of war spoils and natural resources. For a clear exposition of this typology, see *Al-Mawsūʿa al-fiqhiyya*, 45 vols. (Kuwait: Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmiyya, 1980), s.v. *ḥaqq*, §13.

sanctions were not, as I argued earlier in this dissertation, restricted to criminal punishment. Rather, they comprised a broad spectrum of penalties or quasi-penalties. Four subtypes in particular contained some element of a sanction. The first was a tax provision that resembled a sanction (*maʾūna fīhā maʿnā al-ʿuqūba*), such as a tax assessed on treaty lands held by non-Muslims. The second was a mixture of ritual and sanction (*ḥaqq dāʾir bayn al-ʿibāda wa-l-ʿuqūba*), the primary example being expiation (*kaffāra*) by fasting or charity for certain misdeeds. The third was a complete sanction (*ʿuqūba kāmila*), pertaining specifically to many of the offenses carrying fixed penalties (*ḥudūd*), such as fornication, drunkenness, and brigandry. The fourth was the so-called deficient sanction (*ʿuqūba qāṣira*), pertaining exclusively to depriving killers from inheriting their victims. In principle, these rights, being all ritual or quasi-ritual, were regarded as concerning the public interest. They were therefore enforceable by public authorities without private initiative or private legal action, and their enforcement could also not be barred by any private intervention.[600]

Second, there are the purely personal rights (*ḥuqūq al-ʿibād al-khāliṣa*). These are so numerous and recognizable that some classical commentators have simply said as much and moved on.[601] But they may be summarized as anything involving a person's exclusive property interests. These include, notably, the right to lay a damages claim for homicide or personal injury. As a rule, public authorities could not intervene in such private property interests until a claim was filed. In practice as well, it seems that public authorities never did, which makes sense, given that intervening proactively in mundane matters

---

For a classical exposition see, Muḥammad Amīn Amīr Bādishāh, *Taysīr al-taḥrīr: Sharḥ ʿalā Kitāb al-taḥrīr fī uṣūl al-fiqh al-jāmiʿ bayn iṣṭilāḥay al-ḥanafiyya wa-l-shāfiʿiyya*, 4 vols. (Cairo: Al-Bābī al-Ḥalabī, n.d.), 3:174–79.

[600] It is also instructive to point out that this association between pure rituals and pure sanctions is why many jurists placed the chapter on fixed penalties (*kitāb al-ḥudūd*) after the chapters on the four main rituals. See Dāmād Efendi's explanation, for example, at Dāmād Efendi, *Majmaʿ Al-Anhur*, 1:584.

[601] Al-Bukhārī, *Kashf al-asrār*, 4:157.

would be both costly and intrusive.[602]

Third, there are mixed rights in which the divine right predominates. The most notable example given by juries was the fixed-penalty offense of slander (*qadhf*), which usually means, not the casting of any aspersion, but specifically an accusation of illicit sex. Unlike the more "pure" fixed-penalty offenses, slander more directly implicated a private interest, namely the good name of the object of slander. To honor this private interest, a claim by the aggrieved party had to be brought to court before testimony about. However, once the claim was filed, the claimant could not retract, and the court was obligated to see the proceeding to its conclusion pursuant to the public legal interest. Also, once the slander had been established, the sanction could not be waived by the aggrieved party.[603] In addition to slander, some jurists, such as al-Tumurtāshī, included larceny (*sariqa*) as well in the category of mixed rights, whereas other Hanafis placed it among the purely divine rights along with the other fixed-penalty offenses.[604] It is important to note, furthermore, that, besides slander and larceny, there were other mixed rights (in which the divine right predominated) that did not require a claim to be vindicated. In his judicial treatise, al-Tumurtāshī gives the example of a divorcee who, because of an emergency, is forced to leave the house in which she is spending her waiting period and in which she is ordinarily required to remain. If she needed judicial intervention to do so, she did not have to bring a proper claim to be heard by a court. This seems too intuitive to even mention. However, because divorce involved significant personal rights, one might suppose that, under the rule above, all divorce-related matters could

[602] *Al-Mawsūʿa al-fiqhiyya*, s.v. *ḥaqq*, §14.
[603] *Al-Mawsūʿa al-fiqhiyya*, s.v. *ḥaqq*, §15. See also KASHF, 4:158–59. The commentator, 'Alā' al-Dīn al-Bukhārī, notes that the Hanafis differ in this respect from the Shafiʿis, who regard the private interest as preponderant. On this account, the Shafiʿis permitted withdrawal of the claim and waiver of the sanction.
[604] Al-Tumurtāshī, *Musʿifat al-ḥukkām*, 142.

only be settled by the court if someone had a cognizable civil claim. However, because marriage and divorce were also considered quasi-ritual matters, the ordinary rule requiring a proper claim did not apply.[605]

Finally, there are mixed rights in which the personal right predominates.[606] The prime example offered by jurists is requital (*qiṣāṣ*). Earlier in this dissertation, I mentioned that requital, though primarily an extension of other compensatory remedies, nevertheless embodied a public interest. In light of this rights paradigm, we may better understand how jurists formally envision this overlap. Explaining the mixed nature of requital, ʿAlāʾ al-Dīn al-Bukhārī, again commenting on al-Bazdawī, writes:

> Requital encompasses both types of rights in the following way. We have mentioned that homicide is an injury against life. God Almighty possesses the right to be worshipped by that life, and the person has the right to enjoy its preservation. The sanctioned entailed by homicide, therefore, encompasses both right, even it is beyond dispute that the person's right is preponderant (*rājiḥ*). The indicia that requital expresses a divine right include that it, like the fixed-penalty offenses (*ḥudūd*), is mitigated by doubt (*shubha*). They also include that, in essence, requital is recompense for the action itself (*fiʿil*), not a guarantee for the locus of action (*maḥall*), such that a group would be killed for killing one person. Were requital a guarantee for the locus of action, the way damages are, they would not be killed for the act. Recompense for actions, that is to say, is a binding right of God Almighty.
>
> However, because it binds in an equivalent manner, seeking to make reparations (*jabr*) to the extent possible, it embodies a kind of reciprocity for the harm done to the locus. From this it is known that the

[605] Al-Tumurtāshī, 142. Ibn Nujaym writes that a court may hear evidence without a civil claim regarding the following issues: pure fixed-penalty offenses (*ḥadd khāliṣ*), endowments, establishing the manumission or servile status of a slave woman, purely ritual matters like determining, and in divorce. See Zayn al-ʿĀbidīn b. Ibrāhīm Ibn Nujaym, *al-Ashbāh wa-l-naẓāʾir ʿalā madhhab Abī Ḥanīfa al-Nuʿmān*, ed. ʿAbd al-ʿAzīz Muḥammad al-Wakīl (Cairo: Al-Bābī al-Ḥalabī, 1968), 225.
[606] *Al-Mawsūʿa al-fiqhiyya*, s.v. *ḥaqq*, §16.

> personal right preponderates. Additional indicia of this preponderance include that carrying out requital is placed within the mandate of the heirs, that requital is received by inheritance, and that it may be exchanged by settlement for property.[607]

The dominantly private nature of homicide is what distinguished this act of killing from brigandry (*qaṭʿ al-ṭarīq*), which violated an exclusively divine right, implication a public interest and therefore falling to the discretion of the public authorities to hear evidence and pursue. Individual private interests had a stake in the resolution of a homicide that did not exist, or at least was not juridically recognized, in cases of bridandry. The interposition of this dominant private interest explains further why judicial intervention for homicide ordinarily required the laying of a proper claim. Indeed, so strong is this private interest that Dāmād Efendi said that requital is, in practice, the "absolute right of the individual."[608]

That said, the formal adjoining of public interests to private ones was extremely significant. What is served to do, I argue, was enable the vindication of public interests even when private stakeholders declined to exercise their own interests. We have seen this already with al-Tumurtāshī's example of malfeasance. If a petitioner came to a judge asking, not for the recovery of property misappropriated by a public official, but for an end to be put to that official's misbehavior, the judge was freed from the heightened procedural strictures of private civil claims and pursue the one accused of wrongdoing and, if he deemed it warranted, sanction his commission of public wrongs. This applied similarly for other wrongs in which the public and private interests were in tension. Larceny, for example, gave rise simultaneously to the public interest in maintaining the integrity of property ownership generally and to victim's private interest in recovering the stolen property. Accordingly, jurists wrestled with and disagreed about

[607] Al-Bukhārī, *Kashf al-asrār*, 4:161.
[608] Dāmād Efendi, *Majmaʿ Al-Anhur*, 1:585.

how to balance these interests without short-changing them.[609]

The construction and separate articulation of these two legal spaces—one private, one public—were enabled through the paradigm of divine and personal rights. This paradigm went beyond a description of the doctrine that had accumulated over the centuries. Rather, as Emon has shown, it was a productive heuristic that empowered "jurists to construct new rules in light of varying circumstances."[610] Such legislative activity, as it were, need not always have come in the form of written and promulgated statutes. In the same fashion that common-law judges made new decisions frequently without invoking anything more than a previously decided legal principle, the judges in a Muslim polity could apply its discretion, within the paradigm of legal rights, to arrive at "rules" that, though not previously enumerated, were not created out of whole close. There is nothing to suggest, however, that formal written legislation, so long as it comported with this paradigm, would be barred under the same regime.

The juridical mechanism of constructing new rules was the principle of political discretion (*taʿzīr*). On its own, *taʿzīr* referred specifically to the judicial authority to impose sanctions not specified by the law.[611] However, I call it political discretion, rather than simply legal discretion, because this concept was generally regarded to be underpinned by, and for many synonymous with, the sociopolitical demands

[609] Emon, "*Ḥuqūq Allāh* and *Ḥuqūq Al-ʿIbād*," 358–72.

[610] Emon, 388.

[611] Emon, 387. Rendering al-Kāsānī's phrasing, Emon describes the need for *taʿzīr* as arising "when no Sharīʿa precedent addresses a wrong" (*jināya laysa lahā ḥadd muqaddar fī al-sharʿ*). For al-Kāsānī's original, see Abū Bakr b. Masʿūd al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ*, 2nd ed., 7 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1986), 7:63. Emon's translation of *ḥadd* in this context as "precedent," rather than "punishment," is particularly apt. The word *ḥadd*, in addition to meaning a "limit" (whereby the *ḥudūd* represent the moral limits set down by God), it also commonly means "definition" (as in the definition of a term) in the nomenclature of classical jurists. Consequently, when al-Kāsānī says that *taʿzīr* applies to violations that have no *ḥadd* by law, he seems to be referring as much the lack of a definition as to the lack of a sanction. Of course, lack of one follows from the lack of the other, which is part of what makes the ambiguity of the word *ḥadd* so useful.

of the good governance (*siyāsa*).[612] Discretionary sanctions were warranted for violations that were undefined by the law. These violations could be against either a divine right or a personal right. The basis for determining the sanction, however, consisted in a subjective analysis of the aims to be achieved by imposing the sanction—so subjective, in fact, that jurists seemed quite concerned about granting unfettered discretion to judges and other legal authorities.[613]

In any case, it is within this creative discretionary space, I argue, that the formation of positive institutions of government and the enactment of positive legislation could be grounded not simply practically, but also juridically. And it is this exercise of discretion in furtherance of the public good—clothed consciously in the guise of promoting either a divine right or a personal right—that I take to be the space in which a criminal law, posited by the temporal government, could exist according to the concrete demands of the polity. This does not mean that jurists would not—as jurists almost always did—disagree about what a valid or invalid criminal enactment could be. For example, as mentioned above, jurists disagreed about whether fines (*taʿzīr bi-l-māl*) was permissible. They also disagreed about whether the death penalty (*qatl taʿzīran/siyāsatan*) was permissible where it was already an explicitly enumerated sanction. However, these debates were founded on, and therefore reinforced, the basic legitimacy of discretionary positive enactments by the political authority.

The practical application of this discretion, as I also mentioned above, needs to be understood

[612] Peters, *Crime and Punishment*, 68–68, notes the conceptual overlap between the concepts of *taʿzīr* and *siyāsa*, but he nevertheless attempts to distinguish between them. While the distinctions are noteworthy, they are so fine as to be hardly discernible, and Peters does not back up the distinction with any classical citation. For instance, he notes that *taʿzīr* sanctions could only be imposed for acts prohibited by the *sharīʿa* while *siyāsa* sanctions could be imposed in furtherance of a general public interest. Yet the basis for *taʿzīr*, in the Hanafi school at least, is frequently the promotion of some public interest. See, for example, Dāmād Efendi, *Majmaʿ*, 1:609.

[613] Dāmād Efendi, 1:609, in which Dāmād Efendi reviews the varying opinions on the matter.

through the jurisdictions in which it operated. Parallel to rights, jurisdictions were grants of authority, both public and private, to dispose of particular legal matters. The interaction of these jurisdictions helps make sense of how the private civil dimension and public criminal dimension of homicide interacted with one another.

JURISDICTION IN ISLAMIC JURISPRUDENCE

Within Islamic jurisprudence, jurisdiction is expressed with reasonable precision by *wilāya*, whose holder is alternatively called a *wālī*, *mutawallī*, or *walī*.[614] Both the English and Arabic terms, within their respective contexts, capture the multifaceted quality of this legal concept. Jurisdiction, as now generally used, has several meanings. It is, most broadly, the government's general power to exercise authority over all persons and things within its territory. Slightly more narrowly, it also refers to a court's power to decide a case or issue a decree. It also has a territorial dimension, referring to a geographical area, or a subdivision of that area, in which political or judicial authority may be exercised.[615] When qualified, jurisdiction may a refer to the subject matter over which such political or judicial authority may be exercised, such as civil or criminal jurisdiction. *Wilāya* may encompass all of these meanings. It may refer, like *jurisdiction*, both to the office and to the scope of the office. But it also embraces an additional dimension. Specifically, whereas *jurisdiction* is generally used to refer only to the exercise of authority

[614] The plurals, respectively, are *wulāt*, *mutawallūn*, and *awliyā'*. Though not based on any formal statistical analysis, I have observed that *wālī* tends to be used more of public officials, who are often collectively referred to as *wulāt al-umūr*. By contrast, *matawallī* and *walī* are used more often of those holding a private jurisdiction, the former most often for an endowment administrator, the latter for everything else. For example, the heirs who hold the authority to exercise requital or demand damages for homicide are called *awliyā' al-dam*, and each of them is a *walī al-dam*.

[615] *Black's Law Dictionary*, 10th ed., s.v. "jurisdiction." Definitions are taken mostly verbatim, with quotations intentionally omitted to reduce visual clutter.

by public actors, *wilāya* also includes the exercise of authority by private actors.

At bottom, then, legal jurisdiction in Islamic jurisprudence entails the power of disposal (*taṣarruf*) over some legal affair, and more specifically the power to carry out some decision (*tanfīdh al-qawl*) against others whether they accept or refuse.[616] There are two major types of jurisdiction. The first is public jurisdiction (*wilāya ʿāmma*), referring to the power of officials to exercise authority over such persons and matters as they are authorized to exercise authority over. That is a somewhat circular way of saying that public jurisdiction may be delimited. A judge's judicial jurisdiction, for instance, may be extended to or restriction decision-making in certain territories and on certain subject matters. A judge may also be granted political jurisdiction—that is, the jurisdiction over certain military or administrative affairs—in addition to his judicial jurisdiction. Other classically formed jurisdictions include those of the police (*shurṭa*), grievance courts (*maẓālim*), tax collection (*ʿumāla/jibāya/siʿāya*), and the military (*imāra*).[617] The creation and appointment of these jurisdictions is performed by the occupier of a higher jurisdiction, generally speaking the sovereign or a delegate of the sovereign. One of the key markers of public jurisdictions is that its holders are entitled to a salary from the public treasury (*bayt al-māl*), in return for the fulfillment of their offices, whereas holder of private jurisdiction were entitled to no such disbursement of public wealth.[618]

The second major type of jurisdiction is private (*wilāya khāṣṣa*). In a weak sense, private jurisdiction may include a private individual's disposal over his or her own person and property. However, what

[616] ʿAlī b. Muḥammad al-Sharīf al-Jurjānī, *Kitāb al-taʿrīfāt* (Beirut: Dār al-Nafāʾis, 2003), s.v. *al-wilāya fī al-sharʿ*.
[617] For a modern restatement of public jurisdiction, with ample classical references, see *Al-Mawsūʿa al-fiqhiyya*, s.v. *wilāya*, §9–44.
[618] For a modern restatement of public jurisdiction, with ample classical references, see *Al-Mawsūʿa al-fiqhiyya*, s.v. *wilāya*, §9–44.

makes jurisdiction, including when it is of the private sort, is that it entails disposal over others' affairs. To sell your house, for example, or to have an apple for a snack, though both fall within your personal discretion, is generally not an exercise of jurisdiction. Private jurisdiction, rather, entails the exercise of authority regarding someone else's person or property. Supervision of an endowment (*waqf*), which is usually set up by a private benefactor, is a salient example of private jurisdiction. So is any type of legal guardianship, such as over the wealth and well-being of a minor or someone otherwise deemed legally incompetent. A salient example of private jurisdiction for this study belongs to the heirs to a homicide victim, each one of which is called *walī al-dam* or *walī al-maqtūl*, and who may exercise jurisdiction, whether individually or collectively, over the killer. As we have seen at length, this jurisdiction, depending on type of homicide, includes the authority both to demand requital and to demand damages.

Public Jurisdiction

As this overview suggests, Islamic legal jurisdictions were historically diverse, variable, and susceptible to overlapping. Public jurisdictions were theoretically left open-ended by the law. Indeed, in practice the arrangement of public jurisdictions varied considerably from one sovereign Islamic polity to another and over time became embedded into local political custom. Writing sometime in the early fourteenth century, Ibn Taymiyya (d. 728/1328), based in part on observed practice, arrived at the following conclusion:

> How general and specific [public] jurisdictions are, as well as what the scope of authority is of those who occupy them, is a variable question of terminology, circumstance, and custom. There is no definition for this by law. Therefore the jurisdiction of judges (*wilāyat al-quḍāt*) in some places and times may include what falls in the jurisdiction of war (*wilāyat al-ḥarb*) in another place and time, and vice versa. The same

goes for the magistracy (*ḥisba*) and the finance ministry (*wilāyat al-māl*).

Each of these jurisdictions is, at bottom, a legal jurisdiction (*wilāya sharʿiyya*) and a religious office (*manṣib dīnī*). Whoever, therefore, administers them with justice and sagacity, obeying God and His Messenger to the extent possible, will be among the righteous and virtuous; and whoever deals in them with injustice and dissolution will be among the wicked wrongdoers. The applicable precept comes from the following verse, in which God states: "Indeed, the virtuous shall, most surely, be in pure delight. And indeed, the wicked shall, most surely, be in Hellfire." [Q 82:13–14]

Accordingly, in the current custom in the regions of Syria and Egypt, the military jurisdiction (*wilāyat al-ḥarb*) is competent to impose the fixed penalties that are permanent, such amputating the hand of the thief, penalizing the brigand, and so forth. Imposing penalties that are not permanent, such as lashing the thief, often fall within their competence as well, as often does rendering judgment in disputes, controversies, and prosecutions in which there is involved neither a contract nor witnesses. Similarly, the judicial jurisdiction (*wilāyat al-qaḍāʾ*) is competent where there is a contract and witnesses, establishing rights and rendering judgment in such cases. They also have oversight over the administrators of endowments, the wards of orphans, and other well-known matters. In other regions, such as the Maghreb, the military officer has no power to decide anything, but merely carries out the order of whoever occupies the judicial office."[619]

The Syro-Egyptian political custom to which Ibn Taymiyya refers, of course, is that of the Mamluks. His statement here puts normative teeth on the structure of the Mamluk realm (*tartīb al-mamlaka*), as documented by chancery officials and other contemporaries.[620] Ibn Taymiyya's own relationship with

[619] Aḥmad Ibn Taymiyya, *al-Ḥisba* (Amman: Al-Dār al-ʿUthmāniyya, 2004), 61–2.

[620] Abū al-ʿAbbās Aḥmad al-Qalqashandī, *Ṣubḥ al-aʿshā fī kitābat al-inshā*, 14 vols. (Cairo: Al-Maṭbaʿa al-Amīriyya, 1914), 4:5–39.

the Mamluk authorities, as has been documented, was fraught.[621] Yet, to judge by this passage, he drew a distinction between a lack of fairness and a lack of legitimacy. In other words, the failings of the holders of official functions (*wulāt al-umūr*) did not stem from a lack of legitimacy to assign those functions in the first place. The basic power of the political authority not only to appoint (*taqlīd*) people to jurisdictions, but also to define and delimit the scope of those jurisdictions, seems to be beyond reproach.

We observe the same position—the political control of jurisdiction—carried into the Ottoman period. With specific reference to judicial authority, al-Tumurtāshī informs us of the many ways in which the sultan may define the judge's jurisdiction. The judge's jurisdiction was, to begin with, temporary. "It may be qualified," he writes, "by time (*zamān*), place (*makān*), and subject matter (*ḥawādith*). Thus, if the sultan makes one a judge for a certain term, his tenure expires at the end of that term. And the judge of a particular town or subdivision may not adjudicate outside of it."[622] These principles served to minimize forum problems. Having only one judge to adjudicate in each defined geographical area would leave parties that live in that area with one option to settle their disputes. It also helped to minimize the problem of diversity jurisdiction: What if the plaintiff and defendant were domiciled in different geographical areas? Which party's jurisdiction would the dispute be heard in? This was an old disagreement. Abū Yūsuf held that the plaintiff's jurisdiction would take precedence. Al-Shaybānī held the opposite, and this became the majority Hanafi rule.[623] The problem and the solution to diversity jurisdiction both presupposed the legitimacy of a politically appointed judiciary. Indeed, according to an opin-

[621] Sherman A. Jackson, "Ibn Taymiyyah on Trial in Damascus," *Journal of Semitic Studies* 39, no. 1 (1994): 41–85.
[622] Al-Tumurtāshī, *Musʿifat al-ḥukkām*, 97–98.
[623] Al-Tumurtāshī, 98–99.

ion that al-Tumurtāshī cites to Abū Yūsuf, jurisdiction was attached first to the sovereign and only second to the territory. Therefore, if the sovereign went out on a military expedition, the accompanying judges were authorized to adjudicate disputes among the sovereign's subjects. Jurisdiction was so closely attached to the political authority that, even under an oppressive ruler (*jā'ir*), the public appointments are still considered legitimate.

It is extremely significant that politically contingent jurisdictions were not only a historical, but a normative, reality. As I mentioned above, many scholars have viewed classical Islamic jurisprudence as a closed system of normative doctrine and administration, thus viewing the various Islamicate political orders as so many intrusions into the ideal order of law. For example, the courts of grievances (*maẓālim*)—an institution established under that name by the Abbasid caliphate and then continued throughout the Mamluk sultanate—appear in the scholarship as something of a paradox.[624] On the one hand, these courts were formed apparently because the Islamic judicial system failed to deliver adequate justice. On the other hand, because these courts were not truly Islamic, but rather the invention of secular rulers, the justice they delivered was in some way illegitimate.

However, if in fact jurists viewed political variation as a *normative* feature of Islamic law, rather than just a brute practical necessity, this would seem to belie any such notion as a pure Islamic legal administration. Indeed, this notion seems to be an artificial construction of historians. It amounts to saying that the fifty American states all fail to apply American law because each of them differs in their statutory, political, and judicial structures. I do not mean to suggest, subversively, that Islamic law never existed, any more than I means to suggest that American law does not exist. What I mean, rather, is that

[624] For a critical overview of the scholarship on the *maẓālim*, see Mathieu Tillier, "The Mazalim in Historiography," in *The Oxford Handbook of Islamic Law*, ed. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018), 357–80.

Islamic law, like American law or any other complex legal tradition, cannot make sense when it is divorced from the executive functions of the state. This executive function came to be known, in the medieval and early modern nomenclature of Muslim jurists, as *siyāsa* or *siyāsa shar'iyya*. Fortunately, Islamic legal historiography has begun increasingly to recognize the futility, indeed the absurdity, of viewing Islamic law apolitically. Yossef Rapoport, for example, has argued forcefully that "the long-held paradigm that views the state as essentially external to Islamic law … makes no sense at all for legal historians of other civilizations."[625]

Separating law from the demands of the political environment, therefore, not only strains common sense but also seems increasingly at odds with the historical record. Judicial and executive power, it seems more accurate to say, were not seen by jurists to be inherently at odds. Where jurists primarily disagreed, rather, was over how to apportion those functions so as to approximate, if not always perfectly attain, ideal justice.

Distinguishing Law and Fact

Let us now look at how jurists, in their discourse on legal administration, reconciled the principles of law with the demands of political environment. Such statements as the one quoted above from Ibn Taymiyya were incorporated into a broader Mamluk discussion—all under the rubric of *siyāsa*—on the appropriate structure of government, the preferred delegation of public jurisdiction, and the valid scope of each jurisdiction's power.[626] Among Hanafi jurists, this discussion was given perhaps its most thorough and structured elaboration by 'Alā' al-Dīn al-Ṭarābulusī, whose work we have already encountered.

[625] Yossef Rapoport, "Royal Justice and Religious Law: *Siyāsah* and Shari'ah under the Mamluks," *Mamlūk Studies Review* 16 (2012): 71–102 at 102.

[626] I distinguish here advisedly between validity and legitimacy. While jurists differed no end about what was valid or invalid,

This Hanafi discussion was in turn received by Ottoman jurists, notably by Dede Efendi (d. 973/1565), whose Arabic treatise *al-Siyāsa al-sharʿiyya* was translated a number of times into Turkish. Uriel Heyd has seen this work as an unoriginal and therefore rather unremarkable.[627] However, an alternative conclusion may be drawn, namely, that the basic medieval juridical norms regarding public jurisdictions—and more specifically, regarding the variability of jurisdictional arrangements—were received into the Ottoman period without significant modification.

Among members of the Ottoman learned class, Dede Efendi (or Dede Ḫalīfe, as he was also known) had a modest but reputable career. Hailing from Amasya, he had a later start than most. We are told that he was a tanner until about age twenty, when certain encounters with scholar-bureaucrats prompted him to abandon his work as a tradesman and pursue an academic track. He served mostly in academic capacities, working his way up the scale of professorships in a number of colleges, including in Bursa, Amasya, and Aleppo. His reported output included a number of theological and legal treatises, such as his *al-Siyāsa al-sharʿiyya.*[628]

Dede Efendi, following the general structure of al-Ṭarābulusī's treatise, begins by discussing what is specifically meant in law by the term *siyāsa*, which, for simplicity, I will refer to as public policy, a similarly broad concept. In its simplest definition, public policy in Islamic jurisprudence is "law intensified" (*sharʿ mughallaẓ*). What does this mean? Dede Efendi explains by citing al-Bābartī: "Public policy is to intensify the sanction for an offense that has prior legal ruling with the aim of eliminating the evil"

---

they did while presuming the fundamental legitimacy of holding any of those views. This is not unlike the legitimacy of dissent by some members of the US Supreme Court against the majority. Although the dissent's holding is ipso facto invalid, and therefore unlawful in practice, it is not illegitimate to maintain that holding.

[627] Heyd, *Studies*, 199.

[628] ʿAlī b. Bālī, *al-ʿIqd al-manẓūm fī dhikr afāḍil al-Rūm*, 374–75, addended to Taşköprüzāde, *al-Shaqāʾiq al-nuʿmāniyya*.

(*hasman li-māddat al-fasād*).[629] Other jurists put the same idea in terms of "ridding the world of evil" (*ikhlāʾ al-ʿālam min al-fasād*).[630] Having discussed the rights paradigm in Islamic jurisprudence, we may better understand public policy as a principle that extended the reach of the law. Public officials were granted wide latitude (*tawsiʿa ʿalā al-ḥukkām*) to make policy-based decisions.[631] Being charged with upholding the law's norms, they could, for example, impose discretionary sanctions in furtherance of a legal interest (*maṣlaḥa*) inherent in existing legal rules.[632] Al-Ṭarābulusī explained that requital served the legal interest of preserving life and limb (*ṣiyānat al-wujūd fī al-nafs wa-l-aṭrāf*) against would-be killers and injurers.[633] If the process of raising a civil claim failed to meet the required standard of evidence, therefore, the general public authority could, if there existed sufficient cause, investigate the matter and impose a sanction preserved the original interest of the law from being overturned.

Jurists were not so callow as to think that the discretion to extend the law was not susceptible to massive abuse. But they also noted that tying the hands of the public authorities from adopting policies suited to the societies needs would frustrate the objectives of the law. Dede Efendi explains the dilemma:

> Public policy is of two types. There is unjust (*siyāsa ẓālima*) public policy, which the law prohibits. And there is just (*siyāsa ʿādila*) public policy, which exacts what is rightful against the wrongdoer, sets aright many grievances, deters the wicked, and facilitates the objectives of the law. The law therefore mandates

[629] Ibrāhīm b. Yaḥyā Dede Efendi, *al-Siyāsa al-shar'iyya*, ed. Fu'ād ʿAbd al-Munʿim (Alexandria, Egypt: Mu'assasat Shabāb al-Jāmiʿa, n.d.), 73–74. Cf. al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 169.
[630] Emon, "*Ḥuqūq Allāh* and *Ḥuqūq al-ʿIbād*," 326.
[631] Dede Efendi, *al-Siyāsa al-shar'iyya*, 82–90. Cf. Al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 176–78. Both Dede Efendi and al-Ṭarābulusī cite al-Qarāfī.
[632] On legal interest and legal change, see Felicitas Opwis, Maṣlaḥa *and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Leiden: Brill, 2010).
[633] Al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 170.

resorting to it and relying upon it in order to bring about what is right.

It is, however, a broad field that is prone to making minds err and feet slip. For neglecting it, on the one hand, frustrates rights and suspends the law's limits, thus emboldening the wicked and giving aid to the obstinate; while resorting to it liberally opens the door to repugnant abuses and is a cause for the unlawful shedding of blood and seizure of property.

There is therefore a class of people who have tread the blameworthy path of laxity (*tafrīṭ*), for the most part ignoring this domain of activity, on the belief that practicing it contravenes the principles of law (*qawāʿid sharʿiyya*). In doing so, they at once cut off clear avenues to what is right and obstinately pursue a path of blatant error. For to deny lawful public policy amounts to rejecting clear legal texts and to accuse the Rightly Guided Caliphs of error.

Then there is a class of people who have tread the path of excess (*ifrāṭ*), crossing the boundaries of God and exceeding the canons of law (*qānūn al-sharʿ*) to embark upon sundry forms of oppression and wrongful innovation in their public policy. Such people fancy that lawful public policy falls short of the political needs and interest of people. This is blatant ignorance and error....

Finally, there is a class of people who have tread the middle way, the correct way. They join public policy and law together. In so doing they curb and quash wrongdoing while upholding and championing the law.[634]

The loose prescription to take the middle way seems to lack substance. It apparently amounts to a despairing admission that discretionary public policy is both lawful and likely to be abused. This offers cold comfort for those seeking more concrete guidance on how to constitute a lawful government. However, these ambiguous standards are a function of the heuristic quality of the rights paradigm discussed

[634] Dede Efendi, *al-Siyāsa al-sharʿiyya*, 74–76. Cf. Al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 169.

earlier in this chapter. Indeed, ambiguity is an ever-present quality of most constitutional regimes. The success or failure of a given polity's legal system, in the end, depends entirely on the willingness of the polity's members to comply with the standards that they have agreed, explicitly or implicitly, to uphold.

Because it was impracticable to provide a single blueprint for policy in all political settings, Dede Efendi and other jurists instead outlined an open-ended set of standards. In being open-ended, these standards served related purposes. First, they validated the fundamental principle of public discretion. Second, they also stated that principled limits to public discretion existed, even if the exact location of those limits was subject to disagreement. Third, they acknowledged the contingency both of Islamic legal discourse itself and of the political environments in which Islamic law may have been applied.

Through this framework, jurists articulated a juridical space in which legal systems could both comport with Islamic law and considerably vary the institutional expression and even to some extent the substance of law. To put it differently, jurists drew a distinction between law and political fact while recognizing that they were connected. Dede Efendi subtly expresses this tension when saying that those who tread the optimal middle way manage to coherently "join public policy and law together." The explicit separation of *siyāsa* and *sharʿ*, where elsewhere the two are combined into *siyāsa sharʿiyya*, is highly suggestive.

In distinguishing between law and fact, jurists recognized that certain areas of law were subject to variation not on the basis of legal interpretation alone but also on the basis of subjective factual determinations about the legitimate interests of society. We have already seen this already with the notion of variable jurisdictions. Jurisdictions, being legally indeterminate, were therefore subject to fact-based policy decisions. In essence, what Dede Efendi is saying is that, so long as the interests served by a public

policy are legitimate, and so long as no other fundamental principles of law are violated, the holders of temporal authority may adjust the law according the factual situation.[635]

Executive and Judicial Authority

Dede Efendi, again following al-Ṭarābulusī and other earlier writers, fleshes out the implications of the law/fact distinction in two primary ways. First, he shows that many of the sanctions carried out historically, particularly by authoritative figures in the early Muslim community, were so done as a matter of policy, and thus on the basis of subjective factual considerations, not as a matter of law. Second, he shows that the judicial and the executive were distinct but overlapping forms of authority. Let us look at each of these in turn.

Dede Efendi mentions a number of instances in which the early caliphs were reported to impose harsh sanctions not explicitly prescribed by law or even seemingly disallowed by explicit prophetic statements. For example, the Prophet was reported to have said that none may punish with fire except God. Yet, against this, ʿAlī reportedly punished a group of heretics (*zanādiqa*) by fire for ascribing divinity to him.[636] The reported prescription to execute those who engage in homosexual sex, furthermore, was interpreted as a matter of policy (*maḥmūl ʿalā al-siyāsa*) rather than a strict prescription of law.[637] So too the reported prescription to execute a recidivist thief after five acts of larceny.[638] Jurists like Dede

[635] Sherman Jackson discusses the law/fact dichotomy in Sherman A. Jackson, "Islamic Law, Muslims and American Politics," *Islamic Law and Society* 22 (2015): 253–91. He has also, more recently, articulated the notion of public legal discretion as expression a "secular" principle within the framework of Islamic law. See Sherman A. Jackson, "The Islamic Secular," *American Journal of Islamic Social Sciences* 34, no. 2 (2017): 1–31. In using *secular*, Jackson attempts simultaneously to recover the older and plainer sense of the term ("worldly" or "of the world") and to challenge the inherent opposition between the secular and the religious. While I am sympathetic to Jackson's program, I am not prepared to fight the same battle here. The conceptual baggage of *secular* would significantly distract from the broader point I am trying to make. For this reason, unlike Jackson, I intentionally avoid using *secular* and prefer the slightly more neutral term *temporal.*

[636] Dede Efendi, *al-Siyāsa al-sharʿiyya*, 77–78.

[637] Dede Efendi, 78, 81.

[638] Dede Efendi, 80.

Efendi took these incidents not as binding precedents but as situation-specific policies. All of these were a form of *taʿzīr* whose adoption and imposition were ultimately left up to the sovereign's discretion (*raʾy al-imām*).[639] The policy-based nature of these sanctions had two related implications. First, if the sanctions could be imposed, they could also be abandoned. Second, if these could be imposed, other sanctions could be imposed as well.

Such broad latitude awarded to the sovereign, Dede Efendi further explains, is supported by certain features of the law that make it susceptible to natural variations by time (*ikhtilāf al-azmān*) and situation (*ikhtilāf al-aḥwāl*). Here, again following al-Ṭarābulusī, he cites al-Qarāfī. One these features is that the law grants latitude in numerous contexts where the rules otherwise seem firm. For example, those fearing of an oncoming enemy, such as soldiers in battle, may set aside the ordinary motions when performing the prayer.[640] Second, early sovereigns of the Muslim community, pursuant to what later became known as an unattested legal interest (*maṣlaḥa mursala*), adopted policies and institutions without precedent.[641] Third, when the ordinary means of the law failed to uphold well-established rights, the political authority could, as a matter of necessity, institute modifications. For example, if a town was known to have no upstanding citizens, the sovereign was morally obligated to appoint the best available as judge, who was permitted to exercise his best judgment in assessing the reliability of witnesses.[642]

This brings us to the second implication of the law/fact distinction. The latitude afforded to the sovereign meant that there existed a legitimate executive authority, which was governed by political

[639] Dede Efendi, 82.
[640] Dede Efendi, 88.
[641] Dede Efendi, 84–85, defining unattested legal interest as that which the law (*sharʿ*) neither explicitly recognizes nor invalidates, but which may serve as the basis of policy if it comports with good reason and analogous public interests. On unattested legal interest, see Opwis, *Maṣlaḥa*, 165–73.
[642] Dede Efendi, *al-Siyāsa al-sharʿiyya*, 86–87.

circumstance (*siyāsa*), that stood apart from the judicial authority, which was governed by preexisting legal norms (*shar'*). Executive authority enabled the sovereign to vindicate the same rights using procedures not available to judicial officers who were authorized only to resolve private disputes. Al-Ṭarābulusī illustrates these overlapping authorities through an anecdote from the caliphate of ʿAlī. A young man raised a complaint to the caliph against a group of men with whom his father had gone out on a journey. When they returned, his father had not returned with them. They told him that his father had died on the trip and had no possessions with him. Knowing that his father had taken a lot of wealth with him, the young man suspected that the men killed his father and took his property. He brought suit against them before Shurayḥ, the appointed judge. But because he had no witnesses, and the men took a derisory oath, Shurayḥ was forced to let them go. ʿAlī, however, was convinced that the young man's case merited further scrutiny. He called upon his police (*shurṭa*) to detain the men and conducted an investigation. After interrogating them separately, he found that the men's stories did not match up. Under mounting pressure, the men eventually confessed to murdering the young man's father and taking his belongings. ʿAlī fined them the men the value of the stolen property and, for the treacherous murder (*ghadr*), sentenced them to be executed. The basis of both the investigation and the sentence, al-Ṭarābulusī emphasizes, was public policy (*siyāsa*).[643]

If we apply our earlier discussion on the variability of jurisdiction, these separate types of legal authority make better sense. In his sole capacity to resolve civil disputes, Shurayḥ's jurisdiction extended only to private matters, and he was therefore strictly bound, by the rules of evidence, to reject the unverifiable circumstantial evidence raised by the young man and therefore to let the men go even if he

[643] Al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 173.

personally believed them to be lying. ʿAlī's public jurisdiction, by contrast, enabled him, in the interest of the common interest of seeing justice done, to act on the circumstantial evidence and apply a different set of evidentiary standards in order to come to a judgement that better approximated the truth. Recall that adjudication in Islamic jurisprudence fell, as Mohammad Fadel puts it, on a continuum of coercion.[644] When a public norm was at stake, the ruler (*ḥākim*), as the principle holder of public authority, was authorized to adopt stringent measures not available to the judge (*qāḍī*). The same is true, in certain ways, of criminal proceedings today. Because crimes are thought of as violating a public norm, suspected perpetrators may be detained even as they await trial, which may never happen with civil claims. Criminal sanctions are also usually far harsher than criminal sanctions.[645]

As I have argued, criminal law is to be located, as a rule, in the public authority of the executive. In classical Islamic political jurisprudence, executive authority consisted in the power of intervention (*ḥisba*), as distinct from the strictly judicial authority to resolve disputes (*qaḍāʾ*).[646] I mentioned earlier that judicial authority could be expressed through jurisdictions defined by subject matter. The same was true of executive jurisdictions. Classically, as summarized by Dede Efendi, there were two types of public jurisdiction, and there is no hint that either of these was considered by jurists to be "extraordinary." One was the jurisdiction of redressing grievances (*wilāyat al-maẓālim*), the other of prosecuting crimes (*wilāyat al-jarāʾim*). Neither of these jurisdictions was regarded by jurists as entailing limitless

[644] Fadel, "Adjudication in the Mālikī *Madhhab*," 61–75.

[645] This does not mean that those accused of crimes are not afforded certain protections not available to them in civil disputes. Among these are the exclusion of evidence secured by coercion and application of the higher standard of proof beyond a reasonable doubt. However, the prohibition against coerced evidence arguably exists only to counteract the deprivations—such as detention by the police—that suspected criminals may already be subjected to even before being convicted. Also, the origins of proof beyond a reasonable doubt are perhaps as much historical and theological as they are a rational expression of public policy. See James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008).

[646] Fadel, "Adjudication in the Mālikī *Madhhab*," 66. See also Fadel's citation of al-Qarāfī's *Iḥkām* in note 76.

power of coercion. However, in both cases, the holder of such jurisdiction had the authority to adopt investigative measures not available to the regular judge, who was bound by principles of adversarial dispute.[647] Executive authority was not only limited to tribunals. It could be granted to more natural extensions of the sovereign's power, among whom were agents of law enforcement agents, such as the police (*shurṭa*) and so-called market inspector (*muḥtasib*), as well as military personnel.

What is important to note, furthermore, is that these historical public jurisdictions, although not considered extralegal, were also not considered normatively required. To put it in terms of the law/fact distinction, the exact jurisdictional shape of executive authority was a matter of fact, not a matter of law. We saw this earlier in Ibn Taymiyya's statement about the political variability of jurisdictions. Jurists also implied the same point when discussing whether judges (*quḍāt*), in addition to their power to resolve disputes, could also exercise public executive powers if the sovereign so wished. The short answer, as Dede Efendi makes clear, was yes. Citing al-Ṭarābulusī, he argues that the position, particularly in the Hanafi school, is that the judge may be granted some of the powers of executive.[648]

Given the well-established view that judges could be granted executive authority, we should not be surprised to see Ottoman judges, as in the *Case of Satılmış*, exercising authority beyond the resolution of civil disputes. The power to investigate information about a homicide was part of this authority. So was the power to send legal officials to apprehend and bring the accused killer to court on the mere

[647] Baber Johansen, "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim Al-Jawziyya (d. 1351) on Proof," *Islamic Law and Society* 9, no. 2 (January 1, 2002): 168–93.

[648] Dede Efendi, *al-Siyāsa al-shar'iyya*, 105–20. Cf. al-Ṭarābulusī, *Mu'īn al-ḥukkām*, 173–76. Al-Ṭarābulusī notes that al-Qarāfī, as well as al-Māwardī, held the view that the judge could not have jurisdiction over grievances and crimes. However, it is unclear to me whether al-Qarāfī and al-Māwardī were expressing a normative restriction or simply giving a positive account of the legal systems of their times and places. Therefore, it is not clear whether this was a genuine point of disagreement among jurists. [*This is something to look into further and resolve.*]

basis of an allegation (*tuhma*), to put the accused in detention (*ḥabs*), and to use certain forms of verbal and physical pressure to elicit the truth from the accused.[649] Similarly, the sovereign could also restrict these powers or require that the judge impose pecuniary or other nonphysical sanctions upon one found to have committing a public offense. Like jurisdictions in general, such powers "vary according to custom (*ʿurf*) and convention (*iṣṭilāḥ*).... If the judicial jurisdiction in one region or another is restricted, whether expressly or conventionally, from adopting policy-based measures, then the judge may not adopt them. If not, however, the judge may do so. Because a lawful policy claim is decided through examination, such as by detaining or striking the accused, the judge may also render judgment through such means."[650]

Private Preemption of Public Authority

Those delegated such executive authority therefore held wide, though not limitless, latitude in serving of the public good, such as by punishing those known to be evildoers (*maʿrūfūn bi-l-ijrām*).[651] Such punishments—and I call them by this term advisedly—fell under the general category of *taʿzīr*. There was significant one salient instance, however, in which public authority could be preempted. Specifically, private jurisdiction preempted public jurisdiction when the two overlapped by law.

This is illustrated by Dede Efendi in connection with the right of pardon (*ʿafw*). He writes:

> When a discretionary punishment falls exclusively within the public right to establish order, and thus has no connection with the right of a person (*haqq li-ādamī*), the holder of that public authority may choose

[649] Dede Efendi, *al-Siyāsa al-sharʿiyya*, 121–35. Concerning the limitations of using coercion to secure confessions, see Dede Efendi, 129–30; cf. Mohammad Fadel, "Torture," in *Oxford International Encyclopedia of Legal History*.
[650] Dede Efendi, *al-Siyāsa al-sharʿiyya*, 133. Cf. al-Ṭarābulusī, *Muʿīn al-ḥukkām*, 179.
[651] Dede Efendi, *al-Siyāsa al-sharʿiyya*, 132.

> to pursue what best serves the public interests by either pardoning or sanctioning. He is also permitted to allow intercession by those petitioning that the wrongdoer be pardoned. However, if the discretionary punishment comes in connection with right of a person, as in the case of verbal insults and physical attacks, then the one who has been insulted or attacked has a right alongside the public right to correct and rehabilitate. In such a case, the public authority, by pardoning, is not permitted to cancel the right of the one insulted or attacked but must rather fully vindicate the latter's right to sanction the insulter or attacker. However, if the victims pardon, then the public authority has the choice, pursuant to the public interest, either to correctively punish or also to pardon.[652]

This last point was slightly controversial among jurists. Some held that if the victim of an insult or attack pardoned the offender, that preempted the public authority's right to punish.

However, where private pardon did preempt public authority, by unanimous agreement, was in the case of requital for intentional homicide. Here, if the victim's heirs demanded requital, or pardoned the killer, or opted for a settlement, that decision had by law to be honored by the public authority. This preemption rule was captured by Ibn Nujaym and other jurists in a simple maxim: "Private jurisdiction is stronger than public jurisdiction."[653]

What this apparently meant was that, in the case of intentional homicide proven through a private claim, judges could not overrule the heirs in either requiting or pardoning the killer. Here, it seems, the judge's hand was limited in a way that it was not elsewhere. However, it does not seem that, if the heirs declined to requite, the judge could not sanction the wrongdoer with lesser forms of punishment.

[652] Dede Efendi, 136.
[653] Ibn Nujaym, *al-Ashbāh wa-l-naẓā'ir*, 160.

EXCURSUS: POLITICAL PHILOSOPHY

This chapter has focused on the writing of jurists concerning the juridical foundation for structuring government and delegating judicial and executive authority to legal officials. Those writings strongly support a normative principle of public legal discretion. We may supplement that evidence, by way of conclusion, by looking at works of political philosophy by prominent jurists in the sixteenth century.

Specifically, we find additional support for public legal authority in an important line of ethical treatises. The most salient of these, given our Ottoman focus, belongs again to Qınalızāde ʿAlī Çelebi, the same figure who has appeared more than once in this dissertation. Qınalızāde's *Aḫlāq-ı ʿalāl'ī* (or the *Ala'ian Ethics*, as it is called), composed in Turkish, explicitly sees itself as the interpretive continuation of its two Persian antecedents. These works, in reverse chronological order, are the *Akhlāq-i jalālī* of Jalāl al-Dīn Davānī (d. 908/1502) and the *Akhlāq-i nāṣirī* of Naṣīr al-Dīn Ṭūsī (d. 672/1274).[654] All three treatises are formally styled as works in ethics (*akhlāq*), and scholarly convention today accordingly refers to them as each respective author's *Ethics*. But these treatises are not about how to wash your hands, curb your tongue, and generally mind your manners, though to some extent they all touch on such mundane affairs. At bottom, these are works of political philosophy. They all display the Neoplatonic and Aristotelean heritage of medieval Islamic political thought, largely corresponding in substance and coverage to Aristotle's *Politics*. Taken together, these treatises shed important light on an influential elite vision of political order in Islamic thought as well as the survival and adaptation of that

[654] On Ṭūsī, see George E. Lane, "Ṭusi, Naṣir al-Din," *Encyclopædia Iranica.*

vision to the post-Mongol milieu.

Political philosophy, though related to political jurisprudence, is a distinct discipline with its own literature. A full exposition of Islamic political philosophy would therefore take us away from the exact matter at hand. However, Davānī's and Qınalızāde's treatises are worth some brief attention here. Both Davānī and Qınalızāde were trained jurists, and both served in judicial and other official legal capacities. Davānī's life spanned the last seventy-five years or so of the fifteenth century. His professional independence, as compared with Qınalızāde, reflected the greater political fluidity of the time, especially in Iran and Anatolia. Before the firm establishment of the Ottoman and Safavid empires in the early sixteenth century, territorial control changed hands frequently. Political borders were unstable, and the administration of law, in any kind of systematic way, followed suit. The greater part of Davānī's career was spent at Shiraz, where he both studied and taught. He maintained good relations with the two rival Turkmen dynasties who held that city, first the Qara Qoyunlu, then the Aq Qoyunlu when Uzun Ḥasan defeated them. He served for some time as chief judge of the Fars province under the latter dynasty. Through his pen, Davānī was connected with other dynasties, including those that were major rivals to the the Aq Qoyunlus. He dedicated works to the Timurid Abū Saʿīd, the Ottoman Bāyezīd II, and even Maḥmūd of Gujarat. His *Ethics* was one of his earlier works, being dedicated to "Ḥasan Beġ Bahādur Khān," referring to Uzun Ḥasan.[655] Qınalızāde, for his part, was the beneficiary of the sixteenth-century Ottoman project of centralizing the education and public service of the empire's officials. He had a distinguished career both as legal and literary scholar and as a statesman, and he carried out many of his scholarly projects during periods of public service. His *Ethics*, for example, was completed while serving

[655] Muḥammad b. Asʿad Davānī, *Akhlāq-i jalālī* (Lucknow, 1883), 9. On Davānī, see Andrew J. Newman, "Davānī, Jalāl-al-Dīn Moḥammad," in *EIr*.

as the judge of Damascus, and it gained rapid and lasting esteem in Ottoman intellectual circles.[656]

Scholars who have attended to the *Ethics* of each of these scholars have focused mostly on the passages concerning the Circle of Justice (*dā'ire-i 'adliyye*).[657] This was an ancient and widely disseminated political metaphor in the Near East. Attested over time in a number of different formulations, the Circle of Justice represents a kind of proto-constitutional principle,[658] articulating a blueprint for the good government and metaphorically summarizing the appropriate division of wealth, power, and labor that is necessary to build and maintain a prosperous and well-functioning political society. Davānī and Qınalızāde are at the center of this discussion, as their respective formulations effectively and permanently cast the ancient concept in Islamic terms.[659] Qınalızāde seems also to be the first to actually call it the "circle" of justice (though not the first to depict the concept visually in the form of a circle).[660] The *Ethics* of each scholar mounts a cumulative argument about the ideal polity, and the Circle of Justice is that argument's symbolic culmination. Scholars have been right, therefore, to give it special attention.

The *Jalalian* and *Ala'ian Ethics* have other passages, however, that speak a little more directly to the context of public policy. Specifically, the discussion in both works on civilization (*tamddun*) and the art of government (*fann-i siyāsat*) provide a philosophical complement to the juridical basis of discretion

[656] On the background and composition of the *Ala'ian Ethics*, see Hüseyin Yılmaz, *Caliphate Redefined: The Mystical Turn in Ottoman Political Thought* (Princeton, NJ: Princeton University Press, 2018), 72–75.
[657] See generally Linda T. Darling, *A History of Social Justice and Political Power in the Middle East: The Circle of Justice from Mesopotamia to Globalization* (Abingdon, Oxon: Routledge, 2013). Cf. Şerif. Mardin, *The Genesis of Young Ottoman Thought: A Study in the Modernization of Turkish Political Ideas.*, vol. v. 21, Princeton Oriental Studies, (Princeton, N.J.: Princeton University Press, 1962), 94–106.
[658] Indeed, the Circle of Justice was woven into the discourse of Middle East constitutionalism in the nineteenth and twentieth centuries. See Darling, *Circle of Justice*, chaps. 9–10.
[659] Davānī, *Akhlāq-i jalālī*, 331; Kınalızâde Alî Çelebi, *Ahlâk-ı Alâ'î: Kınalızâdenin Ahlâk Kitabı*, ed. Mustafa Koç (Istanbul: Türkiye Yazma Eserler Kurumu Başkanlığı, 2014), PAGE NUMBER. See also Darling, *Circle of Justice*, 117 (Davānī), 140 (Qınalızāde).
[660] Darling, 2.

by sovereign rulers and other public authorities. In Aristotelian fashion, Davānī and Qınalızāde's model for the good administration of a civilized polity (*tadbīr al-madīna*) is analogized to the administration of the household (*tadbīr al-manzil*), which is seen as society's basic unit. The latter discipline corresponds directly to the ancient Greek *oikonomia* (the origin of our modern term "economy"), which, like the Arabic, literally means "household administration." The basic concern of administering the household, as of administering the polity, is the rational management of wealth under circumstances of scarcity.[661] Because necessary resources in both spheres are scarce, their management requires a sensible division of labor, consisting not only in the assignment of tasks to different people but also in the assignment of authority to some over others. The *Ethics* therefore prescribes not only the ideal hierarchy and division of labor but also the desired qualities and competencies to be found in the heads of both household and polity. Just as the household must have both master and servants, so too the polity.

Echoing the political philosophy of al-Fārābī, both Davānī and Qınalızāde accept the premise that human beings, because of their mutual dependence, incline by nature toward civilization (*madanī bi-l-ṭabʿ*). The city (*madīna*)—meant not simply physically as the place of group living, but metaphorically as the place where human "affairs may be ordered in a fitting manner"[662]—is the setting in which the people are best able to flourish both materially and spiritually. However, civilization has a drawback. Because human beings are also self-interested by nature, and have competing desires and aspirations, they are also prone to grave dissension and mutual harm. To curb self-interested impulses and enable

[661] Dotan Leshem, "What Did the Ancient Greeks Mean by *Oikonomia*?," *Journal of Economic Perspectives* 30, no. 1 (2016): 225–38.

[662] Davānī, *Akhlāq-i jalālī*, 233. Translations of the *Jalalian Ethics* are mine with emendations from *Practical Philosophy of the Muhammadan People*, trans. W. F. Thompson (London: Oriental Translation Fund, 1839).

human flourishing, a system of administration, to which all either implicitly or explicitly assent, is necessary. The *Jalalian Ethics* continues:

> They call this administration the supreme governance (*siyāsat-i ʿuẓmā*). To this end, as has been mentioned in the Chapter on Justice, there needs be a law (*nāmūs*), a ruler (*ḥākim*), and a coin (*dīnār*). As to the law, its bearer is such a person who is distinguished from others by divine inspiration (*ilhām*) and revelation (*waḥy*) to assign the duties of ritual and the rules of social intercourse in a manner that serves both worldly and other worldly interests. The ancient philosophers call this person the bearer of the *nomos*, while the convention of the moderns is to refer to its bearer as *nabī* or *shāriʿ* and to its rules as *sharīʿa*.... Next, the ruler is such a person who is so distinguished by divine aid (*taʾyīd-i ilāhī*) as to be able to fulfill and order the interests of individual persons. The ancient philosophers call this person the *absolute sovereign* (*malik ʿalā ʾl-iṭlāq*) and his collective rules *sovereignty*, and the moderns call him *imām* and his collective acts *imāma*. Plato calls him the "administrator of the realm," and Aristotle calls him the "politician"—that is, the one who keeps the affairs of the city, or *polis*, in their due course. When the reins of human interests lie in the capable hands of one of great worth, all manner of blessing and prosperity shall invariably touch every land and every subject.[663]

This passage offers an initial clue that this supreme governance includes two distinct but complementary normative orders, both of which are divinely sanctioned. The *sharīʿa*, properly speaking, is the natural normative order, accessed through revelation and delivered by a human emissary to guide human beings on how to worship and live in keeping with divine will. The *imāma* is the political normative order, established by the one deemed most capable of justly ruling and ordering human affairs such

[663] Davānī, *Akhlāq-i jalālī*, 234–35.

that none in the polity enjoy excessive gains at the expense of others. Both the *sharīʿa* and the *imāma*, in Davānī's formulation, are empowered to issue directives (*aḥkām*), the former in the form of revealed rules, the latter in the form of acts by the legitimate ruler.

Davānī then explains the ruler's position vis-à-vis the two normative orders:

> The administrator of the realm in any case would first be charged with upholding the discrete rules of the law. Yet with respect to particular issues (*juzviyyāt-i umūr*), he may exercise discretion, according to the interests of the time (*maṣlaḥat-i vaqt*), in such a manner as is consonant with the law's universal principles (*qavāʿid-i kulliyya-i sharīʿat*). Such a person would indeed be the shadow and vicegerent of God and the deputy of the Prophet. In the same fashion that the skilled physician keeps in balance the human temperament, so too shall this person watch over the health of the world temperament, which some call the true balance.[664]

Justice (*ʿadālat*) is certainly central to maintaining normative order in the temporal world. But what is salient, in our current context, is that compliance with the divine law does not run counter to the ruler's authority to exercise judgment in the many mundane political matters that require attention. The term for discretion here, *taṣarruf*, is the same found in many legal contexts, such as financial and criminal matters, in which the ruler may undertake actions in the public interest that are not found anywhere in the revealed prescriptions.[665] Whether or not they get written down, these sovereign enactments, I argue, amount to positive legislation. Sovereign enactments must comport with certain universal princi-

[664] Davānī, 236.

[665] For an exposition of major universal principles in the Hanafi tradition, see Ibn Nujaym, *al-Ashbāh wa-l-naẓāʾir*, 19–173.

ples that jurists identify within the natural legal order, but beyond this condition they require nor further explicit authorization. Jurists disagreed about the particular entailments (*juz'iyyāt*) of the law's universal principles.[666] However, such juristic disagreement (*ikhtilāf*), being a constant feature of Islamic legal thought, only lends further legitimacy to the sovereign's positive legal authority. For even when some jurists argued that a policy was unlawful, the object of their dissent was the specific enactment, not the basic principle that the sovereign enjoys wide discretion in matters of public policy.

Qınalızāde follows the same line of argumentation as Devānī, but he augments the thesis to address subtle preoccupations of his sixteenth-century Ottoman political milieu. Some have argued that Qınalızāde, an intellectual figure who exhibits both modesty and self-confidence in his writings, was more hesitant about indulging the unrestrained executive power of the sovereign.[667] There is some justice to this view. In the *Ala'ian Ethics*, Qınalızāde offers the same tripartite Aristotelean view of supreme governance. In his case, however, he tweaks the wording to bring this ancient framework more explicitly in line with an Islamic vision of the natural order, with the rhetorical benefit to boot of making the list rhyme. Accordingly, the three essential components of supreme governance are "the law of the [divine] lawgiver (*nāmus-i şāriʿ*), the safeguarding ruler (*ḥākim-i māniʿ*), and the profitable coin (*dīnār-ı nāfiʿ*)."[668] With slightly greater force than Davānī, Qınalızāde establishes identitifies the *sharīʿa* not just a *nomos*,

[666] See, for example, Ibn Nujaym, 123–26, exploring the limits of sovereign authority to spend public wealth at its discretion. Without negating the basic universal principle that the "sovereign's discretion over subjects (*raʿiyya*) is contingent on public interest," Ibn Nujaym specifically contests abuses in the spending of endowment revenues. Though he does not name names, it seems quite clear that the target of his attack is contemporary rather than historical.

[667] For more on Qinalizade's place in different Ottoman political debates, see Yılmaz, *Caliphate Redefined*, 150–56; Gottfried Hagen, "Legitimacy and World Order," in *Legitimizing the Order: The Ottoman Rhetoric of State Power*, ed. Hakan T. Karateke and Maurus Reinkowski (Leiden: E. J. Brill, 2005), 55–83; Baki Tezcan, "The Definition of Sultanic Legitimacy in the Sixteenth Century Ottoman Empire: The Akhlaq-i Ala'i of Kınalızade Ali Çelebi (1510–1572)" (MA thesis, Princeton University, 1996); Boğaç A. Ergene, "On Ottoman Justice: Interpretations in Conflict (1600–1800)," *Islamic Law and Society* 8, no. 1 (2001): 52–87.

[668] Kınalızâde, *Ahlâk-ı Alâ'î*, 838.

but as *the* universal *nomos*, and he suggests, in calling the ruler its "defender," that the sovereign is ultimately subservient to the natural law.

Qınalızāde does not seem to depart radically from the existing Aristotelean model, nor from Davānī's restatement, as both assert that the natural normative order presupposes the sovereign temporal authority. However, his formulation does reflect the particular Ottoman preoccupation in this period with world order (*niẓām-ı ʿālem*), which could be established only through a law of timeless and universal validity. He is explicit that the *sharīʿa* embraces, if often only as general precepts, all "commands, prohibitions, check, limits, rules, and policies."[669] The elaboration that follows this statement suggests the backdrop against which he made such an explicit statement of the *sharīʿa*'s full scope. It could easily be, acknowledges, that the law of a charismatic and overwhelmingly powerful ruler be mistaken for the universal but more abstract law of the divine. In his own time, the Chingissid *yasa* still loomed large, and the Ottoman *qānūn* was the administrative law of the empire and, because of the Ottomans' Turco-Mongol heritage, the genetic descendant of the *yasa*. Against this concern, Qınalızāde argues that, "although the power (*devlet*) of the ruler … may seem everlasting, and the events brought by the wind may seem to repose by dawn within his power," it is nevertheless the custom of the wind and of the morning light to be here today, gone tomorrow. In other words, he continues, "because the tent of sovereignty must inevitably be severed from that ruling house … that [temporal] law (*qānūn*) must eventually change, and the foundation for its policies must eventually be shaken." He explicitly cites the law of the Chinggisid house as an object case. The natural law, therefore, is not the law of any temporal ruler. He brings his argument full circle by citing, as Davānī does, the reported Aristotelean

[669] Kınalızâde, 838.

statement that the bearers of the natural law are "those who enjoy the fullest of divine providence." Such people, he argues, are only the prophets.[670]

The governance of the world also needs a safeguarding ruler who, with in keeping with the law, is "capable both of administering the interests of the lands and serving the needs of the subjects."[671] These rulers, who themselves do not receive direct divine inspiration, are termed *khalīfa* or *imām*. However, Qınalızāde notes that the actual *khilāfa*, in accordance with a prophetic prognostication, ended after the Rightly-Guided Caliphs (*al-khulafāʾ al-rāshidūn*), after which leadership by force (*teġallüb-i mütagallibe*) created an impediment to those ruling just rulers who directly succeeded the bearer of divine inspiration and law. "Thus, every age does require not an institutor of the divine law (*vāżı-ı şerīʿat*), but it does require a ruler who puts the law into practice and, for particular matters that the law is not explicit on, extracts and bring to light rules from its universal principles."[672] This activity is termed *ijtihād*, a capacity that must be held either by this ruler or, alternatively, by the scholars who guide the ruler. Through this link to the law, the holder of temporal power (*ṣāḥib-i devlet*) may be called the shadow of and vicegerent of God; and, through the same line, the "one exercising apparent authority over the world (*mutaṣarrıf-ı ṣūrī- ʿālem*) is the one exercising actual authority (*mutaṣarrıf-ı ḥaqīqī*)."[673]

Even though Qınalızāde draws a much sharper distinction than Davānī between the natural and temporal normative orders, and thus place a clearer normative constraint on the temporal ruler, a wide space for discretion in specific situations still runs through this scheme. The ruler is still required, in a

[670] Kınalızâde, 838.
[671] Kınalızâde, 842.
[672] Kınalızâde, 842.
[673] Kınalızâde, 842.

complex civilized society, to "oversee administration of justice and equity and to repel injustice, oppression, and tyranny, the society will prosper."[674]. Therefore, although the *Ala'ian Ethics* is more cautious about awarding the sultan's positive enactments the automatic imprimatur of divine sanction, it still appears to support the general authority to act in the service of the public good.

CONCLUSION

In this chapter, I have addressed the vexed problem of how Islamic legal doctrine could be coherently implemented in a variety of political settings. Indeed, the problem appears to be more a problem for Islamic legal historians than it was for historical Muslim jurists and political philosophers. To be sure, as Qınalızāde's political philosophy suggests, traditionally minded jurists had their apprehensions about the replacement of the *sharīʿa* as the natural normative order, or simply its confusion with any supremely powerful temporal regime. What they were not at odds about, however, was the juridical acceptability of policy-based positive enactments (*siyāsa*) by a legitimate sovereign so long as that sovereign, at least notionally, accepted the normative supremacy of the *sharīʿa*. Such positive enactments came, notably, in the form of delegating particular jurisdictions to particular legal officials. The concept of jurisdiction (*wilāya*), which we have discussed at length, is significant because it illuminates the institutional environment in which Islamic law operated. Jurisdiction also helps to distinguish—in a way that coheres with the classical Islamic legal discourse—between judicial authority in the strict sense of resolving disputes (*qaḍā'*) and the political authority that underlay sovereign rule (*ḥukm*). Understanding the nature of sovereign rule, in turn, enables us to get closer to the public legal space in which the

[674] Kınalızâde, 850.

sovereign could legitimately make further policy-based enactments in furtherance of the common good and the general principles of the law. These sovereign enactments, at the level of each polity, are where we must look for criminal homicide.

What this effectively means for the legal historian is that "Islamic" criminal law, as a closed system of law, has never existed. I am content with this conclusion. However, in making this claim, I do not mean to suggest that the discourse of Islamic jurisprudence possesses no stable public norms. What I mean, rather, is that those norms are rather few and thin, and that in practice they make no sense until they get expressed through legal institutions. Instead of focusing squarely on the doctrines of Islamic legal science, it is important as well to examine, for instance, edicts concerning public matters that fell within the sovereign's authority. That many of these edicts were either not formally promulgated as written edicts, or were not collected in one place, does not mean that they are unpreserved. Scholars, particularly those working on Mamluk law, have reconstructed a number of edicts from literary sources.[675]

The Ottoman case, of course, presents certain advantages because Ottoman statutes were frequently written down in official documents. On the basis of such statutes, as I show in the concluding chapter, enable us to better illustrate how Islamic civil and political norms were translated into an actual system of law.

[675] See, for example, Rapoport, "Royal Justice," 86, concerning a 1430 royal edict commanding judges, chamberlains, and other officials not to imprison debtors during an outbreak of the plague. Cf. Yutaka Horii, "The Mamlūk Sultan Qānṣūh Al-Ghawrī (1501–16) and the Venetians in Alexandria," *Orient* 38 (2003): 178–99 at 179, 186.

CHAPTER SEVEN

Conclusion: Homicide in Ottoman Criminal Law

This dissertation has started at one point and arrived at quite another. It started by asking why we find so few homicide cases in the Ottoman court registers. Allowing for the likelihood of societal factors, like the overall safety of Istanbul and other Ottoman cities, I have sought to find whether there are also normative reasons as well. Is there something about the rules, standards, and principles of Islamic homicide law that would either reduce the occurrence of homicide or, more likely, drive the resolution of its occurrences more often into the realm of private negotiation and restitution? Because homicide manifestly implicates both private and public interests—being both an offense against an individual person and a material threat to general social order and security—it serves as a natural lens for examining the nexus between civil and criminal law. Therefore, in examining the normative structure of homicide doctrine in Islamic legal science, I have been naturally led into articulating a broader theoretical framework for studying crime in the Islamic legal tradition.

In this conclusion, I seek to tie together the many parts of this study. However, in place of a straight recap of this study's major themes and findings, I will offer a more applied conclusion. After giving a short summary of the argument, I will show briefly how the theoretical framework outlined over the course of the foregoing chapters can be used to interpret homicide in Ottoman criminal law. Specifically, I will look at the homicide provisions in the sixteenth-century Ottoman Criminal Code and then at several further sample homicide cases. I seek to show that the Ottoman criminal law, in both Ottoman legislation and judicial practice, consisted in the coupling of Ottoman public policy with norma-

tive constraints drawn from Islamic jurisprudence. Such policy-based enactments by the Ottoman sovereign, I seek to illustrate, did not amount to a departure from "Islamic" law but was in fact a discrete political instantiation of it. On the basis of this illustration, I will then discuss some of the broader implications of my findings for the study of Islamic legal thought and history.

ARGUMENT RECAPITULATED

My core argument may be summarized as follows. While Islamic legal science (*fiqh*), including both its substantive (*furūʿ*) and hermeneutic (*uṣūl*) dimensions, constructs a regime of both private and public rights, its primary preoccupation lies with elaborating rules and standards that enable restitution among private persons with seemingly as little intervention by the public authorities as possible. Accordingly, Islamic homicide law, even in its allowance of requital, exhibits a strong logic of civil liability (*ḍamān*), encouraging the resolution of wrongful killings through the payment of civil damages rather than through deprivations imposed by the public authorities. The civil, and thus private, character of homicide law is what enabled these doctrines to be received and applied over long periods of time irrespective of the political environment.

By contrast, jurists were far less voluble about the criminal dimension of homicide. This is because criminal law is a function of public policy, and public policy varies widely according to the means, needs, and objectives of a given polity. Consequently, there arose no elaborate body of public law doctrine that paralleled the private law doctrine. Such public doctrine as existed consisted in a set of principles meant to broadly define the valid interests of the law (*sharʿ*) and thus to shape and constrain the

formation of public policy around those interests. For example, as we saw, the private authority to recover for the injury of homicide, when invoked, trumped the public authority to pardon or otherwise relieve the killer of liability. But beyond the domain of private law, which was much more rigidly determined both substantively and procedurally, the public dimension of the law countenanced not limited but still considerable discretion. In furtherance of the law's interest, the ruling authority could enact substantive rules and adopt procedures to enforce those rules. Therefore, how a public authority should pursue and sanction killers was not defined by Islamic law as such but rather fell to governmental discretion. What constituted a crime and its punishment, in other words, must be sought in the policies adopted by the polity under examination.

HOMICIDE IN OTTOMAN LAW

We may apply this analytical model to Ottoman criminal law. If so interpreted, I argue, Ottoman criminal law may be regarded as one instantiation—in this case, a characteristically Ottoman instantiation—of Islamic public law principles rather than a competitor to them.

It is important to note that there will likely, perhaps necessarily, exist some tension between the Ottoman criminal law and this or that ideal vision of Islamic justice. Whether an Islamic legal system failed to comport perfectly with such visions, or earned the criticism of some Muslim jurists, is a jurisprudential dead-end and a red herring for legal historians. For historians, the Islamicity of a legal system ought to lie simply in whether that legal system lay in the general stream of the Islamic legal tradition. And with respect to jurisprudence, there is hardly a legal system that does not receive the internal criticism of its own legal masters. As noted in Chapter 6, Muslim jurists were well aware that the legislative

and other public powers extended to temporal rulers were subject to abuse. But the mere exercise of public discretion was not a matter of disagreement.[676] Islamic criminal jurisprudence, such as it existed, consisted in an open-ended set of principle. The criminal law as such, however, lay in the enactments of the Ottoman and other political authorities.

Homicide in Ottoman Law

The so-called Ottoman Criminal Code (OCC), particularly evidence in its homicide provisions, exhibits a melding of private and public law doctrines. The criminal code was in fact one section of the Ottoman Law Book (*Qānūnnāme-i Osmānī*), which contained fiscal provisions as well. However, with the expansion of Ottoman law's criminal provisions, the OCC came to stand on its own from other Ottoman public statutes. As with other Ottoman laws, the criminal provisions developed gradually, beginning around the middle of the fifteenth century, and were written and expanded a number of times, with new provisions being added and new organizations being introduced. Many whole and partial versions of the OCC exist, exhibiting variant wordings, in great part because these statutes were written down repeatedly and sent out to the various provinces for implementation by governors and judges.[677] All of these versions were therefore, strictly speaking, official. However, OCC reached its fullest form, unsurprisingly, in the middle of the sixteenth century, during the reign of Sultan Süleymān, and the various available manuscripts are extremely similar in both wording and organization. The likely original compiler

[676] To offer a contemporary parallel, one might argue that the corruptions in the presidential administration of Donald Trump renders his presidency illegitimate and therefore puts his discretionary legal acts as president outside of American law. This, however, is more a rhetorical argument than a jurisprudential one. Rhetorically, his acts, if collectively deemed repugnant, may be branded as un-American. But jurisprudentially, even if his acts are found to be repugnant to American legal principles, they do not fall outside of American law. It is as jurisprudentially meaningless to say that some exercise of public power is un-Islamic as it is to say that it is un-American (or, worse, un-Anglo-American).

[677] For a list of manuscripts of the OCC, see Heyd, *Studies*, 33–37.

of this version was Süleymān's chancellor Celālzāde.[678] It contained 126 enumerable provisions spread out across fifteen enumerated chapters.[679] The Süleymānic OCC was in effect throughout the empire by the end of Süleymān's reign, and the absence of new versions after his reign suggests that this OCC remained largely unmodified for two and a half centuries.[680]

The immediate practical concern of these public laws, as is evident from its provisions and as I have suggested before, was the collection of revenue and thus the creation of circumstances that would induce taxpayers to pay that revenue to the military officials charged with collecting and forwarding it. These circumstances included, notably, maintaining public security and the disciplining corrupt public officials. The criminal provisions may be read generally against this background. The various punishments, including both physical and pecuniary punishments, sought to secure those broad aims. At the same time, however, the exercise of public authority was at times limited or preempted by certain general legal principles. We may observe this in particular with the provisions on homicide.

Most homicide provisions appear in the second chapter of the OCC, titled "On Mutual Beating (*teżārub*), Verbal Abuse (*teşātüm*), Homicide (*qatl-i nefs*), and the Fines (*cerā'im*) for Them." As we may expect, homicide is grouped together with other forms of injury committed by the hand and tongue. Let us look at the relevant provisions:[681]

> 40. If a person inflicts a gashing head-wound [on another] making [his] blood flow, the judge shall chastise [him]

[678] Heyd, 26.

[679] I call the provisions enumerable because they are not actual numbered. Heyd supplies an enumeration, which is what I use will use in citations. The enumeration is aided by the fact that the majority of the provisions are set off by the word "if" (*eǵer).*

[680] Heyd, 32–33.

[681] The translation of these provisions is mostly taken from Heyd, 95–131. However, in certain places, I have made small adjustments that comport with my preferred terminology (e.g., "requital" instead of "retaliation") or that seem to fit the rest of the provision.

and a fine of 30 aspers shall be collected. And if the bone is laid bare and [the wounded person] needs [treatment by] a surgeon—then if the person who inflicted the head-wound is rich, owning one thousand aspers or more, a fine of 100 aspers shall be collected after he has been chastised; if he is poor, [a fine of] 30 aspers; and if he is in average circumstances his property amounting to size hundred aspers, a fine of 50 aspers shall be collected.

41. If a person kills a human being, requital may be carried out, in which case no fine shall be collected. If requital is not carries out, or the killing is not such as to require requital—then if the killer is rich, the property he owns amounting to one thousand aspers or more, a fine of 400 aspers shall be collected; and if he is in average circumstances, owning six hundred aspers, 200 aspers; from a poor person, a fine of 100 aspers; and from an extremely poor person, a fine of 50 aspers.

42. And if two or more persons kill one human being, the fine for homicide shall be collected only once; it shall not be collected from each person separately. And if one person kills two persons or more—if requital for them is carried out, the law shall have been carried out (*şerīʿat yerine varub*); nothing else shall be claimed and no fine be collected. And if requital is not carried out, the judge shall order [the killer to pay] damages; after the decedent's legal heirs (*velī-i maqtūl*) have contented themselves and received their due, one fine shall be collected for each killing as a fine for homicide.

43. If a wounded person states that a certain person has struck him, no regard is [to be paid to his allegation] unless that person is suspect or is someone who has openly been at enmity with the wounded person. [In that case, the assailant] is subject to torture (*ʿörf*) with the cooperation of the judge.

44. If a person is found killed within a quarter or between villages, [the people in the vicinity] shall certainly be examined and compelled to find the killer or to defray the damages. But if no sign of a killing is found [on the dead body, the people] shall not be hurt merely because a corpse has been found [in their vicinity].

50. If a person intentionally (*qaṣdla*) knocks out [another] person's eye or tooth—if requital is carried out, no fine shall be collected; if requital is not carried out or requital is not due, where [the assailant] is rich, 200 aspers shall

be collected as a fine; if he is in average circumstances, 100 aspers; and if he is poor, 50 aspers or 40 aspers.

Art. 40 sets the tone of the following provisions. The judge is instructed, in the case a serious head wound, to chastise the offender (*taʿzīr ėdüb*), often in the form of a corporal punishment, and to fine him 30 aspers. It is generally presumed that the physical punishment entailed strokes, and the amount, being unspecified, was apparently left to the judge's discretion. The fine is fixed unless the wound is severe enough to require medical treatment. In the latter case, the fine is adjusted according to the assailant's financial circumstances.

The following two articles (Arts. 41 and 42) then demonstrate the interaction of Islamic homicide law and Ottoman public law. If one is accused and proven to have committed a homicide entailing requital, the legal heir (*velī-i maqtūl*) may choose to impose requital. If they do, the matter is over, and no fines may be assessed. This appears to be an application of the doctrine that when private and public jurisdiction overlap, the former takes precedence. The lack of a fine here also shows that criminal sanctions were only applied to the offender and could not be assumed by the offender's heirs. In other words, if the killer was executed by requital, the state could not assess a fine because that would amount to punishing the heirs for the killer's misdeed. If the heirs do not impose requital, or if the killing is nonintentional and therefore not entailing requital, the killer lives and may therefore be subject to a fine. This fine, again assessed according to the killer's financial means, comes on top of the civil damages (*diyet*) that the heirs may secure. The same general set of rules applies for nonfatal injuries (Art. 50), where requital in the case of intentional injury stays the government's hand and where nonintentional injury may bring both civil and criminal remedies upon the injurer.

Art. 43 has procedural implications. It suggests that, if a person who suffered a wound invokes the

judge's public authority to apprehend and punish the assailant, the judge may not do so unless there is some additional circumstantial evidence that the accused would have had cause to strike the victim. Such circumstantial evidence included, as mentioned, open enmity between the two parties. This provision does not mean, I suspect, that a civil claim asking for damages may not receive judicial notice. What it means, rather, is that if the complainant offers no evidence at all, the judge is instructed not to exercise independent authority on the grounds of a mere allegation. If there is material reason to believe the complainant, however, the judge may call upon executive officials (*ehl-i ʿörf*) to interrogate the assailant.

Finally, Art. 44 concerns corporate liability. However, the provision does not address the corporate oath (*qasāma*) procedure. Rather, it affirmatively authorizes the judge to investigate a homicide when no killer is known and to apply pressure upon the members of the vicinity to root out the killer, presumably on pain of having to assume liability themselves. The law also confirms that is no signs of foul play are found, the locals will not be forced to assume any responsibility.

As we see from these provisions, the Ottoman statutes on homicide supplemented the prescribed civil penalties with punitive sanctions, often pecuniary ones but also at times physical ones as well. In addition to chastening offenders, the statutes also apparently sought simultaneously to empower the judiciary to take discretionary action and to reduce the burden of the judiciary by excluding baseless claims of injury from judicial notice. The OCC also created a jurisdictional division of labor. The power of discretionary punishment (*taʿzīr*), and of course of adjudication itself, was delegated to the judge. Fines, however, were to be collected and forwarded by the executive officers (*ehl-i ʿörf*).[682] Judges, being

[682] Heyd, 294–95. This conclusion is based on OCC, §18 and §30, according to the Fb manuscript (Başbakanlık Arşivi, Istanbul, Maliye Defteri II, fols. 9b–11b).

trained Ottoman officials rather than local soldiers, were also responsible to police the police, as it were, by reporting corrupt executive officials who fined people without a conviction or collected more than the prescribed amounts. Such abuses occurred with some regularity, such as the collection of the "tithe of damages" (*'öşr-i diyet*). This was a sum that certain corrupt officials, in apparent violation of Ottoman law, would collect from townsmen when someone turned up dead, having died apparently from drowning or some other accident but apparently not at the hands of another human being. Art. 126 of the OCC expressly prohibited the collection of this fine. The wording suggests that the provision was not prospective, but rather reactive to an ongoing problem. There is a fair number of cases in which plaintiffs sued for the return of property taken on the grounds of this unauthorized tithe.[683] A rescript of justice from the early seventeenth century further suggests that the problem of such illegal fining continued to be an issue for the Ottoman central administration.[684]

In sum, then, the OCC shows illustrates legislation in areas where public interests were involved. Where such interests were involved, these statutes served as an adjunct to the largely civil provisions of Islamic jurisprudence. Homicide is particularly illustrative because it is gives rise to both private and public interests. It shows that, in formulating the statutes, the legal drafters of the statutes were sensitive to the boundaries of private and public jurisdiction.

A Sampling of Cases

[683] For example, in 1592, one plaintiff complained that a camel, a carpet, and some gold were taken wrongfully on the grounds that they were a tithe of damages (*bi-ġayr-i ḥakk 'öşr-i diyet deyü*). After considerable argument between the two parties, townspeople intervened and managed to get the two parties to settle on a repayment. Recording the settlement, the record notes that the plaintiff would no longer pursue the defendant with a further claim. See Rıfat Günalan, Mehmet Canatar, and Mehmet Akman, eds., *Üsküdar mahkemesi 84 numaralı sicil (H. 999–1000 / M. 1590–1591)*, İstanbul Kadı Sicilleri 10 (Istanbul: İSAM Yayınları, 2010).

[684] Heyd, *Studies*, 296–99.

Cases involving homicide may also be interpreted with the same framework. What mattered crucially for how the court handled the case was what the court was being asked to do. As we just saw with the OCC provisions, the main obligation of judges was to hear validly presented claims and dispose of them on the terms with which they were brought. As we have seen with the *Case of Satılmış the Falconer*, the petitioning Kılıç Ketḫüdā, who came on behalf of head falconer Ibrāhīm Aġa, was not seeking damages against the alleged killer. What he petitioned the judge to do, rather, was that "the truth of the matter be investigated" (*vaqi' ḥāl keşf olunması*). Upon this request, the presiding judge sent his deputy, along with the local procedural witnesses, to look in to it.

Other cases illustrate a similar modus operandi. For example, in 1551, one Memi b. Yūsuf haled a man into the Üsküdar court and made the following statement: "This here Öksüz Meḥmed b. Yūsuf came on Saturday, and he took a bow and arrow from me and left. And the following night they killed the late Hacı Memi." Öksüz Meḥmed, upon questioning, admitted, "I went on Saturday, took the bow and arrow, and left." The proceeding was recorded upon Memi b. Yūsuf's request.[685] It is admittedly frustrating not to know what became of the homicide claim itself. But it also makes sense that this proceeding does not deal with it. Memi b. Yūsuf is not attempting to prosecute the Öksüz Meḥmed for killing Hacı Memi (a different person by the same name). Indeed, had he wished to, he probably would not have had the standing to do so. It seems, rather, that Memi b. Yūsuf wanted offer potentially useful information to the court's attention or, less altruistically, to cover himself from any liability should Öksüz Meḥmed be held to account for the killing. All that was admitted in this proceeding is that Öksüz Meḥmed had taken the bow and arrow from Memi b. Yūsuf, presumably without the latter known what

[685] Orhan Gültekin, Mehmet Akman, and Mustafa Oğuz, eds., *Üsküdar mahkemesi 17 numaralı sicil (H. 956–963 / M. 1549–1556)*, İstanbul Kadı Sicilleri 6 (Istanbul: İSAM Yayınları, 2010), 275 (no. 674; fol. 67r-1).

they would be used for.

Another case, also recorded in the Üsküdar register, involved two members of the Romany community (*Çingene zümresi*). One Çito b. Poli brought in a man named Yūnus to court and stated, "You—in the judicial district of Yenişehir—you killed the slain Muṣṭafā, and he disappeared. They request that we remand you to them." In other words, Yūnus was accused of killing Muṣṭafā in Yenişehir, then making his way to Üsküdar. The concerned parties in Yenişehir were demanding that Yūnus be remanded to that jurisdiction to face potential consequences there. The request was apparently granted. In addition, Yūnus admitted to having done the deed: "While intoxicated, I and Arslan, a protected non-Muslim (*zimmī*), together killed the deceased Muṣṭafā, and no one else had any involvement in the homicide."[686]

A final colorful case comes from the turbulent economic years after the major currency debasement of 1585. In particular, it illustrates the tension and interaction between public authority and private interests. In the summer of 1592, a woman named Rāżiye bt. Mūsā was apprehended after a group of people reported to the authorities that she was hosting a counterfeiting operation in her house, located near the Meḥmed Paşa Mosque in Üsküdar. In accordance with the law (in the words of the record, *qıbel-i şer'*), a group was sent to investigate the claim. This group included the Üsküdar head of police, a court official, and one of the complainants (whose names are not given in the record). They arrived at Rāżiye's house to discover inside a group of men and women with a stash of counterfeit silver coins (*qalb aqçeleri*) at different stages of fabrication and with all the accoutrements of counterfeiting: an anvil, hammers, a melting pot and ladle, scissors to clip the excess silver off good coins, copper ore to mix in, and casts in which to make the fake coins. The whole crew, counterfeiters and hostess all, were

[686] Gültekin, Akman, and Oğuz, *Üsküdar mahkemesi 17*, 327 (no. 809; fol. 85r-2).

brought to court. Each of them at first denied wrongdoing, but then a couple of them gave in and pleaded poverty or another form of desperation as an excuse for what they were doing. "I'm just a poor soldier," pleaded a man named Sinan, who was in their company. "All they told me was, 'Come and bang out a few coins. And then when I got there, all these people happened to be there working.'" These excuses, along with a tally of the total counterfeit coins, were duly recorded. We don't know exactly what happened to each of the counterfeiters. But Rāżiye, who provided the privacy and security of her home to carry out their work, was soon after put to death on public-policy grounds (*siyāseten qatl olunan*).[687]

This case demonstrates, first of all, the court's involvement in pursuing and punishing criminal activity. Counterfeiting was a serious offense punishable pursuant to a provision in the OCC: "If a counterfeiter's instruments are found in a person's possession, he shall be severely punished" (Art. 99). Under the same article, if someone was found to have engaged in counterfeiting, his or her case was to be referred to the Port for final disposition. I have yet been able to find this case in the Important Affairs registers. However, the absence of any final judgment and sentence in the court registers themselves suggests that a higher executive authority concluded the case. On the basis of the judicial record alone, we know that Rāżiye was executed because of issues that arose in the wake of her death. In a hearing a few weeks later, her husband, one Imirzā Re'īs, was appointed custodian over their minor son's portion of her inheritance. He also sued for the return of Rāżiye's personal effects, which had been confiscated from their home during the whole ordeal.

Rāżiye's case, of course, involves a homicide of the literal, not the criminal, kind. The state, as it were, killed her. However, it nevertheless illustrates how, even in such instances of state-administered

[687] Rıfat Günalan, Mehmet Canatar, and Mehmet Akman, eds., *Üsküdar mahkemesi 84 numaralı sicil (H. 999–1000 / M. 1590–1591)*, İstanbul Kadı Sicilleri 10 (Istanbul: İSAM Yayınları, 2010), 269–87 (nos. 421; fol. 39r-2). 459, 460).

death, private persons could still bring and have honored recovery claims that arose because of the decedent's death. We see in Rāżiye's case again the delicate interplay between private and public interests.

A MODEL FOR STUDYING ISLAMIC CRIMINAL LAW

In this dissertation, I have sought to develop an analytical model for studying crime in Islamic jurisprudence. Specifically, I have broadened the scope of Islamic jurisprudence from centering around Islamic civil jurisprudence alone to including political jurisprudence as well. This model, I believe, can help resolve many of the reservations that scholars have had studying criminal jurisprudence in both the premodern and modern Islamicate legal systems.

Till now, the search for genuine principles of criminal law in Islamic jurisprudence has led scholars for the most part to throw up their hands in despair. Urield Heyd matter-of-factly declares the deficiencies of Islamic substantive and procedural law where crime was concerned. Anderson is forced to look for an emergent concept of crime hidden somewhere in the interstices of Islamic homicide doctrine. And Rudolph Peters resigns himself to the limitation that Islamic law is incommensurable with the "notion of law as found, for example, in common law and civil law systems."[688] He states further that Islamic criminal law, in the end, cannot really be compared with criminal law in common-law or civil-law systems because "we are dealing with a fluid and often contradictory body of opinions and not with a uniform, unequivocal doctrine of criminal law."[689] This analytical impasse arises, I argue, because scholars have supposed that the entirety of Islamic law is contained within the traditional manuals and commentaries of Islamic legal science.

[688] Peters, *Crime and Punishment*, 1.
[689] Peters, 2.

Peters's comments particularly highlight the consequences of narrowing the field of Islamic law to legal science. He and other scholars, whether implicitly or explicitly, take the discursive writings of jurists to constitute the positive *system* of law in all premodern Islamic lands. Yet Islamic legal science was no such thing. What makes for a positive system of law are both the doctrines of law and the institutions of government. Because institutional structures, in the Islamic lands as elsewhere, varied from polity to polity, the "systems" of Islamic law, like the systems of common law and civil law, were similarly different from polity to polity. Islamic legal science, rather, was the centerpiece of the *tradition* of legal thought, in no way different in its discursive nature from the European and English traditions of legal thought. Peters therefore compares apples and oranges: Islamic legal science cannot be compared with common-law or civil-law systems, because doing so would be to compare a discursive legal tradition that is not attached to a particular political entity with the discrete legal systems that are. Had Peters compared tradition with tradition, he would have been forced to modify his comparative statement. If anyone reads the elaborate treatises of premodern English or European jurists, one would know that there is simply nothing "uniform" or "unequivocal" about the common-law and civil-law traditions.

Central to my argument, then, is that homicide in the Islamic legal tradition is distinguishable from homicide in any particular Islamic legal system. Through an extended analysis of both substantive and procedural doctrine, I have shown that, in the discursive discipline of Islamic legal science, homicide is governed by private civil principles rather than public criminal ones. Muslim jurists classified homicide as a part of the "interpersonal law," or *muʿāmalāt*, one of the two broad headings of Islamic legal science alongside the "devotional law" (*ʿibādāt*). Interpersonal law was functionally identical to what we today

call civil law. Its main concern, in other words, was with the legal relationship between individuals rather than the legal relationship between the individual and the public. The appearance of homicide in interpersonal law does not mean that Muslim jurists were unaware of or unconcerned with the public aspects of the act. What it means, I argue, is that Islamic interpersonal law was the venue for addressing the private implications of the act. This is why nearly all of the doctrine focuses on what recovery, and under which evidentiary conditions, a victim's heirs can gain for the wrongful death. Their satisfaction may come in kind or in cash (and usually in the latter), but in either case the remedy is a form of civil compensation, not a criminal punishment.

This claim aligns crime and punishment in Islamic law with the modern understanding of these terms. Criminal law is fundamentally political. What defines a crime is not what the legal scholars deem to be wrong, but rather what the political authority affirmatively undertakes to proscribe and punish. In other words, criminal law exists at the level of the legal system. For example, it impossible to speak, in anything more than rhetorical terms, about "Western criminal law." The West is composed of numerous independent polities. American criminal law, to give another example, is by and large a state-level issue, and the discrepancies between states' criminal statutes is innumerable. Each country in the West, and each state in the United States, has its own internal capacity to prohibit and punish certain behaviors. In quite the same way, it is impossible to speak coherently about "Islamic criminal law." Islamic polities across time and space varied in their rules about what kinds of behavior should be discretionarily punished.

Through the example of homicide, I have argued that, as distinct from Islamic civil law, we must seek out criminal law in the Islamic tradition one legal system at a time. Legal systems, like criminal law,

are politically contingent. The civil rules of a legal tradition tend to transcend political change. This is why, for example, the major civil doctrines of the English common law—tort, contract, and property—remain largely the same in America today despite crossing the Atlantic and undergoing a Revolution. American criminal law, by contrast, has by nature been highly changeable. In similar fashion, we see a high degree of continuity in Islamic civil jurisprudence. We also see that Muslim jurists, in their works of legal science, wrote rather little about public policy. For general principles of public law, we must look to the more specialized area of political jurisprudence. For criminal law as such, we must look for evidence in the recorded acts, such as they exist, of temporal rulers.

I have chosen to focus on Ottoman criminal law. However, the analysis I have applied here may be equally applied to other Islamicate legal systems, whether medieval or early modern. By validating the administrative acts of political authorities as part of Islamic law, I have sought to show that Islamic law, for anyone but those focused on pure jurisprudence, cannot exist outside of a political environment. Therefore, the opposition that many scholars have created between Islamic law and Ottoman law is, I contend, devoid of meaning.

The implications of this study for Islamic law in the modern period is significant as well. If indeed Islamic law in principle embraces a plurality not only of legal opinions but also of legal systems, scholarship may need to reconsider the terms in which it regards the law of Muslim countries in the twentieth and twenty-first centuries. One cannot doubt that the premodern polity and the modern nation-state have fundamental differences. However, it is not so simple to say that Islamic law, being the product of the premodern world, is barred from existence in the modern one. That statement presumes a binary in which Islamic law either exists or does not exist. Yet if Islamic law could previously be molded to the

political environments of the past, the same may be true of Islamic law today. That, however, is a discussion for another time.

Bibliography

Abbasov, Azar. "Taḥqīq *Biḍāʿat al-qāḍī li-iḥtiyājihi ilayhi fī al-mustaqbal wa al-māḍī* al-mansūba ilā Shaykh al-Islām Abī al-Suʿūd Afandī." *İslam Araştırma Dergisi* 35 (2016): 127–83.

Abd-Allah, Umar F. *Mālik and Medina: Islamic Legal Reasoning in the Formative Period*. Leiden: Brill, 2013.

Abou El Fadl, Khaled. "Qurʾanic Ethics and Islamic Law." *Journal of Islamic Ethics* 1 (2017): 7–28.

————. *Reasoning with God: Reclaiming Shari'ah in the Modern Age*. Lanham, MD: Rowman & Littlefield, 2014.

Abū al-Suʿūd Muḥammad b. Muḥammad al-ʿImādī. *Irshād al-ʿaql al-salīm ilā mazāyā al-kitāb al-karīm*. 9 vols. Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.

Ahmad, Muhammad Mushtaq. "The Notions of Dār Al-Ḥarb and Dār Al-Islām in Islamic Jurisprudence with Special Reference to the Ḥanafī School." *Islamic Studies* 47, no. 1 (2008): 5–37.

Ahmad, Shahab, and Nenad Filipovic. "The Sultan's Syllabus Yo: A Curriculum for the Ottoman Imperial *Medreses* Prescribed in a *Fermān* of Qänūnī I Süleymān, Dated 973 (1565)." *Studia Islamica* 98/99 (2004): 183–218.

Aḥmadī, ʿAbd al-ʿAzīz b. Mabrūk al-. *Ikhtilāf al-dārayn wa āthāruhu fī aḥkām al-sharīʿa al-ilāmiyya*. 2 vols. Medina: Al-Jāmiʿa al-Islāmiyya, 1424.

Ahmed, Dawood I., and Tom Ginsburg. "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions." *Virginia Journal of International Law* 54 (2013): 1–83.

Ailes, Edgar H. "Substance and Procedure in the Conflict of Laws." *Michigan Law Review* 39 (1941): 392–418.

Akdağ, Mustafa. *Celâlî isyanları (1550–1603)*. Ankara: Ankara Üniversitesi Basımevi, 1963.

Akgündüz, Ahmet, ed. *Osmanlı kanunnâmeleri ve hukukî tahlilleri*. 9 vols. Istanbul: Osmanlı Araştırmaları Vakfı, 1990.

Al-Azem, Talal. *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Quṭlūbughā's Commentary on the Compendium of Qudūrī*. Leiden: E. J. Brill, 2017.

Al-Ḥajarī, Aḥmad b. Qāsim. *Kitāb nāṣir al-dīn ʿalā 'l-qawm al-kāfirīn* (*The supporter of religion against the infidels*). Edited by P. S. van Koningsveld, Q. Samarrāʾi, and Gerard Albert Wiegers. 2nd ed. Madrid: Consejo Superior de Investigaciones Científicas, 2015.

Al-Mawsūʿa al-fiqhiyya. 45 vols. Kuwait: Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmiyya, 1980.

American Jurisprudence. 2nd ed. St. Paul, MN: Thomson Reuters, 2010.

Amīr Bādishāh, Muḥammad Amīn. *Taysīr al-taḥrīr: Sharḥ ʿalā Kitāb al-taḥrīr fī uṣūl al-fiqh al-jāmiʿ bayn iṣṭilāḥay al-ḥanafiyya wa-l-shāfiʿiyya*. 4 vols. Cairo: Al-Bābī al-Ḥalabī, n.d.

Anderson, J. N. D. "Homicide in Islamic Law." *Bulletin of the School of Oriental and African Studies* 13, no. 4 (1951): 811–28.

Anhegger, Robert., and Halil Inalcık, eds. *Ḳānūnnāme-i Sulṭānī ber mūceb-i 'Örf-i 'Osmānī: II. Mehmed ve II. Bayezid devirlerine ait Yasaḳnāme ve Ḳānūnnāmeler*. Ankara: Türk Tarih Kurumu Basımevi, 1956.

Antov, Nikolay. *The Ottoman "Wild West": The Balkan Frontier in the Fifteenth and Sixteenth Centuries*. Cambridge: Cambridge University Press, 2017.

Arnold, Thurman. "The Role of Substantive Law and Procedure in the Legal Process." *Harvard Law Review* 45, no. 4 (1932): 617–47.

Ashfūrqānī, ʿImād al-Dīn Muḥammad b. Muḥammad al-Khaṭīb al-. *Ṣinwān al-qaḍāʾ wa ʿunwān al-iftāʾ*. Edited by Mujāhid al-Islām al-Qāsimī. 2nd ed. Kuwait: Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmiyya, 2010.

Atçil, Abdurrahman. *Scholars and Sultans in the Early Modern Ottoman Empire*. Cambridge: Cambridge University Press, 2017.

Atçıl, Abdurrahman. "The Route to the Top in the Ottoman Ilmiye Hierarchy of the Sixteenth Century." *Bulletin of the School of Oriental and African Studies* 72, no. 3 (2009): 489–512.

Aydın, Bilgin, and Rıfat Günalan. "XVI. Yüzyılda Osmanlı Devleti'nde Mevleviyet Kadıları." In *Prof. Dr. Şevki Nezihi Aykut Armağanı*, edited by Gülden Sarıyıldız, Niyazi Çiçek, İshak Keskin, and Sevil Pemuk, 19–34. Istanbul: Etkin Kitaplar, 2011.

Azam, Hina. *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure*. New York: Cambridge University Press, 2015.

Baghdādī, Ibn Ghānim. *Majmaʿ al-ḍamānāt fī madhhab al-Imām al-Aʿẓam Abī Ḥanīfah al-Nuʿmān*. 2 vols. Cairo: Dār al-Salām, 1999.

Baghdādī, Ibn Ghānim al-, and ʿAbd al-ʿAzīz Muṣṭafā al-Khālid. *Maljaʾ al-quḍāt ʿinda taʿāruḍ al-bayyināt*. Mecca: Jāmiʿat Umm al-Qurā, 1986.

Baldwin, James E. *Islamic Law and Empire in Ottoman Cairo*. Edinburgh: Edinburgh University Press, 2017.

Bartlett, Robert. *Trial by Fire and Water: The Medieval Judicial Ordeal*. Oxford: Clarendon Press, 1986.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. Oxford: Clarendon Press, 1907.

———. *Of Laws in General*. Edited by H. L. A. Hart. Collected Works of Jeremy Bentham. London: Athlone Press, 1970.

Berk, Richard. "New Claims about Executions and General Deterrence: Déjà Vu All Over Again?" *Journal of Empirical Legal Studies* 2, no. 2 (2005): 303–333.

Biran, Michal. *The Empire of the Qara Khitai in Eurasian History: Between China and the Islamic World*. Cambridge: Cambridge University Press, 2005.

Black, Henry Campbell. *Black's Law Dictionary*. Edited by Bryan A. Garner. 10th ed. St. Paul, MN: Thomson Reuters, 2014.

Bosworth, Clifford Edmund. *The New Islamic Dynasties: A Chronological and Genealogical Manual*. Edinburgh: Edinburgh University Press, 1996.

Bukhārī, Burhān al-Dīn Maḥmūd b. Aḥmad al-. *Al-Muḥīṭ al-burhānī fī al-fiqh al-nuʿmānī*. Edited by ʿAbd al-Karīm Sāmī al-Jundī. 9 vols. Beirut: Dār al-Kutub al-ʿIlmiyya, 2004.

Bukhārī, ʿAlāʾ al-Dīn al-. *Kashf al-asrār ʿan Uṣūl Fakhr al-Islām al-Bazdawī*. 4 vols. Istanbul: Şirket-i Saḥāfiye-i Osmāniye, 1892.

Burak, Guy. "Between the *Ḳānūn* of Qāytbāy and Ottoman *Yasaq*: A Note on the Ottomans' Dynastic Law." *Journal of Islamic Studies* 26, no. 1 (2015): 1–23.

———. "Evidentiary Truth Claims, Imperial Registers, and the Ottoman Archive: Contending Legal Views of Archival and Record-Keeping Practices in Ottoman Greater Syria (Seventeenth–Nineteenth Centuries)." *Bulletin of the School of Oriental and African Studies* 79, no. 2 (2016): 233–54.

Calabresi, Guido, and A. Douglas Melamed. "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral." *Harvard Law Review* 85, no. 6 (1972): 1089–1128.
Calder, Norman. *Studies in Early Muslim Jurisprudence*. Oxford: Clarendon Press, 1993.
Coase, Ronald. "The Problem of Social Cost." *Journal of Law and Economics* 3 (1960): 1–44.
Cook, Walter Wheeler. "'Substance' and 'Procedure' in the Conflict o Laws." *Yale Law Journal* 42 (1933): 333–58.
Cooter, Robert, Stephen Marks, and Robert Mnookin. "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior." *Journal of Legal Studies* 11 (1982): 225–51.
Coşgel, Metin M., Boğaç Ergene, Haggay Etkes, and Thomas J. Miceli. "Crime and Punishment in Ottoman Times: Corruption and Fines." *Journal of Interdisciplinary History* 43, no. 3 (2013): 353–76.
Coulson, N. J. "Doctrine and Practice in Islamic Law: One Aspect of the Problem." *Bulletin of the School of Oriental and African Studies* 18, no. 2 (1956): 211–226.
Coulson, Noel J. *A History of Islamic Law*. Edinburgh: Edinburgh University Press, 1964.
Dāmād Efendi, ʿAbd Allāh b. Muḥammad. *Majmaʿ Al-Anhur: Sharḥ Multaqā Al-Abḥur*. 2 vols. Istanbul: Maṭbaʿa-i ʿĀmire, 1901.
Damaška, Mirjan R. *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven: Yale University Press, 1986.
Darling, Linda T. *A History of Social Justice and Political Power in the Middle East: The Circle of Justice from Mesopotamia to Globalization*. Abingdon, Oxon: Routledge, 2013.
Davānī, Muḥammad b. Asʿad. *Akhlāq-i jalālī*. Lucknow, 1883.
Dede Efendi, Ibrāhīm b. Yaḥyā. *al-Siyāsa al-sharʿiyya*. Edited by Fuʾād ʿAbd al-Munʿim. Alexandria, Egypt: Muʾassasat Shabāb al-Jāmiʿa, n.d.
Demirtaş, H. Necati. *Fetvâları ile Şeyhülislâm Ebüssuʿûd Efendi*. Istanbul: Akıl Fikir Yayınları, 2016.
Donner, Fred M. *Narratives of Islamic Origins: Whe Beginnings of Islamic Historical Writing*. Princeton, NJ: Darwin Press, 1998.
Dubber, Markus D. *An Introduction to the Model Penal Code*. 2nd ed. Oxford: Oxford University Press, 2015.
Duxbury, Neil. *Frederick Pollock and the English Juristic Tradition*. New York: Oxford University Press, 2004.
Düzdağ, Mehmet Ertuğrul. *Şeyhülislâm Ebussuud Efendi Fetvaları Işığında 16. Asır Türk Hayatı*. 2nd ed. Istanbul: Enderun Kitabevi, 1983.
Eads, Linda S. "From Capone to Boesky: Tax Evasion, Insider Trading, and Problems of Proof." *California Law Review* 79 (1991): 1421–84.
Ebussuûd Efendi. *Maʿrûzât*. Edited by Pehlul Düzenli. Istanbul: Klasik, 2013.
EI2 = *Encyclopaedia of Islam, Second Edition*. Edited by P. Bearman et al. 12 vols. Leiden: E. J. Brill, 1960–2005. Online at http://referenceworks.brillonline.com.
EI3 = *Encyclopaedia of Islam, THREE*. Edited by Kate Fleet et al. Leiden: E. J. Brill, 2007–. Online at http://referenceworks.brillonline.com.
EIr = *Encyclopaedia Iranica*. Edited by Ehsan Yartasher and Elton Daniel. London: Routledge, 1983–. Online at http://www.iranicaonline.org.
El Shamsy, Ahmed. *The Canonization of Islamic Law: A Social and Intellectual History*. New York, NY: Cambridge University Press, 2013.

El-Awa, Muhammed Selim. "Approaches to *Sharīʿa*: A Response to N. J. Coulson's *A History of Islamic Law*." *Journal of Islamic Studies* 2, no. 2 (1991): 143–79.

Ellickson, Robert C. *Order without Law: How Neighbors Settle Disputes*. Cambridge, MA: Harvard University Press, 1994.

Emon, Anver M. "*Ḥuqūq Allāh* and *Ḥuqūq Al-ʿIbād*: A Legal Heuristic for a Natural Rights Regime." *Islamic Law and Society* 13, no. 3 (2006): 325–91.

Engel, David. *Myth of the Litigious Society: Why We Don't Sue*. Chicago: University of Chicago Press, 2016.

Ergene, Boğaç A. "On Ottoman Justice: Interpretations in Conflict (1600–1800)." *Islamic Law and Society* 8, no. 1 (2001): 52–87.

Erol, Rasim, Salih Kahriman, Fuat Recep, Sabri Atay, Hüseyin Kılıç, and Yılmaz Karaca, eds. *Istanbul mahkemesi 12 numaralı sicil* (*H. 1073–1074 / M. 1663–1664*). İstanbul Kadı Sicilleri 16. Istanbul: İSAM Yayınları, 2010.

Fadel, Mohammad. "Adjudication in the Mālikī *Madhhab*: A Study of Legal Process in Medieval Islamic Law." PhD diss., University of Chicago, 1995.

———. "'*Istiḥsān* Is Nine-Tenths of the Law': The Puzzling Relationship of *Uṣūl* to *Furūʿ* in the Mālikī *Madhhab*." In *Studies in Islamic Legal Theory*, edited by Bernard G. Weiss, 161–76. Leiden: E. J. Brill, 2002.

———. "Political Legitimacy, Democracy and Islamic Law: The Place of Self-Government in Islamic Political Thought." *Journal of Islamic Ethics* 2 (2018): 59–75.

———. "Public Reason as a Strategy for Principles Reconciliation: The Case of Islamic Law and International Human Rights Law." *Chicago Journal of International Law* 8 (2007): 1–20.

———. "Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought." *International Journal of Middle East Studies* 29, no. 2 (1997): 185–204.

Farnsworth, Ward. *The Legal Analyst: A Toolkit for Thinking about the Law*. Chicago, IL: University of Chicago Press, 2007.

Faroqhi, Suraiya. "The Life and Death of Outlaws in Çorum." In *Armağan: Festschrift Für Andreas Tietze*, edited by Ingeborg Baldauf, Suraiya Faroqhi, and Rudolf Vesely, 59–77. Prague: Enigma Corporation, 1994.

———. "Town Officials, *Timar*-Holders, and Taxation: The Late Sixteenth-Century Crisis as Seen from Çorum." *Turcica* 18 (1986): 53–82.

Feeley, Malcolm M. "Plea Bargaining and the Structure of the Criminal Process." *Justice System Journal* 7 (1982): 340–54.

———. *The Process Is the Punishment: Handling Cases in a Lower Criminal Court*. New York: Russel Sage Foundation, 1979.

Feinberg, Joel. "The Expressive Function of Punishment." *The Monist* 49, no. 3 (1965): 397–423.

Fish, Morris J. "An Eye for an Eye: Proportionality as a Moral Principle of Punishment." *Oxford Journal of Legal Studies* 28, no. 1 (2008): 57–71.

Fleischer, Cornell. *Bureaucrat and Intellectual in the Ottoman Empire: The Historian Mustafa Âli* (*1541–1600*). Princeton, NJ: Princeton University Press, 1986.

————. “Of Gender and Servitude, ca. 1520: Two Petitions of the Kul Kızı of Bergama to Sultan Süleyman.” In *Mélanges En l’honneur Du Prof. Dr. Suraiya Faroqhi*, edited by Abdeljelil Temimi, 143–51. Tunis: Fondation Temimi pour la Recherche Scientifique et l’Information, 2009.

Friedman, Lawrence M. *Crime without Punishment: Aspects of the History of Homicide*. Cambridge: Cambridge University Press, 2018.

Galanter, Marc. “Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society.” *UCLA Law Review* 31 (1983): 4–71.

Garner, Bryan A. *Garner’s Dictionary of Legal Usage*. 3rd ed. New York: Oxford University Press, 2011.

Ginio, Eyal. “Perceiving French Presence in the Levant: French Subjects in the Sicil of 18th Century Ottoman Salonica.” *Südost-Forschungen* 65–66 (2007 2006): 137–64.

Green, Leslie. “Law and Obligations.” In *The Oxford Handbook of Jurisprudence and Philosophy of Law*, edited by Jules Coleman and Scott Shapiro, 514–48. Oxford: Oxford University Press, 2002.

Grossman, Lewis. “Codification and California Mentality.” *Hastings Law Journal* 45 (n.d.): 617–39.

Gültekin, Orhan, Mehmet Akman, and Mustafa Oğuz, eds. *Üsküdar mahkemesi 17 numaralı sicil* (*H. 956–963 / M. 1549–1556*). İstanbul Kadı Sicilleri 6. Istanbul: İSAM Yayınları, 2010.

Günalan, Rıfat, Mehmet Canatar, and Mehmet Akman, eds. *Üsküdar mahkemesi 84 numaralı sicil* (*H. 999–1000 / M. 1590–1591*). İstanbul Kadı Sicilleri 10. Istanbul: İSAM Yayınları, 2010.

Hagen, Gottfried. “Legitimacy and World Order.” In *Legitimizing the Order: The Ottoman Rhetoric of State Power*, edited by Hakan T. Karateke and Maurus Reinkowski, 55–83. Leiden: E. J. Brill, 2005.

Hallaq, Wael B. “From *Fatwās* to *Furūʿ*: Growth and Change in Islamic Substantive Law.” *Islamic Law and Society* 1, no. 1 (1994): 29–65.

————. “Juristic Authority vs. State Power: The Legal Crises of Modern Islam.” *Journal of Law and Religion* 19, no. 2 (2004 2003): 243–58.

————. *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament*. New York: Columbia University Press, 2012.

————. *The Origins and Evolution of Islamic Law*. Cambridge: Cambridge University Press, 2005.

Ḥamawī, Yāqūt b. ʿAbd Allāh al-. *Muʿjam al-buldān*. 5 vols. Beirut: Dār Ṣādir, n.d.

Has, Şükrü Selim. “The Use of *Multaqā’l-Abḥur* in the Ottoman Madrasas and in Legal Scholarship.” *Osmanlı Araştırmaları* 7–8 (1988): 393–418.

Ḥaydar, ʿAlī. *Durar al-ḥukkām: Sharḥ Majallat al-aḥkām*. Translated by Fahmī al-Ḥusaynī. 4 vols. Riyadh: Dār ʿĀlam al-Kutub, 2003.

Helmholz, R. H. *Natural Law in Court: A History of Legal Theory in Practice*. Cambrige, Massachusetts: Harvard University Press, 2015.

Hennigan, Peter C. *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse*. Leiden: Brill, 2003.

Heyd, Uriel. “Some Aspects of the Ottoman Fetvā.” *Bulletin of the School of Oriental and African Studies, University of London* 32, no. 1 (1969): 35–56.

————. *Studies in Old Ottoman Criminal Law*. Edited by V. L. Ménage. Oxford: Clarendon Press, 1973.

Ho, H. L. “The Legitimacy of Medieval Proof.” *Journal of Law and Religion* 19 (2003): 259–98.

Holmes, Oliver Wendell. *The Common Law*. Boston: Little, Brown, and Company, 1881.

Horii, Satoe. “Reconsideration of Legal Devices (*Ḥiyal* in Islamic Jurisprudence: The Ḥanafīs and Their ‘Exits’ (*Makhārij*).” *Islamic Law and Society* 9, no. 3 (2002): 312–57.

Horii, Yutaka. "The Mamlūk Sultan Qānṣūh Al-Ghawrī (1501–16) and the Venetians in Alexandria." *Orient* 38 (2003): 178–99.
Ibn al-Khaṭīb, Lisān al-Dīn Muḥammad. *Muthlā al-ṭarīqa fī dhamm al-wathīqa*. Rabat: Dār al-Manṣūr, 1973.
Ibn al-Qāṣṣ, Aḥmad b. Abī Aḥmad al-Ṭabarī. *Adab al-qāḍī*. Edited by Ḥusayn Khalaf al-Jabūrī. Ta'if: Maktabat al-Ṣiddīq, 1989.
Ibn Kamāl Bāsha. *Tafsīr Ibn Kamāl Bāshā Zāda*. Edited by ʿIzz al-Dīn Jūliya. 3 vols. Morocco: Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmiyya, 2014.
Ibn Manẓūr, Muḥammad b. Mukarram. *Lisān al-ʿarab*. 15 vols. Beirut: Dār Ṣādir, n.d.
Ibn Nujaym, Zayn al-Dīn Ibrāhīm b. Muḥammad. *Al-Baḥr al-rāʾiq: Sharḥ Kanz al-daqāʾiq*. 7 vols. Cairo: Al-Bābī al-Ḥalabī, n.d.
Ibn Nujaym, Zayn al-ʿĀbidīn b. Ibrāhīm. *al-Ashbāh wa-l-naẓāʾir ʿalā madhhab Abī Ḥanīfa al-Nuʿmān*. Edited by ʿAbd al-ʿAzīz Muḥammad al-Wakīl. Cairo: Al-Bābī al-Ḥalabī, 1968.
Ibn Qayyim al-Jawziyya, Muḥammad b. Abī Bakr. *al-Ṭuruq al-ḥukmiyya*. Edited by Nāyif b. Aḥmad al-Ḥamd. 2 vols. Mecca: Dār ʿĀlam al-Fawāʾid, 2007.
Ibn Quṭlūbughā, Abū al-Fidāʾ Zayn al-Dīn Qāsim. *Tāj al-tarājim*. Edited by Muḥammad Ḫayr Ramaḍān Yūsuf. Damascus: Dār al-Qalam, 1992.
Ibn Taymiyya, Aḥmad. *al-Ḥisba*. Amman: al-Dār al-ʿUthmāniyya, 2004.
Ibn Ṭūlūn, Shams al-Dīn Muḥammad ibn ʿAlī. *Al-Fulk al-mashḥūn fī aḥwāl Muḥammad ibn Ṭūlūn*. Edited by Muḥammad Khayr Ramaḍān Yūsuf. Beirut: Dār Ibn Ḥazm, 1996.
Ibn ʿĀbidīn, Muḥammad Amīn b. ʿUmar. *Radd al-muḥtār ʿalā al-Durr al-mukhtār*. 13 vols. Riyadh: Dār ʿĀlam al-Kutub, 2003.
Ibn ʿĀbidīn, Muḥammad b. Muḥammad Amīn. *Majmūʿat rasāʾil Ibn ʿĀbidīn*. 2 vols. Damascus: Al-Maktaba al-Hāshimiyya, 1907.
İlmiyye sālnāmesi. Istanbul: Matbaa-i ʿAmire, 1916.
Imber, Colin. *Ebu's-Su'ud: The Islamic Legal Tradition*. Stanford, CA: Stanford University Press, 1997.
Inalcik, Halil. "Adâletnâmeler." *Belgeler* 2, no. 3–4 (1965): 49–142.
Inalcık, Halil. "Şikâyet hakkı: *ʿArż-i ḥāl ve ʿarż-i maḥżar*'lar." *Osmanlı Araştırmaları* 7–8 (1988): 33–54.
————. "Suleiman the Lawgiver and Ottoman Law." *Achivum Ottomanıcum* 1 (1969): 105–38.
İnalcık, Halil. *The Ottoman Empire: The Classical Age, 1300-1600*. Translated by Norman Itzkowitz and Colin Imber. New York: Praeger Publishers, 1973.
Ireland, Robert M. "Privately Funded Prosecution of Crime in the Nineteenth-Century United States." *American Journal of Legal History* 39 (1995): 43–58.
Jackson, Sherman A. "From Prophetic Actions to Constitutional Theory: A Novel Chapter in Medieval Muslim Jurisprudence." *International Journal of Middle East Studies* 25, no. 1 (1993): 71–90.
————. *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfī*. Leiden: E. J. Brill, 1996.
————. "Islamic Law, Muslims and American Politics." *Islamic Law and Society* 22 (2015): 253–91.
————. "The Islamic Secular." *American Journal of Islamic Social Sciences* 34, no. 2 (2017): 1–31.
Jaṣṣāṣ, Abū Bakr Aḥmad b. ʿAlī al-Rāzī al-. *Sharḥ kitāb adab al-qāḍī li-l-Imām Abī Bakr b. ʿUmar al-Ḫaṣṣāf*. Edited by Aḥmad Farīd al-Mazīdī. Beirut: Dār al-Kutub al-ʿIlmiyya, 2013.

Johansen, Baber. *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*. Leiden: E. J. Brill, 1999.
———. "Formes de langage et fonctions publiques: Stéréotypes, témoins et offices dans la preuve par l'écrit en droit musulman." *Arabica* 44, no. 3 (1997): 333–76.
———. "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim Al-Jawziyya (d. 1351) on Proof." *Islamic Law and Society* 9, no. 2 (January 1, 2002): 168–93.
———. "The Claims of Men and the Claims of God: The Limits of Government Authority in Hanafite Law." *Pluriformiteit En Verdelin van de Macht in Het Midden-Oosten, Middenoosten En de Islam-Publicatie* 4 (1980): 60–104.
———. "Urban Structures in the View of Muslim Jurists." *Revue Des Mondes Musulmans et de La Méditerranée* 55–56, no. 1–2 (1990): 94–100.
Johnson, Noel D., and Mark Koyama. "Tax Farming and the Origins of State Capacity in England and France." *Explorations in Economic History* 51 (2014): 1–20.
Jurjānī, ʿAlī b. Muḥammad al-Sharīf al-. *Kitāb al-taʿrīfāt*. Beirut: Dār al-Nafāʾis, 2003.
Kafadar, Cemal. "Janissaries and Other Riffraff: Rebels without a Cause?" *International Journal of Turkish Studies* 13, no. 1–2 (2007): 113–34.
Kalven, Jr., Harry, and Hans Ziesel. *The American Jury*. Boston: Brown, Little and Co., 1966.
Kant, Immanuel. *The Metaphysics of Morals*. Edited by Lara Denis. Translated by Mary J. Gregor. Rev. ed. Cambridge: Cambridge University Press, 2017.
Kāsānī, Abū Bakr b. Masʿūd al-. *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ*. 2nd ed. 7 vols. Beirut: Dār al-Kutub al-ʿIlmiyya, 1986.
Kātib Çelebi, Muṣṭafā b. ʿAbdullāh. *Kashf al-ẓunūn ʿan asāmī al-kutub wa-l-funūn*. Edited by Muḥammad Sharaf al-Dīn Yaltqaya and Rifʿat Bilge al-Kilīsī. 2 vols. Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.
Kawtharī, Muḥammad Zāhid al-. *Bulūgh al-amānī fī sīrat al-Imām Muḥammad ibn al-Ḥasan al-Shaybānī*. Cairo: Dār al-Hidāyah, n.d.
Kaya, Süleyman. "Mahkeme Kayıtları Kılavuzu: *Sakk Mecmuaları*." *Türkiye Araştırmaları Literatür Dergisi* 3, no. 5 (2005): 379–416.
Kazan, Hilal, Kenan Yıldız, Mehmet Akman, Tahsin Özjan, and Mahmut Ak, eds. *Üsküdar mahkemesi 56 numaralı sicil* (*H. 990–991 / M. 1582–1583*). İstanbul Kadı Sicilleri 9. Istanbul: İSAM Yayınları, 2010.
Kim, Marie Seong-Hak. "'Gouvernement Des Judges' Ou 'Juges Du Gouvernement'? Revolutionary Traditions and Judicial Independence in France." *Korean Journal of International and Comparative Law* 26 (1998): 1–42.
Kınalızâde, Alî Çelebi. *Ahlâk-ı Alâ'î: Kınalızâdenin Ahlâk Kitabı*. Edited by Mustafa Koç. Istanbul: Türkiye Yazma Eserler Kurumu Başkanlığı, 2014.
Kınalızade, ʿAlāʾ al-Dīn ʿAlī b. Amr Allāh. *Ṭabaqāt al-ḥanafiyya*. Edited by Muḥyī Hilāl al-Sarḥān. 3 vols. Baghdad: Dīwān al-Waqf al-Sanī, 2005.
Langbein, John H. "Controlling Prosecutorial Discretion in Germany." *University of Chicago Law Review* 41, no. 3 (1974): 439–67.
———. "The Origins of Public Prosecution at Common Law." *American Journal of Legal History* 17 (1973): 315–35.

Lawson, John D., and Edwin R. Keedy. "Criminal Procedure in England." *Journal of Criminal Law and Criminology* 1, no. 4 (1911): 595–611.
Layish, Aharon. "The Transformation of the *Sharīʿa* from Jurists' Law to Statutory Law in the Contemporary Muslim World." *Die Welt Des Islams* 44, no. 1 (2004): 85–113.
Leiter, Brian. "American Legal Realism." In *The Blackwell Guide to the Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson, 55–66. Oxford: Blackwell Publishing, 2005.
————. "Legal Realism and Legal Doctrine." *University of Pennsylvania Law Review* 163 (2015): 1975–84.
Leshem, Dotan. "What Did the Ancient Greeks Mean by *Oikonomia*?" *Journal of Economic Perspectives* 30, no. 1 (2016): 225–38.
Levmore, Saul. "Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law." *Tulane Law Review* 61, no. 2 (1986): 235–87.
————. "Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations." *Virginia Law Review* 72 (1986): 879–941.
Lile, William Minor. *Equity Pleading and Practice, with Forms*. Edited by Edwin B. Meade. 3rd ed. Charlottesville, VA: Michie, 1952.
Lippman, Matthew. "Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law." *Boston College International & Comparative Law Review* 12, no. 1 (1989): 29–62.
Llewellyn, Karl. *The Bramble Bush: The Classic Lectures on the Law and Law School*. New York: Oxford University Press, 2008.
Loughlin, Martin. "Political Jurisprudence." *Jus Politicum* 16 (2016): 15–32.
Main, Thomas O. "The Procedural Foundation of Substantive Law." *Washington University Law Review* 87 (2010): 801–41.
Maine, Henry Sumner. *Ancient Law*. London: J. M. Dent & Sons, 1917.
Mardin, Şerif. *The Genesis of Young Ottoman Thought: A Study in the Modernization of Turkish Political Ideas*. Princeton, N.J.: Princeton University Press, 1962.
Marglin, Jessica M. "Written and Oral in Islamic Law: Documentary Evidence and Non-Muslims in Moroccan Shariʿa Courts." *Comparative Studies in Society and History* 59, no. 4 (2017): 884–911.
Masud, Muhammad Khalid. "Religion and State in Late Mughal India: The Official Status of the *Fatawa Alamgiri*." *LUMS Law Journal* 3, no. 1 (2016): 32–50.
McAdams, Richard H. *The Expressive Powers of Law: Theories and Limits*. Cambridge, MA: Harvard University Press, 2015.
Merryman, John Henry, and Rogelio Pérez-Perdomo. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*. 3rd ed. Stanford, CA: Stanford University Press, 2007.
Messick, Brinkley. *Sharīʿa Scripts: A Historical Anthropology*. New York: Columbia University Press, 2018.
————. *The Calligraphic State: Textual Domination and History in a Muslim Society*. Berkeley: University of California Press, 1993.
Miller, William Ian. *Eye for an Eye*. Cambridge: Cambridge University Press, 2006.
Mitchell, Gregory. "Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence." *Georgetown Law Journal* 91 (2003 2002): 67–168.

Mnookin, Robert H., and Lewis Kornhauser. "Bargaining in the Shadow of the Law: The Case of Divorce." *Yale Law Journal* 88 (1979): 950–97.
Modarresi, Hossein. "Circumstantial Evidence in the Administration of Islamic Justice." In *Justice and Leadership in Early Islamic Courts*, edited by Intisar A. Rabb and Abigail Krasner Balbale, 16–22. Cambridge, MA: Islamic Legal Studies Program, 2017.
Muḥibbī, Muḥammad Amīn b. Faḍl Allāh al-. *Khulāṣat al-athar fī aʿyān al-qarn al-ḥādī ʿashar*. 4 vols. Cairo: Al-Maṭbaʿa al-Wahbiyya, n.d.
Nasafī, ʿUmar b. Muḥammad al-. *Ṭilbat al-ṭalaba fī al-iṣṭilāḥāt al-fiqhiyya*. Beirut: Dār al-Nafāʾis, 1995.
Nawas, John. *Al-Maʾmūn, the Inquisition, and the Quest for Caliphal Authority*. Atlanta, GA: Lockwood Press, 2015.
Nielsen, Jørgen S. "*Maẓālim* and *Dār Al-ʿAdl* under the Early Mamluks." *Muslim World* 6, no. 2 (1976): 114–32.
Oppenheim, Leonard. "Louisiana's Civil Law Heritage." *Law Library Journal* 42, no. 2 (1949): 249–54.
Opwis, Felicitas. Maṣlaḥa *and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century*. Leiden: E. J. Brill, 2010.
Oxford Encyclopedia of Islam and Law. Edited by Jonathan A. C. Brown. Online at http://www.oxfordislamicstudies .com.
Özcan, Abdülkadir, ed. *Kanunnâme-i Âl-i Osman: Atam Dedem Kanunu*. Istanbul: Hazine Yayınları, 2012.
Pamuk, Şevket. *A Monetary History of the Ottoman Empire*. Cambridge: Cambridge University Press, 2000.
Peirce, Leslie. *The Imperial Harem: Women and Sovereignty in the Ottoman Empire*. New York: Oxford University Press, 1993.
Peters, Rudolph. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*. Cambridge: Cambridge University Press, 2005.
————. "What Does It Mean to Be an Official Madhhab? Hanafism and the Ottoman Empire." In *The Islamic School of Law: Evolution, Devolution, and Progress*, edited by Peri Bearman, Rudolph Peters, and Frank Vogel, 147–58. Cambridge, MA: Harvard University Press, 2005.
Posner, Richard A. *The Problems of Jurisprudence*. Cambridge, MA: Harvard University Press, 1990.
————. "Utilitarianism, Economics, and Legal Theory." *Journal of Legal Studies* 8, no. 1 (1979): 103–140.
Pound, Roscoe. "Juristic Science and Law." *Harvard Law Review* 31, no. 8 (1918): 1047–63.
Powers, Paul R. *Intent in Islamic Law: Motive and Meaning in Medieval Sunnī Fiqh*. Leiden: E.J. Brill, 2006.
————. "Offending Heaven and Earth: Sin and Expiation in Islamic Homicide Law." *Islamic Law and Society* 14, no. 1 (2007): 42–80.
Qalqashandī, Abū al-ʿAbbās Aḥmad al-. *Ṣubḥ al-aʿshā fī kitābat al-inshā*. 14 vols. Cairo: Al-Maṭbaʿa al-Amīriyya, 1914.
Qarāfī, Aḥmad b. Idrīs al-. *al-Furūq al-musammā bi-Anwār al-burūq fī anwāʾ al-furūq*. Repr. 4 vols. Saudi Arabia: Wizārat al-Shuʾūn al-Islāmiyya wa-l-Awqāf wa-l-Daʿwa wa-l-Irshād, 2010.
Qudūrī, Aḥmad b. Muḥammad al-. *Mukhtaṣar al-Qudūrī*. Edited by Kāmil ʿUwayḍa. Beirut: Dār al-Kutub al-ʿIlmiyya, 1997.

Qurashī, Abū Muḥammad ʿAbd al-Qādir al-. *Al-Jawāhir al-muḍiyya fī ṭabaqāt al-ḥanafiyya*. Edited by ʿAbd al-Fattāḥ Muḥammad al-Ḥulw. 2nd ed. 5 vols. Jeddah: Hajr li-l-Ṭibāʿa wa-l-Našr wa-l-Tawzīʿ wa-l-Iʿlān, 1993.

Quṭlūbughā, Qāsim ibn. *al-Taṣḥīḥ wa-l-tarjīḥ ʿalā Mukhtaṣar al-Qudūrī*. Edited by Ḍiyāʾ Yūnus. Beirut: Dār al-Kutub al-ʿIlmiyya, 2002.

Rabb, Intisar A. *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law*. Cambridge Studies in Islamic Civilization. New York, NY: Cambridge University Press, 2015.

———. "Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt." *Islamic Law and Society* 17 (2010): 63–125.

———. "The Curious Case of Bughaybigha, 661–883: Land and Leadership in Early Islamic Societies." In *Justice and Leadership in Early Islamic Courts*, edited by Intisar A. Rabb and Abigail Krasner Balbale, 23–246. Cambridge, MA: Islamic Legal Studies Program, 2017.

Rabb, Intisar A., and Abigail Krasner Balbale, eds. *Justice and Leadership in Early Islamic Courts*. Cambridge, MA: Islamic Legal Studies Program, 2017.

Radin, Max. *The Law and You*. New York: New American Library, 1948.

Rapoport, Yossef. "Royal Justice and Religious Law: *Siyāsah* and Shariʿah under the Mamluks." *Mamlūk Studies Review* 16 (2012): 71–102.

Richman, Daniel C., and William J. Stuntz. "Al Capone Revenge: An Essay on the Political Economy of Pretextual Prosecution." *Columbia Law Review* 105 (2005): 583–639.

Richter, Liesa L. "Posnerian Hearsay: Slaying the Discretion Dragon." *Florida Law Review* 67, no. 6 (2015): 1861–1908.

Risinger, D. Michael. "'Substance' and 'Procedure' Revisited with Some Afterthoughts on the Constitutional Problems of 'Irrebuttable Presumptions.'" *UCLA Law Review* 30 (1982): 189–216.

Robinson, Chase F. *Islamic Historiography*. New York: Cambridge University Press, 2003.

Robinson, O. F., T. D. Fergus, and William M. Gordon. *European Legal History: Sources and Institutions*. 3rd ed. London: Butterworths, 2000.

Sakhāwī, Muḥammad b. ʿAbd al-Raḥmān al-. *al-Ḍawʾ al-lāmiʿ li-ahl al-qarn al-tāsiʿ*. 12 vols. Beirut: Dār al-Jīl, n.d.

Samour, Nahed. "A Critique of Adjudication: Formative Moments in Early Islamic Legal History." In *Justice and Leadership in Early Islamic Courts*, edited by Intisar A. Rabb and Abigail Krasner Balbale, 47–66. Cambridge, MA: Islamic Legal Studies Program, 2017.

Sartore, Melissa. *Outlawry, Governance, and Law in Medieval England*. New York: Peter Lang, 2013.

Schacht, Joseph. *An Introduction to Islamic Law*. Oxford: Clarendon Press, 1964.

———. *The Origins of Muhammadan Jurisprudence*. Oxford: Clarendon Press, 1950.

Schauer, Frederick. *The Force of Law*. Cambridge, MA: Harvard University Press, 2015.

Schiller, A. Arthur. "Jurists' Law." *Columbia Law Review* 58, no. 8 (1958): 1226–38.

Schneider, Irene. *Das Bild des Richters in der «Adab al-qāḍī»-Literatur*. Frankfurt am Main: P. Lang, 1990.

Schoeler, Gregor. *The Genesis of Literature in Islam: From the Aural to the Read*. Translated by Shawkat M. Toorawa. The New Edinburgh Islamic Surveys. Edinburgh: Edinburgh University Press, 2009.

Shāfiʿī, Muḥammad b. Idrīs al-. *al-Umm*. Edited by Rifʿat Fawzī ʿAbd al-Muṭṭalib. 11 vols. Cairo: Dār al-Wafāʾ, 2001.

Shapiro, Martin. *Courts: A Comparative and Political Analysis*. Chicago, IL: University of Chicago Press, 1986.
Shaybānī, Muḥammad b. al-Ḥasan al-. *al-Aṣl*. Edited by Muḥammad Būynūkālin. 13 vols. Beirut: Dār Ibn Ḥazm, 2012.
————. *Kitāb al-aṣl*. Edited by Abū al-Wafā' al-Afghānī. 4 vols. Hyderabad: Maṭbaʿat Majlis Dā'irat al-Maʿārif al-ʿUthmāniyya, 1966.
Shaybānī, Muḥammad ibn al-Ḥasan. *The Islamic Law of Nations: Shaybānī's Siyar*. Edited by Majid Khadduri. Baltimore: Johns Hopkins Press, 1966.
Simnānī, ʿAlī b. Muḥammad al-. *Rawḍat al-quḍāt wa tarīq al-najāt*. Edited by Ṣalāḥ al-Dīn al-Nāhī. 2 vols. Beirut: Mu'assasat al-Risāla, 1984.
The Stanford Encyclopedia of Philosophy. Edited by Edward N. Zalta. Exclusively online at https://plato.stanford.edu. URLs provided to most recent archived versions.
Stilt, Kristen. *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt*. Oxford: Oxford University Press, 2011.
Ṭarābulusī, ʿAlā' al-Dīn ʿAlī b. Khalīl al-. *Muʿīn al-ḥukkām fīmā yataraddadu bayn al-khaṣmayn min al-aḥkām*. Beirut: Dār al-Fikr, n.d.
Taşköprüzāde. *al-Shaqā'iq al-nuʿmāniyya fī ʿulamā' al-dawla al-ʿuthmāniyya*. Beirut: Dār al-Kutub al-ʿIlmiyya, 1975.
TDVIA = *Türkiye Diyanet Vakfı İslam Ansiklopedisi*. Üsküdar, İstanbul : Türkiye Diyanet Vakfı, İslâm Ansiklopedisi Genel Müdürlüğü, 1988–2013. Online at http://islamansiklopedisi.org.tr.
Tezcan, Baki. "The Definition of Sultanic Legitimacy in the Sixteenth Century Ottoman Empire: The Akhlaq-i Ala'i of Kınalızade Ali Çelebi (1510–1572)." MA thesis, Princeton University, 1996.
————. "The Ottoman Monetary Crisis of 1585 Revisited." *Journal of the Economic and Social History of the Orient* 52 (2009): 460–504.
————. *The Second Ottoman Empire: Political and Social Transformation in the Early Modern World*. New York: Cambridge University Press, 2010.
Tillier, Mathieu. "The Mazalim in Historiography." In *The Oxford Handbook of Islamic Law*, edited by Anver M. Emon and Rumee Ahmed, 357–80. Oxford: Oxford University Press, 2018.
Tumurtāshī, Muḥammad b. ʿAbd Allāh al-. *Matn Tanwīr al-abṣār wa jāmiʿ al-biḥār*. Cairo: Al-Maktaba al-Nabawiyya, n.d.
Tumurtāshī, Muḥammad b. ʿAbd Allāh al-, and Muḥammad Sharīf Sulaymān. *al-Wuṣūl ilā qawāʿid al-uṣūl*. Beirut: Dār al-Kutub al-ʿIlmiyya, 2000.
Tunick, Mark. *Punishment: Theory and Practice*. Berkeley: University of California Press, 1992.
————. *Punishment: Theory and Practice*. Berkeley: University of California Press, 1992.
Tyan, Émile. *Histoire de l'organisation judiciaire en pays d'Islam*. 2nd edition. Leiden: E. J. Brill, 1960.
————. "Judicial Organization." In *Law in the Middle East*, edited by Majid Khadduri and Herbert J. Liebesny, 236–78. Washington, DC: The Middle East Institute, 1955.
Uzunçarşılı, Ismail Hakkı. *Osmanlı devletinin saray teşkilâtı*. 2nd ed. Ankara: Türk Tarih Kurumu, 1984.
VanDrunen, David. "Natural Law, the *Lex Talionis*, and the Power of the Sword." *Liberty University Law Review* 2 (2008): 945–67.
Vidmar, Neil, and Valerie P. Hans. *American Juries: The Verdict*. Amherst, NY: Prometheus Books, 2007.

Viscusi, W. Kip. "The Value of Life in Legal Contexts: Survey and Critique." *American Law and Economics Review* 2, no. 1 (2000): 195–222.

White, Joshua M. *Piracy and Law in the Ottoman Mediterranean*. Stanford, CA: Stanford University Press, 2018.

Whitman, James Q. *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*. New Haven: Yale University Press, 2008.

Yılmaz, Hüseyin. *Caliphate Redefined: The Mystical Turn in Ottoman Political Thought*. Princeton, NJ: Princeton University Press, 2018.

Zarinebaf, Fariba. *Crime and Punishment in Istanbul, 1700–800*. Berkeley, CA: University of California Press, 2010.

Zaylaʿī, Faḫruddīn ʿUthmān b. ʿAlī al-. *Tabyīn al-ḥaqāʾiq: Sharḥ Kanz al-daqāʾiq*. 6 vols. Bulaq: Al-Maṭbaʿa al-Kubrā al-Amīriyya, 1895.

Zgonjanin, Sanja. "Quoting the Bible: The Use of Religious References in Judicial Decision-Making." *New York City Law Review* 9 (2005): 31–91.

Zuḥaylī, Wahbah al-. *Āthār al-ḥarb fī al-fiqh al-islāmī*. 2nd ed. Beirut: Dār al-Fikr, 1966.

Zysow, Aron. *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory*. Atlanta, GA: Lockwood Press, 2013.

ʿAwda, ʿAbd al-Qādir. *al-Tashrīʿ al-jināʾī al-islāmī muqāranan bi-l-qānūn al-waḍʿī*. 2 vols. Beirut: Dār al-Kitāb al-ʿArabī, n.d.

ʿUbaydī, Ḥusayn b. ʿAbd Allāh al-. "al-Ṣulḥ fī al-qatl al-ʿamd aw al-khaṭaʾ." *Majallat al-Jamʿiyya al-fiqhiyya al-saʿūdiyya* 13 (2012): 77–134.