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Islamic Law and the Crime of Theft: An Introduction

David F. Forte
Cleveland-Marshall College of Law

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ISLAMIC LAW AND THE CRIME OF THEFT: AN INTRODUCTION

DAVID F. FORTE*

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I. INTRODUCTION

Whenever anyone mentions the Islamic law of theft, a vision of the severing of human hands almost automatically comes to mind. It is a distressing vision. In fact, it is designed to be distressing. As a permanent mark on the body of the guilty party, it seeks to make him a sign and a deterrent to those who might also be tempted to steal.¹

We judge the policy as harsh and in no way fitting the crime. The fact that mutilation, maiming, and torture were part of all contemporary legal systems a thousand years ago may give us reason not to judge the practice as severely as we might be inclined. History may be of little comfort to our emotional and moral distress, however, when modern states seek to reintroduce the penalty. Today, individuals hold that the

* Professor of Law, Cleveland-Marshall College of Law; A.B., Harvard College; M.A., University of Manchester; Ph.D., University of Toronto; J.D., Columbia University.

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¹ *Islam's Eye for an Eye*, THE ECONOMIST, July 16, 1977, at 62.

punishment of amputation is contrary to fundamental human rights.² The Second Vatican Council, for example, condemned mutilation as a punishment.³

The motivation for introducing the penalty of amputation among a few modern Islamic states may be quite different from the motivation which led Islamic jurists of classical times to refine and modify the Qur'anic injunction that thieves' hands be stricken off. Many modern states have reimposed the ancient penalty for theft, in part, to establish their *bona fides* in terms of the classic Shari'a.⁴ Yet, the classic Shari'a is often uncertain that amputation is a commendable policy.

This Article introduces the concept of theft in Islamic law. As such, it does not pretend to be comprehensive either in the data it puts forth or in its analysis. Rather, the Article raises a number of issues for discussion, and offers, most tentatively, suggested answers to the following points: 1) whether theft in Islamic law properly belongs to the species of manifest criminality; 2) what possible justifications exist for such an extreme penalty; 3) what were the requirements for conviction; and 4) some concluding observations as to why the classical jurists encumbered a prosecution for theft with so many restrictions.

II. THEFT AS A SPECIES OF MANIFEST CRIMINALITY

Amputation of the hand for theft is one of a series of so-called Qur'anic or *hadd* punishments—punishments required by God from which there can be no deviation. *Hadd* crimes and punishments include adultery (stoning), false accusation of adultery (whipping), drinking wine (whipping), highway robbery (double amputation or death), apostasy (death), rebellion (death), and, of course, theft. Offenses outside of this list are punishable at the discretion (*ta'zir*) of the judge. Homicide and bodily harm, whether intentional or negligent, are punished by retaliation or by a stated compensation.⁵

² Physicians in Pakistan objected to their participation in the punishment because it would violate their Hippocratic oath. *Id.* See also Universal Declaration of Human Rights, art. 5, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, art. 7, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, art. 3, 213 U.N.T.S. 221; American Convention on Human Rights, art. 5, Nov. 22, 1969, T.S. No. 36. *But see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *reprinted in* THE REVIEW 58 (Dec. 1985).

³ *Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)* in THE DOCUMENTS OF VATICAN II IN A NEW AND DEFINITIVE TRANSLATION WITH COMMENTARIES AND NOTES BY CATHOLIC, PROTESTANT, AND ORTHODOX AUTHORITIES 226 (W. Abbott ed. 1966).

⁴ THE ECONOMIST, *supra* note 1, at 62. See also Mayer, *Libyan Legislation in Defense of Arabo-Islamic Sexual Mores*, 28 AM. J. COMP. L. 287 (1980).

⁵ For a description of these other penalties, see Forte, *Comparative Criminal Law and Enforcement: Islam*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 193 (1983).

The punishment for theft first appeared in the Qur'an, Sura 5:41.

As to the thief
Male or female,
Cut off his or her hands
A punishment by way
Of example from God
For their crime:
And God is Exalted in Power.⁶

Other so-called Qur'anic punishments are not as specifically mentioned in the Qur'an as is the punishment for theft.

The Islamic jurists who rose to a position of dominance in Islam a century and a half after the death of Mohammed developed and refined the nature of the crime of theft, the elements needed for a conviction, and the manner of inflicting the required punishment. In doing so, it appears that these early Islamic jurists viewed the crime as what we would term today a species of manifest criminality. They clearly saw its punishment as a type of exemplary and reflective punishment.

According to Professor George Fletcher, the principle of manifest criminality is "that the commission of the crime be objectively discernible at the time that it occurred."⁷ Underlying the concept of manifest criminality is the idea that the crime is something that everyone knows when he sees it. It is a crime derived from the shared experience of everyone, not an activity whose criminality is established or defined by an external legislature.⁸ The element of intent enters into the adjudication of manifest criminality only to the extent that it serves to disprove delictual appearances, e.g., "I wasn't stealing the jar. I was taking it from the shelf to put it in a safer place." Unlike subjective criminality, where the external act is proof of the culpable intent, manifest criminality is based on the idea that the objective act is punishable. The lack of requisite intent only forces the observer (the judge or the jury) to take a second look at the actual occurrence and question whether what the eye has seen is true.⁹

The pattern of manifest criminality is dominant in both the common law and the Islamic law of theft. Both arise out of a common experience expressing the shock experienced when an intruder undermines the sanctity of one's abode, the shelter of one's family and goods. Each has the same concrete image of the punishable act: the breaking of the close, at night, while the owner is present and probably asleep, the taking of something valuable, and then stealthfully absconding with it. Variations are present, but they revolve around the one image of the secret, cowardly thief who steals by night.

⁶ THE KORAN INTERPRETED, 133 Sura V, Verse 41 (A. Arberry trans. 1976).

⁷ G. FLETCHER, *RETHINKING CRIMINAL LAW* 116 (1978).

⁸ *Id.* at 116-17.

⁹ *Id.* at 117-18.

Until the eighteenth century, the punishment for theft in common law was death.¹⁰ Islamic law requires the amputation of the hand. The rules for carrying out the Shari'a punishment are strict. For the first offense, the thief's right hand is cut off at the wrist. The wound is cauterized with boiling oil, and, according to the Hanbali school, the hand can be tied around the criminal's neck for three days.¹¹ The Shafi'i and Maliki schools decree the loss of the left foot for a second offense. Further offenses cost the thief his left hand and right foot successively. A fifth offense will incur a discretionary penalty.¹² If the reader is puzzled as to how a man without hands or feet can break into a house quietly at night and carry away goods before being discovered, the penalty schedule merely shows that many of the rules were worked out in a speculative way by jurists and did not necessarily refer to actual cases. This example highlights an endemic problem in researching Islamic law: little work has been done to determine the extent to which the law was applied in practice.

The Hanbali and Hanafi jurists would imprison the offender after the second amputation until he repented. They would not inflict a third or fourth amputation.¹³ Most jurists limit one amputation to each conviction, disregarding the number of times the thief has stolen in the interim or the number of counts of thievery upon which the conviction rests.¹⁴

The punishment is obviously exemplary and reflective, a principle carried even to recidivism. It is exemplary, not only because the Qur'an defines it as such, but because it is designed to hold up to the community the offensiveness of the crime. Branding the culprit as a criminal and using the punishment as a form of deterrence are interwoven justifications for exemplary punishments. In colonial times, a robber's forehead was branded with the letter "R"¹⁵ and in England the heads of traitors were displayed to demonstrate the heinous quality of conspiring against the integrity of polity.¹⁶ A horribly painful and demeaning punishment known as death by slow slicing (ling-ch'ih) was inflicted on rebellious people in China by the Mongolian emperors.¹⁷

¹⁰ *Id.* at 30-31.

¹¹ SHAYKH IBRAHIM IBN MUHAMMAD IBN SALIM IBN DU'YAN, *MANAR AL-SABIL* (Crime and Punishment under Hanbali Law) 101-02 (George M. Barood trans. 1962)[hereinafter cited as BAROODY].

¹² NAWAWI, *MINHAJ ET TALIBIN* 448 (E.C. Howard trans. from French trans. of L.W.C. Van den Berg 1914). 4 KHALIL BEN ISH'AQ, *ABRÉGÉ DE LA LOI MUSULMANE SELON LE RITE DE L'IMAM MALÉK* 52 (G.H. Bousquet trans. 1961).

¹³ Heffening, *Sarik*, in 4 *THE ENCYCLOPEDIA OF ISLAM* 173 (1934). The Shi'ites will imprison an offender upon the third offense and execute him on the fourth. *Id.*

¹⁴ The recent practice in the Sudan is apparently contrary to the single amputation rule. A report states that a "repeat offender" was sentenced to the amputation of a hand and a foot in public. Associated Press, AM cycle, December 19, 1983, available on NEXIS.

¹⁵ G. NEWMAN, *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS* 12 (1983).

¹⁶ See *Execution of Jeremiah Brandreth*, *id.* at 27-28.

¹⁷ P. CH'EN, *CHINESE LEGAL TRADITION UNDER THE MONGOLS: THE CODE OF 1291 AS RECONSTRUCTED* 42-43 (1979).

In addition to being exemplary, the punishment of amputation is reflective; it is a punishment inflicted upon the criminal that serves as a physical reflection of his action of committing the crime. The source from which Mohammed derived the idea of amputation for theft is unclear. Unlike other aspects of criminal and civil law derived from the Qur'an, amputation was not a common punishment present in pre-Islamic Arabia.¹⁸ A collection of Arabic folk traditions indicates that a local rival of Mohammed who controlled part of Mecca utilized such a punishment. One source indicates that the Quraysh tribe had inflicted amputation on a thief from another tribe.¹⁹ Beyond these references, however, there is little cultural indication as to what may have influenced Mohammed to impose such a penalty. In fact, evidence exists that after the death of Mohammed and before the rise of legal schools, theft was punished by means other than amputation.²⁰ On the other hand, other cultures have recognized amputation as an appropriate punishment for stealing. Hammurabi decreed it for a person who stole crops from the ground and who was caught with the crops in his hands.²¹

III. JUSTIFICATIONS FOR THE PENALTY OF AMPUTATION

A number of possible values may be advanced whenever this kind of reflective and exemplary punishment is imposed. The first and most often cited is deterrence.²² Maiming, torture, death, disfiguration, either before or after death, and the threat of damnation can all be deterrents. Deterrence is a consequentialist justification, tending to exclude other values such as proportionality, dignity of the person, or character, which do not also have utility in discouraging similar actions by other persons.

The second justification is protection of the public from repeat or worse offenses from the same offender. This justification is also consequentialist. Death, maiming, perpetual imprisonment, or banishment are the most effective penalties to prevent recidivism. Islamic jurists have used this argument as a justification for amputation.²³

¹⁸ J. SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 18 (1964).

¹⁹ Al-Mutrak, *Sharia Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia*, in *THE EFFECT OF ISLAMIC LEGISLATION ON CRIME PREVENTION IN SAUDI ARABIA: PROCEEDINGS OF THE SYMPOSIUM HELD IN RIYADH, 16-21 SHAWAL 1396 A.H.* 451 (1980). A tradition attributed to Mohammed states that "the people before you were doomed because if a noble man stole he was set free, but if the thief happened to be a man of low rank his hands were cut off." *Id.* at 450. The traditions, however, are weak guides to pre-Islamic history.

²⁰ J. SCHACHT, *THE ORIGINS OF MUHAMMADAN JURISPRUDENCE* 191 (1950).

²¹ R. ROBERTS, *THE SOCIAL LAWS OF THE Q'ORAN* 92 n.2 (1925 reprinted 1971). I have been told, but have been unable to confirm, that Viking law had a similar penalty.

²² See, e.g., Safwat, *Offences and Penalties in Islamic Law*, citing Asad, *The Message of the Qur'an*, 26 *ISLAMIC Q.* 159 (1982); Al-Mutrak, *supra* note 19, at 454; Kamel, *The Principle of Legality and its Application in Islamic Criminal Justice*, in M. BASSIOUNI, *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 164 n.67 (1981) [hereinafter cited as M. BASSIOUNI].

²³ See, e.g., Al-Mutrak, *supra* note 19, at 452.

A third justification, rehabilitation and reform, seems to be contradicted by the penalty itself. Rehabilitation, making a man whole, is literally foreclosed by the punishment. Reform could be advanced as a justification in that a one-handed man is less likely to steal. The jurists' concern with recidivism, however, would belie a reformist motivation. Ironically, a one-handed man is less likely to be able to earn a living and will therefore be tempted to steal more. Furthermore, he would be able to use the fact of his need as a sufficient basis to avoid a subsequent conviction. Finally, the very distinction between *hadd* and *ta'zir* penalties demonstrates the irrelevancy of reform as a justification for amputation. In *ta'zir* crimes, the judge weighs all factors of the crime, especially the character of the accused in addition to signs of his repentance, in fashioning an appropriate punishment. In *hadd* crimes, the judge is explicitly forbidden to consider any such factor. He must decree amputation for theft. He has no choice in the matter.

Retribution, a fourth possible justification, does not appear to be present in the required penalty of amputation. Retribution is a punishment in which the culprit is made to suffer harm to the same degree as inflicted upon his victim.²⁴ In any theft, the harm that a criminal inflicts is twofold. As St. Thomas Aquinas concisely stated, the harm is in the loss of thing taken, and in the act of its being taken.²⁵ At first blush, it might seem that the Shari'a recognizes the distinction. The stolen item must be returned if it is still in the thief's possession.²⁶ In addition, the thief suffers amputation for his act of taking. A modern jurist divides the action into two: a civil cause on behalf of the owner against the thief for the loss of the good (the harm), and a penal action on behalf of God for violating His right (the wrongdoing).²⁷ Nonetheless, the theory of retribution fails as a justification for amputation due to the severity of the punishment. The key to retribution is that the criminal suffers, as much as it can be approximated, in proportion to the objective harm he has caused. In amputation, proportionality is lacking. If the elements of the crime are proven, the judge is totally without discretion to modify the penalty regardless of the particular circumstances: a man must be maimed for life for the taking of a chattel.

A clearer value present in the *hadd* penalty for theft seems to be vengeance; the harmed party seeks revenge from the person who harmed him in a way that reflects the subjective, not the objective, harm that the injured party received.²⁸ In fact, the culprit who is convicted of a theft

²⁴ Fletcher prefers the concept of "wrongdoing." G. FLETCHER, *supra* note 7, at 456-69.

²⁵ 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* 1460, pt. II-II, Q. 62, Art. 7 (Fathers of the English Dominican Province trans. 1947).

²⁶ According to the Shafi'i school, however, the thief remains liable to the owner for the value of the good even if it is lost or destroyed. NAWAWI, *supra* note 12, at 447-48.

²⁷ S. ABDEL-WAHAB, *AN INTRODUCTION TO ISLAMIC JURISPRUDENCE* 113-14 (1963).

²⁸ Aristotle, *Rhetorica*, in 11 THE WORKS OF ARISTOTLE, Book I, c.11, 1369^b 13-16 (W. R. Roberts trans., ed. 1966).

may not have his hand cut off unless the victim of the crime has brought a specific charge against the culprit (some schools permit accusation by confession). The legal inquiry is conducted in the presence of the owner, and if the good has been returned before a charge is lodged, the thief may not be accused of theft.²⁹ Furthermore, the victim of the crime must be present at the time the punishment is inflicted.³⁰ Thus, the Shari'a has ordered and regulated the instinct of vengeance in the case of theft.

It therefore appears that the Islamic law of theft, with its exemplary and reflective punishment, appears to be based on an objective theory of manifest criminality in the act. However, the punishment for the act is based upon the subjective need of avenging the harmed party, not the objective measurement of the harm done in the sense of the wrongfulness of the act.

There is, however, no contradiction between manifest criminality as the offense, and vengeance as the *raison d'être* of the punishment. Even with the subjective need of vengeance, the punishment of amputation logically fits with the pattern of manifest criminality because the punishment goes to the objective malefaction that the offender has perpetrated, not to the subjective guilt of the party involved. The punishment, therefore, objectively renders the culprit as one who has committed a particular crime and subjects him to the continuing punishment of shame while explicitly excluding any punishment based on guilt. The offender continues to carry his wrongdoing as a sign of shame in the community for the rest of his life; the manifest act is punished by a manifest badge of shame.³¹

Even though the animus behind the punishment may have been vengeance, *post hoc* justifications for exemplary punishments almost always return to the category of deterrence. While observers naturally feel revulsion that an individual should carry a sign of shame and, in particular, a maiming for the rest of one's life for an act done at one particular time and place, the answer of authority is invariably that the continued visible evidence of the punishment acts as a deterrence. Indeed, this excuse is given by contemporary Islamic states which cling to the punishment or which have recently instituted it.

Nonetheless, there are limits to our subjecting the rationality of the Islamic law of theft to a modern systematic analysis. A casuistical legal system has a life of its own, evident, for example, in the absurdity of a four-fold amputation for recidivism. Generic justifications for punishment may not control when the logical drive of analogy is present. For example, in three of the four Sunni schools of law, the theft of a free child will not

²⁹ Heffening, *supra* note 13, at 173.

³⁰ AL-MARGHINANI, *THE HEDAYA* 112 (C. Hamilton trans. 1795) [hereinafter cited as *HEDAYA* 1795 ed.]

³¹ If one should wish to plumb the psychological and social imperatives that lay behind exemplary punishments, Nathaniel Hawthorne's *THE SCARLET LETTER* will provide one of the most trenchant sources.

incur amputation, for a free child is not a chattel owned in law by another.³² One would think that the taking of a child is so heinous that any theory of punishment—deterrence, prevention of recidivism, retribution for that particular act of stealing, and the deep felt passion for vengeance—would easily justify amputation. Yet the jurists only extend a particular legal rule to a particular thing without apparent regard to the fact that this thing is a human child in need of special protections. The writings of the jurists are unclear as to how kidnapping would be punished. Most likely, it would be punished discretionarily, without earning a penalty as severe as amputation. We have no knowledge of a systematic way for actually punishing kidnapping. Research into actual court cases remains remarkably scant.

Admittedly, a legal system's value structure may not be consistent because it is in the process of development. We know, for example, that the Islamic jurists established rather rigid rules defining the particular kind of taking that could incur amputation. A series of "objectively" determinable requirements needed satisfaction before punishment could be inflicted. Possibly, the system was in a process of maturing from one based on primitive notions of vengeance and deterrence toward one based on a more objective calculation of wrongs that began to approach the degree of harm for which amputation might be thought of as an appropriate retribution. In fact, the *qadi* was to determine whether all the elements of the crime had been proven, and it is a hallmark of the development of a legal system from self-help and vengeance towards external notions of justice that the adjudication of a dispute is accomplished by a disinterested third party. The progression, however, was stymied by the fact that Mohammed's decree was actually written into the Qur'an and that the particular political history of Islam defining the role of law established an outside limit to further development. The Islamic law of theft, in other words, may have been frozen between the legal norms of vengeance, and those of responsibility and retribution.

IV. ELEMENTS OF A THEFT IN ISLAMIC LAW

The arrested developmental aspect of the Islamic law of theft may be seen when we regard the necessary elements of the crime that the jurists developed. If the elements of the common law of theft are compared with law of theft in Islam, George Fletcher's concept seems to bear up: the Islamic law of theft is based on the idea of manifest criminality. On the other hand, once the elements of the Islamic law of theft are surveyed, a somewhat different pattern established by the Islamic jurists emerges. The judicial system is seemingly obstructed from having to inflict the

³² The Maliki school is the only one that would punish child stealing with amputation. SIDI KHALIL, *MALIKI LAW (THE MUKHTASAR)* 336 n.1 (F. Ruxton trans. 1916 reprint 1980).

punishment of amputation except in the most specific and narrow instances. These circumstances are not, as a Western reader might guess, occasions when the theft so offends public policy that the extreme penalty must be applied. Rather, the narrow circumstances are only those left after the maze of casuistical regulations protecting the accused has been negotiated by the court. In other words, it is clear that the Islamic jurists, no matter what Mohammed might have envisioned accomplishing by instituting the punishment while he was leader at Medina, did not have the same sense of social compulsion to inflict the punishment as often as possible in order to lessen the instances of theft. The jurists permitted too many exceptions to permit a conclusion that they possessed a rather rigid view of the necessity of punishment. This is not true about all the Islamic jurists; many are more restrictive in some of the elements of theft than in others. On the whole, however, a pattern of hesitation seems to be present.

To be convicted of theft under the classic Shari'a, a number of requirements must be met. Any of these requirements may fail to be fulfilled if circumstances lead an observer to "doubt" (*shubhah*) that the requirement in fact has been met. In Arabic, the word for doubt means "resemblance" and has a physical connotation. This again confirms the pattern of manifest criminality; should the accused's actions in any way "resemble" a lawful action, the legal grounds for doubt are present, and he may not be convicted of the *hadd* crime of theft.

A. Adulthood (*Baligh*)

In Islamic law, one reaches adulthood with all its rights and responsibilities at the time of puberty. Physiological signs can establish one's puberty. Alternatively, one becomes an adult upon attaining a certain age. Depending on the school, proof of adulthood can be accepted as early as nine years for girls and twelve for boys. Again, depending on the jurist, adulthood can be presumptively achieved as late as nineteen for boys and fifteen for girls.

B. Competency (*Akil*)

In addition to being an adult, one must be mentally competent before being subject to the *hadd* penalties for theft. Islamic law defines competency as "the full possession of one's mental faculties."³³ It signifies the capacity to act deliberately towards a conscious purpose. As such, Islamic law collapses notions of competency and voluntariness. A lunatic, whether insane or an idiot, is not responsible for his actions and is placed in the hands of the court or under the care of a person who would have

³³ Juynboll, *Akil*, in 1 THE ENCYCLOPAEDIA OF ISLAM 239 (1913).

been his guardian at law if the lunatic had been a minor.³⁴ Mentally retarded persons are legally classified as juveniles who have not reached puberty.³⁵ Islamic law recognizes both permanent and temporary insanity as a defense, and pardons from liability those who are emotionally and mentally disturbed if they lose their sense of discrimination between right and wrong. Epileptics also are excused from criminal responsibility.³⁶ Forgetfulness is another defense; the juristic definition of that concept is rather loose, including periods of amnesia, as well as when one forgets things that one "used to know due to learning too many other things."³⁷ Stealing items during a period of forgetfulness, or while one is sleepwalking, will relieve an individual of responsibility for a *hadd* offense, but not of compensating the victim for his loss of property.³⁸

Beyond adulthood and competency, an additional requirement is imposed for property management. Discretion and good judgment (*rushd*) must be shown before any adult can administer his own property.³⁹ The factors of physical development, competency, discretion and good judgment enable Islamic law to characterize puberty as transitional. In the opinion of Shafi'i, if a minor possesses discretion even before reaching adulthood, he is responsible for the return of any goods he may have taken as well as subject to punishment under *ta'zir*. The age of a discerning minor is generally set at seven years; the mentally retarded adult is often characterized as a discerning minor in the law.⁴⁰ This intermediate period between childhood and adulthood corresponds to the same notion present in the common law.

C. Mental Intention (*Niya*)

As with competency, Islamic law confuses notions of voluntariness with intent. For the Islamic jurists, intent is an independent requirement. However, most of the notions surrounding intent also point to an idea of manifest criminality. For example, mental intention is not present if one acts under duress. Duress relieves one of responsibility for theft if the act was done because of a serious threat to life or limb. However, the compulsion must be actual and not merely conjectural.⁴¹ The victim is not viewed

³⁴ NAWAWI, *supra* note 12, at 168.

³⁵ Bahnassi, *Criminal Responsibility in Islamic Law*, in M. BASSIOUNI, *supra* note 22, at 187.

³⁶ *Id.* at 186.

³⁷ *Id.* at 190.

³⁸ A. RAHIM, *MUHAMMADAN JURISPRUDENCE* 224 (1911 reprint 1981).

³⁹ 33 RIYAD MYDANI 225, *quoted in* A. QADRI, *ISLAMIC JURISPRUDENCE IN THE MODERN WORLD* 270 (1963). 1 A. QUERRY, *DROIT MUSULMAN: RECEUIL DE LOIS CONCERNANT LES MUSULMANS SCHYITES* 470 (1871).

⁴⁰ Bahnassi, *supra* note 35, at 192.

⁴¹ NAWAWI, *supra* note 12, at 447.

as coerced unless he is in fact beaten, wounded, or imprisoned, and the threat is taken against his very life or bodily integrity. A mere beating is not enough: it must instill a fear for one's life or limbs. Consequently, a single blow or a single day's imprisonment is insufficient to constitute duress, unless the victim is of high rank whose dignity would be harmed and impaired by lesser blows than would be necessary for a common person.⁴² The coerced party must believe that he will be afflicted with serious harm if he does not accede to the coercion, and the one threatening the harm must be in a position to carry out the threat.⁴³ A threat to one's property is an insufficient basis for avoiding liability.

In many circumstances, duress does not excuse an act, but makes it altogether lawful. The Hedaya treats coercion, not as an excuse from punishment, but as voiding the illegality altogether in cases of eating carrion or drinking wine. In these acts, only the rights of God are involved and not the rights of men, therefore, doing them without evil intent makes them perfectly legal. In fact, the Hedaya treats one who refuses to bend to coercion in this case as "an accessory with another to his own destruction, and is consequently an offender."⁴⁴

Like compulsion, necessity does not excuse the crime so much as to negate its illegality *ab initio*. In fact, necessity is classified as a form of compulsion.⁴⁵ If one commits what would ordinarily have been theft in order to avoid an inescapable evil, one simply does not have the requisite intention for committing the crime.

Hunger operates as a form of necessity relieving the thief of legal responsibility, if he has had "no inclination to transgression," i.e., if he was not going to steal absent his hunger.⁴⁶ If one steals perishable foodstuffs, the *hadd* may not apply in any case, since it is presumed in most schools that one stole out of hunger.⁴⁷ The taker need not return the food; in a formula startlingly on all fours with the solution to the same problem by St. Thomas Aquinas,⁴⁸ the Hedaya asserts that title to the food actually passes to the starving person because of his need.⁴⁹

⁴² AL-MARGHINANI, THE HEDAYA 519 (C. Hamilton trans. 2d ed. 1870)[hereinafter cited as HEDAYA 1870 ed.].

⁴³ *Id.*

⁴⁴ *Id.* at 521. A. RAHIM, *supra* note 38, at 322.

⁴⁵ Bahnassi, *supra* note 35, at 192.

⁴⁶ *Id.*

⁴⁷ R. ROBERTS, *supra* note 21, at 93. Apparently Shafi'i would have applied the *hadd* to the theft of perishable foods. HEDAYA 1795 ed., *supra* note 30, at 88.

⁴⁸ "It is not theft, properly speaking, to take secretly and use another's property in a case of extreme need: because that which he takes for the support of his life becomes his own property by reason of that need." 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1481 Pt. II-II, Q. 66, Seventh Art. Reply Obj. 2 (Fathers of the English Dominican Province trans. 1947).

⁴⁹ "[T]he property of another is made lawful to us in all cases of necessity (such as in a situation of famine for instance)." HEDAYA 1870 ed., *supra* note 42, at 522.

D. Minimum Value (Nihab)

As in the common law, unless the value of stolen goods meets or exceeds a certain value, the *hadd* penalty may not be applied. Very early in the development of Islamic law, the school at Kufa in Iraq (later to develop into the Hanafi school) set the minimum figure at five dirhams, a simplistic analogy from the five fingers of the amputated hand.⁵⁰ Other jurists in Iraq, however, preferred a ten dirham floor; this became the dominant rule in the Hanafi doctrine.⁵¹ In the Shafi'i, Maliki, and Shi'ite schools, the amount must be three dirhams or $\frac{1}{4}$ dinar.⁵² The precious metal weights of these coins varied, particularly in regard to the dirham. One source sets the weight of the dirham, which was usually a silver coin, at 2.97 grams while a single gold dinar weighed 4.25 grams.⁵³ The modern equivalents of those coins would be minimal; over a thousand years ago when Islamic law was coalescing, however, it would have been unusual for a common man to possess silver or gold coins.⁵⁴ As a result, the jurists established their respective minimums to reinforce the point that the *hadd* penalty applied only to thefts of rather major proportions.⁵⁵

Once a threshold amount is set, specific problems of when it is reached arise. The jurists use the rule that any single or separable taking must equal the required amount for the penalty to be applied. Of course, the

⁵⁰ J. SCHACHT, *supra* note 20, at 107. The tiny Ibadi school absorbed the early Kufan formula. *Id.* at 261. The Ibadis are a sect separate from both the Sunnis and the Shi'ites.

⁵¹ J. SCHACHT, *supra* note 18, at 38. The Zaidis, a Shi'ite sect, also require a ten dirham minimum. Heffening, *supra* note 13, at 173.

⁵² Heffening, *supra* note 13, at 173; IBN QUDAMA, *LE PRÉCIS DE DROIT* 266 (H. Laoust trans. 1950). Some jurists reportedly set the minimum at $\frac{1}{4}$ gold dinar or three silver dirhams, others at ten silver dirhams, and others at 40 dirhams. Mansour, *Hudud Crimes*, in M. BASSIOUNI, *supra* note 22, at 198. The later Kufans and the school at Medina (later the Maliki School) each took their respective figures of ten and three dirhams and extended them to be the minimum amount of dower a husband had to pay on marriage. N. COULSON, *A HISTORY OF ISLAMIC LAW* 40 (1964); J. SCHACHT, *supra* note 20, at 108.

⁵³ von Zambaur, *Dirham*, in 1 *THE ENCYCLOPEDIA OF ISLAM* 978-79 (1913). Both the Shafi'i and Hanafi schools excuse the theft of bullion of a greater weight, if after discounting the wastage in minting, the result would have been less than the minimum. HEDAYA 1795 ed., *supra* note 30, at 85. NAWAWI, *supra* note 12, at 443.

⁵⁴ At \$400 a troy ounce, a $\frac{1}{4}$ gold dinar would be worth \$13.65, and at \$11 a troy ounce, ten silver dirhams would equal \$10.59. In modern Sudan, the minimum was set at "a quarter of a golden dinar or three dirham of silver or its equivalent worth in Sudanese currency." Penal Code (September 8, 1983) Sec. 320(b). A later judicial circular set the equivalent at 100 Sudanese pounds or \$40. Letter from C. Gordon, USAID, Sudan, to author (October 18, 1984).

⁵⁵ According to the Hedaya, the value of the stolen item was originally equal to that of a shield. Malik and Shafi'i used the least valuable shield as a measure, although the Hanafis used the most valuable shield, following the rule that any doubt should mitigate against inflicting the *hadd* punishment. HEDAYA 1795 ed., *supra* note 30, at 84. I have yet to discover historical or economical studies detailing the extent to which the rule protected the property owners or merchant classes in the Islamic empire.

formula only begs the question of what is a single taking. In the Shafi'i school, if a thief breaks into a house on two occasions, and each of his thefts is less than the *nihab* but together exceed it, the acts are regarded as a single theft unless the owner has already discovered the first break-in and has repaired the break in his dwelling. On the other hand, if two thieves jointly take something, the value of what they took will be divided in half and neither punished with amputation if the resultant amounts are each less than the required minimum.⁵⁶

For the Maliki's, a series of successive thefts even in a single evening does not incur the *hadd* unless at least one of the takings exceeds ¼ dinar.⁵⁷ The fact that a thief returned through the same opening in the house does not matter in this school although it does in the Shafi'i school.

E. Type of Good (Mal)

The *hadd* penalty applies only to those chattels with title enforceable in the law.⁵⁸ Such property is designated *mal*. The *hadd* is never applied to illegal seizures of real property.⁵⁹ Since Muslims are forbidden to consume wine, pork, or the meat of pagan sacrifices, the law will not enforce any Muslim's claim to these items.⁶⁰ Consequently, the theft of such chattels will not be punishable by amputation. Even if a Muslim steals wine or pork from a non-Muslim, the *hadd* does not apply, although the thief must compensate the victim for the loss. If the victim were Muslim, compensation would not be required.⁶¹ Since the Hanafi school permits the consumption of medicinal liquor made from raisins, jurists include it as *mal* property. Theft of this product is still exempt from the *hadd* under the fiction that the thief might not have intended to steal it but, in the words of the Hedaya, "he may explain his intention in taking it, by saying, 'I took it with a view to spill it.'"⁶² In other words, there is a doubt or resemblance to a lawful act. The other schools, however, do not exempt a Hanafi caught within their jurisdiction from the *hadd* crime of intoxication.

The Hanafi, Shafi'i and Shi'ite schools rigorously apply the principle of *mal* property to excuse one who steals a free person or a free child.⁶³ Since a free person cannot be owned, the absconding of that person is not theft.

⁵⁶ NAWAWI, *supra* note 12, at 443.

⁵⁷ 4 KHALIL BEN ISH'AQ, *supra* note 12, at 52.

⁵⁸ S. KHALIL, *supra* note 32, at 337. 2 A. QUERRY, *supra* note 39, at 517.

⁵⁹ 2 A. QUERRY, *supra* note 39, at 517.

⁶⁰ S. KHALIL, *supra* note 32, at 337. Nawawi includes as things "impure in themselves" the untanned skin of an animal that died from natural causes or was slaughtered contrary to law. NAWAWI, *supra* note 12, at 443.

⁶¹ A. QADRI, *supra* note 39, at 267.

⁶² HEDAYA 1795 ed., *supra* note 30, at 89.

⁶³ NAWAWI, *supra* note 12, at 446; S. KHALIL, *supra* note 32, at 336 n.1; 2 A. QUERRY, *supra* note 39, at 518.

This does not mean that the theft of a slave is subject to the *hadd*. On the contrary, virtually all the schools treat taking a slave as usurpation and not as theft.⁶⁴ Two reasons explain why stealing a slave is not a *hadd* offense. First, a necessary element of the *hadd* offense of theft is that the object stolen must be in the custody (*hirz*) of another. Being persons as well as property, slaves are regarded as in their own custody. They "can give an account" of themselves.⁶⁵ Thus, some Hanafis regard the stealing of an infant slave as a *hadd* offense, because the infant's lack of ability to care for themselves make them more property than persons.⁶⁶ Secondly, theft requires stealth. An open taking of another's property is punished under the law of usurpation with civil remedies, while *ta'zir* punishments are occasionally employed. It is presumed that a slave, being competent, will resist. The taking, therefore, is open and lacks stealth. However, the Malikis will apply the *hadd* to one who entices or seduces a slave away from its owner⁶⁷ because, in that case, the taking is not an open usurpation but is considered a form of stealth. Similarly, the penalty is applied to one who takes a slave lacking discretion⁶⁸ because such a slave is unable to resist; thus the taking need not be open. For the same reasons, the Shi'ites excuse from the *hadd* the taking of an adult slave, but not the absconding of a slave who is a child.⁶⁹

Other categories of non-*mal* property exist in Islamic law such as items of idle amusement, religious goods, and books. The theft of a talking parrot, a dog, chess boards, playing cards, or musical instruments will not incur the *hadd* penalty.⁷⁰ The Shafi'is, however, believe that a guitar is a physical container separate from the music which comes out of it. If the crafted wood of a guitar has a value exceeding the legal minimum apart from its use as musical instrument, then amputation can be imposed.⁷¹ The Hanafis also treat the theft of certain musical instruments as subject to punishment because they are esteemed for the wood or ivory of which they are crafted. In other words, they are objects of value rather than musical instruments.

The Hanafis exempt the theft of holy things, such as the Qur'an or crosses⁷² (the latter more because a cross may not be owned by a Muslim

⁶⁴ Heffening, *supra* note 13, at 173; HEDAYA 1795 ed., *supra* note 30, at 91.

⁶⁵ HEDAYA 1795 ed., *supra* note 30, at 91.

⁶⁶ *Id.* Abu Yusuf, however, would exempt even the theft of an infant slave. *Id.*

⁶⁷ S. KHALIL, *supra* note 32, at 339.

⁶⁸ *Id.*

⁶⁹ 2 A. QUERRY, *supra* note 39, at 518.

⁷⁰ S. KHALIL, *supra* note 32, at 336-37; R. ROBERTS, *supra* note 21, at 92. HEDAYA 1795 ed., *supra* note 30, at 90. The Hedaya treats the property status of dogs as doubtful, and legal doubt bars the imposition of the *hadd*. *Id.* at 92. Mongrels, however, are definitely seen as common property. *Id.*

⁷¹ NAWAWI, *supra* note 12, at 444. The Malikis will also calculate the separate value of the wood. S. KHALIL, *supra* note 32, at 337.

⁷² R. ROBERTS, *supra* note 21, at 92.

and the thief may plead intent to destroy the article).⁷³ The Hedaya even treats ornamented Qur'ans as exempt for three reasons. First, the taker's intent is defective, for he "may plead that his intention was merely to *look into* and *read* it."⁷⁴ Secondly, what is written in the Qur'an is not *mal* property. Third, custody of the Qur'an is only for its content, and not its paper or binding.⁷⁵ According to one opinion of Abu Yusuf, however, the *hadd* will still apply if the ornamentation exceeds the required minimum.⁷⁶ Shafi'i, on the other hand, regarded the Qur'an as a salable article and hence a form of *mal* property.⁷⁷

Finally, books in general are exempt, for the thief is presumed to be after the contents and not the sheaf of scripted paper.⁷⁸ Since Islamic law never developed a conception of intellectual property, stealing another man's thoughts is not the theft of any form of legally protected property.

F. Property of Another

The stolen good must belong to another person, and the thief must lack any colorable claim over the chattel.⁷⁹ According to the Shafi'i school, a thief's claim of ownership over the good in court will suffice to remove the threat of the *hadd* from him. Any such claim will, by definition, create legal doubt (*shubhah*); the *hadd* may not be imposed if there is doubt.

If the thief actually owns the object at the time of taking, even though he was unaware of it, no theft occurs. An example of this situation is gaining title through inheritance.⁸⁰ The accused is also excused from amputation if he can show he had part interest in the item. For the Hanafis and Shafi'is, the taking from jointly owned stock to the detriment of one's partners is treated as a breach of trust (*khiyanah*) and not theft.⁸¹ The Malikis, however, will amputate the hand of one who steals from his partners if he takes more than the minimum value of his rightful proportion of the common goods.⁸²

⁷³ HEDAYA 1795 ed., *supra* note 30, at 90. One opinion of Abu Yusuf holds that a crucifix stolen from a church is exempt from the *hadd*, but not if it is stolen from a house. *Id.* Similarly, the Hedaya will not exempt the stealing of a gold coin with the image of an idol upon it because coins are not objects of worship, and the thief cannot plead that he intended to destroy the coin. *Id.*

⁷⁴ *Id.* (italics in original).

⁷⁵ *Id.*

⁷⁶ *Id.* at 89-90.

⁷⁷ Another opinion of Abu Yusuf agrees with Shafi'i. *Id.* at 89.

⁷⁸ However, the Hanafis presume that if the thief took a ledger book, he wanted the book itself and not its paper. That particular theft would be punishable if the book's value was above the requisite minimum. HEDAYA 1795 ed., *supra* note 30, at 92.

⁷⁹ IBN QASIM AL-GHAZZI, FATH AL QARIB (RÉVÉLATION DE L'OMNIPRÉSENT) 585 (L.W.C. van den Berg trans. 1894).

⁸⁰ NAWAWI, *supra* note 12, at 444.

⁸¹ NAWAWI, *supra* note 12, at 444; S. KHALIL, *supra* note 32, at 337 n.3.

⁸² The goods must not be kept in a place over which the thief had control. S. KHALIL, *supra* note 32, at 337.

The Hanafi school does not regard stealing from the public treasury as incurring amputation because they regard the fisc as common property in which each Muslim owns a share.⁸³ For the Shafi'is and Malikis, however, the stolen item and abstractor must have a specific connection. For example, if the stolen item was specially earmarked for an association of which the accused is a member, or if a Muslim takes money allocated to a public purpose, or a poor person takes relief funds, there is no *hadd*.⁸⁴

The jurists also exclude things in a wild state as having no owner, such as unformed wood, grass, fishes, birds, and (in the opinion of some) unharvested fruit.⁸⁵ Other jurists do not apply the *hadd* to the taking of these things because, under the requirement for a minimum value, they are hard to value,⁸⁶ they are not within proper custody,⁸⁷ or they are common property.⁸⁸ The Hanafis will punish those who steal crafted wood such as utensils, platters, or doors if the value of the workmanship exceeds the value of the raw material.⁸⁹ The value, of course, must exceed the *nihab*.

G. Safekeeping (*Hirz*)

The penalty of amputation can be inflicted legally only if the object stolen must be taken from a place of safekeeping (*hirz*). For three of the Sunni schools, the concept of *hirz* covers two situations: the first implies safekeeping by reason of place, such as a private home; the second situation concerns safekeeping by reason of personal guard over the item in question. The Shafi'is have three categories: 1) those things safe by reason of the place in which they are kept; 2) those things in the open which need an alert watchman; and 3) those things in only a partially secure place which need a guardian present but not necessarily awake or on the watch.⁹⁰ The definition of a physical *hirz* and a sufficient guard have exercised the imagination of Islamic jurists for centuries.

Generally speaking, Islamic law maintains a sense of things being properly in their ordinary place of safekeeping, such as goods in a shop, personal possessions in a house, an animal in a fold, or, for the Malikis, a child in its home.⁹¹ However, household goods and clothes are not secure

⁸³ 2B CAMBRIDGE HISTORY OF ISLAM 491 (1970); S. KHALIL, *supra* note 32, at 33 n.2.

⁸⁴ NAWAWI, MINHAJ ET TALIBIN 223-24 (L.W.C. van den Berg trans. 1882); 4 KHALIL BEN ISH'AQ, *supra* note 12, at 53.

⁸⁵ J. SCHACHT, *supra* note 20, at 180.

⁸⁶ R. ROBERTS, *supra* note 21, at 91. HEDAYA 1795 ed., *supra* note 30, at 87.

⁸⁷ HEDAYA 1795 ed., *supra* note 30, at 87-88.

⁸⁸ *Id.* at 88.

⁸⁹ *Id.* at 93.

⁹⁰ NAWAWI, *supra* note 12, at 445.

⁹¹ 6 KHALIL IBN-ISHAQ, PRÉCIS DE JURISPRUDENCE MUSULMANE OU PRINCIPES DE LÉGISLATION MUSULMANE CIVILE ET RELIGIEUSE, SELON LE RITE MALEKITE 465-66 n.10 (M. Perron trans. 1848).

in a stable, nor are gold and silver coins that safe in a courtyard of a house.⁹²

A private home is the archetypical *hirz*. Beyond that, however, the schools differ dramatically as to what kind of building enjoys the status of a *hirz*. For many Shi'ites, the general rule is that a place of safekeeping is one in which only the owner has unlimited access.⁹³ Unless the item is in a locked enclosure or buried, the Shi'ites will not generally apply the penalty of amputation.⁹⁴ The Shafi'is rely on custom to determine what constitutes a proper closing or fastening of any given enclosure.⁹⁵

The Malikis are much more liberal in their definition of *hirz*. For them, safekeeping is implied when a good is placed where it does not normally run a risk of loss.⁹⁶ Instead of requiring the owner to lock up his property or to follow custom to ensure the enclosure's doors or gates are properly secured, the Malikite rule merely requires the owner to avoid an undue exposure of loss. Even places more public than a private home enjoy protected status under Maliki law. For example, homes having a quasi-public status, such as residences where judges, doctors, or jurists receive clients off the street, are also seen as place of custody. Even public baths constitute a *hirz*.⁹⁷ For all Islamic schools of thought, if someone is a guest invited into a home or other place of safekeeping, any theft by that guest will not incur the extreme penalty. An invitation removes the barrier to his entrance making the house no longer *hirz* in relation to him.

The Malikis also regard a chattel in safekeeping if it is a good found appropriately in a shop, a stall, a tent, or in front of a tent.⁹⁸ Analogously, grain in a silo, if near the house of the owner, is likewise covered.⁹⁹ Furthermore, animals in a herd, fruit or grain on a threshing floor, a good loaded in a cart or in the pack on an animal, anything on board ship, a corpse in a tomb or buried at sea are also considered to be in custody.¹⁰⁰ The Shafi'is, on the other hand, protect a corpse's shroud only if the tomb is close to houses, or if the tomb is enclosed in a crypt or mausoleum. A tomb in the desert is not a place of custody.¹⁰¹ Similarly, the Shafi'i jurists opine that cattle in a stable are in custody only if the stable is near the house of their owner. A herd in the open, even if enclosed in a corral, is not protected.¹⁰²

⁹² NAWAWI, *supra* note 12, at 445.

⁹³ A. QUERRY, *supra* note 39, at 517.

⁹⁴ *Id.*

⁹⁵ NAWAWI, *supra* note 84, at 224.

⁹⁶ S. KHALIL, *supra* note 32, at 339.

⁹⁷ *Id.*

⁹⁸ *Id.* at 338.

⁹⁹ *Id.* at 339.

¹⁰⁰ *Id.* at 338-39.

¹⁰¹ NAWAWI, *supra* note 12, at 445.

¹⁰² *Id.*

The Hanafi school, as represented by the Hedaya, will not punish any theft of a shroud with amputation.¹⁰³ But the position of the jurists here is not derived from considerations of custody. Rather, the Hedaya argues that the shroud has no owner, since a dead man cannot possess property. Furthermore, since the Hanafis see deterrence as the ultimate basis for imposing the *hadd* penalty, amputation would be inappropriate because grave stealing is not a frequent crime.¹⁰⁴ Not surprisingly, the legal experts of classical Islam spent much time defining commercial places of custody in a commercial society centered on trade. Consequently, inns and hostelries, as well as caravans were given defined legal regimes for determining the circumstance in which they provided protection for the goods held within.

H. *Stealth*

Although safekeeping and stealth are conceptually different elements, Islamic jurists normally consider stealth as part of their treatment of *hirz*. Stealth is part of the image of theft, a process of secretly entering a place not one's own, taking a good not one's own, and removing it from its place of safekeeping. If the secrecy of the chain of action is broken at any point, the requirement of stealth is not met. One does not enter a public building secretly, for example. Even if one does, however, the act of entering easily resembles a lawful act. Similarly, the chain is broken if one is an invited guest, or if one is caught in possession of the goods. An open taking is treated as robbery, punishable by *ta'zir* but not by amputation. In the case of highway robbery, a separate *hadd* punishment of double amputation or, in some cases, death applies.

I. *Proof*

The rich and complex methodology of Islamic criminal procedure deserves a lengthy treatment of its own. Here, I mention only certain salient points in terms of the crime of theft. For most of the Islamic schools of law, the person whose property was stolen must bring the charge. The claim must be raised before the property is returned, and it must be corroborated by two male Muslim witnesses of high repute. Alternatively, in the Hanbali school, a man may be convicted by confessing his own guilt two times in open court; this is properly analogous to the testimony of two witnesses. In this situation a man is regarded by his confession as being a witness against himself. He is not convicted by subjective intent, but by the fact that he was witness to an objective fact—namely, that he himself stole the good.

¹⁰³ Abu Yusuf differs from the Hedaya's point of view in this case. HEDAYA 1795 ed., *supra* note 30, at 94.

¹⁰⁴ *Id.*

The judge normally counsels the defendant that a retraction is lawful; there is no moral or legal obligation to come forward with a confession.¹⁰⁵ God will judge what is in a man's heart. Alternatively, some jurists allow for preventive detention to hold the accused within the jurisdiction of the court, while some permit beating an accused of bad character to elicit a confession. Many jurists, however, require circumstantial corroboration of confessions in such cases.¹⁰⁶ As with normal Muslim witnesses, a retraction of confession voids the probative value of the proof. If the convicted person runs away while being brought to his place of punishment, and he had been convicted because of his own confession, the fact of his running away will, in some instances, be considered equivalent to a retraction of his confession.

The two male witnesses must testify to all the particulars of the case. Their testimony may not conflict. Should they change their testimony before execution, the *hadd* may not be applied.¹⁰⁷ The witnesses may not be near relatives to the accused and, for many jurists, they may not have an interest in the case. Once such witnesses have testified, proof is complete. The sentence will be imposed unless the judge can be shown, presumably by defendant's statements, that the actions testified to can nonetheless be shown to "resemble" lawful actions. In that case, sufficient legal doubt will exist and the *hadd* will not be imposed.

Only the Hanafis have a doctrine of laches whereby the failure of witnesses to come forward in a timely fashion creates a doubt *ipso facto*. Similarly, an undue delay in imposing the punishment will bar the *hadd* from being applied.¹⁰⁸

J. Summary

Unless all the above requirements were met, an accused could not be convicted of the *hadd* crime of theft. Instead, he could be charged with pilfering, usurpation, breach of trust, fraud, false pretenses, or robbery and held liable civilly or punished by *ta'zir*.

V. CONCLUSION

Among the various problems associated with conviction under Islamic law, two issues emerge. The first is the issue of manifest criminality. Islamic law clearly defines theft in terms of people's everyday experience

¹⁰⁵ Osman, *The Rights of the Individual to Personal Security in Islam*, in M. BASSIOUNI, *supra* note 22, at 73.

¹⁰⁶ Awad, *Rights of the Accused under Islamic Criminal Procedure* in M. BASSIOUNI, *supra* note 22, at 93.

¹⁰⁷ Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence*, in M. BASSIOUNI, *supra* note 22, at 113.

¹⁰⁸ *Id.* at 113-14.

of looking at the concrete act of stealing. Second, there is the problem of emblematic or exemplary punishment. The issue of institutionalized vengeance is evident in Islamic law and accompanied by the justification of deterrence—a justification that is explicitly supported in many of the writings of the jurists. Beyond this, however, one sees that taken as a whole, including all the requirements of adulthood, intent, minimum value, custody, no colorable claim, and rigid procedure, it was difficult to convict a person of theft when no confession was present. The jurists' hesitation was even codified in a tradition that the *hadd* penalties should be avoided if at all possible.¹⁰⁹ Most of these prophylactic rules were developed by the jurists in their disputations and writings with one another. Whether the jurists developed them in disputations solely among themselves or in connection with actual cases, as did the common law, is not known at present.

The jurists had an additional reason to try to limit the incidence of the punishment of amputation. One of the fundamental premises of Islam is that one's external acts will not damn an individual to hell if the individual has in fact attempted to make repentance, and repentance can be solely internal. And that is why a malefactor is encouraged to be silent and seek forgiveness in God's eyes. Although the law is clear that external acts are what are forbidden, discouraged, neutral, approved, or required as the case may be, it is a man's internal will that leads to his damnation or salvation. In fact, Islam has a rather generous formula according to one tradition. A good intention gains credit with God; if it is put into action, it gains tenfold credit. An evil intention does not damn an individual absent being followed by a concrete act.¹¹⁰ Manifest criminality as the basis of the criminal law, and the notion of the responsible will of man as a theological ground norm are in tension in Islamic law. The tension is endemic, for Islamic law does not formally distinguish between the secular and the sacred. Further, man is regarded as the greatest creation of Allah. To inflict intentionally a mutilation and a maiming on the creation of Allah, in effect, distorts one of Allah's greatest achievements. Yet the Qur'an explicitly commands amputation. How would the jurist contend with such a contradiction?

The history of the establishment of Islamic law placed outer limits on the extent to which a jurist could ignore some of the most draconian rules. He was far less free than the common law judge operating under precedent. Possibly jurists attempted to mitigate the dissonance in the values by creating mechanisms by which the Qur'an's prescribed penalty for theft was kept as a matter of principle, since the Qur'an could not be disobeyed explicitly. On the other hand, its practical effect was lessened so that underlying values accorded the repentance of the human person and

¹⁰⁹ Bassiouni, *Sources of Islamic Law*, in M. BASSIOUNI, *supra* note 22, at 26.

¹¹⁰ 1 AL-BUKHARI, SAHIH 1 (M. Khan. trans. 1976).

the integrity of Allah's creation could be maintained. This issue certainly needs further investigation, but it is possible that the very contrived, sophisticated, and subtle development of the rules of law by the Islamic jurists were an attempt to strike this uncomfortable but necessary balance.

