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TWO LEGAL PROBLEMS BEARING ON THE EARLY HISTORY OF THE QUR'ĀN[1]

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The Qur'ān is generally supposed to have originated in a social, cultural and linguistic environment familiar to the early commentators, whose activities began shortly after Muḥammad's death and many of whom were natives of the two cities in which he had been active; yet they not infrequently seem to have forgotten the original meaning of the text.[2] It is clear, for example, that they did not remember what Muḥammad had meant by the expressions *jizya ʿan yad*,[3] *al-ṣamad*,[4] *kalāla*[5] or *īlāf*; indeed, the whole of Sūra

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2 Rippin would like Islamicists to forget about the original meaning of the Qur'ān (A. Rippin [ed.], *Approaches to the History and Interpretation of the Qur'ān*, Oxford 1988, pp. 2ff.). But though the study of *tafsīr* certainly should not focus on it alone, a historian of the rise of Islam cannot do without it. Rippin objects that "the scholar will never become a seventh-century Arabian townsperson but will remain forever a twentieth-century historian or philologian"; but we will never become tenth-century Iraqis, nineteenth-century Egyptians or anyone else in our own or other people's past either, nor will we ever become anything other than ourselves in the present. Should we then abandon altogether the attempt to understand what other people are trying to say?

3 F. Rosenthal, 'Some Minor Problems in the Qur'ān', *The Joshua Starr Memorial Volume*, New York 1953, pp. 68ff.; cf. C. Cahen, 'Coran IX-29', *Arabica* 9, 1962; M.M. Bravmann, 'A propos de Qur'ān IX-29', *Arabica* 10, 1963; id., 'The Ancient Arab Background of the Qur'ānic Concept *al-Gizyatu ʿan Yadin*', in his *The Spiritual Background of Early Islam*, Leiden 1972 (reprinted from *Arabica* 13, 1966, and 14, 1967); M.J. Kister, '"An Yadin" (*Qur'ān*, IX/29)', *Arabica* 11, 1964; and now also U. Rubin, 'Qur'ān and *Tafsīr*. The case of "ʿan Yadin"', *Der Islam* 70, 1993.

106 (*Quraysh*), in which the word *īlāf* occurs, was as opaque to them as it is to us;[6] and the same is true of the so-called 'mysterious letters'.[7] *Kalāla* is a rather unusual case in that several traditions (attributed to 'Umar) openly admit that the meaning of this word was unknown;[8] more commonly, the exegetes hide their ignorance behind a profusion of interpretations so contradictory that they can only be guesswork. "It might", as Rosenthal observes, "seem an all too obvious and unconvincing argument to point to the constant differences of the interpreters and conclude from their disagreement that none of them is right. However, there is something to such an argument".[9] There is indeed. Given that the entire exegetical tradition is characterized by a proliferation of diverse interpretations, it is legitimate to wonder whether guesswork did not play as great a role in its creation as did recollection;[10] but the tradition is not necessarily right even when it is unanimous. In this paper I shall first adduce an example of a Qur'ānic passage misunderstood by the exegetes without there being any disagreement whatsoever about the interpretation, and next discuss the exegetical memory loss with reference to the discontinuity between Qur'ānic legislation and Islamic law, of which I shall adduce another example.

4 Rosenthal, 'Some Minor Problems', pp. 72ff. According to U. Rubin, '*Al-Ṣamad* and the High God: An Interpretation of *sūra* CXII', *Der Islam* 61, 1984, the exegetical tradition does preserve the meaning of this word (cf. below, note 25).

5 D.S. Powers, 'The Islamic Law of Inheritance Reconsidered: A New Reading of Q. 4:12B', *Studia Islamica* 55, 1982; cf. also id., 'The Will of Sa'd b. Abī Waqqāṣ: A Reassessment', *Studia Islamica* 58, 1983; id., 'On the Abrogation of the Bequest Verses', *Arabica* 29, 1983; id., *Studies in Qur'ān and Ḥadīth*, Berkeley, Los Angeles and London 1986.

6 M. Cook, *Muhammad*, Oxford 1983, pp. 71f.; P. Crone, *Meccan Trade and the Rise of Islam*, Princeton and Oxford 1987, pp. 205ff. For a recent attempt to pinpoint the original meaning of *īlāf*, see U. Rubin, 'The *Īlāf* of Quraysh', *Arabica* 31, 1984.

7 Cf. A.T. Welch, *EI²*, s.v. 'al-Ḳur'ān', col. 412.

8 Powers, 'Islamic Law of Inheritance Reconsidered', pp. 74f.

9 Rosenthal, 'Some Minor Problems', p. 68.

10 Cf. I. Goldziher, *Die Richtungen der Islamischen Koranauslegung*, Leiden 1920, pp. 83f.

I. *Kitāb* in 24:33

The first thirty-four verses of Sūra 24 (*al-Nūr*) are concerned with sexual morality. The Sūra starts by laying down the penalty for fornicators and proceeds to accusations of unchastity, laying down the penalty for *qadhf*, specifying the procedure of *li'ān*, and engaging in a long diatribe against *ifk*; next it regulates entry into other people's houses, sets out rules regarding modest demeanour, encourages marriage, and concludes with a statement that "now we have sent down to you signs making all clear..." Thereafter the subject matter changes; verse 35 starts the celebrated 'mystic' passage of the Qur'ān after which the Sūra is named.

Sūrat al-Nūr 1-34 is thus a treatise on chastity (with the exception of verse 22, which has no apparent bearing on the subject). Verses 32-33 go as follows:

٣٢ وَأَنْكِحُوا
ٱلْأَيَامَىٰ مِنْكُمْ وَٱلصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ إِنْ يَكُونُوا فُقَرَاءَ يُغْنِهِمُ ٱللَّهُ مِنْ فَضْلِهِ
وَٱللَّهُ وَاسِعٌ عَلِيمٌ ٣٣ وَلْيَسْتَعْفِفِ ٱلَّذِينَ لَا يَجِدُونَ نِكَاحًا حَتَّىٰ يُغْنِيَهُمُ ٱللَّهُ مِنْ فَضْلِهِ
وَٱلَّذِينَ يَبْتَغُونَ ٱلْكِتَابَ مِمَّا مَلَكَتْ أَيْمَانُكُمْ فَكَاتِبُوهُمْ إِنْ عَلِمْتُمْ فِيهِمْ خَيْرًا وَآتُوهُمْ مِنْ
مَالِ ٱللَّهِ ٱلَّذِي آتَاكُمْ وَلَا تُكْرِهُوا فَتَيَاتِكُمْ عَلَى ٱلْبِغَاءِ إِنْ أَرَدْنَ تَحَصُّنًا لِتَبْتَغُوا عَرَضَ
ٱلْحَيَوٰةِ ٱلدُّنْيَا وَمَنْ يُكْرِهْهُنَّ فَإِنَّ ٱللَّهَ مِنْ بَعْدِ إِكْرَاهِهِنَّ غَفُورٌ رَحِيمٌ/

32. a. "Marry off the spouseless among you, and your slaves and slavegirls that are righteous;
b. if they are poor, God will enrich them of His bounty.
c. God is all-embracing, all-knowing.
33. a. And let those who do not find a match be abstinent till God enriches them of His bounty.
b. And for those in your possesion who desire a *kitāb*, write them a *kitāb* if you know some good in them.
c. And give them of the wealth of God that He has given you.
d. And do not compel your slavegirls to prostitution, if they desire to live in chastity, in order that you may pursue the goods of the present life.
e. If anyone compels them, then after the compulsion laid upon them, God will be all-forgiving, all-compassionate".

It should be clear that verse 33b-e is a loose paraphrase of verses 32a-33a.

32a: "Marry off the spouseless among you, and your slaves and slavegirls that are righteous" = 33b: "And for those in your possession who desire a *kitāb*, write them a *kitāb* if you know some good in them".
32b: "if they are poor, God will enrich them" = 33c: "and give them of the wealth of God that He has given you".
33a: "And let those who do not find a match be abstinent till God enriches them of His bounty" = 33d: "And do not compel your slavegirls to prostitution, if they desire to live in chastity, in order that you may pursue the goods of the present life".
32c: "God is all-embracing, all-knowing" = 33e: "If anyone compels them, then after the compulsion laid upon them, God will be all-forgiving, all-compassionate".

It should also be clear that 32c has been misplaced (it ought to have followed rather than preceded 33a), and that this is why the verse division has gone wrong. Our concern is not with verse division, however, but rather with the meaning of *kitāb*. There can be no doubt that the word means a marriage contract here (cf. Hebrew *ketubah*).[11] The passage is about marrying off the spouseless in general and slaves and slavegirls in particular: if they are too poor to afford the dower, God will provide/you should provide out of the money God gives you; if they must wait, let them be abstinent/do not force them into prostitution. This is in keeping with the fact that, as mentioned already, the general subject is sexual morality.

Yet *all* Muslim commentators understand *kitāb* as a manumission document, more precisely as a contract of manumission in return

11 Marriage contract is also one of the meanings of *kitāb* in modern Arabic (cf. H. Wehr, *A Dictionary of Modern Written Arabic*, ed. J.M. Cowan, Wiesbaden 1966; M. Hinds and S. Badawī, *A Dictionary of Egyptian Arabic*, Beirut 1986, s.v.), and it is attested in medieval Arabic too (R. Dozy, *Supplément aux dictionnaires arabes*, Leiden 1881, s.v.; drawn to my attention by E. Kohlberg); but the dictionaries of classical Arabic fail to record it (cf. E.W. Lane, *An Arabic-English Lexicon*, London 1863-93; *Wörterbuch der klassischen arabischen Sprache*, Wiesbaden 1970— , s.v.). Though it does of course mean a written contract in general, a foreign usage may be reflected here.

for payment of a specified sum in instalments over a specified period (usually known as *kitāba* or *mukātaba*). This understanding is faithfully reflected in both Bell's and Arberry's translations:
Bell: "And for those in your possession who desire the writing (of manumission) write it if ye know any good in them".
Arberry: "Those your right hands own who seek emancipation, contract with them accordingly, if you know some good in them".

Though manumission is plainly out of context here, there seems to be no trace of disagreement over the meaning of the word, be it in Sunnī,[12] Shīʿī,[13] Khārijī,[14] or for that matter Islamicist literature.[15] The commentators argued about the the phrase "if you know some good in them", the issue being whether it was a reference to moral probity or to financial ability. They also disagreed on whether the Qurʾānic verse made it obligatory or merely recommended for the owner of a slave to contract a slave in *kitāba* if

12 ʿAbd al-Razzāq b. Hammām al-Ṣanʿānī, *al-Muṣannaf*, ed. H.-R. al-Aʿẓamī, Beirut 1970-72, vol. 8, nos. 15570-95; ʿAbdallāh b. Muḥammad Ibn Abī Shayba, *Kitāb al-muṣannaf fī ʾl-aḥādīth wa ʾl-āthār*, ed. M.A. al-Nadwī, Bombay 1979-83, vol. 7, nos. 2886-95; Muqātil b. Sulaymān, *Kitāb tafsīr al-khams miʾat āya min al-Qurʾān*, ed. I. Goldfeld, Ramat Gan 1980, pp. 234f.; Muḥammad b. Jarīr al-Ṭabarī, *Jāmiʿ al-bayān fī tafsīr al-Qurʾān*, Cairo 1321-28, vol. 18, pp. 88ff.; ʿAbdallāh b. ʿUmar al-Bayḍāwī, *Anwār al-tanzīl wa-asrār al-taʾwīl*, Istanbul n.d., vol. 2, p. 140; Fakhr al-Dīn al-Rāzī, *al-Tafsīr al-kabīr*, Cairo n.d., vol. 23, pp. 215ff.; Abū Bakr Muḥammad b. ʿAbdallāh Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, ed. ʿA.M. Bajāwī, vol. 3 [Cairo] 1957, pp. 1369ff.; Muḥammad b. Aḥmad al-Qurṭubī, *al-Jāmiʿ li-aḥkām al-Qurʾān*, Cairo 1933-50, vol. 12, pp. 244ff.; Ismāʿīl b. ʿUmar Ibn Kathīr, *Tafsīr al-Qurʾān al-ʿaẓīm*, Cairo n.d., vol. 3, pp. 287f.

13 Abū ʾl-Ḥasan b. ʿAlī b. Ibrāhīm al-Qummī, *Tafsīr*, ed. T. al-Mūsawī al-Jazāʾirī, Najaf 1387, vol. 2, p. 102; Muḥammad b. al-Ḥasan al-Ṭūsī, *Tafsīr al-tibyān*, ed. A.H.Q. al-ʿĀmilī, vol. 7, Najaf 1962, pp. 433f.; Saʿīd b. Hibat Allāh al-Rāwandī, *Fiqh al-Qurʾān*, ed. A. al-Ḥusaynī and M. al-Marʿashī, Qumm 1397-99, vol. 2, pp. 215f.

14 Abū Ghānim Bishr b. Ghānim al-Khurāsānī, *Kitāb al-mudawwana al-kubrā*, ed. M. Aṭfayyish, [Beirut 1974], vol. 2, pp. 177f.; Abu ʾl-Hawārī al-ʿUmānī al-Ibāḍī, *al-Dirāya wa-kanz al-ghināya fī tafsīr khams miʾat āya*, n.p. 1974, p. 216.

15 In addition to translations of the Qurʾān, see R. Roberts, *The Social Laws of the Qoran*, London 1925, pp. 59f.; J. Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford 1950, p. 279.

the slave so desired. And they took the injunction "give them of the wealth of God that He has given you" to mean that the manumitter ought charitably to forgo the last instalments. The one thing they never considered was the possibility that *kitāb* here meant marriage contract rather than manumission document. The institution of *kitāba* has its roots in provincial law, and it does not owe a single feature to the Qur'ān, not even the practice of charitably forgoing the last instalments: the charitable practice was read into the book rather than derived from it.[16] The Qur'ān does not in fact refer to the institution at all. Why then did the Muslims come to see *kitāba* here? Even if the exegetes had forgotten the original meaning of *kitāb* in this verse, they could easily have deduced it from the context, yet they never tried.[17] But why *did* they forget the original meaning? It seems unlikely that they should have displaced or suppressed it because they needed to find a Qur'ānic sanction for *kitāba*, for numerous institutions of Islamic law are validated by Ḥadīth alone, and *kitāba* was not an especially controversial procedure in need of a Qur'ānic peg. Given the continuous nature of the tradition, moreover, the original meaning ought to have been difficult to displace.

Rosenthal suggests that the gaps in the exegetical recollection should be explained with reference to the disparity between Muḥammad's personal knowledge and that of his followers on the one hand, and the discontinuity between Muḥammad's environment and that of the exegetes on the other: Muḥammad may have been familiar with foreign words and topics that were unknown to his audience; and since a number of traditions assert that he disliked being questioned about religious matters, he may have refused to explain himself when he was not understood; at the same time the pagan environment

16 Cf. P. Crone, *Roman, Provincial and Islamic Law*, Cambrige 1987, ch. 5, esp. pp. 72f., 145[100].

17 They were not even worried by the use of *kitāb* for *kitāba*, though the only other attestations of *kitāb* in that sense seem to reflect the usage of the Qur'ān itself ('Abd al-Razzāq, *Muṣannaf*, vol. 8, no. 15578; Muḥammad Ibn Sa'd, *al-Ṭabaqāt al-kubrā*, Beirut 1957-60, vol. 5, pp. 85, 86; Aḥmad b. Abī Ṭayfūr, *Kitāb Baghdād*, vol. 6, ed. H. Keller, Leipzig 1908, p. 164). It did however worry Schacht (*Origins*, p. 279 and the note thereto).

was shrinking and idioms were changing.[18] In short, though the early commentators were familiar with the environment in which the Qur'ān originated, the continuity should not be envisaged as total.

This is a reasonable explanation which copes well enough with examples such as *al-ṣamad* and *al-rajīm* in the expression *al-shayṭān al-rajīm* (an Ethiopian loan-word which the commentators wrongly took to be an Arabic word meaning 'stoned'; it is however an uncertain example of exegetical failure to remember, in that Muḥammad may have understood it the same way).[19] It could perhaps account for the fate of the mysterious letters, too (on the assumption, for example, that Muḥammad refused to divulge their meaning so as to heighten their impact). But it hardly suffices to explain how the meaning of an entire (if short and fragmentary) sūra could be lost, and it cannot cope at all with the fact that the meaning of *legal* terms was forgotten. It may well be that *kalāla* was a foreign word known to Muḥammad and not to his audience, but we can hardly suppose that he kept his knowledge to himself in this case; for without knowledge of the meaning of *kalāla*, one is left without a key to Qur'ānic rules of succession. If Muḥammad intended these rules to be applied, he must have explained what *kalāla* meant; and once the rules were applied, his understanding of the term must have been embedded in practice, where it ought to have survived even though the pagan environment receded and other terminology changed, and where indeed it ought to have been retrievable even if Muḥammad's explanations were forgotten. *Jizya ʿan yad* and the *kitāb* of 24:33 are likewise legal terms which Muḥammad must have been at pains to ensure that his followers understood correctly and which thus ought to have remained unproblematic whether he used them in an idiosyncratic sense or not. But in all three cases the terms owe their classical meaning to exegetical reasoning rather than to simple recollection; in all three cases, then, we must assume that Muḥammad's explanations were forgotten *and* that practice based thereon came to an end. There seems to have been discontinuity of a more drastic kind than Rosenthal's argument allows for.

18 Rosenthal, 'Some Minor Problems', p. 68.

19 Rosenthal, 'Some Minor Problems', pp. 83f. (Ethiopian *ragama* means 'to curse'.)

Powers, to whom Islamicists owe their awareness of the *kalāla* problem, rightly offers a theory of a more radical nature: in his view the original meaning of Qur'ānic *kalāla* was suppressed for political reasons in the decades after Muḥammad's death, along with the original import of the Qur'ānic rules of succession.[20] But this theory does not seem to work. For one thing, Powers can scarcely be said to have proved that Muḥammad's followers were once familiar with what he takes to be the original meaning of *kalāla* (female in-law)[21] or the original meaning of Qur'ānic inheritance law in general;[22] nor is the reader persuaded that there were political reasons to suppress them.[23] What one does infer from his work is rather that the meaning of *kalāla* and attendant inheritance law had never been known: there was nothing to remember, nothing to suppress; all one sees are frantic attempts to make sense of a recalcitrant text.[24] For another thing, *kalāla* is only one among several examples of exegetical memory loss and Powers' conspiracy theory cannot easily be extended to cover the parallel cases. It seems unlikely that the original meaning of terms as diverse as *al-ṣamad, jizya ʿan yad, īlāf, kalāla* and *kitāb*, not to mention *Sūrat Quraysh* and the mysterious letters, should have been suppressed for political reasons, though suppression (for theological rather than political reasons) is also postulated by Rubin in his discussion of *al-ṣamad*: early Islamic history is getting more and more Machiavellian.[25] It might reasonably be objected that there could be a number of factors behind the exegetical failure to remember, deliberate suppression being involved in the case of *kalāla* (and, if one accepts Rubin's argument, *al-ṣamad*), other factors being at work in other cases. But the number of cases is now sufficiently large for separate explanations to have a makeshift appearance; a single theory accounting for all the known examples, and indeed for all those likely to turn up in future, would be more convincing. At the very least, we need a single theory for all the

20 Powers, *Studies*, ch. 4.

21 He argues that the traditions in which ʿUmar agonizes about the meaning of *kalāla* are carefully coded anecdotes put into circulation by people who knew the real meaning of the *kalāla* verses, but who were debarred from saying so directly because the issue was too controversial (*Studies*, pp. 32ff.). But one needs more sensitivity to innuendo than I possess to be persuaded of a secret message in these traditions.

22 No exegete ever read *yūrith* for *yūrath* in Qur. 4:12b/15, or discerned a distinction between testate and intestate succession in the book (with the exception of al-Qurṭubī, cf. Powers, *Studies*, p. 186), or between primary and secondary heirs; everyone in Powers' opinion wrongly took the Qur'ān to rule that males are entitled to twice the shares of females, and so on.

23 According to Powers, Qur. 4:12b/15 originally referred to the possibility of designating a testamentary heir, which was embarrassing to those who claimed that Muḥammad had died without designating a successor (*Studies*, pp. 113ff.). But a verse enabling a man to bequeath his property to a female in-law or wife (as it does in Powers' reconstruction) has no obvious bearing on political succession; and if it did have political implications, its meaning ought to have been preserved by those who claimed that Muḥammad *had* designated a successor; but there is no trace of it among the Shīʿites. By what mechanisms, moreover, could the early caliphs suppress the original meaning of a verse which (*ex hypothesi*) many other Companions had heard and understood correctly while the Prophet was still alive? "Islamic society ... was not the sort of monolithic totalitarian culture in which a few ideologues could impose their views ... on a community which knew them to be untrue", as Kennedy points out with reference to Crone and Cook in the mistaken belief that the authors of *Hagarism* proposed a conspiracy theory (H. Kennedy, *The Prophet and the Age of the Caliphates*, London and New York 1986, p. 357).

24 The fact that the Muslims seem never to have known the original meaning does not of course imply that Powers has failed to discover it. Whether he has or not is a separate question without bearing on the problem at hand.

25 Powers' suppression theory does at least have the merit of acknowledging that something has been genuinely lost. By contrast, what Rubin takes to be the original meaning of *al-ṣamad* (*al-maṣmūd ilayhi*) is an interpretation common in the exegetical tradition from Abū ʿUbayda to modern times: in what sense was it suppressed? Al-Ṭabarī may not cite any traditions in its favour, but he knew the interpretation nonetheless (and in fact opted for it himself); and the actual traditions reappear in works composed after his death (Rubin, '*Al-Ṣamad*', pp. 203, 211). Presumably, then, Rubin simply means that the (in his view) original interpretation of the word went out of favour and thus came to coexist with alternative explanations, though it remained perfectly well known until today. But nothing suggests that it started as the *only* interpretation: alternative explanations are present in the earliest material (e.g., Muqātil in Rubin, ibid., p. 214n). The meaning of *al-ṣamad* was thus controversial as far back as the tradition will take us. Sound philological scholarship may have enabled the exegetes to *discover* the original meaning of this word (cf. ibid., p. 211), but they did not *remember* what it was supposed to mean.

examples involving law. For law is the most exoteric of subjects, and the oblivion affecting the legal terminology of the Qur'ān poses the same intractable problem whatever the specific terms involved: how could the meaning of such terminology be forgotten if the rules it formulated were explained and applied from the moment of their revelation?

This takes us to another well-known problem, namely that there is less continuity between Qur'ānic and Islamic law than one would expect. Schacht, to whom most Islamicists owe their awareness of this problem, held that certain rules were based on the Qur'ān from the start, "particularly in family law and law of inheritance, not to mention cult and ritual";[26] but even so, he argued, "anything which goes beyond the most perfunctory attention given to the Koranic norms and the most elementary conclusions drawn from them belongs almost invariably to a secondary stage in the development of doctrine";[27] and he noted that "there are several cases in which the early doctrine of Islamic law diverged from the clear and explicit wording of the Koran", giving the rejection of the validity of written documents (contrary to 2:282) as his main example.[28] Burton's work on the stoning penalty for *zinā* and other conflicts between Qur'ān and Sharī'a,[29] Powers' work on inheritance, and Hawting's work on the rights of the divorced woman during her waiting period[30] all suggest that Schacht understimated the discontinuity to which he drew attention:[31] of rules based on the

26 Schacht, *Origins*, p. 224; id., *An Introduction to Islamic Law*, Oxford 1964, p. 18.

27 Schacht, *Origins*, p. 227; id., *Introduction*, p. 18.

28 Schacht, *Introduction*, pp. 18f.; id., *Origins*, pp. 188, 226.

29 J. Burton, *The Collection of the Qur'ān*, Cambridge 1977, pp. 55 (inheritance law), 61 (widows' rights), 72ff. (stoning penalty).

30 G.R. Hawting, 'The Role of Qur'ān and *Ḥadīth* in the Legal Controversy about the Rights of a Divorced Woman during Her "Waiting Period" ('Idda)', *Bulletin of the School of Oriental and African Studies* 52, 1989.

31 Powers' contribution is the most significant in that it postulates drastic discontinuity in the very core of Islamic law, yet it is meant as a refutation of Schacht's thesis. Powers takes Schacht to claim that the development of Islamic law only began about a hundred years after the Prophet's death and tries to prove that it began before (see *Studies*, pp. 1-8, 209); but what Schacht actually claimed is that the *evidence* only takes us back to about 100 A.H. not that nothing happened in the preceding century (Schacht, *Origins*, p. 5). Schacht did claim that the law as we know it from the second century onwards is surprisingly un-Qur'ānic, but that is precisely what Powers himself concludes.

Qur'ān from the start we no longer possess a single clear-cut example. But how is it to be explained? Schacht argued that "Muhammadan law did not derive directly from the Koran but developed ... out of popular and administrative practice under the Umayyads, and this practice often diverged from the intentions and even the explicit wording of the Koran".[32] But this merely restates the question: why did the popular and administrative practice of the Umayyad period diverge from the explicit wording of the Qur'ān? Some might invoke the supposed secular-mindedness of the Umayyads, but this is a stereotype which Schacht rightly rejected and which moreover fails to help in that it contrasts the popular (pious) and official (impious) practice of the Umayyad period instead of linking them.[33] Others might argue that Qur'ānic legislation is likely to have been swamped by Jāhilī practice when the mass of Arab tribesmen joined the *umma*, and by non-Arab practice when they conquered the Middle East; but there does not seem to be any resurgence of either Jāhilī or Middle Eastern practice behind the adoption of the stoning penalty or the rejection of written evidence,[34] nor does the discontinuity between Qur'ānic and Islamic inheritance law discovered by Powers seem to be explicable in such terms. One would in any case have expected Qur'ānic law to survive the inundation. There is nothing problematic about the proposition that a mass of extra-Qur'ānic law, sometimes un-Qur'ānic in spirit, was *added* to the Qur'ānic core, but how did Qur'ānic law come to be *undone*? If

32 Schacht, *Origins*, p. 224.

33 Schacht, *Introduction*, p. 23; cf. also P. Crone and M. Hinds, *God's Caliph: Religious Authority in the First Centuries of Islam*, Cambridge 1986, p. 23.

34 The stoning penalty reflects Pentateuchal doctrine, not Middle Eastern practice. The rejection of written evidence went against *both* Qur'ānic law *and* Jāhilī practice according to Schacht, who notes that 'nothing definite is known about the origin of this feature' (*Origins*, p. 188; cf. *Introduction*, pp. 18f., but without documentation of the alleged Jāhilī practice).

flogging had been the official penalty for *zinā* since the revelation of the flogging verses, and if the Muslims had regularly recited these verses thereafter, how did the discontinuity set in?

Coulson's key objection to Schacht's work was precisely that it postulates an impossible discontinuity, and his argument is relevant even though it is focused on Ḥadīth rather than the Qur'ān. He points out that Qur'ānic legislation was revealed in response to practical problems (this being how the tradition presents it), but that it cannot have been implemented without further clarification; for it tends to leave fundamental questions unanswered, and its precise implications are often unclear. It follows that Qur'ānic legislation must have been supplemented with rulings of other kinds from the start, first by the Prophet, later by his Companions, and thereafter by the lawyers: why then does Schacht systematically deny the authenticity of rulings if they are credited to the Prophet and his Companions rather than to lawyers? In Coulsons's opinion, Schacht postulates a void where there must have been continuous development: the community cannot have left its legal problems unsolved, and the lawyers cannot totally have forgotten how the law was applied before their own time.[35]

This is an eminently reasonable argument. If Qur'ānic legislation was implemented, the development of Qur'ānic into Islamic law ought indeed to have been continuous, and the Prophet's understanding of the law ought indeed to have been preserved, be it in words or practice or both (unless deliberate suppression was involved, which I shall henceforth assume was not the case). But the void postulated by Schacht is real: how would Coulson account for the adoption of the stoning penalty, the rejection of written evidence, the uncertainty regarding the meaning of *kalāla*, or the misunderstanding of the word *kitāb*? The Prophet must, *ex hypothesi*, have explained and implemented the law in each of these cases, and he is indeed said to have done so in Ḥadīth; but what Ḥadīth presents him as implementing is Islamic law, complete with its divergence from Qur'ānic legislation: Ḥadīth does not refute the void, but on the contrary illustrates it. *If* Qur'ānic law was implemented, there cannot have been a void; but *if* there is a void, it would follow that Qur'ānic law cannot have been implemented.

35 N.J. Coulson, *A History of Islamic Law*, Edinburgh 1964, part 1, esp. chs. 1 and 5.

That Qur'ānic law should have remained a dead letter until a secondary stage of legal development is a fairly startling proposition, but Burton seems to take it for granted. According to him, the discontinuity between the two arises from the fact that Qur'ānic legislation did not reach the lawyers directly: what they took up was not the book itself, let alone practice based on it, but rather exegetical versions of its contents. *Tafsīr* generated *sunna* for the lawyers: thus 5:42-49 generated stories about Muḥammad applying the stoning penalty in cases of adultery, and this *sunna* won legal recognition, its incompatibility with 24:2 (which specifies flogging) notwithstanding.[36] The lawyers did not in Burton's view pay any serious attention to the text itself until about 800, when they were confronted with Qur'ānic fundamentalists.[37]

Now this theory could certainly account for the misunderstanding of *kitāb* in 24:33, provided that we take Burton's exegetes to have been story-tellers (which is in fact how he seems to envisage them himself).[38] The *quṣṣāṣ*, whose contribution to the exegetical tradition is well attested, were not fussy about the accuracy of their interpretations, and the stories they told in explanation of 24:33 are typical of their approach. Although the verse forms part of a larger unit which must have been composed or, as they saw it, revealed, together they happily assigned different occasions of revelation to the component parts of the verse (not to mention the unit). Thus 33b ("and for those in your possession who desire a *kitāb*...") was allegedly revealed about a slave of Ḥuwayṭib b. 'Abd al-'Uzzā or Ḥāṭib b. Abī Balta'a who wanted a *kitāba* but

36 Burton, *Collection*, ch. 4. The argument is restated in his 'Law and Exegesis: The Penalty for Adultery in Islam', in G.R. Hawting and A.-K. A. Shareef (eds.), *Approaches to the Qur'ān*, London and New York 1993.

37 Burton, *Collection*, pp. 19ff., 161, 177, et passim. Al-Shāfi'ī (d. 822) is presented as the leading opponent of the 'Qur'ān party' and the person to whom the *sunna* owed its rescue (pp. 24ff., 92).

38 Ibid., pp. 70, 185. The *qāṣṣ* is explicitly mentioned in his 'Law and Exegesis', p. 270.

whose owner refused to give him one;[39] but 33d ("and constrain not your slavegirls to prostitution...") was supposedly triggered by a slavegirl or slavegirls of ʿAbdallāh b. Ubayy, who had one, two or six, whose names were such-and-such and whom he prostituted, though she/they were unwilling; so she/they went to the Prophet, whereupon this statement was revealed.[40] Both claims must be pure fiction. But given this approach, it is not particularly strange that *kitāb* should have been understood as *kitāba*: the sheer fact that the word was mentioned in the context of slaves probably sufficed to suggest a manumission document to the *quṣṣāṣ*, generating instant stories based on this understanding of the word. The stories they told, or some of them, survive in exegetical works of the most reputable kind, and the lawyers never doubted that 24:33 was concerned with manumission: they misunderstood *kitāb* just as they ignored the flogging penalty (which is prescribed in the same 'treatise on chastity'), and it could well be that they took their cue from story-telling exegetes in both cases.

But why should the interpretation of Qur'ānic law have been left to *quṣṣāṣ*? Burton's answer that the lawyers did not regard the scripture as a source of law until about 800 begs the question how they could have had a scripture containing legislation *without* regarding it as a source of law? Are we to take it that even the Prophet did not see it as such (implying that he made no attempt to put its legislation into practice), or that his concept of the Qur'ān as a source of law was forgotten by later generations (who forgot his contribution to practice, too)? Neither hypothesis is very persuasive. If the Prophet enacted legislation that was rapidly incorporated into a scripture recited by everyone thereafter, it is hard to see how anyone could have failed to endow it with supreme authority over and above all

39 ʿAlī b. Aḥmad al-Wāḥidī, *Asbāb al-nuzūl*, Beirut 1316, p. 245; al-Qurṭubī, *Aḥkām*, vol. 12, p. 244.

40 al-Wāḥidī, *Asbāb*, pp. 245ff., with numerous versions; al-Rāzī, *Tafsīr*, vol. 23, p. 220; al-Qurṭubī, *Aḥkām*, vol. 12, p. 254; Ibn Kathīr, *Tafsīr*, vol. 3, pp. 288f., with other versions; Ibn al-ʿArabī, *Aḥkām*, vol. 3, p. 1374; al-Ṭūsī, *Tibyān*, vol. 7, p. 434; Ibn Ḥajar, *al-Iṣāba fī tamyīz al-ṣaḥāba*, Cairo 1328, vol. 4, pp. 408f. (s.v. 'Muʿāda').

other forms of law, that of the Pentateuch included. Even if the conquests disrupted practice and the story-tellers muddled things with their stories thereafter, the flogging verse is quite unambiguous; and the caliphs would have been in a position to ensure that practice was restored to what they took to be its original form. The scholars might in due course have disputed the validity of the caliphal understanding of right practice and quarreled among themselves over the reconciliation of Qur. 4:15, which prescribes lifelong incarceration for women guilty of gross moral turpitude, and Qur. 24:2, which prescribes flogging for both men and women guilty of unlawful intercourse; but why should they have quarreled over *stoning*?

Burton compounds the problem by arguing that Muḥammad collected his own revelations.[41] A prophet who fixes his own message in writing is presumably motivated by a desire to be correctly understood long after he has died, meaning that he will do his best to endow his contemporaries, too, with a correct understanding of his message, which in this particular case must have meant explaining (if not implementing) its legal passages on a par with the rest. Yet the lawyers suffered from amnesia after his death and took their clues from the story-tellers. It does not make sense.

What is more, the amnesia was not confined to the lawyers. The significance of non-legal terms and passages such as *al-ṣamad, īlāf, Sūrat Quraysh* in general and the mysterious letters was also forgotten, while at the same time the story-tellers took it upon themselves to supply not just *sunna* to the lawyers but also *tafsīr* in general and Prophetic biography in particular to scholarly exegetes and historians.[42] This goes well enough with Burton's view of exegesis as a universal bottleneck through which every verse of the Qur'ān, and indeed every item of historical recollection, had to pass in order to reach the believers;[43] but a universal bottleneck

41 Burton, *Collection*, pp. 239f.

42 Cf. H. Birkeland, *The Legend of the Opening of Muhammad's Breast*, Oslo 1955; and/or id., *The Lord Guideth*, Oslo 1956, pp. 38-55 (on Sūra 94); Crone, *Meccan Trade*, ch. 9 (on Sūra 106).

43 My summary of Burton's views here rests less on his *Collection* than on his written and oral contributions to the colloquia on Ḥadīth held at Oxford 1982, Cambridge 1985 and Oxford 1988.

cannot be explained with reference to the attitude of lawyers. What Burton conjures up is not a situation in which the lawyers paid scant attention to the scripture, but rather one in which the story-tellers had sole access to it: according to him, the Qur'ān existed for purposes of generating wild *tafsīr* but not for purposes of sober checking, with the paradoxical result that it generated divergence from itself. But if the scripture had been available since the time of the Prophet, how can the story-tellers have had a monopoly on it? Everyone would have been in a position to check their stories against the text, and the existence of a canonical scripture must rapidly have engendered scholarly exegetes, who were rivals of the *quṣṣās* rather than their allies.[44] How then could the story-tellers reign supreme for long enough actually to shape the classical understanding of the book? Burton's theory cries out for some sort of modification.

We are thus left with Wansbrough. Wansbrough would reject all the arguments reviewed so far as based on a faulty premise inasmuch as they all assume the Qur'ān to be a collection of Muḥammad's revelations collected in Medina before the centre of the Muslim community had been transferred to the non-Arab Middle East. According to Wansbrough, the Qur'ān did not originate in Arabia, nor indeed did Islam: the Arabs had not established a new religious community of their own by the time they left Arabia; rather, they chanced upon a new sectarian development in the Middle East (Iraq?) after the conquests and proceeded to adopt it as their own, rewriting its history and giving it an Arab imprint in the process. The Qur'ān emerged out of a diversity of sources as part of this process, in which the story-tellers played a crucial role: the popular sermon was the instrument of both transmission and explication of the Prophetic *logia*, which had originated in a sectarian environment and from which the Qur'ānic canon was eventually separated; but its text crystallized so slowly that one cannot speak of a *ne varietur* version

44 Cf. J. Pedersen, 'The Islamic Preacher', in *Ignace Goldziher Memorial Volume*, vol. 1, Budapest 1948; id., 'The Criticism of the Islamic Preacher', *Die Welt des Islams* 2, 1953.

until about 800 A.D.[45] (that is about the time that Burton would have his lawyers begin to pay attention to its text).[46]

As it stands, this theory can only be saved on the assumption that all evidence purporting to date from before 800, be it Muslim or non-Muslim, literary or documentary, is by definition inauthentic, or in other words that evidence incompatible with the theory is *ipso facto* wrong.[47] The contention that the *ne varietur* Qur'ān only emerged about 800 could moreover be said to fall between two stools: on the one hand, a scripture undoubtedly existed before 800,[48] so the date proposed is too late; but on the other hand, it was only in the tenth century that seven *ne varietur* versions of

45 J. Wansbrough, *Qur'anic Studies*, Oxford 1977; id., *The Sectarian Milieu*, Oxford 1978.

46 Both authors would seem to imply that 'Uthmān only came to be credited with the creation of the *textus receptus* about 800 A.D.; for Wansbrough would hardly go so far as to argue that there were stories about the canonization of the Qur'ān before it had actually been canonized, while Burton holds all the stories of the collection and canonization of the Qur'ān to be engendered by theories of *naskh*, which were evolved when Qur'ānic fundamentalists forced the jurists to confront the discrepancies between the Qur'ān and *fiqh* (*Collection*, pp. 161f.), that is, not long before al-Shāfi'ī. Yet the story of 'Uthmān's canonization of the Qur'ān is deeply entrenched in the tradition when it emerges into full light about 800.

47 Leaving aside the early non-Muslim sources, whose testimony Wansbrough naturally rejects (cf. *Doctrina Iacobi*, pseudo-Sebeos, and other accounts in P. Crone and M. Cook, *Hagarism: The Making of the Islamic World*, Cambridge 1977; Wansbrough, *Sectarian Milieu*, pp. 117f.), there are monotheist coins and inscriptions from the time of Mu'āwiya onwards which can hardly be dismissed as so many literary stereotypes (and which are not discussed), while the first coin to identify Muḥammad as *rasūl Allāh* dates from 66/685f (Crone and Hinds, *God's Caliph*, pp. 24f.). Where should one fit in "the establishment of a *modus vivendi* between the new authority and the indigenous communities, and the distillation of a doctrinal precipitate (a common denominator) acceptable initially to an academic élite, eventually an emblem of submission (*islām*) to political authority" (Wansbrough, *Sectarian Milieu*, p. 127)?

48 Specimens of Qur'ānic material such as the Dome of the Rock inscription or the legend on the reformed coinage do not prove that the materials had stabilized as a scripture, partly because they are snippets and partly because they mix up what are now verses in different sūras. But the sheer fact that the sixteen mangled lines of the Khirbet el-Mird fragment are recognizable as

this scripture were canonized,[49] so the date proposed is also too early. More precisely, the contention is unclear: Wansbrough does not explain what he means by *ne varietur* in a context in which uniformity was never achieved.

His suggestion that we should abandon the premise of all existing arguments is nonetheless very helpful in the present context; for if the Qur'ān was only put together some time *after* the conquests, we have the 'void' we need in order for things to get out of kilter. For a start, we could accommodate the evidence that the Muslims once accepted the Pentateuch as their scripture, or as

Qur. 3:102f does suggest that there was a stable text by the late Umayyad period (cf. M.J. Kister, 'On an Early Fragment of the Qur'ān', *Studies... Presented to L. Nemoy*, Ramat-Gan 1982; see A. Grohmann, *Arabic Papyri from Ḫirbet el-Mird*, Louvain 1963, p. xi, on the date of the site); and a Nubian papyrus datable to 741/758 contains two Qur'ānic quotations preceded by *wa-'llāh tabāraka wa-ta'ālā yaqūlu fī kitābihi* (M. Hinds and H. Sakkout, 'A Letter from the Governor of Egypt to the King of Nubia Concerning Egyptian-Nubian Relations in 141/758', in W. al-Qāḍī (ed.), *Studia Arabica et Islamica, Festschrift for Iḥsān 'Abbās*, Beirut 1981, p. 218, lines 7-11), so it can no longer be claimed that "those sources which may with some assurance be dated before the end of the second/eighth century (and thus before Ibn Isḥāq) contain no reference to Muslim scripture" (Wansbrough, *Sectarian Milieu*, p. 58). Moreover, one would expect a scripture, in the sense of a stable text regarded as supremely authoritative, to announce its presence by deeply colouring all diction and thought; and the supposedly mid-Umayyad, possibly late Umayyad, possibly even early 'Abbāsid, but at any rate not *ninth-century* theological epistles are indeed permeated by the Qur'ān in this way (cf. M. Cook, *Early Muslim Dogma*, Cambridge 1981, p. 16 *et passim*). To Wansbrough this simply means that they must be too late to count (cf. *Qur'anic Studies*, pp. 160-63, on the letter ascribed to al-Ḥasan al-Baṣrī). The letter of the late Umayyad caliph al-Walīd II regarding his successors is similarly replete with Qur'ānic citations and allusions, but to a follower of Wansbrough there can be no question of accepting it as authentic (cf. N. Calder's reaction in his review of Crone and Hinds, *God's Caliph*, in *Journal of Semitic Studies* 32, 1987, pp. 376f.). Followers of Wansbrough will now have to explain away the letters of 'Abd al-Ḥamīd b. Yaḥyā too (cf. W. al-Qāḍī, 'The Impact of the Qur'ān on Arabic Literature during the Late Umayyad Period: The Case *of* 'Abd al-Ḥamīd's Epistolography', in G.R. Hawting and A.-K.A. Shareef (eds.), *Approaches to the Qur'ān*, London and New York 1993.

49 Cf. Welch in *Encyclopaedia of Islam*², s.v. 'al-Ḳur'ān', cols. 408f.

one of them, which would allow us to explain why the lawyers took stories in which Muḥammad inflicts a Pentateuchal penalty on Jews to establish a *sunna* for Muslims: it is not otherwise clear why this 'gossip' (as Burton calls it) should have been endowed with legal significance,[50] or why the lawyers assumed the Prophet also to have adopted other Pentateuchal law that happens not to contradict the Qur'ān.[51] If, further, the Qur'ān was codified and canonized after the conquests, it ceases to be problematic that the reception of its legislation belongs to a secondary stage. And finally, a belated canonization of the book would give us a period in between, in which a variety of religious works, including proto-Qur'ānic materials, were in circulation without having coalesced as an Arab scripture, that is, without there being a single work endowed with overriding authority, general availability and a presumption of internal coherence. In the absence of a book available to all in written and oral transmission, the welter of Arab and non-Arab books endowed with ill-defined degrees of authoritativeness would have been directly accessible only to those who could actually read them, except insofar as parts of them were recited in prayer and other cultic contexts. Where, then, would one turn for information on the prophets' messages, and for explanation of the passages recited, if not to story-tellers and other self-appointed experts who professed to have read such books, or to have had them read to them, or to have heard from those who had? Long after the Qur'ān had been canonized, experts of this kind continued to supply information on the sayings and doings of Muḥammad's predecessors.[52] In the absence of a supremely authoritative book canonized in the Ḥijāz,

50 Cf. Burton, *Collection*, pp. 70, 185. The question is raised in his 'Law and Exegesis', pp. 273f., but I cannot see that it is answered.

51 Cf. P. Crone, 'Jāhilī and Jewish Law: The *Qasāma*', *Jerusalem Studies in Arabic and Islam* 4, 1984, pp. 166-82. N. Calder, *Studies in Early Muslim Jurisprudence*, Oxford 1993, p. 212, charges me with creating "an ingenious link between Deut. 21:1-9 and the Ḥanafī law of *qasāma*". But since the Muslims themselves assert that the *qasāma* is a Biblical institution and offer a loose translation of Deut. 21:1-9 in support of this claim, it takes more ingenuity to deny the link than to affirm it.

52 Cf. *Encyclopaedia of Islam*², s.v. 'Isrā'īliyyāt'.

moreover, there cannot have been a tradition of scholarly exegesis rooted in the Ḥijāz. The scholars must have arrived at a later stage, breaking the monopoly of the story-tellers, but taking over rather than rejecting their interpretations: they had no independent recollection of their own. There must of course have been people who remembered what Muḥammad said and did in historical fact, but such people will have been few and far between once the vast majority of Arabs had joined the *umma* and settled in the conquered lands; and one would assume them to have put their knowledge to story-telling use so as not to be outdone by those who drew crowds even though their credentials were inferior, meaning that genuine recollection will soon have entered the general pool of story-telling material, where it will have been lost. In short, we would have a situation in which story-telling exegetes did indeed enjoy a monopoly on revelation, be it that of the prophets or that of the Prophet, and in which all revelation and historical knowledge passed through Burton's exegetical bottleneck, to be denuded of original meaning in the process.

So far, so good. But if we envisage the story-tellers as both transmitters and explicators of the materials from which the Qur'ān was to emerge, how do we explain the fact that they were utterly uninhibited when it came to interpretation, yet remarkably disciplined when it came to the text? They did not substitute *kitāba* for *kitāb*, replace *īlāf* with a more familiar word or otherwise improve on what they did not understand, as one would have expected them to do. *Pace* Wansbrough, the text seems to have been endowed with immutability, or something close to it, from an early date.[53] This is something of a problem. It goes well enough with Burton's view that the Qur'ān existed as a document long before it existed as a source, but the objection to this view remains

53 According to Burton, "the very unhelpfulness of the Qur'ān document when called upon to behave as the Qur'ān source, and the frequent embarrassment it caused the Muslim scholars, speak very strongly for its authenticity as a document, in the sense that it does not have any of the appearance of having been concocted after the evolution of the legal doctrine with the aim of supplying its documentation" (*Collection*, p. 187). This is certainly true, but then nobody suspects the lawyers of having concocted it. The fact that it was not really intelligible to the story-tellers either does however point to a loose end in Wansbrough's theory.

as before: how can the Muslims have possessed a book which they regarded as supremely authoritative for purposes of recitation, but not for purposes of law? *Pace* Burton, the assumption of nonscriptural form does seem to be indispensable when we turn to the fate of Qur'ānic legislation. It is thanks to their diametrically opposed views on the stability of the text in the dark centuries before c. 800 that Wansbrough and Burton offer contrasting theories rather than identical ones, their views being highly compatible in other respects; and since neither theory is acceptable as it stands, the solution must lie somewhere in between. But how it should be envisaged I do not know. I must accordingly confine myself to the observation that a theory of belated codification and canonization works very well in the present context, not only in that it would allow us to explain all the examples so far known of exegetical ignorance of, and juristic lack of attention to, the import of Qur'ānic passages, but also in that it could be assumed to work for future examples as well. It certainly works for the three examples that have turned up since Wansbrough wrote, the first being Powers' inheritance laws and the second the *kitāb* that I have already discussed; the third is the rule to which I shall now proceed.

II. The DAEP Rule

The DAEP rule relates to succession, more precisely to the devolution of the property of freedmen and freedwomen. The example is more complex than that of *kitāb*, so the reader will have to put up with a few preliminary remarks.

For purposes of presentation we may divide an individual's relatives into two broad categories, male agnates (males related to the individual through male links) and all the rest, whom we may call cognates. The first of these categories is actually found in classical Sunnī law (male agnates being known as *'aṣaba*), but the second is not: classical Sunnī law divides the relatives here called cognates into two distinct classes, with quite different rules of inheritance applying to each class. The first comprises all the cognates who have been awarded a fixed share of the estate in the Qur'ān; they are known as *aṣḥāb* or *dhawū' l-farā'iḍ/ashām* and are generally referred to in English as Qur'ānic heirs. The second class is made up of all the remaining cognates, who are known as *dhawū 'l-arḥām* and

referred to in English as uterine or distant heirs, or outer family; I shall call them non-Qur'ānic cognates in this article.

Classical Sunnī law regulates the relationship between the three classes of heirs as follows. Qur'ānic heirs cannot be excluded by representatives of the other classes, but nor do they exclude male agnates: if the *de cujus* leaves Qur'ānic heirs and male agnatic relatives, one allots the former their Qur'ānic share and awards the residue (if any) to the latter. But male agnates and Qur'ānic heirs alike exlude non-Qur'ānic cognates, who are only called to succession in the absence of heirs of other types (with the exception of the spouse relict) and who are not recognized as heirs at all by the Mālikīs.[54]

The manumitter (whether male or female) counts as a male agnate for purposes of succession to his or her freedman or freedwoman. If the latter leaves genuine male agnatic relatives (e.g. a son), the manumitter is excluded by the rules governing priority within the agnatic class (the nearer in degree excludes the more remote); but if no genuine male agnatic relatives are present, the manumitter will inherit together with Qur'ānic heirs and exclude non-Qur'ānic cognates.[55]

Now in pre-classical law, the manumitter was treated quite differently. He was excluded by Qur'ānic heirs instead of inheriting along with them; and he was excluded by non-Qur'ānic cognates, too, instead of excluding them. In other words, *all* cognates excluded the manumitter. I have discussed this rule elsewhere from the point of view of the history of *walā'*,[56] but in the present context its significance is this: most of the traditions which support this rule show no awareness of the fact that cognates comprise two wholly different classes of heirs; the traditions do not divide them into a Qur'ānic and a non-Qur'ānic variety, but rather treat them all as members of a single category, which they call *dhawū 'l-arḥām*.

For lack of a more graceful term, I have dubbed the pre-classical doctrine the DAEP rule (*dhawū 'l-arḥām* exclude patrons). The

54 On all of this, see N.J. Coulson, *Succession in the Muslim Family*, Cambridge 1971.

55 Crone, *Roman, Provincial and Islamic law*, pp. 36f.

56 Ibid., pp. 79f.

acronym refers to patrons rather than manumitters because the latter were only one out of two types of patron acknowledged in early law, which treated them almost identically, and the traditions do not always specify which type of patron they have in mind. It is invariably the manumitter rather than the contractual patron who is mentioned in the traditions that do specify, and this is as might be expected: freedmen are far more prominent than contractual patrons in the early sources (legal or non-legal), and most schools eventually rejected the contractual patronate altogether.[57] But the DAEP rule must be presumed to have applied to patrons of both kinds.

We may now turn to the material, which can be divided into three groups.

1. Numerous early authorities, especially Kūfan ones, are said to have awarded the entire estate to a *dhū raḥim* at the expense of a patron. This was the correct solution according to 'Umar,[58] 'Alī,[59] and 'Umar II[60] among the caliphs. It was also the correct solution in the eyes of

57 Ibid., pp. 38, 91.

58 *Kāna 'Umar wa-'bn Mas'ūd yuwarrithāni [dhawī] 'l-arḥām dūna 'l-mawālī. Qāla, fa-qultu: fa-'Alī b. Abī Ṭālib? Qāla: kāna ashaddahum fī dhālika*, as a much cited tradition has it ('Abd al-Razzāq, *Muṣannaf*, vol. 9, no. 16197; H.P. Raddatz, 'Frühislamisches Erbrecht nach dem *Kitāb al-farā'iḍ* des Sufyān at-Taurī', *Die Welt des Islams* 13, 1971, p. 40 [omits the statement on 'Alī]; Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11205 [omits *dūna 'l-mawālī*]; al-Shāfi'ī, *Kitāb al-umm*, Būlāq 1321-25, vol. 7, p. 166; Aḥmad b. al-Ḥusayn al-Bayhaqī, *al-Sunan al-kubrā*, Hyderabad 1344-55, vol. 6, p. 242, top. Cf. also Muḥammad b. Yūsuf Aṭfayyish, *Sharḥ al-nīl wa-shifā' al-'alīl*, vol. 8, Cairo 1343, p. 394). For other traditions on 'Umar, see 'Abd al-Razzāq, *Muṣannaf*, vol. 9, nos. 16196, 16203.

59 Cf. the preceding note; Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11208; Bayhaqī, *Sunan*, vol. 6, pp. 241f.; al-Muḥammad b. Ya'qūb al-Kulaynī, *al-Uṣūl min al-kāfī*, ed. 'A.A. al-Ghaffārī, Tehran 1377-81, vol. 7, pp. 135f.; Muḥammad b. 'Alī Ibn Bābūya, *Man lā yaḥḍuruhu 'l-faqīh*, ed. H.M. al-Kharsān, Tehran 1390, vol. 4, p. 223, nos. 709-10; Muḥammad b. al-Ḥasan al-Ṭūsī, *Tahdhīb al-aḥkām*, ed. H.M. al-Kharsān, vol. 9, Tehran 1382, pp. 328ff.; N.B.E. Baillie, *A Digest of Moohummudan Law*², vol. 2, London 1887, p. 346.

60 'Abdallāh b. Aḥmad Ibn Qudāma, *al-Mughnī*, ed. T.M. al-Zaynī et al., Cairo 1968-70, vol. 6, p. 323, no. 4830.

Shurayḥ,[61] Masrūq,[62] Ibn Masʿūd,[63] Ibn Masʿūd's son, grandson[64] and nephew,[65] al-Shaʿbī,[66] al-Aswad, ʿAlqama,[67] ʿAbīda[68] and Ibrāhīm al-Nakhaʿī in Kūfa;[69] Jābir b. Zayd in Baṣra;[70] Muʿādh b. Jabal,[71] Abū ʾl-Dardāʾ[72] and Maymūn b. Mihrān in Syria;[73] Ibn ʿAbbās, Mujāhid and ʿAṭāʾ in Mecca;[74] Jābir al-Anṣārī,[75] Muḥammad al-Bāqir[76] and Jaʿfar al-Ṣādiq in Medina;[77] as well as Ṭāwūs in the Yemen.[78] This

61 Abū ʿUbayd al-Qāsim b. Sallām, *Kitāb al-amwāl*, ed. M.Kh. Harās, Cairo 1968, p. 309, no. 529; cf. also Aṭfayyish, *Nīl*, vol. 8, p. 394.

62 ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, no. 16203; Ibn Qudāma, *Mughnī*, vol. 6, p. 323, no. 4830; Aṭfayyish, *Nīl*, vol. 8, p. 394.

63 Cf. above, note 58; also ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, nos. 16196, 16203; Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11218 (fails to specify that the competitor was a patron; appears in the chapter on *radd*); Bayhaqī, *Sunan*, pp. 241f.; Ibn Qudāma, *Mughnī* , vol. 6, p. 323, no. 4830; Aṭfayyish, *Nīl*, vol. 8, p. 394.

64 I.e., Abū ʿUbayda b. ʿAbdallāh b. Masʿūd and al-Qāsim b. ʿAbd al-Raḥmān b. ʿAbdallah b. Masʿūd (ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, nos. 16204-5; Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11218 [fails to specify that the competitor was a patron]; Ibn Qudāma, *Mughnī*, vol. 6, p. 323, no. 4830).

65 I.e., ʿAbdallāh b. ʿUtba b. Masʿūd (Ibn Qudāma, *Mughnī*, vol. 6, p. 323, no. 4830). He is counted as a Medinese by some (Ibn Ḥajar, *Tahdhīb al-tahdhīb*, Hyderabad 1325-27, vol. 5, p. 311).

66 ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, no. 16203; Ibn Qudāma, *Mughnī*, vol. 6, p. 323, no. 4830; Aṭfayyish, *Nīl*, vol. 8, p. 394.

67 ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, no. 16196 (ʿAlqama); Raddatz, 'Erbrecht', p. 40 (ʿAlqama); Ibn Qudāma, *Mughnī*, vol. 6, p. 323, no. 4830; Aṭfayyish, *Nīl*, vol. 8, p. 394 (both).

68 Ibn Qudāma, *Mughnī*, vol. 6, p. 323, no. 4830.

69 ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, nos. 16196, 16203; Ibn Qudāma, *Mughnī*, vol. 6, p. 323, no. 4830; Aṭfayyish, *Nīl*, vol. 8, p. 394.

70 Ibn Qudāma, *Mughnī*, vol. 6, p. 323, no. 4830; Aṭfayyish, *Nīl*, p. 394.

71 Aṭfayyish, *Nīl*, vol. 8, p. 394.

72 Ibid.; cf. Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11207, on Abū ʾl-Dardāʾ (who awards the entire estate to a maternal half-brother in the absence of other heirs, no mention being made of a patron).

73 Ibn Qudāma, *Mughnī*, vol. 6, p. 323, no. 4830.

74 Aṭfayyish, *Nīl*, vol. 8, p. 394.

75 Baillie, *Digest*, vol. 2, p. 346.

76 Ibn Bābūya, *Man lā yaḥḍuruhu al-faqīh*, vol. 4, p. 223, no. 708; Baillie, *Digest*, vol. 2, p. 346.

77 al-Kulaynī, *Kāfī*, vol. 7, pp. 135f.

78 Aṭfayyish, *Nīl*, vol. 8, p. 394.

material gives us the pre-classical rule, or rather half of it, and establishes that it was widely accepted. It only gives us half of the rule because nothing indicates that *dhū raḥim* means other than non-Qurʾānic cognate here. But what types of heirs did the above-mentioned authorities have in mind?

2. Some traditions answer this question by adducing case law.

(a) A freedwoman of ʿAlqama's died leaving a maternal half-sister's son or daughter, or a maternal half-brother's daughter,[79] plus ʿAlqama, her patron. ʿAlqama awarded the entire estate to the surviving relative with the comment that it was hers by right.[80] ʿAlī awarded the entire estate to a maternal aunt and a paternal grandmother in competition with patrons.[81]

The heirs in question are non-Qurʾānic cognates, that is *dhawū ʿl-arḥām* in the classical sense of the word.[82]

(b) Ibn Masʿūd's grandson similarly awarded the entire estate of a freedwoman to her mother rather than to her patrons.[83] ʿAlī gave the entire estate to a sister at the expense of the patrons,[84] and both Ibn Masʿūd and his son used to do the same.[85] ʿAlī also gave the entire estate to a daughter,[86] and when

79 ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, no. 16196; Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11212; Raddatz, 'Erbrecht', p. 40.

80 Thus the first two sources referred to in the previous note (the third is exceedingly concise). Compare Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11210, where ʿAlqama's client gratuitously bequeaths a third of his estate to his patron's family, leaving the rest to his maternal sister's son (who would thus have been the sole heir if the freedwoman had died intestate).

81 al-Kulaynī, *Kāfī*, vol. 7, p. 135, no. 2; al-Ṭūsī, *Tahdhīb*, vol. 9, p. 329, no. 1183; Baillie, *Digest*, vol. 2, p. 346 (maternal aunt); Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11211 (paternal grandmother).

82 Though grandmothers are treated differently from the bulk of non-Qurʾānic cognates in classical law (cf. Coulson, *Succession*, pp. 60f.).

83 ʿAbd al-Razzāq , *Muṣannaf*, vol. 9, no. 16205.

84 al-Ṭūsī, *Tahdhīb*, vol. 9, p. 330, no. 1189.

85 ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, no. 16204. This tradition makes no explicit mention of a patron, and it is later cited in illustration of *radd* (vol. 10, no. 19130). But ʿAbd al-Razzāq presumably took it to be a case of sister versus patron when he put it in his *bāb mīrāth dhī ʿl-qarāba* (compare the similar case above, note 63).

86 al-Ṭūsī, *Tahdhīb*, vol. 9, p. 330, nos. 1186f. (where the daughters are slaves whose manumission is purchased, presumably out of the estate); pp. 331f., nos. 1192f. (where the widow gets her eighth); cf. also no. 1195.

> Ibrāhīm al-Nakhaʿī was reminded that the Prophet had given only half the estate to the daughter in the classical case of Ibnat Ḥamza, awarding the remaining half to the patroness, he tried to explain it away, implying that he himself would have given the entire estate to the daughter.[87]

In this material the cognates are Qurʾānic heirs, not *dhawū ʾl-arḥām* in the classical sense; yet they are adduced in illustration of the same rule as their non-Qurʾānic counterparts.

3. Finally, ʿAbd al-Karīm b. Abī ʾl-Mukhāriq (d. 126/743f) sets out the doctrine as follows:[88]

> When a man died leaving patrons who had freed him, but no *dhū raḥim* other than [for instance] a mother or maternal aunt, they would award the estate to her and not call the patron to succession together with her; for they do not call patrons to succession together with a *dhū raḥim*.

Here a Qurʾānic cognate (mother) and a non-Qurʾānic one (maternal aunt) are explicitly enumerated as heirs of the same type, covered by the same rule.

There is no doubt that the terminology at least is odd in these traditions, but the fact that the propounders of the DAEP rule speak of both types of cognates as *dhawū ʾl- arḥām* does not necessarily mean that they were ignorant of the distinction between them. It is possible that the pre-Islamic Arabs operated with the two broad categories of relatives outlined above, that is male agnates and cognates in the sense of the rest (who may or may not have been heirs); if this is correct, and if the cognates were known as *dhawū ʾl-arḥām*, one would expect the term occasionally to have been used in its undifferentiated sense even after the Qurʾān had divided the cognatic category into two. But is it correct? The hypothetical Jāhilī usage is not reflected in the Qurʾān, in which no terms for

87 Raddatz, 'Erbrecht', p. 39 (where *innahā* should be emended to *innamā*); ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, no. 16212; Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11209; al-Bayhaqī, *Sunan*, vol. 6, pp. 242: *innamā aṭʿamahā rasūl Allāh ṣalʿam ṭuʿmatan* (to which the response in ʿAbd al-Razzāq is that if he did so, then we will too).

88 ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, no. 16203: *inna ʾl-rajul idhā māta wa-taraka mawāliyahu ʾlladhīna aʿtaqūhu wa-lam yadaʿ dhā raḥim illā umman aw khālatan dafaʿū mīrāthahu ilayhā wa-lam yuwarrithū mawāliyahu maʿahā, wa-innahum lā yuwarrithūna mawāliyahu maʿa dhī raḥim.*

either agnates or cognates are used at all.[89] (The cognates in receipt of shares are referred to in specific terms as mother, daughter, sister and the like.) It could with equal plausibility be argued that the cognatic category encountered in these traditions was created and named by the early lawyers; and if this is correct, we must note that the category was un-Qurʾānic, not only in the sense that *dhawū ʾl-arḥām* was employed to mean cognates rather than relatives in general, but more particularly in that cognates were assigned to a single category even though the Qurʾān had awarded shares to some of them and failed to mention the rest.

However this may be, it is not only the terminology that is odd in our traditions. The material could admittedly be harmonized with classical law on the assumption that the Qurʾānic and non-Qurʾānic cognates were treated differently even though they were covered by the same term and the result was the same too: the so-called *dhawū ʾl-arḥām* of 2(b), who were in fact Qurʾānic heirs, were first awarded their Qurʾānic shares and next given the rest of the estate by *radd*,[90] whereas the genuine *dhawū ʾl-arḥām* of 2(a) were first awarded Qurʾānic shares by recourse to the mechanisms of *qarāba* or *tanzīl*[91] and next given the residue by *radd* again. There are in fact a few traditions in respect of which this assumption is valid: one mentions both Qurʾānic shares and *radd*,[92] while another explicitly distinguishes between Qurʾānic and non-Qurʾānic heirs.[93] And the

89 *Wa-ūlū ʾl-arḥām baʿḍuhum awlā bi-baʿḍin* (Qur. 8:76; 33:6). As Mundy notes, the term is not suggestive of priority of agnates over cognates and affines (M. Mundy, 'The Family, Inheritance, and Islam: A Re-examination of the Sociology of Farāʾid Law', in A. al-Azmeh (ed.), *Islamic Law: Social and Historical Contexts*, London 1988, p. 32, where the absence of a term for agnatic relatives as such is also noted); it obviously does not suggest a purely cognatic category either.

90 Cf. Coulson, *Succession*, pp. 49ff.

91 Ibid., ch. 7.

92 Ibn Abī Shayba, *Muṣannaf*, vol. 11, no. 11208; Ibn Bābūya, *Man lā yaḥḍuruhu al-faqīh*, vol. 4, p. 224, no. 712, where the client leaves a daughter and a wife: ʿAlī gave the wife an eighth and the daughter a half, awarding the residue to the daughter by *radd* and excluding the patrons.

93 ʿAlī would exclude the patron from succession in the presence of a *dhū qarāba* even if the latter was not a recipient of *al-mīrāth al-mafrūḍ* (al-Kulaynī, *Kāfī*, vol. 7, p. 136, no. 7).

transmitters, fully aware that adherents of the DAEP rule figure in traditions on *radd* and *tanzīl* as well,[94] undoubtedly subscribed to the assumption with respect to the entirety of the material.[95] They would hardly have transmitted it if they did not.

But if we disregard the exceptional traditions,[96] the assumption becomes gratuitous. In what is both the earliest and the fullest account of the DAEP rule, that of ʿAbd al-Razzāq b. Hammām, the traditions give no indication of a differentiation between the heirs of 2(a) and 2(b); indeed, ʿAbd al-Karīm's account of the rule explicitly conflates them. The *prima facie* reading of ʿAbd al-Razzāq's material is that all the heirs involved are treated identically: all are awarded the entire estate, not through a combination of Qurʾānic shares, *qarāba, tanzīl* or *radd*, but simply because awarding the entire estate to the only heir is the obvious solution for anyone who is not constrained to think in terms of fixed shares. When Ibrāhīm al-Nakhaʿī tried to explain away the case of Ibnat Ḥamza, in which the Prophet gives the daughter her Qurʾānic maximum of half the estate and hands the rest to the manumitter, al-Shaʿbī is supposed to have objected that "you do not know whether this took place before

94 ʿAbd al-Razzāq's *bāb mīrāth al-qarāba* includes material on *radd*, and one of his traditions on non-Qurʾānic cognates versus patrons recurs in his chapter on *radd* (cf. above, note 85). Ibn Abī Shayba's chapter on *man kāna yuwarrithu dhawī ʾl-arḥām dūna ʾl-mawālī* is followed by one on *radd*, again with some overlap between the two (cf. above notes 63, 92).

95 Cf. ʿAbd al-Razzāq, *Muṣannaf*, vol. 10, nos. 19112-17; Ibn Abī Shayba, *Muṣannaf*, vol. 11, nos. 11213ff.; Raddatz, 'Erbrecht', p. 40; Ibn Qudāma, *Mughnī*, vol. 6, p. 319, no. 4826. In fact there is a strong tendency in Ibn Abī Shayba for the traditions on non-Qurʾānic cognates versus patrons to become traditions about non-Qurʾānic cognates *tout court*. Note also how Shurayḥ appears as an adherent of the DAEP rule in Abū ʿUbayd (above, note 61), but as a supporter of the rights of non-Qurʾānic cognates in general in Muḥammad b. Khalaf Waki', *Akhbār al-quḍāt*, ed. ʿA.M. al-Marāghī, Cairo 1947-50, vol. 2, p. 321.

96 The first (above, note 92) is exceptional also in that it involves two heirs on the client's side, i.e. it does not confine its attention to the relative priority of two classes of heirs, but seeks to apportion rights within these classes too. The second (note 93) formulates the DAEP rule in the language of a tenth-century author.

or after [the revelation of] the *farāʾiḍ*", meaning that Ibrāhīm's supposition that the daughter had a right to the entire estate only made sense on the assumption that the Qurʾānic laws of inheritance had not been revealed at the time.[97] This is my understanding too.

To clinch the case is difficult. If there was a pre-Qurʾānic stage of Islamic law, the chances are that most of the evidence relating thereto will have disappeared, not because there was a Machiavellian conspiracy to suppress it, but rather because the Muslims devoted immense energy to ironing out inconsistencies within the tradition and none at all to transmitting material that had become unintelligible or plain wrong to them. Only ambiguous evidence (such as the DAEP rule itself) is likely to have slipped through the net. One tradition does come close to clinching the case, but as might be expected, the cost of its survival was corruption. It goes as follows:[98]

أخبرنا عبد الرزاق قال: أخبرني سليمان الأحول عن أبي حبيب العراقي أن امرأة كان لها ابن، فتوفّي وله خمسون دينارًا، ليس له وارث إلا أمه، ومواليه بعيد منه، فقال له أبو الشعثاء: ويحك خذيها ولا تعطيها شيئاً.

ʿAbd al-Razzāq — Ibn Jurayj — Sulaymān al-Aḥwal — Abū Ḥabīb al-ʿIrāqī: a woman had a son who died leaving fifty dinars. He had no heirs apart from his mother and his patrons, [who] was/were distant (masc. sg.) from him. So Abū ʾl-Shaʿthā' said to him (*sic*): 'Poor you, take (fem. sg.) them and do not (fem. sg.) give her (*sic*) anything'.

97 Raddatz, 'Erbrecht', pp. 39f. This was presumably meant as a crushing reply to Ibrāhīm (compare the response in ʿAbd al-Razzāq, above, note 87). But al-Shaʿbī elsewhere figures as a supporter of the DAEP rule (above, note 66), and the Imāmīs and Nāṣirī Zaydīs took al-Shaʿbī to be coming to Ibrāhīm's rescue: he was suggesting that the case of Ibnat Ḥamza *was* enacted before the revelation of the inheritance laws, and thus abrogated by it (cf. below, note 110). Sufyān al-Thawrī also seems to have read it in this vein (below, note 119).

98 ʿAbd al-Razzāq, *Muṣannaf*, vol. 9, no. 16206. As regards the *isnād*, Ibn Jurayj and Sulaymān al-Aḥwal are well-known Meccans, but who was Abū Ḥabīb al-ʿIrāqī? Ibn Ḥajar lists one man of that *kunya* (*Tahdhīb*, vol. 12, p. 68), and al-Dūlābī lists seven (*Kitāb al-kunā wa-ʾl-asmā'*, Hyderabad 1322, vol. 1, p. 143); but none of them seems to fit.

There are several ways in which this garbled text could be emended. For a start, how many patrons were there? The number of patrons does not affect the rules, but it does affect the sense of this tradition; for if there was only one (reading *wa-mawlāhu ba'īd minhu*), the patron could be the "him" addressed, and Abū 'l-Sha'thā''s statement could in that case be emended to "take them [reading *khudhhā* for *khudhīhā*] and do not give her [reading *lā tu'ṭihā* for *lā tu'ṭīhā*] anything": the tradition would disinherit the mother. But it is quite possible that the plural *mawālih* and the singular *ba'īd* should be left unemended, since there are other early passages in which *ba'īd* is treated as invariable when used as a predicate of persons;[99] if so, there were several patrons and someone else was addressed. If Abū 'l-Sha'thā' was talking to the mother (reading *lahā* for *lahu*), his statement could be emended to "take them, and do not give him [reading *tu'ṭihi* for *tu'ṭīhā*] anything": the tradition disinherits the patron. This would certainly make more sense if Abū 'l-Sha'thā' is Jābir b. Zayd, a well known propounder of the DAEP rule.[100] Both of these readings rest on the assumption that the text describes a case taken to Abū 'l-Sha'thā', who is acting as judge; but one could also construe it as a tradition of the question-answer type: "...Abū Ḥabīb al-'Irāqī [who asked Abū 'l-Sha'thā' about the case of] a woman who...so Abū Sha'thā' said to him,..." This reading fits the fact that Jābir does not seem to have held office as judge, nor does Sulaym b. Aswad al-Muḥāribī, a Kūfan Abū 'l-Sha'thā' who died in 83/702 and whose views on the DAEP rule are not recorded.[101] The question-answer hypothesis also goes well with the *wayḥaki* of the answer ('Poor you, don't you know?'); but it does not exactly make it easier to emend the rest of Abū 'l-Sha'thā''s statement.

99 T. Nöldeke, *Zur Grammatik des klassischen Arabisch*, Vienna 1897 (revised A. Spitaler, Darmstadt 1963), p. 22n. I owe both the point and the reference to Dr. L. Conrad.

100 See the reference given above, note 70.

101 Jābir b. Zayd and Sulaym b. al-Aswad al-Muḥāribī are the only two men with the *kunya* Abū 'l-Sha'thā' listed by Ibn Ḥajar (*Tahdhīb*, vol. 12, p. 127). Al-Dūlābī adds others, but none is relevant (*Kitāb al-kunā*, vol. 2, pp. 5f.).

However we emend it, he is saying that somebody is to be given nothing, so who is the somebody? The tradition should be read in conjunction with another in which al-Qāsim b. 'Abd al-Raḥmān, the grandson of Ibn Mas'ūd, excludes a patron from succession in the presence of a mother, awarding the entire estate to the latter on the grounds that it was she who had born and bred the deceased, that is, on moral grounds.[102] In Abū 'l-Sha'thā''s tradition, too, the mother has a better right in moral terms than the patrons, for we are told that the latter were distant, meaning that their legal connection with the client was remote:[103] some benefactor (*mawlā mun'im*) in the past had freed his slave or guided an infidel to Islam, but these people had merely inherited the patronate. Unlike the mother, then, they had no claim to gratitude from the deceased. Now information of this kind is never irrelevant, so the question is whether the tradition endorses the mother's moral right or mentions it in order to demonstrate its irrelevance. If we take it to endorse her right, it is saying that the patrons had no right to succession because they were distant, thereby implying that they would or might have been called to succession if they had been closer. This is an implausible and otherwise unattested legal doctrine. On the other hand, if the tradition is saying that patrons take the estate *even though* they are distant, it establishes that the moral considerations invoked by al-Qāsim are irrelevant: the law is the law however unjust it may seem at times. This too would yield an otherwise unattested doctrine (patrons exclude mothers), but there is nothing implausible about it: the client owes his legal personality to his manumitter/guide to Islam, not to his mother, and the patron is the person "closest to him in life and death", as a tradition puts it.[104] One frequently feels

102 'Abd al-Razzāq, *Muṣannaf*, vol. 9, no. 16205: *ḥamaltihi fī baṭniki wa-arḍa'tihi bi-thadyiki, laki 'l-māl kulluhu.*

103 Compare Abū 'l-Faraj al-Iṣbahānī, *Kitāb al-aghānī*, Cairo 1927-74, vol. 4, p. 26 (*min ba'īd al-walā'*). The terms *qarīb* and *ba'īd* are commonplace in connection with genealogical relationships too.

104 *Man aslama 'alā yadayhi fa-huwa mawlāhu/huwa awlā 'l-nās bi-maḥyāhu wa-mamātihi*, see for example Shāfi'ī, *Umm*, vol. 6, p. 186; al-Tirmidhī, *al-Ṣaḥīḥ*, Cairo 1931-34, vol. 8, p. 265; al-Bukhārī, *Le recueil des traditions mahométanes*, ed. L. Krehl and T.W. Juynboll, Leiden 1862-1908, vol. 4, p. 289; Abū Dāwūd, *Ṣaḥīḥ*

that this expression must once have been rather more seriously meant than the rights of the patron in recorded law would suggest.

If the mother was excluded, we have clinched the case: Qur'ānic shares were unknown, or at any rate ignored. But what if this reading is wrong? Yet another mother excluding yet another patron does not clinch anything unless the tradition is polemical against those who would do the reverse. But it could of course simply be polemical against those who would have her share with the patron. In al-Qāsim's tradition the mother is awarded *al-māl kulluh*, suggesting that the alternative was to restrict her to her Qur'ānic share, not to exclude her: the issue was her right to *radd*. Abū 'l-Sha'thā''s tradition could be similarly understood, since we are explicitly told that somebody (the mother?) takes *all* the property and gives the other party *nothing*. This would make good classical sense of the tradition as far as the mother is concerned, but it gets us into trouble with the patrons again, for the tradition would now be implying that they did not get the residue because they were distant whereas they would or might have got it if they had been close, which still does not make any sense at all. The assumption that the issue was all or nothing to either patron or mother works much better. But the text is too ambivalent for this reading to be proved.

All is not lost, however, for the case can still be corroborated by indirect means. As mentioned already, classical Sunnī law does not accept the DAEP rule: the patron inherits along with Qur'ānic cognates and excludes non-Qur'ānic ones, instead of being excluded by both. But the rule did not disappear without a trace: all schools of Kūfan origin[105] preserve it to a greater or lesser extent. Thus

sunan al-muṣṭafā, Cairo 1348, vol. 2, p. 20; Ibn al-Athīr, *al-Nihāya fī gharīb al-ḥadīth*, ed. T.A. al-Zāwī and M.M. al-Ṭannāḥī, Cairo 1963-65, vol. 5, p. 229; Ibn Ḥajar, *Tahdhīb*, vol. 6, p. 47 (s.v. "'Abdallāh b. Mawhab").

105 The Imāmīs are usually classified as a Medinese school, rather than a Kūfan one, but cf. Crone, *Roman, Provincial and Islamic Law*, p. 21 (and note the alignment between Ḥanafīs, Zaydīs and Imāmīs on contractual clientage on p. 38; between Zaydīs and Imāmīs on *kitāba* on p. 76; and between Ḥanafīs, Zaydīs, Imāmīs and Ibāḍīs, i.e. all the Iraqis, on p. 95, section iii, on bequests). It should be obvious from what follows that the Imāmī position on respective rights of patron and *dhawū 'l-arḥām* is anything but Medinese even though it is ascribed to imams who resided in Medina and occasionally to other Medinese authorities too (such as Jābir al-Anṣārī, above, note 75).

the Ḥanafīs and Qāsimī Zaydīs continued to apply the DAEP rule to the *contractual* patron: whereas the manumitter counts as an agnate, the contractual patron only inherits in the absence of all relatives, be they male agnates or cognates of the Qur'ānic *or* non-Qur'ānic variety.[106] The contractual patron is absent from the Kufan work ascribed to Zayd b. 'Alī, and here the manumitter excludes non-Qur'ānic cognates precisely as he does in Sunnī law; but the DAEP rule still applies when the manumitter is in competition with *Qur'ānic* cognates: they exclude him instead of sharing with him.[107] The Nāṣirī Zaydīs also dropped the contractual patron, but they preserved the DAEP rule unchanged in respect of the manumitter: both Qur'ānic *and* non-Qur'ānic cognates exclude him.[108] And the Imāmīs preserved the rule intact: the manumitter *and* the contractual patron inherit only in the absence of all relatives, be they agnates, Qur'ānic cognates *or* non-Qur'ānic cognates.[109] The Nāṣirīs and Imāmīs disliked the case of Ibnat Ḥamza as heartily as did Ibrāhīm al-Nakha'ī.[110]

What the Kūfan schools show us is clearly fractured parts of what must once have been a single doctrine, as in fact it still is in the case of the Imāmīs. The fracture has occurred along the divide between manumitter and contractual patron and has split the applicability of the doctrine in half; but the result is wonderfully symmetrical in that the schools have preserved the rule for *different* halves of the whole: the Nāṣirīs and pseudo-Zayd

106 Crone, *Roman, Provincial and Islamic Law*, pp. 38f. and note 49 thereto.

107 Zayd b. 'Alī (attrib.), *Majmū' al-fiqh*, ed. E. Griffini, Milan 1919, p. 255, 849f.

108 Crone, *Roman, Provincial and Islamic Law*, p. 37.

109 Ibid., pp. 37, 38f.

110 The Imāmīs dismiss it as a tradition related by the *mukhālifūn* which is *muwāfiq li-madhāhib al-'āmma*, due to *taqiyya*, contradicted by another version, *munqaṭi'*, enacted before the revelation of the *farā'iḍ* and abrogated by it, disliked by Ibrāhīm al-Nakha'ī, and at all events superfluous as the truth is clear from the Qur'ān regardless of Ḥadīth! (Ibn Bābūya, *Man lā yaḥḍuruhu al-faqīh*, vol. 4, pp. 223f., no. 711; al-Ṭūsī, *Tahdhīb*, vol. 9, nos. 1190-92). The Nāṣirī Zaydīs likewise regarded it as contrary to the book of God, weak and disapproved of by al-Sha'bī and other traditionists (Muḥammad b. Ya'qūb al-Hawsamī, *Kitāb sharḥ al-ibāna*, MS Ambrosiana, D. 224, fols. 101a, 123a). Compare above, note 97.

retain it when the cognates are in competition with a manumitter, the Ḥanafīs and Qāsimis when they are in competition with a contractual patron. In pseudo-Zayd there is an additional fracture along the divide between Qur'ānic and non-Qur'ānic cognates, the old rule being preserved only for Qur'ānic cognates in competition with a manumitter; and the result is asymmetrical in that no school retains it only for non-Qur'ānic cognates in competition with him. But then nobody would, for the obvious reason that non-Qur'ānic cognates could not be placed in a better position than their Qur'ānic counterparts (by continuing to exclude manumitters even when Qur'ānic heirs had come to share with them); and it is in any case its preservation in connection with the *Qur'ānic* half of the former *dhawū 'l-arḥām* that is significant. Besides, the Imāmīs make up for the missing piece by preserving the rule intact. The DAEP rule must indeed have been to the effect that all cognates were heirs of the same type; all excluded manumitters and contractual patrons, who were heirs of the same type too.

Presumably the adherents of the DAEP rule held cognates of any kind to exclude patrons for the simple reason that they were blood relations whereas patrons were not: heirs by *nasab* exclude heirs by *sabab* (the spouse relict excepted), as the Imāmīs were later to put it.[111] The distinction between Qur'ānic and non-Qur'ānic blood relations is intrusive to this line of thought; indeed, it must have been this very distinction (in combination with a new stress on agnatic ties) that caused the fracture.[112] The Imāmīs managed to *accommodate* the distinction, but their laws of inheritance can hardly be said to be based on it: "[Imami] Shi'i jurisprudence majestically sweeps aside all those troublesome distinctions and divisions, between Qur'ānic and other heirs, and between agnatic and non-agnatic relatives, in which the generality of Muslim jurists were enmeshed", as Coulson

111 Crone, *Roman, Provincial and Islamic Law*, p. 148, note 27.

112 Classical Sunnī inheritance law may be characterized as agnatic succession modified by Qur'ānic legislation (Coulson, *Succession*, p. 33); but the view that the agnatic rules were a straight carry-over from tribal Arabia is undoubtedly mistaken (cf. Mundy, 'The Family, Inheritance, and Islam', pp. 30, 47; Powers, *Studies*, ch. 3; Crone, *Roman, Provincial and Islamic Law*, p. 80).

puts it.[113] The Imāmīs swept them aside, it would appear, because they were committed to an archaic doctrine formulated before the distinctions in question had made their appearance. Their inheritance laws may thus be a counterpart to their conception of the imamate, both being elaborations of doctrines once common to the Muslim world at large.[114] Archaisms are also well attested in other types of Imāmī law.[115]

When then did the fracture of the DAEP rule outside Imāmī circles occur? The unfractured rule is ascribed to Companions, Successors and later authorities, but not to the Prophet; apparently, it did not live to be defended in terms of the classical rules of the game. It was however widely adhered to, we are told, by authorities who died in the 730s, such as 'Aṭā' (d. 114/732), Muḥammad al-Bāqir (d. 114 or 119/733 or 737), al-Qāsim b. 'Abd al-Raḥmān (d. 120/738f) and Maymūn b. Mihrān (d. 118 or 126/736 or 743f),[116] so it must have been current in the 730s and, given that some of these ascriptions are likely to be spurious, presumably in the generation thereafter too. But in that generation it was on the way out. Though still supported by Ja'far al-Ṣādiq (d. 148/765)[117] and, apparently, Ibn Abī Laylā (d. 148/765)[118] and Sufyān al-Thawrī (d. 116/778),[119] it

113 Coulson, *Succession*, p. 110.

114 Cf. Crone and Hinds, *God's Caliph*.

115 Crone, *Roman, Provincial and Islamic Law*, index, s.v. 'Imāmī law', for six examples relating to the law of slavery and *walā'*.

116 Cf. above, notes 64, 73, 74, 76.

117 al-Kulaynī, *Kāfī*, vol. 7, pp. 135f.

118 S. al-Maḥmaṣānī, *al-Awzā'ī wa-ta'ālīmuhu 'l-insāniyya wa-'l-qānūniyya*, Beirut 1978, p. 229, claims that he disinherited all non-Qur'ānic cognates. This is not implausible, given his Medinese inclination; but no references are given, and the claim is contradicted by al-Ḥusayn b. Aḥmad al-Siyāghī, *Kitāb al-rawḍ al-naḍīr*, completed by 'Abbās b. Aḥmad al-Ḥasanī, Cairo 1347-49, vol. 5, p. 64; cf. also Ibn Qudāma, *Mughnī*, vol. 6, p. 319, no. 4826. (The question is not broached in Abū Yūsuf, *Ikhtilāf Abī Ḥanīfa wa-'bn Abī Laylā*, ed. A.-W. al-Afghānī, Hyderabad 1358, or Wakī', *Quḍāt*, vol. 3, pp. 129ff.)

119 Sufyān al-Thawrī starts his *bāb fī 'l-mawālī*, with the Ibnat Ḥamza tradition, complete with Ibrāhīm al-Nakha'ī's attempt to explain it away and al-Sha'bī's reply; but he proceeds to cite another tradition in which a *dhū raḥim* excludes a patron, suggesting that he too construed al-Sha'bī's reply as a dismissal of Ibnat

appears in its fractured form in the doctrine attributed to Abū Ḥanīfa (d. 150/767)[120] and the Kūfan work ascribed to Zayd b. ʿAlī,[121] and it was wholly abandoned by al-Awzāʿī (d. 157/774),[122] Mālik (d. 179/795)[123] and later school founders.[124] The DAEP rule thus seems to have lost out at the hands of men who flourished about 120-50/740-70. But these men can hardly have been the first to be confronted with the problem that made the rule inviable. Assuming that the problem made its appearance at least a generation before it was solved, the jurists' discovery of the Qurʾānic cognates must be dated to 90-120/710-40 at the latest. An earlier date would be preferable, but there are limits to how much earlier we can make it

Ḥamza's case (Raddatz, 'Erbrecht', pp. 39f.; cf. above, notes 97, 110). That he was a supporter of the DAEP rule is in fact stated by both Ibn Qudāma (*Mughnī*, vol. 6, p. 310, no. 4826) and al-Siyāghī, or rather his continuator (*Rawḍ*, vol. 5, p. 64). The claim to the contrary is thus unlikely to be correct (Sarakhsī, *Mabsūṭ*, vol. 30, p. 3).

120 See for example Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-aṣl*, ed. A.-W. al-Afghānī, vol. 4 (1), Hyderabad 1973, p. 166, from al-Shaʿbī: Ibn Masʿūd used only to call the manumitter to succession in the absence of *dhū qarāba*, but Abū Ḥanīfa held the patron to have a better right with reference to the tradition about Ibnat Ḥamza.

121 Cf. above, note 107. (On the date of this work, see W. Madelung, *Der Imam al-Qāsim b. Ibrāhīm und die Glaubenslehre der Zaiditen*, Berlin 1965, pp. 54ff.) Note that ʿAlī, reputedly the most vigorous supporter of the DAEP rule (above, notes 58f.), is here made to endorse the priority of manumitters over non-Qurʾānic cognates.

122 Maḥmaṣānī, *al-Awzāʿī*, p. 229, where al-Awzāʿī espouses the Mālikī disinheritance of all non-Qurʾānic cognates. No reference is given, but compare Ibn Qudāma, *Mughnī*, vol. 6, p. 319, no. 4826; al-Siyāghī, *Rawḍ*, vol. 5, p. 64.

123 Cf. Mālik, *Muwaṭṭaʾ*, Cairo n.d., vol. 1, pp. 338f. (*Kitāb al-farāʾiḍ, bāb man lā mīrāth lahu*).

124 Al-Shāfiʿī disinherited the non-Qurʾānic cognates altogether after the fashion of the Medinese (cf. his *Umm*, vol. 6, p. 166; Sarakhsī, *Mabsūṭ*, vol. 30, p. 3; Ibn Qudāma, *Mughnī*, vol. 6, p. 319, no. 4826), though his followers abandoned this position. Abū Thawr, Dāwūd al-Ẓāhirī and al-Ṭabarī also disinherited them (Ibn Qudāma, *loc. cit.*), as did al-Qāsim b. Ibrāhīm, though the Zaydīs at large did not (Siyāghī, *Rawḍ*, vol. 5, p. 64; Madelung, *al-Qāsim*, pp. 134f.).

if the DAEP rule was still commonly accepted in the 730s. Simplistic calculations based on a single example have their limits too, of course; but for what it is worth, the evidence of the DAEP rule suggests a mid-Umayyad date for the arrival of the canonical scripture.[125]

We may now summarize. Three legal terms of the Qurʾān (*kalāla, jizya ʿan yad, kitāb* in 24:33) were unintelligible to the early commentators, as were several non-legal phrases and passages (*al-ṣamad*, possibly *al-rajīm*, the mysterious letters and *Sūrat Quraysh*). At the same time Qurʾānic legislation seems to have been partly ignored and partly misunderstood by the lawyers, two of whose rules (stoning penalty, rejection of written evidence) contradict the book, while a third (DAEP rule) fails to take account of it; and a whole cluster of rules (Powers' inheritance laws) seems to misrepresent its intentions. This is a fairly impressive score, and it cries out for a unitary explanation; but it is not easy to see how such an explanation can be provided without abandoning the conventional account of how the Qurʾān was born.

125 Compare the conjectural date in Crone and Cook, *Hagarism*, p. 18.