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THE ISLAMIC ORIGINS OF THE COMMON LAW

JOHN A. MAKDISI*

Henry II created the common law in the twelfth century, which resulted in revolutionary changes in the English legal system, chief among which were the action of debt, the assize of novel disseisin, and trial by jury. The sources of these three institutions have long been ascribed to influences from other legal systems such as Roman law. Professor Makdisi has uncovered new evidence which suggests that these institutions may trace their origins directly to Islamic legal institutions. The evidence lies in the unique identity of characteristics of these three institutions with those of their Islamic counterparts, the similarity of function and structure between Islamic and common law, and the historic opportunity for transplants from Islam through Sicily.

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This Article develops a thesis on the origins of the common law that was first explored in my article entitled *An Inquiry into Islamic Influences During the Formative Period of the Common Law*, in *ISLAMIC LAW AND JURISPRUDENCE* 135 (Nicholas Heer ed., 1990). The thesis in its present form was the topic of lectures at Duke University (Feb. 19, 1997), Loyola University New Orleans (Apr. 4, 1997), and the American Oriental Society (Apr. 6, 1998). It is dedicated to my father, George, whose work and encouragement inspired me on this venture, and to my wife, Junicka, whose love and support carried me through its storms.

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INTRODUCTION

The origins of the common law are shrouded in mystery. Created over seven centuries ago during the reign of King Henry II of England,¹ to this day we do not know how some of its most distinctive

1. See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 457 (1983) (affirming that "Henry II created the English common law by legislation establishing judicial remedies in the royal courts"); PAUL BRAND, 'Multis Vigiliis Excogitatum et Inventam': *Henry II and the Creation of the English Common Law*, in *THE MAKING OF THE COMMON LAW* 77, 78 (1992) (stating that Henry II "has most claim to be regarded as the founder of the English Common Law"); CHARLES HOMER HASKINS, *THE RENAISSANCE OF THE TWELFTH CENTURY* 220 (1927) (remarking that "[t]he age of Henry II is an epoch of the first importance in the history of the common law"); SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD

institutions arose. For example, where did we get the idea that contract transfers property ownership by words and not by delivery or that possession is a form of property ownership? Even more importantly, where did we get the idea that every person is entitled to trial by jury?

Historians have suggested that the common law is a product of many different influences, the most important being the civil law tradition of Roman and canon law.² Yet, as we shall see, the legal institutions of the common law fit within a structural and functional pattern that is unique among western legal systems and certainly different from that of the civil law. The coherence of this pattern strongly suggests the dominating influence of a single preexisting legal tradition rather than a patchwork of influences from multiple legal systems overlaid on a Roman fabric. The only problem is that no one preexisting legal tradition has yet been found to fit the picture.

This Article looks beyond the borders of Europe and proposes that the origins of the common law may be found in Islamic law. The first three Parts examine institutions that helped to create the common law in the twelfth century by introducing revolutionary concepts that were totally out of character with existing European legal institutions. For the first time in English history, (1) contract law permitted the transfer of property ownership on the sole basis of offer and acceptance through the action of debt;³ (2) property law protected possession as a form of property ownership through the assize of novel disseisin;⁴ and (3) the royal courts instituted a rational procedure for settling disputes through trial by jury.⁵ This Article explores the origins of these three institutions by tracing their unique

THE FIRST 22 (William Stubbs ed., 9th ed. 1913) (asserting that "[t]he reign of Henry II initiates the rule of law"); R.C. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL: STUDIES IN THE EARLY HISTORY OF THE COMMON LAW* 403 (1972) (observing that in the twelfth century "the firm foundations were laid for the imposing edifice of the English common law, one of the great achievements of human legal thought").

2. See HAROLD J. BERMAN & WILLIAM R. GREINER, *THE NATURE AND FUNCTIONS OF LAW* § 25.2, at 572, 578-79 (4th ed. 1980) (stating that "[i]n England the impact of both Roman and Canon law was felt quite strongly in the creation of the English legal system under Henry II and in its subsequent development in the 13th century"). The idea of Roman law influences is strongly supported by the extent to which Bracton borrowed from Justinian's *Corpus Juris Civilis*. See Samuel E. Thorne, *Translator's Introduction* to 1 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND, at xxxii-xxxviii (George E. Woodbine ed. & Samuel E. Thorne trans., Harvard Univ. Press 1968) (n.d.) [hereinafter BRACTON].

3. See *infra* notes 15-107 and accompanying text.

4. See *infra* notes 108-205 and accompanying text.

5. See *infra* notes 206-341 and accompanying text.

characteristics to three analogous institutions in Islamic law. The royal English contract protected by the action of debt is identified with the Islamic *'aqd*, the English assize of novel disseisin is identified with the Islamic *istihqaq*, and the English jury is identified with the Islamic *lafif*.

Part IV examines the major characteristics of the legal systems known as Islamic law, common law, and civil law and demonstrates the remarkable resemblance between the first two in function and structure and their dissimilarity with the civil law.⁶ Part V traces a path from the Maliki⁷ school of Islamic law in North Africa and Sicily to the Norman law of Sicily and from there to the Norman law of England to demonstrate the social, political, and geographical connections that made transplants from Islam possible.⁸

The conclusions of this Article shatter some widely held theories on the origins of the common law, but they should not come as a complete surprise. Other writers have already suggested an Islamic influence on the common law. In 1955, Henry Cattan noted that the English trust closely resembled and probably derived from the earlier Islamic institution of *waqf*.⁹ George Makdisi revealed many parallel institutions in Islamic and western legal education,¹⁰ including most

6. See *infra* notes 342-539 and accompanying text.

7. There are four *sunni* (orthodox) schools of law in Islam: Hanafi, Shafi'i, Maliki, and Hanbali. See John Makdisi, *Islamic Law Bibliography*, 78 L. LIBR. J. 103, 104-05 (1986). These schools developed in the eighth and ninth centuries, with the Maliki school spreading primarily over North and West Africa. See *id.* at 105. While differences appeared among the schools in terms of legal methodology and principles of law, these differences were slight relative to their similarities. See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 60, 67 (1964). Nevertheless, serious research in Islamic law requires the study of legal methodology and principles within the context of each school as an integral unit possessing its own terminology and spirit. See CHAFIK CHEHATA, ETUDES DE DROIT MUSULMAN 46 (1971).

8. See *infra* notes 540-618 and accompanying text.

9. See Henry Cattan, *The Law of Waqf*, in 1 LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 203, 213-15 (Majid Khadduri & Herbert J. Liebesny eds., 1955). For an earlier discussion of the influence of the *waqf* on the creation of the English trust, see Ann Van Wynen Thomas, *Note on the Origin of Uses and Trusts—Waqfs*, 3 SW. L.J. 162, 166 (1949). For a specific discussion of the influence of the Islamic *waqf* on the creation of Merton College in thirteenth-century England, see Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231, 1248-55 (1988). See generally O. PESLE, LA THEORIE ET LA PRATIQUE DES HABOUS DANS LE RITE MALEKITE (1941) (providing an overview of the law of *waqfs*); William F. Fratcher, *The Islamic Wakf*, 36 MO. L. REV. 153 (1971) (tracing the history of *waqfs* from 634 A.D. to the middle of the twentieth century).

10. See, e.g., George Makdisi, *Interaction Between Islam and the West*, 44 REVUE DES ETUDES ISLAMIQUES 287, 289 (1976); George Makdisi, *The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court*, 34 CLEV. ST. L. REV. 3, 16

notably the scholastic method,¹¹ the license to teach,¹² and the law schools known as Inns of Court in England and *madrasas* in Islam.¹³ Abraham Udovitch pointed out that the European *commenda* probably originated from Islam.¹⁴ Yet none of these scholars have suggested that the common law as an integrated whole was a product of Islam. Given the evidence outlined below, this conclusion can no longer be avoided as a plausible theory.

I. CONTRACT IN THE ACTION OF DEBT

To understand the nature of contract law as practiced in the English royal courts¹⁵ in the twelfth century, we start with the first classical textbook on English law, commonly known by the name of its purported author, Glanvill.¹⁶ After studying Glanvill directly, we will examine interpretations of his text from a Roman perspective,

(1985-86) [hereinafter Makdisi, *Origins of the Inns of Court*].

11. See George Makdisi, *The Scholastic Method in Medieval Education: An Inquiry into Its Origins in Law and Theology*, 49 SPECULUM 640, 648 (1974).

12. See GEORGE MAKDISI, THE RISE OF HUMANISM IN CLASSICAL ISLAM AND THE CHRISTIAN WEST: WITH SPECIAL REFERENCE TO SCHOLASTICISM 26-29 (1990).

13. See Makdisi, *Origins of the Inns of Court*, *supra* note 10, at 3-4, 9, 16-17. In 1986, when George Makdisi's article on the origins of the Inns of Court was being published, J.H. Baker published a work in which he discussed the methods of teaching by lecture and disputation in the English Inns of Court and lamented the obscure origins of this institution. See J.H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS 8-13 (1986).

14. See ABRAHAM L. UDOVITCH, PARTNERSHIP AND PROFIT IN MEDIEVAL ISLAM 171-72 & 171 n.4 (1970). The *commenda* is a commercial arrangement in which investors entrust an agent with capital or merchandise, which the agent trades. See *id.* at 170. The agent returns to the investors the principal along with a previously-arranged share of the profits. See *id.* While the agent is entitled to the remaining profits, the agent bears no liability for losses resulting from the venture. See *id.*

15. The English royal courts administered the King's justice in courts called *Curia Regis*, while the local courts consisted of the Anglo-Saxon courts of public justice (the "county court" and the "hundred court") and the courts of the private jurisdictions of the lords of various degrees (called in more modern times the "courts baron"). See 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 41-43, 107-10, 153-56 (2d ed., Cambridge Univ. Press 1959) (1895).

16. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (G.D.G. Hall ed. & trans., Nelson 1965) (c. 1187-89) [hereinafter GLANVILL]; 1 POLLOCK & MAITLAND, *supra* note 15, at 168 (describing *Glanvill* as the first classical textbook on English law). There is some doubt as to whether Glanvill wrote the book that bears his name, with some scholars speculating that it may have been written by Hubert Walter, Glanvill's kinsman and secretary. See 1 POLLOCK & MAITLAND, *supra* note 15, at 163-65 (noting that the question of who authored the treatise is "interesting rather than important, for, though we would gladly know the name of the man who wrote our first classical text-book, it is plain that he was one who was very familiar with the justice done in the king's court during the last years of Henry II").

followed by a new interpretation from an Islamic perspective.

A. *Glanvill's Definition of Contract*

The earliest writ regularly issued by the English royal courts to recover contract debts was the writ of debt in the twelfth century.¹⁷ It permitted the buyer and the seller each to enforce the obligation of the other party in a sale of goods.¹⁸ Contracts for the sale of goods were not unusual at this time in non-royal courts, but the writ of debt in the royal courts introduced a new concept of obligation by which the contracting parties were bound.¹⁹ The old concept of obligation, as seen in Anglo-Saxon contracts, was that of a promise marked by some formality such as a handshake.²⁰ After making the promise, the seller had an obligation, undergirded by the morality of keeping a promise, to deliver what still remained his own property to the buyer.²¹ The new concept of obligation, embodied in the action of debt, was a grant effectuated by the agreement of the parties.²² After making the agreement, the seller had an obligation, based on the transfer of ownership that had already taken place upon agreement, to deliver the buyer's property to the buyer.²³

To understand the nature of this new type of contractual obligation protected by the action in debt, we turn to its earliest definition provided by Glanvill²⁴ in the late 1180s:

The cause of a debt may also be purchase or sale, as when anyone sells some thing of his to another; for then the price

17. See A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 53 (1987). The word "writ" is a technical term referring to a type of formal written order or notice issued under the issuer's seal. See VAN CAENEGEM, *supra* note 1, at 107. In the common law, the writ was a procedural device that specified the plaintiff's claim and bestowed on judges the authority to try the particular claim. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 355-56 (5th ed. 1956); see also BERMAN, *supra* note 1, at 446-48 (discussing the judicialization of the writs).

18. See SIMPSON, *supra* note 17, at 160.

19. See *id.* at 95.

20. See Harold D. Hazeltine, *The Formal Contract of Early English Law*, 10 COLUM. L. REV. 608, 609 (1910). Some of the formalities involved were the delivery of a chattel of no substantial value (*wed* or *vadium*), a hand grasp (*on hand syllan*), an oath (*ad* or *juramentum*), or a pledge of good faith (*trywa*). See *id.*

21. See *id.* at 608-09.

22. See SIMPSON, *supra* note 17, at 80.

23. See *id.*

24. Ranulf de Glanvill was a statesman and lawyer whose book was not only the earliest treatise of the common law but also long remained the standard textbook of English law. See 2 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 188-90 (3d ed., rewritten 1923).

is owed to the seller and the thing purchased is owed to the buyer. A purchase and sale is effectively complete when the contracting parties have agreed on the price, provided that this is followed by delivery of the thing purchased and sold, or by payment of the whole or part of the price, or at least by the giving and receipt of earnest.²⁵

Most of this statement is clear. A complete sale was effectuated by contractual agreement on the price. In other words, the contract of purchase and sale, which was a binding set of mutual obligations, was completed by agreement. This contract, in turn, was the cause of a debt whereby the thing purchased was owed to the buyer by the seller and the price was owed to the seller by the buyer. There are two parts of Glanvill's statement, however, that are not clear. What does it mean to say that something was "owed" in an action in debt? And what does it mean to say "provided that this is followed by delivery"?

To say that something was "owed" in the action of debt was to say that something was "owned." In the writ of debt the plaintiff complained that the defendant "*ei iniuste deforciat*."²⁶ The word "*deforciat*," which translates directly as "*deforces*," was used in the sense that the debtor was withholding the creditor's own property.²⁷ Therefore, the debt "owed" by a contracting party was the obligation to pay the other party what was already owned by that other party. The seller's goods became the buyer's goods as soon as the contract obligation arose; at that point, the seller held the buyer's own property.

The buyer's ownership of the object of sale subsequent to the completion of the contract, but prior to delivery, was confirmed by what happened upon death of one of the parties to the contract protected by the action of debt. Liability to pay the debt or to collect the debt passed to the heir upon the death of the debtor or the creditor.²⁸ If the object of the debt had not been something already owned by the buyer/creditor, there would have been a problem with the suit by the heir, because the obligation would have been a mere right of action, and a man could not inherit a mere right of action.²⁹

25. GLANVILL, *supra* note 16, at 129.

26. *Id.* at 116. This phrase is translated by Hall as "he is unjustly withholding from him." *Id.*

27. See ROBERT L. HENRY, *CONTRACTS IN THE LOCAL COURTS OF MEDIEVAL ENGLAND 15-16* (1926); 2 POLLOCK & MAITLAND, *supra* note 15, at 205, 212.

28. See 2 POLLOCK & MAITLAND, *supra* note 15, at 344-46; SIMPSON, *supra* note 17, at 82.

29. See 2 POLLOCK & MAITLAND, *supra* note 15, at 346.

Therefore, the debt in the form of the object of sale was something owed by the seller as a nonowner to the buyer as an owner. In other words, the purchase and sale, complete upon agreement by the parties, created a new legal relationship between the parties. The mere agreement of the parties immediately transferred the ownership of the object of sale from the seller to the buyer who could claim it in an action of debt as his own property.

The second ambiguity in Glanvill's passage arises from the meaning of the conditional words "provided that." Glanvill stated that agreement completed the purchase and sale "provided that this is followed by delivery of the thing purchased and sold, or by payment of the whole or part of the price, or at least by the giving and receipt of earnest."³⁰ The interpretation of this condition depends on whether it is a condition precedent or a condition subsequent.

A condition precedent is something that must happen before a legal effect can take place, whereas a condition subsequent is something that will take away a legal effect if it happens.³¹ For example, if *A* gives *B* a deed for a certain piece of property and the deed states that "it is on condition that *B* build a road to the property within a year," the legal effect, which is the transfer of the property, takes place only after the road is built when the condition is precedent. When the condition is subsequent, the transfer of the property takes place immediately, but it may be lost a year later if the road has not been built.

To determine whether a condition is precedent or subsequent, one may look to the meaning of the condition. For example, in modern-day American contract law, conditions precedent may be found in the example of an insurance company that promises to pay for damages caused if a fire occurs and if the insured files proof of loss with the insurer within sixty days after the loss.³² These two conditions are precedent to the insurance company's payment for damages because, logically, the company would not pay before it has proof of the fire.³³ On the other hand, if a provision states that the insurance company's obligation to pay is discharged if the insured

30. GLANVILL, *supra* note 16, at 129.

31. According to Black's Law Dictionary, the definition of a "condition precedent" is "one that is to be performed before the agreement becomes effective," and a "condition subsequent" is "a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition." BLACK'S LAW DICTIONARY 293-94 (6th ed. 1990).

32. See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 11-7, at 441 (3d ed. 1987).

33. See *id.*

fails to sue within one year of the filing of a proof of loss, the meaning of this condition makes it subsequent because the failure to sue within the time specified works a "discharge" to a duty that has already arisen.³⁴

One may look not only to the meaning but also to the language of the condition to determine whether it is precedent or subsequent. John Gray, a reputed scholar who wrote on estates and future interests in the common law of property, stated:

Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to, the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested.³⁵

Cornelius Moynihan has supplied examples to illustrate this distinction. He gives as an example of a contingent remainder (a remainder subject to a condition precedent): "A devises to B for life, then, if C survives B, to C and his heirs."³⁶ The condition precedes the gift in remainder to C in the text and is precedent to the gift taking effect in C. Moynihan gives as an example of a vested remainder subject to divestment (also called a vested remainder in fee simple subject to a condition subsequent): "A conveys to B for life, remainder to C and his heirs on the express condition that if the premises are used for the sale of intoxicating liquor A shall have the power to re-enter and repossess himself as of his former estate."³⁷ The condition is subsequent to the gift taking effect in C.

Whether we look at the meaning or the language used in Glanvill's passage containing the conditional words "provided that," the words are strongly suggestive of a condition subsequent. The meaning of the passage is to complete the contract upon agreement of the parties and then follow it with delivery. Note the juxtaposition of the language "effectively complete when the contracting parties have agreed on the price" followed by the language "provided that this is followed by delivery." As for the language used, the condition is not incorporated into the language used by Glanvill to describe the completion of the contract. It comes after these words in the manner

34. *Id.* § 11-7, at 442.

35. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 108, at 95 (4th ed. 1942).

36. CORNELIUS J. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 130 (2d ed. 1987).

37. *Id.* at 127.

described by John Gray as discharging an obligation if the condition does not occur. Furthermore, it uses the words "provided that," which themselves denote a condition subsequent.³⁸

Thus, in Glanvill's passage the obligation on the seller to deliver the goods, as well as the obligation on the buyer to deliver the price, both of which arose upon their agreement, was based on the grant of property that took place at that time. The purchase and sale was, in Glanvill's words, "effectively complete." The contract of purchase and sale was a binding set of mutual obligations that immediately gave rise to a debt whereby the thing purchased was owned by and thus owed to the buyer by the seller, and the price was owed to the seller by the buyer. Nevertheless, in order to enforce the performance of the obligation by the other party, each party had to perform his own obligation or at least part of it.³⁹ The seller had to deliver the object of sale in order to compel delivery of the price; the buyer had to deliver the whole or a part of the price (or at least give earnest) in order to compel delivery of the object of sale. One party's failure to perform constituted the occurrence of a condition subsequent that terminated the other party's duty of performance. Consequently, if one party did not deliver, the obligation on the other party was divested by the existence of the condition subsequent of nondelivery. Glanvill's language is a classic case of a condition subsequent.⁴⁰

This straight reading of the text of Glanvill's definition generally has not been accepted by scholars who have attributed the action of debt to Roman law origins. The next section of this Article explains how these scholars' visions have been distorted by viewing the action of debt through the lens of Roman law. Following this section, the last section of this Part offers a revised analysis from the perspective of an Islamic law influence on the action of debt and confirms the legitimacy of the straight reading of Glanvill's text.

B. Glanvill Interpreted in an Incomplete Historical Context

Scholars of Glanvill, who perceived his work to have been written in the Roman historical context, discussed three issues concerning contractual obligation: its cause, its nature, and its legal

38. See JOHN MAKDISI, *ESTATES IN LAND AND FUTURE INTERESTS: PROBLEMS AND ANSWERS* 6 (3d ed. 1999).

39. See G.D.G. Hall, *Introduction* to GLANVILL, *supra* note 16, at xxxviii.

40. Cf. SIMPSON, *supra* note 17, at 192-93 (describing the conditions of payment on a lease in *Wheler's Case*, as a condition subsequent because the contract was effective as a grant).

effect.⁴¹ Specifically, they sought out the elements necessary to create a contractual obligation, the subsequent change in legal relationship that occurred between the contracting parties, and the effects of this change in legal relationship on the rights and duties of the parties.⁴²

Generally, it was agreed that at least one element needed to create the contractual obligation protected by the action of debt was the consent of the parties.⁴³ As a preliminary matter then, there was little sense in tracing the origin of this contract to the Germanic law of northern and western Europe because the Germanic law did not recognize consensual contracts.⁴⁴ This nonrecognition was particularly true of Anglo-Saxon law before the Norman Conquest. Exchanges were known either as completed transactions (real contracts) with no duty engendered on either side⁴⁵ or as unilateral promises marked by some formality such as the delivery of a chattel of no substantial value (*wed*), a hand grasp (*on hand syllan*), an oath (*ad*), or a pledge of good faith (*trywa*).⁴⁶ Evidence of this old notion of contract as promise existed in the twelfth century in the contract protected by the local and ecclesiastical courts of England⁴⁷ but not in the contract protected by the action of debt in the royal courts of England.

Therefore, scholars turned their attention primarily to Roman law as the possible origin of the writ of debt. Roman law required that the parties agree on the price and the object of sale in order for the contract to be formed.⁴⁸ G.D.G. Hall, in his introduction to Glanvill's treatise, claimed that Glanvill's contract was an ingenious

41. See *id.* at 75-80 (comparing Simpson's view with those of Barbour, Pollock and Maitland, and Hall).

42. See *id.*

43. See 3 HOLDSWORTH, *supra* note 24, at 421; SIMPSON, *supra* note 17, at 77, 80.

44. See 2 POLLOCK & MAITLAND, *supra* note 15, at 184-85. But see OLIVER WENDELL HOLMES, *THE COMMON LAW* 198-99 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) (arguing that the action of debt was probably of German descent).

45. See 2 POLLOCK & MAITLAND, *supra* note 15, at 185 ("[T]he money was paid when the ox was delivered and the parties have never been bound to deliver or to pay.").

46. See HENRY, *supra* note 27, at 206, 241-46; Hazeltine, *supra* note 20, at 609.

47. See 2 POLLOCK & MAITLAND, *supra* note 15, at 189-92 (discussing the Church's enforcement of contractual promises before the Conquest); 2 *id.* at 197-202 (discussing the Church's enforcement of contractual promises after the Conquest); Hazeltine, *supra* note 20, at 616 (discussing the influence of the concept of formal promise on contract law in ecclesiastical and local courts). The concept of obligation based on promise appeared also as a matter of course in thirteenth-century England in the form of the writ of covenant, but this writ postdated the writ of debt. See SIMPSON, *supra* note 17, at 9.

48. See 2 RAYMOND MONIER, *MANUEL DE DROIT ROMAIN: LES OBLIGATIONS* 136 (5th ed. 1954).

adaptation of Roman law because it adopted the idea of a consensual contract from the *emptio-venditio* (contract of purchase and sale) of Roman law, although, contrary to Roman law, it was enforceable only by the plaintiff who had performed his side of the contract.⁴⁹ Hall determined that the cause of the obligation owed the seller was consent plus delivery of the thing sold, while the cause of the obligation owed the buyer was consent plus delivery of the price.⁵⁰

This notion of obligation based on both consent and delivery was rejected by A.W.B. Simpson. He noted that "Glanvill does not, as Hall contends say that the performance of the plaintiff of his part of the transaction is the *causa debendi* [cause of the obligation]; the causes listed are contracts."⁵¹ The cause of the obligation, according to Simpson, was only the consent of the parties.⁵² Consent was what made the contract binding.⁵³ Delivery, if it had any legal effect, was what made the contract actionable, enabling the plaintiff to bring an action to obtain what was owed to him.⁵⁴ On this point Simpson was correct, but then Simpson proceeded to link Glanvill's contract to Roman law.

In Roman law, once consent occurred, the seller had an obligation to deliver the goods to the buyer, and the buyer had an obligation to pay the price to the seller. However, the agreement in itself did not transfer ownership of the goods immediately to the buyer.⁵⁵ Rather, ownership of the goods did not pass until the buyer received the goods and paid the price.⁵⁶ The Roman actions for the seller (*actio venditi*) and for the buyer (*actio empti*) on the sale were said to sound in contract (*ex contractu*), but this notion of contract was much more akin to tort (*ex delicto*) in the nature of its obligation than it was to property.⁵⁷ Thus in Roman law, a disappointed party had a *personal* right of action, as opposed to the English action of debt in which the disappointed party had a *property* right to the specific thing owned. Nicholas pointed out that the difference between property and obligation was the difference between owning and being owed. It was the difference between actions in rem and

49. See G.D.G. Hall, *Introduction* to GLANVILL, *supra* note 16, at xxxviii.

50. *See id.*

51. SIMPSON, *supra* note 17, at 77 n.2.

52. *See id.* at 77.

53. *See id.*

54. *See id.* at 162-63. There was some question whether delivery was necessary in all cases to make a contract actionable. *See id.* at 160-69.

55. *See* 2 MONIER, *supra* note 48, at 143.

56. *See* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 178-79 (1962).

57. *See id.* at 158.

actions in personam, and he stated that there was "an unbridgeable division" between the two.⁵⁸ It was in this tradition of Roman law that Simpson placed Glanvill's contract.

At this point in the analysis, the English contract protected by the action of debt began to cause trouble for scholars who have placed it in the Roman law tradition. The nature of the obligation formed by consent in the English contract was different from that in the Roman contract. The English action did not sound in contract or tort, but rather in property. The plaintiff did not complain (*queritur*) that he had been done a wrong but rather demanded (*petit*) what was his own.⁵⁹ The action was *petitory*. In essence, the obligation owed to the buyer was based on the buyer's ownership of the goods in the hands of the seller, which occurred as soon as the agreement was reached between the parties and before delivery.⁶⁰ Contrary to Roman law, consent transferred ownership of the object of sale *before* delivery.

The full import of this difference between English and Roman law was realized by Chief Justice Thomas Brian⁶¹ in 1478-1479, but Simpson writing four hundred years later refused to accept Brian's analysis. Chief Justice Brian stated that the English contract was completed by agreement of the parties and that at this point the property in the object of sale, in the sense of ownership of the object of sale, passed to the buyer.⁶² Simpson admitted that property passed to the buyer upon the mere agreement of the parties, but he redefined "property" in this context to mean "a right to . . . possession."⁶³ Property was no longer ownership; it was a right. In redefining property as a right to possession, Simpson equated "property" with "obligation *ex contractu*" in order to maintain the link with Roman law. For Simpson, property in the sense of "ownership" passed only upon delivery of the goods, just as in Roman

58. *Id.* at 100.

59. See SIMPSON, *supra* note 17, at 75-76. On the other hand, the action on the writ of covenant and the later action of assumpsit, which provided other means of protecting a contract in English law, did sound in tort. The covenant bound the covenantor to a future performance and the failure to perform was considered a tort. See *id.* at 80.

60. See *id.* at 75-76.

61. Brian served as Chief Justice of the Court of Common Pleas from 1471-1500. See JOHN SAINTY, *THE JUDGES OF ENGLAND 1272-1990*, at 47 (1993).

62. See SIMPSON, *supra* note 17, at 167 (stating Chief Justice Brian's theory). The Chief Justice recognized that the seller had no right to the price until he delivered or tendered delivery, and the buyer had no right to the goods until he paid or tendered payment. This stage when the contract became actionable was different than the stage at which "ownership" passed upon agreement of the parties. See *id.* at 167-68.

63. *Id.* at 162.

law, and no fifteenth-century Chief Justice was right to say otherwise.

Simpson characterized Brian's idea—that property as ownership passed upon agreement—as “mysterious.”⁶⁴ No doubt the failure to find any precedent for this idea in other legal systems did present a mystery, but Simpson's attempt to redefine property as “a right to possession” in order to provide the English contract with a Roman precedent does not make sense in light of two legal effects of the English contract. These legal effects, examined below, support the proposition that property as “ownership” passed upon completion of the contract and that Brian's analysis was the correct one.

One legal effect of the contract of sale protected by the action of debt was the transmission of the buyer/creditor's right to his heir.⁶⁵ Ordinarily, rights were intransmissible unless they were attached to property that passed from a deceased person to his heir.⁶⁶ Therefore, the heir's right to bring an action to obtain the object of sale had to be based on the ownership of the object of sale by the buyer/creditor even though the object of sale was still in the hands of the seller.

Pollock and Maitland, writing in the late nineteenth-century, held the view, later espoused by Simpson, that the debt in a contractual obligation was a personal right of action.⁶⁷ Therefore, they had difficulty with the idea that the heir could sue for the debts that were due to the dead man because a man should not have been able to bequeath a right of action.⁶⁸ Pollock and Maitland attempted to explain this aberration by suggesting the existence of a “roundabout scheme” to give the property of the debt to the creditor as property.⁶⁹ They suggested that a judgment or a recognizance confessing the judgment in court was the means by which the debt owing in a personal action really became the creditor's property.⁷⁰ However, they presented no evidence that supported this explanation. The transmissibility of the buyer/creditor's debt to the heir did require that the debt be attached to the creditor's property,⁷¹ but this attachment was not accomplished by means of a judgment or a recognizance. It was accomplished at the very moment when the

64. *Id.* at 168.

65. *See id.* at 82.

66. *See* 2 POLLOCK & MAITLAND, *supra* note 15, at 346 (citing 4 BRACTON, *supra* note 2, at 14 (folio 407b), for the rule that actions cannot be bequeathed).

67. *See* 2 *id.* at 205.

68. *See* 2 *id.* at 346 (citing 4 BRACTON, *supra* note 2, at 14 (folio 407b), who stated that “[a]ctions cannot be bequeathed”).

69. *Id.*

70. *See* 2 *id.*

71. *See* 2 *id.*

contract was made.

Another legal effect of the contract of sale was to place the risk of loss on the seller in possession of the object of sale when it was destroyed. As Glanvill stated, "[t]he risk in respect of the thing purchased and sold is generally on the party in possession, unless there is an agreement to the contrary."⁷² This placement of risk on the seller was justified only if the seller no longer owned the object of sale and no longer had a right to hold it. His responsibility was thus akin to that of a usurper⁷³ who was responsible for loss or destruction even if it occurred without fault. Roman law, which left ownership of the object of sale in the seller's hands until delivery, placed the risk of loss on the buyer after the contract was formed and before delivery.⁷⁴ The seller's continued ownership made him responsible only for maintaining the object of sale with due care before its conveyance.⁷⁵ The absolute liability of the English seller corresponded to the liability of a usurper without title; the limited liability of the Roman seller corresponded to the liability of a bailee⁷⁶ with limited title.

Chief Justice Brian's conclusion that the ownership of the object of sale passed upon the conclusion of the contract before delivery is verified by the legal effects of the contract. This form of contract has no precedent in any legal system of the western world. As stated above, it is somewhat inconceivable that this idea should have appeared suddenly in twelfth-century England without precedent. Let us turn, then, to Islamic law to analyze the characteristics of this non-western legal system and assess whether it influenced the English common law of contract through the action of debt.

C. *The Islamic 'Aqd*

The idea that ownership in the property of goods passed at the time of agreement—even before the physical transfer of the goods—

72. GLANVILL, *supra* note 16, at 130; *see also* 2 POLLOCK & MAITLAND, *supra* note 15, at 210 (citing Glanvill for the proposition that the risk remained with the party in possession of the goods).

73. In other words, a converter. A converter who has appropriated a chattel must pay its full value at the time and place of conversion, at which time the title will pass to the converter. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 15, at 89-90 (5th ed. 1984).

74. *See* 2 MONIER, *supra* note 48, at 147; NICHOLAS, *supra* note 56, at 179.

75. *See* NICHOLAS, *supra* note 56, at 179.

76. That is, a modern bailee. In Glanvill's time, it appears that the English bailee was strictly liable for the object in his custody. *See* GLANVILL, *supra* note 16, at 128; 3 HOLDSWORTH, *supra* note 43, at 337-39. In modern times, a bailee is responsible only for negligence. *See* RALPH E. BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY § 2.3, at 15-16 (4th ed. 1991).

may have been unknown to western legal systems in the twelfth century, but it was known in Islam. Chafik Chehata, a noted scholar on the Islamic law of contract (*'aqd*),⁷⁷ confirmed that at this time in Islamic law the property of the object of sale, whether it was movable or immovable, passed as soon as the contract of sale was concluded (that is, upon offer and acceptance).⁷⁸ This passing of ownership gave rise to the obligation in the buyer to convey the price to the seller in exchange for the object of sale which the buyer owned.

In the English action of debt, the creditor/buyer complained that the debtor/seller was unjustly withholding (*deforciat*) from him; that is, that the debtor was unjustly withholding the creditor's own property. This idea was anticipated in Islamic law with respect to a claim for movable property that was detained by the seller after a sale. The buyer was required to declare that the thing was unjustly in the possession of the seller:

With respect to the plaintiff's saying, "I claim it from the defendant," this is also indispensably requisite; because to demand it is his right, and the demand must therefore be made; and also, because it is possible that the land may be in the possession of the defendant in virtue of pawnage,—or detention after a sale of it, to answer the price,—and this apprehension is removed by the claim of it.—Lawyers have observed that because of the above possibility, it is requisite, in a case of moveable property, that the plaintiff declare that the thing is unjustly in the possession of the defendant.⁷⁹

77. I had the honor to work as a student under the guidance of Professor Chehata at the University of Paris II during the last few months of his life. His direction set the agenda for my work over the course of the next two years in Paris.

78. See Chafik Chehata, *L'Acte Translatif de Propriete en Droit Musulman Hanefite*, 21 REVUE AL QANOUN WAL IQTISAD 455, 455, 457, 460 (1951) (reprinted in TRAVAUX DE LA SEMAINE INTERNATIONALE DE DROIT MUSULMAN 36-43 (Louis Milliot ed., 1953)). Khalil mentioned four ways in which a sale may be concluded:

A sale is made perfect by the mere consent of the parties, even though such consent be tacit; as well as by the reciprocal delivery of the thing and the price. It may be concluded either by a positive stipulation, as "will you sell that to me?" followed by an affirmative answer, or by the acceptance of an offer of purchase or sale.

F.H. RUXTON, MALIKI LAW BEING A SUMMARY FROM FRENCH TRANSLATIONS OF THE MUKHTASAR OF SIDI KHALIL WITH NOTES AND BIBLIOGRAPHY 157 (1916). Note that the use of the term "perfect" to mean binding in English law has been ascribed to the civil law, see SIMPSON, *supra* note 17, at 162 n.2, but it is the same term as "*tamm*" used in Islamic law to describe the binding effect of the contract upon offer and acceptance, see 6 ABU BAKR MAS'UD B. A. KASANI, BADA'I' AS-SANA'I' FI TARTIB ASH-SHARA'I' 2983 (1971).

79. THE HEDAYA, OR GUIDE: A COMMENTARY ON THE MUSSULMAN LAWS 401 (Charles Hamilton trans., Premier Book House 2d ed. 1975) (1870) [hereinafter

The passing of ownership of the object of sale upon the conclusion of the contract created a legal imbalance by combining the physical presence of the price with the ownership of the object of sale in the hands of the buyer. This imbalance required the buyer to give up the price to the seller in order to restore balance between the parties. In this situation, Islamic law operated on a principle of equivalence. The imbalance was the source of the contractual obligation on the buyer to pay the price.⁸⁰

The source of the contractual obligation in Islamic law anticipated the English concept of *quid pro quo*. *Quid pro quo* means "something for something." When a contract to sell was concluded, the seller granted "something" to the buyer, which created a right in the seller to correspondingly obtain "something" from the buyer. Holdsworth, writing on English law in the early part of this century, defined the "something" from the seller as the "right to sue,"⁸¹ but Holdsworth's analysis confused cause and effect. The right to sue was not the "something" that was conveyed from seller to buyer but rather the effect of the conveyance of that "something." The *quid pro quo* itself was the ownership of the object of sale that was given by the seller to the buyer at the conclusion of the contract before physical delivery in anticipated exchange for the price. When the physical presence of the price remained in the buyer's hands along with the newly acquired ownership of the object of sale, the seller had the right to sue for it. Thus, the *quid pro quo* in English law was the

HEDAYA].

80. Chehata stated:

However, the true cause of the obligation of the buyer is not the contract of sale, but the fact that the property of an object has been transferred to him. He must pay because he cannot combine in his hands both the object and its price. The price is the equivalent of the object. Not to pay the price is to break the equilibrium that each contract must assure. This equilibrium is only the perfect equivalence of the performances, as commutative justice requires.

The theory of the cause is reduced thus to a theory of equivalence. Equality is the goal of the contractants, as the texts say explicitly. Also, if the object is destroyed before delivery, the buyer no longer owes the price. The price does not have an equivalent any more in effect. Likewise, if the buyer should be dispossessed, he will be able to be reimbursed the price. Finally, the seller will not be held to deliver the object as long as the price has not been paid.

....

It is therefore established that one cannot oblige himself without there existing a considered equivalent. But the contract will always be interpreted in a manner such that the performances be considered as the equivalent of one for the other.

CHAFIK CHEHATA, *THEORIE GENERALE DE L'OBLIGATION EN DROIT MUSULMAN HANEFITE: LES SUJETS DE L'OBLIGATION* 67-68 (1969) (author's translation).

81. 3 HOLDSWORTH, *supra* note 43, at 356.

same as that in Islamic law. The transfer of the ownership of the object of sale to the buyer who continued to hold the price caused an imbalance, which generated the obligation on the buyer's part to transfer the price to the seller.

In both Islamic and English law, the source of the contractual obligation was based on commutative justice. Enforcement of the contract was to preserve equality between the contracting parties, not to compel the keeping of a promise. Promise played no role in this contract, contrary to Anglo-Saxon England where contract was based on the notion of promise.⁸² The Anglo-Saxon contract was a *wed* surety contract that made a promise binding by the handing of a person or thing to the obligor.⁸³ This notion of contract as promise also appeared in the local and borough courts of England in the twelfth century.⁸⁴ However, with the appearance of the action of debt in the royal courts in twelfth-century England, promise as moral justice was replaced by equality as commutative justice. This change incorporated the very essence of the Islamic contract for the first time into English law.⁸⁵

Nevertheless, the absence of promise in the Islamic contract did not mean that the notion of covenant or promise was not respected. In fact, the Qur'an, in much the same way as the Judeo-Christian tradition, enjoins its followers to "fullfil (Every) engagement, For

82. See HENRY, *supra* note 27, at 241-43.

83. See Hazeltine, *supra* note 20, at 611-12. Robert Henry stated:

Legally binding agreements which did not create debts in the sense of . . . definite things owed, but bound the promisors to certain duties, are of great antiquity in Anglo-Saxon law. In fact, the earliest contract mentioned in the Dooms was a wedding contract which amounted to more than a mere purchase of the bride, as it included outstanding duties even after the bride had been delivered.

HENRY, *supra* note 27, at 206.

84. See Hazeltine, *supra* note 20, at 615-16.

85. In 1985, in a Conference on Comparative Links Between Islamic Law and the Common Law, Aron Zysow argued that "the Islamic law of contract bears a more significant resemblance to the medieval action of debt than to our modern law of contract." Aron Zysow, *The Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law*, 34 CLEV. ST. L. REV. 69, 69 (1985-86). He also pointed out that the basis of both the Islamic contract and the English contract in the action of debt was a grant and not a promise. See *id.* at 75. It is not clear, however, what Zysow considered the grant to be in the English contract. He quotes Simpson to say that the grant was the debt, and, as we have noted above, Simpson conceived the grant to consist of the right to possession and not the property interest that is the basis of the Islamic grant. See *id.* Zysow also relied on Milsom's idea that the passing of property idea was a means of rationalizing the enforceability of consensual sales and not the foundation of the contract that is the very source of the obligation in Islamic law. See *id.* at 76. Therefore, Zysow did not reach the conclusion that Islamic law might have influenced the common law in this area. See *id.*

(every) engagement Will be enquired into (On the Day of Reckoning).”⁸⁶ The key word in this passage is engagement (*‘ahd*)—a term used frequently throughout the Qur’an—which indicates that one’s promises are binding before God.⁸⁷ The term for contract (*‘aqd*), on the other hand, is rarely used in the Qur’an.⁸⁸ While it is thus evident that Islam urged the keeping of one’s promises as a matter of religion, promises were unenforceable as a matter of law.⁸⁹

One may speculate why this bifurcation existed between religion and law. While religion for the Muslims was concerned with determining the path to eternal salvation, informing one concerning it, and encouraging one along it, law was concerned with creating legal relationships between people, informing one concerning them, and enforcing their maintenance. The discussions in religion focused on ritual and prayer, right and wrong, and punishment and forgiveness in the spiritual world. The discussions in law focused on rights, duties, and remedies. The purpose of religion was to help one find eternal salvation; punishment was in God’s hands, with the religious authority serving as counselor. Law was focused on conflicts between people taking place on this earth. For people to live in harmony with each other, it was necessary to set legal boundaries between each person’s sphere of action and ownership and to provide some worldly means to ensure that these boundaries would be maintained.

Religion and law approached human action from opposite ends of the spectrum even though in many respects their interests overlapped. Religion was concerned with the morality of the inner intentions of a person as that person approached human action. Law was concerned with the effect of human action insofar as it transgressed established boundaries between individuals and interfered with another’s established rights. The difference was one between moral responsibility and proprietary right. Thus, if a person intended and firmly resolved to kill another, he may have been guilty of a sin against God, but, if he later changed his mind, he would not have been held legally responsible for his bad intent. On the other hand, if a person used all due care to keep an animal confined on his property and intended no harm to another person by the animal, that

86. THE HOLY QUR’AN: TEXT, TRANSLATION AND COMMENTARY 17:34 (‘Abdullah Yusuf ‘Ali trans., new rev. ed. 1989) [hereinafter QUR’AN].

87. See CHEHATA, *supra* note 7, at 159.

88. See *id.* at 158-59 n.1.

89. See Ch. Chehata, *Le Concept de Contrat en Droit Musulman*, 13 ARCHIVES DE PHILOSOPHIE DU DROIT 129, 136-37 (1968).

person might have been held legally responsible for the animal's harming another person if the animal escaped, even though the person would have incurred no moral responsibility.

It is not difficult to see why Islam as a religion encouraged the keeping of one's promise. A promisor established a situation of trust.⁹⁰ In the context of religion it was immoral to breach that situation of trust, but the law separated itself from religion in this situation⁹¹ and did not protect the expectations arising from that promise. Such expectations were not considered a property interest the boundaries of which required protection for the peace and security of society. To establish a protected property interest there had to be a transfer of ownership of the object of sale. Once this transfer took place, legal protection was accorded to the new owner and not before. For this reason, Islamic law required that the words of offer and acceptance used to form a contract be stated in the past tense (or in the present tense if the intent was to transfer immediately), but never in the future tense.⁹²

The legal effects of a contract formed by an offer and acceptance that transferred ownership of the object of sale immediately to the buyer included the placement of the risk of loss on the seller in possession of the object of sale when it was destroyed. Glanvill confirmed that the risk fell on the seller in possession for a contract

90. Charles Fried stated:

To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only *like*) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust. A liar and a promise-breaker each *use* another person. In both speech and promising there is an invitation to the other to trust, to make himself vulnerable; the liar and the promise-breaker then abuse that trust.

CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 16 (1981).

91. See CHEHATA, *supra* note 7, at 158 (stating that Islamic law, especially in the area of contract, loses its religious character).

92. See CHEHATA, *supra* note 80, at 111. Note that M.T. Clanchy made the following reference to the use of the past tense in England:

Likewise the drafting rule became general that the past tense should be used in charters for the act of giving: "Know that I, A of B, *have* given," not simply "I give." This emphasized that the ceremonial conveyance was the crucial transaction, whereas the charter was merely a subsequent confirmation of it. This rule only became firmly established in the thirteenth century. Numerous charters of the twelfth century depart from it, presumably because their more amateur draftsmen did not appreciate the relationship between written record and the passage of time.

M.T. CLANCHY, *FROM MEMORY TO WRITTEN RECORD: ENGLAND, 1066-1307*, at 208 (1979).

protected by the action of debt in English law.⁹³ This same legal effect occurred in Islamic law where the responsibility of the seller was called *qabd daman*.

The term *qabd daman* referred to the responsibility placed on a usurper. This responsibility engendered an obligation to pay the value of the usurped object if it was lost, irrespective of the cause, including even loss due to an act of God.⁹⁴ Because the seller had an obligation to deliver the object of sale as soon as the contract was concluded, he took on a responsibility similar to that of a usurper while he held the object of sale.⁹⁵ The object had passed into the patrimony of the buyer as soon as the contract had been concluded, and if it was subsequently destroyed, he was entitled to damages.⁹⁶ The one difference between the responsibility of the usurper and that of the seller in whose hands the object of sale was destroyed was that the former owed the value of the object lost and the latter owed the price.

Chehata explained this difference between the usurper and the seller by the fact that the usurper was responsible for his taking, while the seller was responsible for his custody.⁹⁷ He pointed out that another case in which the responsibility for custody existed was that of the potential buyer who held the object of sale under a null (*batil*) contract or a vitiated (*fasid*) contract or while the pre-contractual negotiations were taking place (*'ala sawm al-shira*).⁹⁸ Chehata explained that the receipt of the object by the buyer, even though it was still owned by the seller, was with the permission (*idhn*) of the seller, and this permission eliminated the taking (*qabd*) element of usurpation.⁹⁹ Nevertheless, because the contract had never been validly formed before the object was lost, the price did not exist and the damages were the value of the object lost, exactly as in the case of usurpation.¹⁰⁰

I would go further than Chehata and fully equate the *qabd daman* of the seller with that of the usurper. Although the seller was responsible for the price, the price stood as the best evidence of the value of the object destroyed and therefore was, in effect, the same

93. See GLANVILL, *supra* note 16, at 130.

94. See 2 CHAFIK CHEHATA, ETUDES DE DROIT MUSULMAN: 2 / LA NOTION DE RESPONSABILITE CONTRACTUELLE; LE CONCEPT DE PROPRIETE 108 (1973).

95. See *id.* at 109.

96. See *id.* at 109, 111.

97. See *id.* at 110-11.

98. See *id.* at 111.

99. See *id.*

100. See *id.* at 112.

damages as those of the usurper. Regardless of the explanation concerning the specific nature of the damages, however, the point remains that the seller was a type of usurper while he held the object of sale after the contract had been formed. His responsibility was *qabd daman*, in contrast to the responsibility of the bailee, agent, and borrower, which was that of *qabd amana*.

Qabd amana was responsibility only for a transgression (*ta'addi*) against the object for which its value was owed.¹⁰¹ In other words, the holder of the object was not responsible for an act of God as in the case of the contract of sale, but only for causing the loss of the object through some fault of his own. This was the responsibility of one who destroyed the good of another (*itlaf*).¹⁰² The difference between the responsibility of a bailee and that of the seller holding the good of the buyer was that the bailee had a title to enjoy or hold the object while the seller had no such title.¹⁰³ Therefore, loss of the good by the bailee was not a breaking of the contract but rather a transgression against the property of another beyond the bounds of his contract.¹⁰⁴

The difference between *qabd daman* and *qabd amana* was really the difference between the responsibility in a wrongful detention for harm incurred without regard to fault and the responsibility in a rightful detention for harm incurred only by fault. The former generated an absolute liability that did not take intent (*qasd*) into account, while the latter required intent as the basis of its notion of responsibility.¹⁰⁵ Similarly, this distinction appeared in English law between the responsibility of the seller in an action of debt and what we now know as the responsibility of a modern bailee.¹⁰⁶

In the area of contract, the royal courts of England diverged quite radically from the local and ecclesiastical courts by creating a contract protected by the action of debt that passed ownership from seller to buyer at the time of contract formation. The unique contribution of the action of debt to the common law has not been widely celebrated because it was not long before the action of covenant, and eventually the action of assumpsit, reintroduced the concept of contract as promise and came to dominate Anglo-American contract law as it is practiced today.¹⁰⁷ But for the span of a

101. See *id.* at 112-13.

102. See *id.*

103. See *id.* at 112.

104. See *id.* at 112-13.

105. See *id.* at 114.

106. See *supra* text accompanying note 76.

107. See SIMPSON, *supra* note 17, at 9, 199-210.

few centuries after the writ of debt appeared in the twelfth century, the action of debt in the royal courts provided a remedy that made the common law unique among western legal systems of its time. Islamic law was the only legal system that shared the unique features of the English contract protected by the action of debt, and the Islamic contract existed long before the writ of debt appeared in England. It is not inconceivable that England owes this debt to Islam.

II. PROPERTY IN THE ASSIZE OF NOVEL DISSEISIN¹⁰⁸

A. *A Speedy Remedy for Loss of Ownership*

The assize of novel disseisin played a major role in shaping the course of the common law.¹⁰⁹ Created by King Henry II sometime between 1155 and 1166 to restore lands unlawfully seized, this judicial reform protected title to land by providing a speedy means of establishing rightful possession.¹¹⁰ It provided landowners with security under the king's law by replacing trial by battle¹¹¹ with trial by jury, by shortening the time period for obtaining recovery, and by providing easier access to the courts.¹¹² King Henry II also created other assizes to help families maintain control of their inherited lands, including the assize of mort d'ancestor (1176 A.D.), which regularized the heritability of land, and the Grand Assize (1179 A.D. or 1182 A.D.), which enabled the possessor to have his rights unequivocally reaffirmed by a jury.¹¹³ It was the assize of novel disseisin, however, that revolutionized the procedures for protecting land ownership in England.

Enacted in the middle of the twelfth century, the assize of novel disseisin remained an extraordinarily vital institution for over two hundred years.¹¹⁴ The action was brought in the king's court and was

108. This Part draws liberally from my article entitled *An Inquiry into Islamic Influences During the Formative Period of the Common Law*, in *ISLAMIC LAW AND JURISPRUDENCE* 135 (Nicholas Heer ed., 1990).

109. Harold Berman stated that Henry II created the English common law by such legislation. See BERMAN, *supra* note 1, at 457.

110. See DONALD W. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* 3, 11, 18 (1973).

111. Trial by battle declined in use after the introduction of the assize of novel disseisin and finally was abolished in 1819. See GLANVILL, *supra* note 16, at 180-81.

112. See SUTHERLAND, *supra* note 110, at 2-3.

113. See MALCOLM BARBER, *THE TWO CITIES: MEDIEVAL EUROPE 1050-1320*, at 324-25 (1992).

114. See SUTHERLAND, *supra* note 110, at 1.

authorized by a writ purchased from the king.¹¹⁵ Twelve jurors were picked to inspect the property and learn the facts of the case. These investigative jurors declared the facts to the court, which would then determine, on the basis of the jurors' declarations, whether the plaintiff had been disseised (that is, removed) unjustly and without judgment by the person alleged within a particular time period.¹¹⁶ The assize of novel disseisin soon attracted many plaintiffs to the king's court seeking recovery of their land. The assize was summary in nature and more rational than the cumbersome and often dangerous action brought on a writ of right.

The writ of right was proprietary in nature.¹¹⁷ Its action took place in the lord's court and required the establishment by the plaintiff of proof of ownership. If the evidence was not strong enough to constitute a proof, either the plaintiff or the defendant might be required to support his claim by trial by battle, a bloody device introduced in England by the Normans after the Conquest of 1066.¹¹⁸ Battle required the plaintiff and defendant, or their champions, to engage in single combat on the theory that God's intervention would give victory to the side of justice.¹¹⁹ This method of proof was irrational.¹²⁰ Not surprisingly, this form of justice soon gave way and declined in use upon the rise of the assize of novel disseisin, which offered a short and effective means to protect tenants against unjust takings by their lords.¹²¹

For all its importance, the origin of the assize of novel disseisin has remained a mystery. Henry of Bracton, in an oft-quoted passage from the thirteenth century, claimed that the assize had been thought out and invented through many wakeful nights.¹²² Yet from where

115. See *id.* at 5.

116. See W.L. WARREN, HENRY II, at 338-41 (1973). Disseisin is a usurpation of the right of seisin. Seisin embodies the feudal concept of ownership whereby a person held land under claim of a freehold estate. See 2 POLLOCK & MAITLAND, *supra* note 15, at 35-36.

117. For a history of the writ of right, see VAN CAENEGEM, *supra* note 1, at 206-34.

118. See 1 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 299-302, 308-10 (A.L. Goodhart & H.G. Hanbury eds., 7th rev. ed. 1956); 2 POLLOCK & MAITLAND, *supra* note 15, at 598-610.

119. See ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL 103-04, 108-13, 115-16 (1986).

120. See 2 POLLOCK & MAITLAND, *supra* note 15, at 77. For a discussion of rational and irrational methods of proof, see John Makdisi, *Formal Rationality in Islamic Law and the Common Law*, 34 CLEV. ST. L. REV. 97 (1985-86).

121. See SUTHERLAND, *supra* note 110, at 43; see also *id.* at 30-31, 96-97 (citing S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 117-19 (2d ed. 1969), as support for the idea that the assize was first founded to protect tenants against their lords).

122. See 3 BRACTON, *supra* note 2, at 25 (folio 164b); see also BRAND, *supra* note 1, at

King Henry and his advisors gleaned the idea for this assize remains uncertain. Even today it is asserted that "the assize was created in the reign of Henry II, but beyond that basic fact almost nothing about its origin is agreed on anymore."¹²³ Indeed, S.F.C. Milsom went so far as to state that "[t]he assize of novel disseisin is the greatest enigma in the history of the common law."¹²⁴

The assize appears to have come neither from Normandy nor from Anglo-Saxon law. The writs from Normandy were different in form and order of development.¹²⁵ As for Anglo-Saxon law, if one looks at the collection of Doms named after Aethelbirht of Kent,¹²⁶ it is clear that protection was accorded to ownership and to peace,¹²⁷ with no mention of protection of possession.¹²⁸ It is only in canon law

78 (observing that the Bracton treatise contained little reference to Henry II other than mentioning this connection to the assize of novel disseisin); 1 POLLOCK & MAITLAND, *supra* note 15, at 146 (commenting that Bracton's remark concerning Henry's wakeful nights seems believable in light of the sudden appearance of this new legal principle); SUTHERLAND, *supra* note 110, at 6 (noting Bracton's comment).

123. SUTHERLAND, *supra* note 110, at 5. Indeed, Lady Stenton, speaking more generally of the judicial development of this period, has stated, "[i]t is probable that the early stages by which the momentous results of Henry II's reign were achieved will never be adequately recalled." DORIS M. STENTON, *ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER: 1066-1215*, at 26 (1964). Even the origin of the term assize appears to be unknown. See 1 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT* 614-15 n.1 (4th ed. photo. reprint 1987) (1883) (concluding that "there is no reason to look for an Arabic derivation, as is done in the editions of Du Cange").

124. S.F.C. Milsom, *Introduction* to 1 POLLOCK & MAITLAND, *supra* note 15, at xxxviii.

125. See MELVILLE MADISON BIGELOW, *PLACITA ANGLO-NORMANNICA: LAW CASES FROM WILLIAM I TO RICHARD I PRESERVED IN HISTORICAL RECORDS* at xxvii n.1 (London, Sampson Low, Marsten, Searle & Rivington 1879).

126. Aethelbirht, a convert of St. Augustine, reigned in Kent in the latter part of the sixth and first part of the seventh centuries. See A.S. DIAMOND, *PRIMITIVE LAW PAST AND PRESENT* 57 (1971). The "Doms," or judgments, are the oldest surviving literary work in any Teutonic tongue and the oldest collection of English laws and ordinances to be authenticated. See *id.* at 57-59; see also EDWARD JENKS, *LAW AND POLITICS IN THE MIDDLE AGES* 191 (New York, Henry Holt & Co. 1898) (comparing the Doms with the *Leges Barbarorum*).

127. See JENKS, *supra* note 126, at 188-200. Jenks stated:

Now here we have two perfectly distinct ideas. On the one hand, there is the offence of depriving a man of valuable things. On the other, there is the offence of creating a disturbance within an orbit over which a man is assumed to have physical control. Our forefathers had distinct names for these ideas. The one was a breach of *mund* (*mund-bryce*); the other a breach of *frith* (*frith-bryce*).

Id. at 196.

128. Even in the case of an alleged theft of movable property, the burden of proof was on the holder of the property to prove ownership or produce a warrantor. The possessor did not benefit from any presumption of ownership through his possession. See *id.* at 202-05.

and in Roman law that one finds some evidence of a resemblance to the assize of novel disseisin.

Pollock and Maitland, Holdsworth, and Jenks believed that the assize was suggested by the canonist action called the *actio spolii*.¹²⁹ Sutherland discounted this idea because the *actio spolii* could not have appeared much earlier than the assize of novel disseisin.¹³⁰ Harold Berman rejoined that Pollock and Maitland's reference to the canonist *actio spolii* was simply a red herring and that there might indeed have been canonist roots since the *actio spolii* was merely a revised version of the older ecclesiastical *canon redintegranda*.¹³¹ Yet in the end, Sutherland appears to have been right. The *canon redintegranda* was Gratian's rule of restitution appearing in Causae II and III of *The Concordance of Discordant Canons* written about 1140,¹³² and was only elaborated during the course of the second half of the twelfth century.¹³³ Because the assize of novel disseisin was created sometime between 1155 and 1166, it is unlikely that the *canon redintegranda* influenced the creation of the assize.

Furthermore, the *canon redintegranda* itself was directed to an entirely different purpose than that of the assize. While the *canon redintegranda* was designed to protect against breaches of the peace, the assize was designed to protect ownership. The purpose of the *canon redintegranda*, the precursor of the *actio spolii*, is demonstrated by the following example given by Berman: A person, *A*, was entitled to a judicial decree restoring him to possession against *B* even if *B* had dispossessed *A* because *A* himself had been wrongfully in possession by forcibly having dispossessed *B*. The principle,

129. See 2 HOLDSWORTH, *supra* note 24, at 204; JENKS, *supra* note 126, at 118-19; 2 POLLOCK & MAITLAND, *supra* note 15, at 47-48. The *actio spolii* permitted "any holder of a benefice in the church [to] sue for recovery on the simple ground that he had been 'despoiled.'" SUTHERLAND, *supra* note 110, at 21.

130. See SUTHERLAND, *supra* note 110, at 21 n.5. Van Caenegem agreed with H.G. Richardson and G.O. Sayles that the thirteenth-century *actio spolii* could not have had an influence on an assize that appeared a half century earlier. See VAN CAENEGEM, *supra* note 1, at 387.

131. See Letter from Harold J. Berman, Robert W. Woodruff Professor of Law, Emory University School of Law, to the author, at 3 (Apr. 2, 1991) (on file with the *North Carolina Law Review*).

132. See BERMAN, *supra* note 1, at 143, 240-41. Gratian was a Bolognese monk, whose treatise, commonly known as the *Decretum*, synthesized the canon law of the time in a coherent, scholastic form. See 1 POLLOCK & MAITLAND, *supra* note 15, at 112-13.

133. See VAN CAENEGEM, *supra* note 1, at 387 (citing FRANCESCO RUFFINI, L'ACTIO SPOLII 303 (photo. reprint 1972) (1889)). After pointing out this anachronism, van Caenegem proceeded to offer his own view that the assize was "the outcome of a long native process of gradual judicialisation of the old practice of repressing unlawful disseisin by way of an executive police measure." *Id.*

according to Berman, "was that a person out of possession who could prove that he had been forcibly or fraudulently dispossessed should have a preliminary judicial remedy of restitution before anything else concerning the matter was considered, and he was not to be benefited by taking the law into his own hands."¹³⁴ The purpose of such a provision was to protect against a breach of the peace even if the true owner was the one who was breaching the peace.

While the purpose of the assize of novel disseisin was to protect property holders against usurpation of their property, it was also to protect ownership. The following example, appearing in the early part of the thirteenth century in the *Curia Regis Rolls*, demonstrates the protection of ownership:

The defendant could plead that the plaintiff got his seisin by intrusion. William de Brademare complained that Walter Dabernun had disseised him of his free tenement in Leatherhead and Fetcham. Walter's defence was that while he lay sick almost to death, William intruded into the land. William replied that Walter gave him the land by charter after his illness. He was asked whether the witnesses were present, and replied that all but three were there. He would put himself on them if they had the courage to bear witness to the truth. Walter denied both the charter and seisin; and offered twenty shillings to have an enquiry. Whether because Walter's defence was good or because William, like the witnesses, found his courage failing, he withdrew in the following term and put himself in mercy.¹³⁵

It appears from this case that Walter was the prior possessor, William dispossessed Walter, and then Walter dispossessed William. Walter would not have been able to defend against William's claim of disseisin under the *canon redintegranda* because he apparently had disseised William last, and that alone was sufficient to constitute a breach of the peace. But under the assize of novel disseisin, Walter defended on the basis of prior possession as the best evidence of true ownership. William tried to counter this claim of true ownership by claiming ownership under a charter, but he did not produce the proper evidence and Walter won the case. This case illustrates the true purpose of the assize of novel disseisin—to protect ownership. More specifically, it illustrates the use of the concept of possession to

134. BERMAN, *supra* note 1, at 241-42.

135. INTRODUCTION TO THE CURIA REGIS ROLLS, 1199-1230 A.D., at 163 (C.T. Flower ed., 1944) [hereinafter INTRODUCTION TO THE CURIA REGIS ROLLS] (footnotes omitted).

establish ownership protected by the assize of novel disseisin. Possession stood as a presumption of ownership, and the assize of novel disseisin protected the possession of the one who was first dispossessed (Walter) unless it could be proved that his dispossessor (William) was the true owner. Of course, if the presumption of ownership had been rebutted by showing that William was the true owner by way of a charter, William would have prevailed on the assize. In the absence of such proof, however, prior possession was proof of ownership, and the last dispossessor, Walter, was able to defend against William's claim of disseisin under the assize of novel disseisin on the basis of this proof of ownership.¹³⁶

The origins of the assize of novel disseisin have been ascribed not only to canon law but also to Roman law. A number of scholars have focused specifically on the interdict *unde vi*.¹³⁷ As an action to recover the possession of property, this Roman interdict did share features with the English assize. For example, both actions made it illegal to remove an owner from his property by force.¹³⁸ Property governed by the two actions included land and fixtures, but not movables.¹³⁹ Movable property on land that was usurped could be recovered along with the income the land had produced during the period of usurpation.¹⁴⁰ Also, the plaintiff who had been ejected must

136. See HOLMES, *supra* note 44, at 166 (maintaining that "the English law has always had the good sense to allow title to be set up in defence to a possessory action," including the assize of novel disseisin) (footnote omitted); SUTHERLAND, *supra* note 110, at 98-100 (summarizing several cases wherein prior possession appears to have been a successful defense in the assize of novel disseisin); cf. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 106-07 (Boston, Little, Brown & Co. 1898) (discussing the assize of *mort d'ancestor*). But see BERMAN, *supra* note 1, at 455 (stating that the assize was "an action against the dispossessor wholly independent of ownership, an action to which the defendant's own ownership was no defense"); 2 POLLOCK & MAITLAND, *supra* note 15, at 49-50 (contending that in the time of Edward I, a disseisor who lacked title could still use the assize to protect his seisin—even as against the ejected owner); Thomas Lund, *The Modern Mind of the Medieval Lawyer*, 64 TEX. L. REV. 1267, 1284-85 n.69 (1986) (citing Maitland's rejection of Holmes's view of the assize in F.W. Maitland, *The Beatitude of Seisin*, 1, 4 LAW Q. REV. 24, 34-39 (1888)).

137. See 2 HOLDSWORTH, *supra* note 24, at 204; 2 POLLOCK & MAITLAND, *supra* note 15, at 48, 52; SUTHERLAND, *supra* note 110, at 22. For a description of this interdict, see J. INST. 4.15.6; DIG. 43.16.

138. See SUTHERLAND, *supra* note 110, at 22; Maitland, *supra* note 136, at 28-29, 38.

139. See SUTHERLAND, *supra* note 110, at 22-23. The *actio spolii*, by contrast, could be used to recover possession of incorporeal rights as well as movable and immovable things. See BERMAN, *supra* note 1, at 241.

140. See SUTHERLAND, *supra* note 110, at 23. John Reeves remarked that "in no other recognition [than novel disseisin] was there any mention in the judgment *de fructibus et catallis*." 1 REEVES' HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE ROMANS TO THE END OF THE REIGN OF ELIZABETH 232 (W.F. Finlason ed., Philadelphia, M. Murphy 1880); see GLANVILL, *supra* note 16, at 170.

have been in actual possession.¹⁴¹

Nevertheless, the same major discrepancy that existed between the *canon redintegranda* and the assize of novel disseisin also existed between the interdict *unde vi* and the assize of novel disseisin. Under the Roman interdict *unde vi*, if an owner took land back from a non-owner, the non-owner could recover the land even if the owner could prove his ownership. The language of Justinian's Institutes describing the interdict stated this point explicitly: "By [the interdict *unde vi*] he who has expelled him is forced to restore to him the possession, although the person to whom the interdict is given has himself taken by force, clandestinely, or as a concession, the possession from the person who has expelled him."¹⁴² The owner under the interdict was not allowed to offer any proof of ownership because ownership was not a defense. The interdict protected possession as an end in itself, and a possessor was protected even against repossession by the owner. This was not the rule in England. As noted in the case of William de Brademare quoted above, the assize of novel disseisin did not protect possession as an end in itself but, rather, protected an owner.

The difference in function between the Roman and English actions is clear. The Roman interdict emphasized the maintenance of peace and quiet,¹⁴³ while the English assize emphasized the protection of property rights.¹⁴⁴ The same difference existed between the canon

141. See SUTHERLAND, *supra* note 110, at 22.

142. J. INST. 4.15.6; see 4 DIG. 4.43.15.1 (Ulpian, Ad Edictum 68). Professor Berman, in a letter to me on April 2, 1991, stated that he did not think that this language in Justinian's Institutes supported my point that under Roman law, ownership was not a defense. He stated that "[i]t only says that prior dispossession by the plaintiff is not a defense." Letter from Harold Berman to John Makdisi, *supra* note 131, at 2. Professor Berman's point is supported in his book, *Law and Revolution: The Formation of the Western Legal Tradition*, in which he stated that "if a nonowner in possession of land was ejected by armed force (*vi et armata*) he had a right to be restored, provided the defendant was not himself the owner." BERMAN, *supra* note 1, at 454. Earlier in the book, however, he quotes from a passage in the Institutes concerning the interdict *unde vi* that "if a person has taken possession of a thing by force, and it is his own property, he is deprived of ownership of it" *Id.* at 243 (quoting J. INST. 4.15.6). My reading of the interdict *unde vi* is supported by Barry Nicholas's interpretation in *An Introduction to Roman Law*, which states: "The title of either party is altogether irrelevant. The dispossessor may not even plead in defence that he is the owner." NICHOLAS, *supra* note 56, at 109.

143. Maitland described this principle as follows:

It is a prohibition of self-help in the interest of public order. The possessor is protected, not on account of any merits of his, but because the peace must be kept; to allow men to make forcible entries on land or to seize goods without form of law, is to invite violence.

2 POLLOCK & MAITLAND, *supra* note 15, at 41.

144. Maitland described this principle in the following way:

and English actions. Thus, there is no evidence that the assize of novel disseisin originated in Norman, Anglo-Saxon, canon, or Roman law. What gave rise to the new concept suddenly appearing in the assize that protected ownership by protecting possession as evidence of ownership? To answer this question, one must venture beyond the borders of Western Europe. In the Islamic world, the concept of protection of possession as evidence of ownership was well established by the twelfth century, being guaranteed through the action of *istihqaq*.

B. The Islamic Istihqaq

The Islamic *istihqaq* was an action for recovery of land upon usurpation (*ghasb*).¹⁴⁵ This action was brought before the *qadi*¹⁴⁶ to restore the owner who was removed from his property. There was a presumption that the possessor of property who had his property taken was the owner and thus entitled to the return of his property.¹⁴⁷ If the dispossessor could prove that he had a better right to the property (in other words, that he was the owner in relation to the possessor), the action for recovery by the dispossessed person failed.¹⁴⁸ In such a case, the presumption of ownership that initially operated in favor of the dispossessed person was rebutted. It was this presumption of ownership based on possession that appeared later in the English assize but never appeared in the *canon redintegranda* or the Roman interdict *unde vi*.

The Islamic *istihqaq* also enjoyed another characteristic of

In order to give an adequate protection to ownership, it has been found necessary to protect possession. To prove ownership is difficult, to prove possession comparatively easy. Suppose a land-owner ejected from possession; to require of him to prove his ownership before he can be reinstated, is to require too much; thieves and land-grabbers will presume upon the difficulty that a rightful owner will have in making out a flawless title. It must be enough then that the ejected owner should prove that he was in possession and was ejected; the ejector must be precluded from pleading that the possession which he disturbed was not possession under good title. Possession then is an outwork of property.

2 *id.* at 42; see also SUTHERLAND, *supra* note 110, at 23-24 (listing other discrepancies between the Roman and English actions).

145. See 3 KHALIL BEN ISH'AQ, ABREGE DE LA LOI MUSULMANE SELON LE RITE DE L'IMAM MALEK 100-07 (G.-H. Bousquet trans., 1961).

146. The *qadi* was a judge.

147. See MARCEL MORAND, ETUDES DE DROIT MUSULMAN ET DE DROIT COUTUMIER BERBERE 47-48, 50 (1931).

148. See *id.* at 55; see also LOUIS MILLIOT, INTRODUCTION A L'ETUDE DU DROIT MUSULMAN 636 (1953) (noting that when there is a conflict between proofs of the right of property, the older of two titles emanating from the same seller is preferred).

possession that later appeared in the English assize. As between two strangers in title to a piece of property, prior possession was evidence of ownership even if absolute title could be shown in a third person. In England, if *B* usurped land from *A*, and *C* then usurped this same land from *B*, *B* had an action for recovery of the land from *C* under the English assize even though *A* was the proven owner.¹⁴⁹ Sarakhsi, an eleventh-century Islamic jurist, similarly declared that when a bailee held land that was then usurped by a stranger, the bailee could recover from the usurper even though he was not the owner. Otherwise, usurpers would be encouraged to take property knowing that bailees would have no recourse against them.¹⁵⁰ One could argue in this case that the bailee stood as an agent of the owner in recovering the property; however, it was confirmed by a later Islamic author, 'Alamgir, that a simple possessor was protected as well. A person who usurped a slave from an owner and in turn had the slave usurped from him could bring an action for recovery against the second usurper.¹⁵¹

The similarity in characteristics between the substantive law of the assize of novel disseisin and the substantive law of the *istihqaq* is complemented by a similarity in the characteristics of the methods by which the actions were brought. In both actions:

- (1) a jury of twelve witnesses was called upon to provide the truth of the matter, which it was incumbent on the judge to accept;¹⁵²

149. See 2 POLLOCK & MAITLAND, *supra* note 15, at 46. Maitland stated:

He who possesses has by the mere fact of his possession more right in the thing than the non-possessor has; he of all men has most right in the thing until someone has asserted and proved a greater right. When a thing belongs to no one and is capable of appropriation, the mere act of taking possession of it gives right against all the world; when a thing belongs to *A*, the mere fact that *B* takes possession of it still gives *B* a right which is good against all who have no better.

2 *id.* at 43.

150. See 11 SHAMS AL-A'IMMA A. BAKR M. B. A. SAHL A. SARAKHSI, *KITAB AL-MABSUT FI AL-FURU'* 124-25 (1978); CHEHATA, *supra* note 94, at 150-52.

151. See 5 COMMISSION OF SULTAN 'ALAMGIR, *AL-FATAWI AL-HINDIYA* 147 (2d ed. 1973) (describing a case where a slave escaped from the second usurper and the first usurper was permitted to recover the value of the slave even though the true owner did not hold the first usurper liable). For the general principle that the right to recover against a usurper existed even for a prior possessor who was himself a usurper against another prior possessor, see JAUQUES EL-HAKIM, *LE DOMMAGE DE SOURCE DELICTUELLE EN DROIT MUSULMAN* 170 n.5 (2d ed. 1971) (citing Art. 910 of the MAJALLA, which is translated in 1 C.A. HOOPER, *THE CIVIL LAW OF PALESTINE AND TRANS-JORDAN* 231 (1933)); MILLIOT, *supra* note 148, at 603.

152. See 2 ROBERT BRUNSCHVIG, *ETUDES D'ISLAMOLOGIE* 201, 207 (1976) (discussing in the chapter entitled *Le Systeme de la Preuve en Droit Musulman* that it is incumbent upon the judge to accept the testimony); 4 J. LAPANNE-JOINVILLE, *RECUEIL DE JURISPRUDENCE CHERIFIENNE* 180-88 (1952) (listing the various methods by which an

- (2) the action lay against the disseisor as well as against any third party who may have taken the property from the disseisor, though the third party need not be included in the action;¹⁵³
- (3) the defendant was compelled to appear in court;¹⁵⁴
- (4) if the defendant was not available, his bailiff was attached, and if the bailiff was not available, then the action would proceed in their absence;¹⁵⁵
- (5) excuses by the parties for being absent were not allowed to delay the proceedings unduly;¹⁵⁶
- (6) if the defendant confessed the disseisin, the action was settled on the basis of the confession without a verdict being rendered;¹⁵⁷
- (7) defenses could be entered against defects in the judicial

Islamic judge determined the proper jury of 12 witnesses, such as the honorability of the witnesses and the type of facts given in their testimony, but not including the judge's own evaluation of their sincerity); SUTHERLAND, *supra* note 110, at 65-66, 70-73 (calling this procedure a "recognition" in England).

153. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 228; 2 POLLOCK & MAITLAND, *supra* note 15, at 54-56; SUTHERLAND, *supra* note 110, at 18-19. While the *istihqaq* permitted a suit to be brought alone against a successor in interest to the usurper, the assize of novel disseisin limited the suit to a joint action against both the successor and the usurper. This limitation was expanded, however, by a supplementary action to the assize of novel disseisin called the writ of entry sur disseisin. This supplementary action permitted a suit alone against the successor. See 2 POLLOCK & MAITLAND, *supra* note 15, at 64-67. Maitland stated that for a while the writ of entry sur disseisin appeared only to have been allowed when an assize of novel disseisin had been arrested by the death of one of the parties. See *id.* at 64-65. On the other hand, in the Roman interdict *unde vi* the dispossessor could turn around and sell the land to a third person or a third person might dispossess the dispossessor, and there would be no recovery from this third person for the dispossessed landholder. Only when the dispossessed landholder was a true owner in this case was he protected by an action called the *vindicatio* in Roman law. See NICHOLAS, *supra* note 56, at 108-09.

154. See MILLIOT, *supra* note 148, at 726; SUTHERLAND, *supra* note 110, at 18, 66; Emile Tyan, *La Procedure du 'Defaut' en Droit Musulman*, 7 STUDIA ISLAMICA 115, 116, 121-25 (1957).

155. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 169; MILLIOT, *supra* note 148, at 730; SUTHERLAND, *supra* note 110, at 18; Tyan, *supra* note 154, at 128. This action was the only English action in which the defendant's bailiff could be called as a substitute. See SUTHERLAND, *supra* note 110, at 20. For a description of the institution of the *wakil*, the Islamic analogue of the English party's bailiff, see EMILE TYAN, HISTOIRE DE L'ORGANISATION JUDICIAIRE EN PAYS D'ISLAM 262-75 (1960).

156. See SUTHERLAND, *supra* note 110, at 18, 66-67. See generally MILLIOT, *supra* note 148, at 730 (explaining that a defendant was required to render himself immediately before the judge or on the day fixed). The assize of novel disseisin was the only English party action in which the defendant was allowed no excuses. See SUTHERLAND, *supra* note 110, at 20.

157. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 171; SUTHERLAND, *supra* note 110, at 19.

process;¹⁵⁸

- (8) defenses could be entered to provide prima facie proof of such facts as the defendant not having disseised the plaintiff, a valid judgment in the defendant's favor, or the status of the defendant's relationship with the plaintiff;¹⁵⁹
- (9) the plaintiff must have been in actual possession;¹⁶⁰
- (10) a successful plaintiff could recover not only the land but also the movable property that was on it when he was ejected and the income that the land had produced during his absence;¹⁶¹
- (11) the action had to be brought within a limited amount of time;¹⁶²
- (12) the action could be brought by the public authority or by a private party;¹⁶³ and
- (13) the judgment in a case could be reviewed and reformed if it was contrary to the law or a false application of the law.¹⁶⁴

From this identification of the Islamic *istihqaq* with the English assize of novel disseisin, it appears that the concept of possession was important in both legal systems for establishing proof of ownership for one party in the absence of proof for the other. There is a further question whether possession can ever ripen into more than a presumption of ownership so that it prevails even in the face of proof

158. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 178; SUTHERLAND, *supra* note 110, at 70.

159. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 180-89; SUTHERLAND, *supra* note 110, at 19-20, 39, 70-72, 214.

160. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 172; SUTHERLAND, *supra* note 110, at 20.

161. See MILLIOT, *supra* note 148, at 604; SUTHERLAND, *supra* note 110, at 15, 23, 52-54. One feature of Islamic law not shared by English law was the fact that the Islamic action for recovery applied not only to land but also to movable property independent of land. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 60. The English action applied only to movable property if it was on land sought in the action. See SUTHERLAND, *supra* note 110, at 23. The reason for this distinction probably can be attributed to the unique dual court system in England. The ecclesiastical courts, which administered canon law, exercised jurisdiction over testate and intestate succession to personal property, while the royal courts, which administered common law, exercised jurisdiction over land. See John Makdisi, *The Vesting of Executory Interests*, 59 TUL. L. REV. 366, 368-69 (1984).

162. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 190-91 (noting a 10-year time limit); SUTHERLAND, *supra* note 110, at 9-10, 23 (observing that the time limit in Henry II's reign was defined often by the King's movements in and out of the kingdom).

163. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 170; ABOU 'L-HASAN 'ALI MAWERDI, *LES STATUTS GOUVERNEMENTAUX OU REGLES DE DROIT PUBLIC ET ADMINISTRATIF* 169-70 (E. Fagnan trans., 1915); SUTHERLAND, *supra* note 110, at 13-14.

164. See *LE LIVRE DES MAGISTRATURES D'EL WANCHERISI* 87-90 (Henri Bruno & Gaudefroy-Demombynes eds. & trans., 1937); SUTHERLAND, *supra* note 110, at 74-75.

of ownership by the other party. Roman law recognized such a ripening of possession into ownership in the concept of prescription. The next section discusses how both Islamic and English law rejected this concept of prescription in favor of a procedural limitation that produced the same result.

C. Prescription Versus Limitation

Under the Roman system of prescription, and more specifically acquisitive prescription, the passage of time caused an ownership right to be destroyed in one person and created in another.¹⁶⁵ Roman law knew two forms of acquisitive prescription. Under the law of the Twelve Tables,¹⁶⁶ land was acquired by *usucapion* if the claimant, with good cause and in good faith, took land that had not at any time been taken by force and maintained uninterrupted possession for two years.¹⁶⁷ Later, Justinian created the *longissimi temporis praescriptio*, which gave ownership to anyone who took land in good faith, irrespective of just cause, and held it for thirty years.¹⁶⁸ In both cases, the original owner's right was extinguished in him and recreated in the new owner.¹⁶⁹

While Roman law prescribed the right, English law took a different approach. English law limited the time within which an action could be brought to establish one's ownership. Royal ordinances set limits to the time the action on the assize of novel

165. See NICHOLAS, *supra* note 56, at 121. Acquisitive prescription destroys ownership in an owner and creates it in another, while extinctive prescription merely destroys ownership in an owner. See *id.* Nicholas points out that it makes no sense to eliminate the ownership of property in one person through an extinctive prescription without determining another person to own the property:

In a system such as the Roman, . . . a system of extinctive prescription would be so inconvenient as to be unworkable. Ownership would in effect be *pro tanto* abolished. For at the end of the period the owner would lose his right, but the possessor would have no more than possession. If, for example, the thing were stolen from him by A and stolen from A by B, he could not claim the thing from B, and so on.

Id.

166. The Twelve Tables was legislation promulgated in the fifth century B.C. in Rome. See *id.* at 15.

167. See *id.* at 122-25. Bracton spoke somewhat obscurely about *usucapio* as the long-continued user of English law, but Maitland affirmed that there was no such acquisitive prescription for land in England. See 2 POLLOCK & MAITLAND, *supra* note 15, at 81, 141 (citing BRACTON, *supra* note 2, at 156-66 (folios 51b, 52); see also JOHN W. SALMOND, *ESSAYS IN JURISPRUDENCE AND LEGAL HISTORY* 110 & n.2 (Littleton, Colo., F.B. Rothman 1891) (recognizing the contrast between English and Roman law in this area despite the confusing use of Roman terminology introduced by Bracton).

168. See NICHOLAS, *supra* note 56, at 128-29.

169. See *id.* at 120-21.

disseisin could be brought.¹⁷⁰ These limits were usually pegged to a coronation or to the king's last voyage abroad. The different events determined by royal ordinance included the recent event of the king's last journey into Normandy in Glanvill's time; after Glanvill they included the coronations of Richard I and Richard II, the coronation of John, John's return from Ireland, Henry's coronation, and Henry's trip to Gascony.¹⁷¹ In the early thirteenth century, the interval of time within which the action could be brought was successively altered to what appears to have been about ten years.¹⁷²

In the early part of this century, scholars disputed whether prescriptive acquisition existed in Islamic law as it did in Roman law. In April 1935, Rectenwald took a position against other scholars in the field in favor of the existence of prescriptive acquisition, arguing that the possession of long duration (a period of ten years called *hiyaza*) in Islamic law was analogous to the Roman concept of *usucapion* according to his reading of some of the Islamic texts.¹⁷³ A few months after Rectenwald's article and in the same law journal, however, Jules Roussier-Theaux provided a more considered study of the sources and pointed out the words of Ibn Rushd: "By consensus, the possession of long duration in itself does not transfer property but manifests it."¹⁷⁴ In other words, the acquisition of property was not accomplished by a prescription that extinguished one ownership and created another.¹⁷⁵ Rather, possession was the manifestation or evidence of ownership that could bar other evidence of ownership after a lengthy period of time.

The view of Roussier-Theaux was confirmed in Louis Milliot's important introductory book on Islamic law.¹⁷⁶ Possession in Islamic law for the ten-year *hiyaza* was a way to "settle the claim and quash the hearing" (*al-hiyazat allati taqta' al-haqq wa tabtal sama' al-da'wa*).¹⁷⁷ Even when a plaintiff could show proof that he had

170. See GLANVILL, *supra* note 16, at 167.

171. See F.W. Maitland, *The Beatitude of Seisin. II.*, 4 LAW Q. REV. 286, 292-93 (1888).

172. See INTRODUCTION TO THE CURIA REGIS ROLLS, *supra* note 135, at 159.

173. See G. Rectenwald, *De l'Existence de la Prescription Acquisitive en Legislation Musulmane*, 51 REVUE ALGERIENNE, TUNISIENNE ET MAROCAINE DE LEGISLATION ET DE JURISPRUDENCE 45, 45-46, 48-50 (1935). David Santillana took a similar position. See 1 DAVID SANTILLANA, ISTITUZIONI DI DIRITTO MUSULMANO MALICITA CON RIGUARDO ANCHE AL SISTEMA SCIAFITA 340-49 (1925).

174. Jules Roussier-Theaux, *La Possession*, 51 REVUE ALGERIENNE, TUNISIENNE ET MAROCAINE DE LEGISLATION ET DE JURISPRUDENCE 147, 184 (author's translation) (1935).

175. See MORAND, *supra* note 147, at 59.

176. See MILLIOT, *supra* note 148, at 628.

177. *Id.* at 627 (author's translation).

purchased land from the defendant, he nevertheless lost the suit if the defendant remained in possession for ten years after the sale.¹⁷⁸ By this procedural device of limiting the action, both English law and Islamic law created an irrebuttable presumption of ownership from lengthy possession. Ownership was not transferred to the possessor of lengthy duration as it was in Roman law; rather, the possessor enjoyed the effect of ownership because the real owner could not pursue the action to recover his property.

This notion of limiting an action so as to allow lengthy possession to be treated as ownership has the same overtones as the notion discussed above that prior possession be treated as ownership against a subsequent usurper. Significantly, both notions presume ownership from possession. In fact, upon closer examination it becomes apparent that English and Islamic law each had a three-tier theory of possession as the presumption of ownership. Each tier depended on the nature of the possession of the defendant in an action by a plaintiff to recover his property. The defendant's possession could be based on (1) no title; (2) color of title; or (3) title. In each of these three situations, protection was accorded to a different type of prior possession by the plaintiff. The three tiers of protection are described below, first for English law and then for Islamic law.

1. English Law

a. Defendant Had No Title

Bracton stated that when possession was taken by force it had nothing of right and could never acquire a vestment through the passage of time, unless through the negligence of the prior possessor.¹⁷⁹ In other words, this usurpation did not give any proprietary interest to the usurper over the prior possessor. The usurper had no title. On the other hand, a prior possessor who held no more than a naked possession in this sense did have a proprietary claim when a subsequent usurper took away his possession. As soon as the prior possessor took naked possession of the land, he was considered seised of free tenement as against all others who had no right in the land.¹⁸⁰ Thus, if a usurper took forcible possession of land from a true owner and then immediately was ejected by a second usurper who took forcible possession, the first usurper would have

178. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 211-12.

179. See 2 BRACTON, *supra* note 2, at 157, 159; 3 *id.* at 13, 163.

180. See 3 *id.* at 133-35; 2 POLLOCK & MAITLAND, *supra* note 15, at 50-51.

seisin as against the second usurper by the mere fact of his prior naked possession and consequently could bring an action to eject the second usurper. Naked possession in this case was a presumption of ownership in favor of the plaintiff.

b. Defendant Had Color of Title

The defendant possessor could claim that he took the land from the plaintiff because he was the true owner. Although he might not have been able to prove his ownership as an absolute proposition, he might have been able to show that he had good color of title by having had possession of the land prior to the plaintiff. In other words, the evidence might have shown that the defendant occupied the land, then the plaintiff disseised him and occupied the land, and then the defendant in turn disseised him and reoccupied the land. The plaintiff could not prevail against the defendant in such a case by showing merely possession.¹⁸¹ He had to show what Maitland called "title de fraunc tenement," which stood "as it were midway between possession and ownership."¹⁸² This type of ownership could be gained by the plaintiff remaining on the land for a period of time before he was disseised.¹⁸³ In addition, it appears that the plaintiff also had to possess under some good color of right in himself.¹⁸⁴

The period of time that a possessor had to remain in possession before he gained title of free tenement was stated by Bracton to be four days under ordinary circumstances; a disseisin by the defendant after that time would be "unjust" because it would be "without process of law."¹⁸⁵ Although Sutherland rejected this four-day rule, he still maintained that the defendant had to act without undue delay in order to avoid an unlawful ejectment.¹⁸⁶ The length of the period of time depended in part on whether the defendant knew of the disseisin by the plaintiff and was present at the time.¹⁸⁷ Also, the illness, imprisonment, or minority of the defendant were each a

181. For example, see cases 2, 7, and 8 in SUTHERLAND, *supra* note 110, at 98-99.

182. Maitland, *supra* note 136, at 39.

183. *See id.* at 35-39.

184. *See* SUTHERLAND, *supra* note 110, at 104 ("Some recorded cases suggest that the time allowed [before the possessor gained title of free tenement] may have depended in part on whether the usurper pretended from the first some good colour of right for himself.").

185. *See* 2 POLLOCK & MAITLAND, *supra* note 15, at 49-52 ("without process of law"); Maitland, *supra* note 136, at 29-36 ("unjust").

186. *See* 2 POLLOCK & MAITLAND, *supra* note 15, at 50; SUTHERLAND, *supra* note 110, at 101-04.

187. *See* SUTHERLAND, *supra* note 110, at 98.

reason for an extension of time within which the defendant could eject the plaintiff as a means of self-help without violating the assize.¹⁸⁸

Thus, title of free tenement gained by possession after a short period of time protected a possessor claiming good color of title against a prior possessor claiming good color of title if the prior possessor used self-help to regain his possession. What means did the prior possessor have to regain his possession after his disseisor gained title of free tenement? One means was to use the assize of novel disseisin to regain his possession by judicial process rather than by self-help. In such a case, the title of free tenement in the disseisor did not prevail over the status of the prior possessor. The disseisor might claim that he owned the land, but unless he could produce a lawful judgment he was usually defeated in the assize.¹⁸⁹ The other means to regain possession was for the prior possessor to retake his possession by self-help and wait for the limitation period of the assize of novel disseisin to run out. In this case, the title of free tenement in the first disseisor did not prevail over the status of the second disseisor (the original prior possessor) as possessor for a lengthy period of time because the first disseisor was not permitted to bring an action under the assize. As noted above, the period of time during which a disseisin was considered novel, and therefore actionable, in the early thirteenth century was about ten years.¹⁹⁰

c. Defendant Had Title

Sutherland cited some cases wherein the court did not appear to be concerned about the length of time during which a disseisor held possession before being ejected by his prior possessor.¹⁹¹ These cases indicate that the ownership of the land could be traced to one of the parties or to a common source. In two cases, an original owner gave or sold the land to one party and then to the other; the court decided in favor of the first transferee.¹⁹² In one case, one party was the lessor of an expired lease and the other the widow of the lessee; the court decided in favor of the lessor.¹⁹³ In these cases, it appears that title of free tenement was not sufficient to overcome proof of ownership by transfer. The only obstacle to an owner winning on this basis was the

188. See *id.* at 104. For a case involving a minor, see *id.* at 99 (case 5).

189. See *id.* at 39-40.

190. See INTRODUCTION TO THE CURIA REGIS ROLLS, *supra* note 135, at 159.

191. See SUTHERLAND, *supra* note 110, at 98-99 (cases 1, 4, and 6).

192. See *id.* (cases 1 and 6).

193. See *id.* at 99 (case 4).

limitation period for bringing the assize of novel disseisin. If the non-owner held the land for the length of this limitation period, the owner would be barred from bringing suit.

2. Islamic Law

a. Defendant Had No Title

Islamic law did not allow a usurper who took possession forcibly from a prior possessor to gain title against the prior possessor by the passage of time unless it was a very long period of time, such as fifty years.¹⁹⁴ Islamic law protected the prior possessor by giving him an action for recovery (*istihqaq*) against the usurpation (*ghasb*).¹⁹⁵ The plaintiff whose land was usurped had merely to show his possession (*yad*) in order to recover his land from the usurper.¹⁹⁶ The prior possessor did not have to justify how or why he held the property.¹⁹⁷ Thus, if a usurper took forcible possession of land from a true owner and then immediately was ejected by a second usurper who took forcible possession, the first usurper would have the right to recover against the second usurper by the mere fact of his prior possession (*yad*) and could bring an action to eject the second usurper.¹⁹⁸ *Yad* in this case was a presumption of ownership in favor of the plaintiff.

b. Defendant Had Color of Title

The plaintiff and the defendant could each claim that they possessed the land as an owner independently of the other. In such a case, the one who could show the earliest possession that could be considered a presumption of ownership would win the suit.¹⁹⁹ There were several requirements that were necessary in order to establish a possession that could be considered a presumption of ownership: The possession had to last for ten months, be an actual possession, be enjoyed by the possessor as an owner, be attributed to the possessor as an owner, and the possessor's ownership must not have been disputed by any person.²⁰⁰ The possession that met these requirements was called *hawz*, and the possessor with the earliest *hawz* won the suit. There was one way in which the other party might

194. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 221-22, 224-25.

195. See 3 KHALIL BEN ISHAQ, *supra* note 145, at 100-07.

196. See MILLIOT, *supra* note 148, at 605.

197. See MORAND, *supra* note 147, at 47.

198. See MILLIOT, *supra* note 148, at 603.

199. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 175-76, 190.

200. See 4 *id.* at 173.

win the suit over the party with the earliest *hawz*—the other party could establish a possession for a much lengthier period of time. If possession lasted ten years and obeyed the same requirements as those for *hawz*, it was called *hiyaza* and prevailed over a prior *hawz*.²⁰¹

c. Defendant Had Title

In the section above, the plaintiff and defendant each claimed title but could not establish priority vis-à-vis the other. In such a case, the earliest *hawz* was relied on to establish priority. If the plaintiff or the defendant could trace ownership to a transfer from the other, this ownership would not be defeated by proof of an earlier *hawz* in the other.²⁰² The transferee won in an action for recovery of the land. The only defense for the transferor would be to establish the lengthy possession of *hiyaza*.²⁰³ For example, if an individual sold land but remained in possession for ten years, he would prevail in an action for recovery of that land by the buyer after that time.²⁰⁴

This description demonstrates that Islamic law not only anticipated the concept of the limitation of the action for recovery that appeared later in English law, but it also anticipated the three levels of security whereby the presumption of possession as ownership was protected in England:

- (1) *Yad*, the lowest level of possession protected as a presumption of property in Islamic law against a usurper, anticipated the protection given to a prior possessor in the common law against a usurper.
- (2) *Hawz*, the next highest level of protected possession in Islamic law, anticipated the common law protection given to a possessor against a subsequent possessor who could show some color of title.
- (3) *Hiyaza*, the highest level of protected possession in Islamic law, anticipated the common law protection given to a possessor who could trace his possession back to the limiting time period for the assize of novel disseisin.

Neither the qualified possession of ten to twelve months (*hawz*) nor the long possession of ten years (*hiyaza*) caused the transfer of property in Islamic law as did the institution of acquisitive

201. See 4 *id.* at 175-76, 190-91.

202. See 4 *id.* at 188, 211.

203. See 4 *id.* at 211-12.

204. See 4 *id.* at 176.

prescription in Roman law. Nor did they extinguish the right of another to his property. The same is true for the title of free tenement and the limitation period of the assize of novel disseisin in England. As Holdsworth commented, the "system of *usucapio* which by lapse of time turns *possessio* into *dominium* would be unnecessary and indeed unintelligible" in the English system.²⁰⁵ Rather, extended possession extinguished the right to bring an action for recovery, called the *istihqaq* in Islamic law and called the assize of novel disseisin in the common law. The correct term for this legal effect is the limitation of an action. By extinguishing the right to bring an action, the legal effect of the limitation of the action was to make the presumption of ownership irrebuttable.

In the area of property, as in the area of contract, the royal courts of England introduced a radical concept. By making possession a presumption of ownership, they turned away from the notion of *dominium* in the Roman law and made property a relative concept. Consequently, ownership was determined on the basis of one's relationship to another person and not merely on the basis of an absolute right. This contribution was made possible through the institution of the assize of novel disseisin, which cannot be traced to any other western legal system of the time. Islamic law was the only legal system to share the unique features of the English assize, and it did so long before the assize appeared in the middle of the twelfth century in England. It is not inconceivable that England borrowed the concept of the assize of novel disseisin from Islam.

With the action of debt in contract law and the assize of novel disseisin in property law, Islam had quite an impact on the common law. Yet the importance of these borrowed legal actions pale by comparison to the borrowing in the area of procedure described below.

III. PROCEDURE IN TRIAL BY JURY

A. *Methods of Proof Before the Creation of the Jury*

The institution of the jury in England is highly prized as the "*palladium*" of our liberties.²⁰⁶ Alexander Hamilton hailed it "as a

205. 3 HOLDSWORTH, *supra* note 43, at 94.

206. 4 WILLIAM BLACKSTONE, COMMENTARIES *350. Article three, section two of the United States Constitution as adopted in 1789 guarantees the right to trial by jury in all crimes except impeachment. See U.S. CONST. art. III, § 2. The Sixth and Seventh Amendments in the Bill of Rights were added in 1791 to ensure "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

barrier to the tyranny of popular magistrates in a popular government."²⁰⁷ Justice Byron White echoed these words two centuries later when he observed that the right to a jury trial is to "prevent oppression by the Government" and "to protect . . . against judges too responsive to the voice of higher authority."²⁰⁸ If one considers the fact that the jury was created in its distinctive form by King Henry II in the twelfth century,²⁰⁹ this tribute is a witness to the remarkable vitality of the institution. It is no wonder that the jury stands as one of the most celebrated cornerstones of the common law.

In marked contrast to the jury trial stand the more primitive methods of proof that predominated before its advent. The ordeals by fire and by water were popular methods for determining guilt or innocence on the basis of divine signs.²¹⁰ The fire ordeal was performed by holding heavy pieces of red hot iron in one's hand or walking over nine red hot plowshares. If the party emerged unhurt, then the person was exonerated.²¹¹ The water ordeal was performed by plunging one's arm up to the elbow in boiling water and escaping unhurt or by being thrown into a river and sinking to show one's innocence.²¹² The use of ordeals was popular with the English before the arrival of the Normans.²¹³ Their use declined under the Normans during the twelfth century, practically disappearing from civil cases and only partially used in criminal cases.²¹⁴ Ordeals were finally outlawed by the decree of the Lateran Council in 1215 that ordered that their use be discontinued throughout Christendom.²¹⁵

As popular as the ordeal was among the Anglo-Saxons, the method of proof by duel was equally as popular among the Normans.

committed," *id.* amend. VI, and to preserve the right to a jury trial in all suits at common law over twenty dollars, *see id.* amend. VII. Every state constitution also provides for trial by jury. *See* 1 FRANCIS X. BUSCH, *LAW AND TACTICS IN JURY TRIALS* 17-43 (1959).

207. THE FEDERALIST NO. 83, at 562 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

208. *Duncan v. Louisiana*, 391 U.S. 145, 154, 156 (1968).

209. *See* VAN CAENEGEM, *supra* note 1, at 60.

210. *See* 4 WILLIAM BLACKSTONE, *COMMENTARIES* *342 (stating that these methods of proof were used "in consequence of a notion that God would always interpose miraculously to vindicate the guiltless").

211. *See* 4 *id.* *343.

212. *See* 4 *id.*; R.C. VAN CAENEGEM, *LEGAL HISTORY: A EUROPEAN PERSPECTIVE* 75-76 (1991); THE LAWS OF THE EARLIEST ENGLISH KINGS app. II (F.L. Attenborough ed. & trans., 1922).

213. *See* MELVILLE MADISON BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND FROM THE NORMAN CONQUEST* 322 (South Hackensack, N.J., Rothman Reprints 1972) (1880).

214. *See id.* at 323.

215. *See id.*

Proof by duel was introduced to England after the Conquest, soon displacing the ordeal in civil procedure and establishing itself in criminal procedure as well.²¹⁶ Proof by duel was offered in the form of a complaint-witness, who was prepared to testify on behalf of the plaintiff (from personal knowledge or that of his father) and to fight as the plaintiff's champion to support this testimony.²¹⁷ This method of proof was so dangerous, costly, and unjust that Glanvill waxed eloquent in describing how the jury replaced the duel to care for the life and condition of men.²¹⁸ The duel died out in the thirteenth century²¹⁹ and, after having long been forgotten, was abolished formally in England in 1820.²²⁰

Compurgation, known also as wager of law, was a trial by ritual oaths.²²¹ Each of the parties swore to their claims to open the lawsuit, and the party allowed to give the oath of proof swore to a set formula.²²² Then the compurgators as oath helpers swore to a formula that supported the party giving the oath of proof.²²³ The number of the compurgators varied from one to forty-eight; their purpose was not to swear as to the facts of the case at hand "but to the credibility of the party for whom they appeared."²²⁴ Compurgation was employed in both criminal and civil cases before and during the twelfth century, although it was affected by the encroachment of the ordeal and the duel.²²⁵ It survived in later years primarily in the actions of debt and detinue²²⁶ and was finally abolished by an act of Parliament in 1836.²²⁷

Trial by party-witnesses was also a method of proof by ritual oaths. Witnesses appeared on behalf of the party designated to give

216. *See id.* at 327.

217. *See* THAYER, *supra* note 136, at 43.

218. *See* GLANVILL, *supra* note 16, at 28 (stating that "[t]his assize . . . takes account so effectively of both human life and civil condition that all men may preserve the rights which they have in any free tenement, while avoiding the doubtful outcome of battle [and] may avoid the greatest of all punishments, unexpected and untimely death"); *see also* THAYER, *supra* note 136, at 41-42 (noting the "powerful contemporaneous impression" that the introduction of the organized jury made on Glanvill).

219. *See* BIGELOW, *supra* note 125, at xii.

220. *See* BIGELOW, *supra* note 213, at 288.

221. *See* PLUCKNETT, *supra* note 17, at 115; *see also* THAYER, *supra* note 136, at 24-34 (discussing the history of the wager of law).

222. *See* BERMAN, *supra* note 1, at 58.

223. *See id.*

224. BIGELOW, *supra* note 213, at 301; *see also* PLUCKNETT, *supra* note 17, at 115 (noting that the wager of law was basically "a character test").

225. *See* BIGELOW, *supra* note 213, at 306-08.

226. *See* THAYER, *supra* note 136, at 29.

227. *See* BIGELOW, *supra* note 213, at 288.

the proof and testified *de visu et auditu*²²⁸ in support of their party's facts according to a narrow formula.²²⁹ The witnesses who swore to the set formula were making an assertory oath, not a promissory oath to tell the truth in answer to questions.²³⁰ They were men selected by the party who was designated to give the proof; "they were not . . . selected impartially to speak the truth."²³¹ No fixed number of witnesses was required except that the group, called a suit or *secta*, had to consist of more than one.²³² Although originally they were not subject to examination concerning the facts,²³³ it appears that by the thirteenth century the court could examine these suitors one by one to determine whether they knew the facts.²³⁴ This method of proof was used more frequently in civil than in criminal cases, but by the middle of the twelfth century it began to decline in use.²³⁵ While Bracton gave the impression that this method of proof was a serious rival to trial by jury, Maitland confirmed that in time it became an anomaly and a mere formality that could be safely neglected.²³⁶

All these methods of proof were displaced largely by the jury in the middle of the twelfth century. At that time, King Henry II instituted the jury as the predominant method of proof through his newly created assizes, the most popular of which was the assize of novel disseisin discussed above. His action created a procedure that would revolutionize the judicial process for centuries to come.

B. The English Jury

Much time and effort has been spent trying to ascertain the origins of the jury.²³⁷ While the jury had features of the Anglo-Saxon dooms, Maitland pointed out that doomsmen gave judgment on the law and did not recognize or declare the truth of a matter by giving

228. The term *de visu et auditu* means on the basis of personal knowledge or reliable report. See *id.* at 335.

229. See BIGELOW, *supra* note 125, at xx-xxi.

230. See 2 POLLOCK & MAITLAND, *supra* note 15, at 601.

231. BIGELOW, *supra* note 213, at 335.

232. See 2 POLLOCK & MAITLAND, *supra* note 15, at 607. The rule prohibiting a single witness was *testis unus, testis nullus*. The number of witnesses found in cases was as varied as 3, 4, 6, 7, 10, 11, and 13. See 2 *id.*

233. See BIGELOW, *supra* note 213, at 308.

234. See 2 POLLOCK & MAITLAND, *supra* note 15, at 609-10.

235. See BIGELOW, *supra* note 213, at 308-10.

236. See 2 POLLOCK & MAITLAND, *supra* note 15, at 637-39.

237. See VAN CAENEGEM, *supra* note 1, at 58 n.1 (citing several major works that discuss various theories as to the origins of the jury). Note that the term *jurata*, used today to refer to the medieval form of the modern jury, was hardly used at this time, and when it was, the term did not hold its technical meaning as used here. See *id.* at 53.

judgment on the facts as in the case of the jury.²³⁸ The jury also had features of the Frankish *inquisitio*, adopted by the Normans, in which members of the community were selected and sworn to declare the truth on a matter.²³⁹ Van Caenegem pointed out, however, that the sworn inquest of the Normans made use of an administrative procedure giving information to crown officials and not a judicial procedure to decide litigation between ordinary parties as in the case of the jury.²⁴⁰ Perhaps the closest analogue to the modern jury can be seen in the Anglo-Saxon tradition of using a group of neighbors to solve disputes by their sworn verdict.²⁴¹ This local "recognition"²⁴² was a judicial technique for establishing proof of facts, but it took place by free agreement of the parties or the free choice of the court and not as a matter of right as in the case of the jury.²⁴³

Van Caenegem concluded that the jury developed from both the royal inquest and the popular recognition.²⁴⁴ The authoritative injunction of the royal inquest appeared in the royal writ, which called a sworn body and ordered it to give a verdict; the judicial aspect of the popular recognition appeared in the judicial forum of the assize wherein the jury did its job.²⁴⁵ Furthermore, according to van Caenegem, this development took place in the second decade of Henry II's reign, starting in 1164 when the assizes were created.²⁴⁶

238. See 1 POLLOCK & MAITLAND, *supra* note 15, at 139-40, 548-50; 2 *id.* at 629.

239. See CHARLES HOMER HASKINS, NORMAN INSTITUTIONS 196 (1960); 1 HOLDSWORTH, *supra* note 118, at 312-13; 1 POLLOCK & MAITLAND, *supra* note 15, at 140-41; THAYER, *supra* note 136, at 47-48. Trial by inquest or inquisition (*inquisitio per testes*, as it was sometimes called) was an inquiry by the court into the facts of a dispute. See BIGELOW, *supra* note 213, at 175 n.4, 335. For an example, see GLANVILL, *supra* note 16, at 27. The term "inquisition" was used broadly to refer to any royal administrative interrogation, and it was used notably for the interrogations leading to the *Domesday Book*. See VAN CAENEGEM, *supra* note 1, at 53, 61-62. It was an administrative device, initiated on the authority of the king and held by royal commissioners, to obtain information for the good of the government, not to solve litigation between two ordinary parties. See *id.* at 67-68. Court was merely one forum in which the inquisition was used to gather information for the crown. See *id.* at 62, 67.

240. See VAN CAENEGEM, *supra* note 1, at 61-62, 67.

241. See *id.* at 69-71.

242. The term "recognition" is used broadly to refer to the finding and giving of a sworn body's verdict. See *id.* at 52. It was used in connection with the inquest and the assize as well as for the popular recognition of Anglo-Saxon times. See *id.* at 52, 69. When Henry II used the term in the middle of the twelfth century in the assize, inquisition was understood to refer to the impanelling and interrogating of the jury, while recognition consisted of the jury's finding and giving an answer. See *id.* at 52.

243. See *id.* at 76, 402-03.

244. See *id.* at 86, 102.

245. See *id.*

246. See *id.* at 86.

Although there was sporadic use of such juries earlier in the twelfth century and even the use of a very few in the eleventh century, no rules or regularity had developed to indicate their use was more than happenstance.²⁴⁷ Thus, van Caenegem maintained that the jury with all its basic characteristics was created in the second half of the twelfth century, primarily from a blending of Norman and Anglo-Saxon institutions.²⁴⁸

Van Caenegem's explanation of the origins of the jury is well-conceived if one stays within the confines of western legal history. If one looks beyond the borders of Europe, however, to analyze possible origins in Islamic law, the Islamic antecedents are found to provide a much closer fit for the basic characteristics of the jury than the Norman/Anglo-Saxon antecedents suggested by van Caenegem. The basic characteristics to be examined are that (1) the jury is a body of twelve sworn people drawn from the neighborhood; (2) who must give an answer; (3) unanimously; (4) about a matter that they have personally seen or heard; (5) binding on the judge; (6) to settle the truth concerning facts in a case; (7) between ordinary people; (8) submitted to a jury upon a judicial writ; (9) obtained as of right by the plaintiff. Each of these characteristics is examined in turn.

1. The Jury Is a Body of Twelve Sworn People Drawn from the Neighborhood

The number of people on early English juries was generally twelve,²⁴⁹ and they gave their verdict on oath.²⁵⁰ The voice of the jurors was deemed to be the voice of the countryside—the verdict of “a neighbourhood, a community.”²⁵¹ Glanvill stated that twelve jurors had to be found who knew the truth of the matter: “When twelve knights who are all certain of the truth of the matter appear to make the recognition, then the assize shall proceed to declare which of the parties, demandant or tenant, has the greater right in the land claimed.”²⁵² He then raised the question, but left it unanswered, as to what was to be done if fewer than twelve knights could be found for offering to prove a matter in court.²⁵³

The reason that the number of jurors was twelve “is difficult to

247. *See id.* at 83-86.

248. *See id.* at 103.

249. *See* BIGELOW, *supra* note 213, at 258-59; BIGELOW, *supra* note 125, at xxii.

250. *See* 2 POLLOCK & MAITLAND, *supra* note 15, at 612, 623.

251. 2 *id.* at 624.

252. GLANVILL, *supra* note 16, at 35.

253. *See id.* at 37.

pinpoint.”²⁵⁴ One theory has proposed that it came from the twelve members of the presentment jury of the hundred (a subdivision of a county in England), which “formed the basis of the later creation of petit juries of twelve.”²⁵⁵ Other theories have looked to the fact that twelve was a common number throughout Europe or to the fact that twelve was an esteemed number in Scripture with the twelve apostles, the twelve tribes of Israel, the twelve patriarchs, and the twelve officers of Solomon.²⁵⁶

2. Who Must Give an Answer

It was the duty of the jurors to state the result of their inquiries into the facts in the form of a verdict.²⁵⁷ Maitland spoke of the burden of this duty on the poorer freeholders when the richer freeholders were able to obtain charters exempting themselves from jury service.²⁵⁸

3. Unanimously

Glanvill stated that the twelve must all be in agreement on the truth of the matter, or, if not, then more would be found until there were twelve who agreed.²⁵⁹ This process was called “afforcing the assise.”²⁶⁰

4. About a Matter that They Have Personally Seen or Heard

According to Glanvill, the type of “knowledge required from the jurors is that they shall know about the matter from what they have personally seen and heard, or from statements which their fathers made to them in such circumstances that they are bound to believe them as if they had seen and heard for themselves.”²⁶¹

254. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 10 (1993).

255. *Id.*

256. *See id.* at 11-12.

257. *See* 2 POLLOCK & MAITLAND, *supra* note 15, at 625.

258. *See* 2 *id.* at 631.

259. *See* GLANVILL, *supra* note 16, at 34. Bigelow stated that although Glanvill represented the close of the period, “there can be no doubt that the principle of unanimity prevailed from the first, when a definite number was to be summoned.” BIGELOW, *supra* note 125, at xxii n.3. Maitland seemed to think that unanimity was not finally established as a requirement until the fourteenth century. *See* 2 POLLOCK & MAITLAND, *supra* note 15, at 626.

260. MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 113 (William S. Hein & Co. 1992) (1894).

261. GLANVILL, *supra* note 16, at 34-35; *see also* BIGELOW, *supra* note 213, at 335 (emphasizing that the jurors had to be “sufficiently acquainted with the facts by personal

5. Binding on the Judge

Glanvill affirmed that if the jurors declared the tenant with the greater right, then the court "shall award" that the tenant was quit "from the demandant's claim."²⁶² The only way in which the verdict of the jury could be reversed was by the process of attain (*convictio*), whereby the twelve jurors were accused before twenty-four jurors and convicted of a false oath.²⁶³ This procedure did not allow the judge to substitute his own judgment for that of the jury; if the verdict was reversed, the verdict of the twenty-four was substituted for that of the twelve. For the grand assize, this practice of substituting one verdict for another was discontinued within the generation after Glanvill.²⁶⁴ The binding nature of the jury's verdict stood in stark contrast to the power of the judge in the Roman law system to freely evaluate the evidence.²⁶⁵

6. To Settle the Truth Concerning Facts in a Case

Glanvill declared that "the true legal position" of the case had to be known to the jurors.²⁶⁶ If it was not, then recourse was to be had to others until those who knew the truth were found.²⁶⁷ Furthermore,

knowledge or by reliable report ('de visu et auditu,' in the language of the time)').

262. GLANVILL, *supra* note 16, at 35.

263. See 2 POLLOCK & MAITLAND, *supra* note 15, at 542, 665. This procedure was introduced by King Henry II for his assizes. See 3 WILLIAM BLACKSTONE, COMMENTARIES *402. The punishment was quite severe. Blackstone stated that the judgment for a false verdict was "that the jurors should lose their *liberam legem* and become forever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed." 3 *id.* *404.

264. See VAN CAENEGEM, *supra* note 1, at 91. For the other assizes, Blackstone stated that he observed very few instances of attain on the books later than the sixteenth century. See 3 WILLIAM BLACKSTONE, COMMENTARIES *405.

265. After the enactment of the Twelve Tables around 450 B.C., the Roman judge heard the evidence either of witnesses or documents and then withdrew to consider his judgment with the help of his *consilium*. See H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 11-12, 188 (1961). As Jolowicz states, "in the main the judge had complete freedom in weighing the evidence that the parties put before him." *Id.* at 188. There was not much change in this approach during the next four centuries of the Republic before its fall, nor, it appears, during the three centuries of the Principate. See *id.* at 195, 223, 404-10. During the Dominate from the third century A.D. to the sixth century, the judge was bound to observe certain rules for the valuation of evidence, including legal presumptions. See *id.* at 462-63. Still, the judge did not lose his power to evaluate the evidence. See *id.* Finally, in the sixth century, Justinian's Code confirmed the power of the judge to freely evaluate the evidence. He stated that "the judge knows best what weight to attach to witnesses." DIG. 22.5.3.1 (Callistratus, De Cognitionibus 4).

266. GLANVILL, *supra* note 16, at 34.

267. See *id.*

each juror had to swear that he would not declare "falsely, nor knowingly suppress the truth."²⁶⁸ The verdict, which means "something said truly," was the result of a true effort to discover the truth. The jurors had at least a fortnight to "certify themselves" as to the facts, the parties had an opportunity to address the jurors in court, and documents could be submitted to inform the jury.²⁶⁹ To obtain those who would state the truth, the jurors were required to be free, lawful, impartial, and disinterested.²⁷⁰ This function of stating the truth is emphasized by the fact that the term for jury when the assizes first appeared was not *jurata*,²⁷¹ but rather jurors were known as *testari*, which means witnesses.²⁷²

7. Between Ordinary People

Van Caenegem emphasized that the purpose of the assizes, which used the jury, was to decide the outcome of civil litigation between ordinary parties.²⁷³

8. Submitted to a Jury upon a Judicial Writ

Glanvill gave an example of the writ of novel disseisin, which reads in the beginning as follows: "N. has complained to me that R. unjustly and without a judgment has disseised him of his free tenement in such-and-such a vill since my last voyage to Normandy."²⁷⁴ This writ directed that a jury be summoned and that the bailiff hear its recognition.²⁷⁵ In this way, King Henry II made this method of proof a requirement, and no longer a matter of choice.

9. Obtained as of Right by the Plaintiff

Van Caenegem pointed out that although the judicial writ mandated the use of the jury, it was really the decision of the plaintiff, who obtained the writ, to start the process.²⁷⁶ The writ was "given out by chancery as a matter of course to all plaintiffs who complained

268. *Id.*

269. 2 POLLOCK & MAITLAND, *supra* note 15, at 627-28. The use of documents in this way was called "evidence," and it was apparently the first time that this term had been used. 2 *id.* at 628.

270. *See* 2 *id.* at 621.

271. *See* VAN CAENEGEM, *supra* note 1, at 53.

272. *See* 2 POLLOCK & MAITLAND, *supra* note 15, at 622 & n.2.

273. *See* VAN CAENEGEM, *supra* note 1, at 102.

274. GLANVILL, *supra* note 16, at 167. "Vill" was a town in old English law.

275. *See* VAN CAENEGEM, *supra* note 1, at 102 (pointing out the authoritative nature of this injunction).

276. *See id.*

about the wrong for which the writ had been drafted and were willing to pay a moderate, current fee."²⁷⁷

These nine characteristics define the nature and uniqueness of the jury as a method of proof in the twelfth century. To what extent did these characteristics manifest themselves in the two institutions most commonly studied up to now as the places of origin of the jury—namely, the royal inquest and the popular recognition? The degree of similarity between these two western institutions and the jury is examined in the next section. Subsequently, an Islamic institution that manifested a much closer fit with the jury than either of these western institutions is explored.

C. *The Royal Inquest and the Popular Recognition*

The royal inquest used (1) a body of sworn people, but before Glanvill's time, the number varied with each inquest and was certainly not pegged at twelve.²⁷⁸ There was (2) a duty to give an answer compelled by royal authority,²⁷⁹ but (3) unanimity was not required.²⁸⁰ The body of sworn people was required (4) to testify as to what they had seen or heard,²⁸¹ but their testimony was not (5) binding on the judge as a matter of action.²⁸² The purpose of the

277. *Id.* at 402-03; accord THAYER, *supra* note 136, at 55. A corollary to the right to bring one's own lawsuit is the right to have it adjudicated regardless of the refusal of the defendant to participate. Judgment was given as a matter of course in an assize even if one of the parties was opposed and stayed away. Glanvill stated that if the defendant did not send a representative or an essoiner, then there were various summonses, and that if they were ignored, ultimately "seisin shall be adjudged to the other party, and the tenant shall not be allowed to reopen the issue except on the question of property by means of a writ of right." GLANVILL, *supra* note 16, at 5-6. Likewise, he stated:

If anyone has at any time replied in court and, while present there, has had a day appointed him, on which day he neither comes nor sends an essoin, his tenement shall be taken into the hand of the lord king without any right to replevy it, and he shall be summoned to come on an appointed day to hear judgment in his case. Whether he comes or not on that appointed day, he will lose his seisin on account of his default.

Id. at 12.

278. See BIGELOW, *supra* note 213, at 258-59; BIGELOW, *supra* note 125, at xxii-xxiii; VAN CAENEGEM, *supra* note 1, at 68; *id.* at 63-67 (providing examples of inquests).

279. See VAN CAENEGEM, *supra* note 1, at 67-68.

280. See 2 POLLOCK & MAITLAND, *supra* note 15, at 625 (stating that sometimes a single verdict was taken and sometimes the verdict of the majority was accepted).

281. See BIGELOW, *supra* note 213, at 335; see also VAN CAENEGEM, *supra* note 1, at 68 (stating that the inquest was often held on the spot where the dispute was taking place because the people who should know the facts were likely to live there and be gathered easily).

282. See 1 POLLOCK & MAITLAND, *supra* note 15, at 143-44. Maitland discusses a case in the time of William the Conqueror that sought the verdict of certain Englishmen as to what lands were held by a certain church. See 1 *id.* According to Maitland, the case would

inquest was (6) to settle the truth concerning facts in a case.²⁸³ The dispute was (7) not between ordinary people, but rather a demand for information by royal or ducal authority inspired by a desire for good administration and government.²⁸⁴ Finally, there were (8) royal orders that commanded the inquest,²⁸⁵ but these orders were (9) not obtained as of right by the plaintiff.²⁸⁶ Comparing the inquest to the jury, one finds that similarities exist between only four of the nine points enumerated above.

The popular recognition used (1) a body of sworn neighbors who knew the land or other matter in dispute, but the body's size varied.²⁸⁷ It is unlikely that this body of neighbors (2) was required to give an answer, because it was frequently elected by the litigants, which suggests a consensual process.²⁸⁸ Although those who gave the verdict acted as one body and gave a collective verdict, there is no evidence that the vote of the body had to be (3) unanimous, and in fact a case as late as 1182-1183 suggests that a majority vote was sufficient.²⁸⁹ The body of sworn people (4) testified as to what they knew.²⁹⁰ Their verdict was not (5) binding on the judge as a matter of law as in the case of the jury's verdict in the assizes, but rather it was binding as a result of the consent of the parties or the choice of the court.²⁹¹ The purpose of the popular recognition was (6) to settle the truth concerning facts in a case.²⁹² The dispute in the case was (7) between ordinary people,²⁹³ but the case was (8) not initiated by a judicial writ, and the use of a body of sworn neighbors (9) was not obtained as of right by the plaintiff.²⁹⁴ Comparing the popular

involve a verdict, but not a judgment, and the justices were to restore only those lands that had no claimant under the Conqueror, not all the lands. See 1 *id.* at 144; see also BIGELOW, *supra* note 213, at 335 (stating that there was no defined body of triers between the court and the parties, but more or less witnesses only).

283. See BIGELOW, *supra* note 213, at 335; VAN CAENEGEM, *supra* note 1, at 67-68.

284. See VAN CAENEGEM, *supra* note 1, at 62.

285. See *id.* at 67-68. For examples of these inquests, see *id.* at 63-66.

286. See *id.* at 67 (stating that only the king had the unlimited right to initiate an inquest, although he granted exceptional privilege to others to do so on occasion).

287. See *id.* at 76. For examples of particular cases, see *id.* at 70-76. It appears that the number tended to be 12 in the latter half of the 12th century for recognitors used for disputes in the local courts. See *id.* at 75-76. The use of 12 at this time may have become more prevalent because the number of jurors used in the assizes was generally 12.

288. See *id.* at 77.

289. See *id.* at 79.

290. See *id.* at 76.

291. See *id.*

292. See *id.* at 69-77.

293. See *id.* at 76.

294. See *id.* at 56, 69, 71, 76, 86 n.1. The popular recognitions "were occasionally and freely employed to settle disputes between parties in local courts or even outside any court

recognition to the jury, one finds that similarities exist for only three of the nine points enumerated above.

The jury that appeared in the assizes possessed several characteristics, then, that were not shared by the royal inquest or the popular recognition. In both the inquest and the recognition, the number of jurors was not required to be twelve, the verdict was not required to be unanimous nor was it binding on the judge as a matter of law, and the plaintiff did not have a right to trial by jury.²⁹⁵ These features are important characteristics to keep in mind as we turn to a study of the *lafif*—the Islamic precursor to the jury.

D. The Islamic Lafif

In order to understand the operation of the jury in Islamic law, it is helpful to examine its characteristics in a somewhat different order than that used for the English jury above. At the end of this section, however, a point for point comparison between the Islamic *lafif* and the English jury is offered to establish the remarkable similarity that existed between these two institutions.

1. Case Between Ordinary People, Obtained as of Right by the Plaintiff

Disputes in Islamic law between ordinary parties were settled before the judge called a *qadi*. The plaintiff (*mudda'i*) initiated an action by filing a complaint (*maqal*), to which the defendant (*mudda'a 'alayhi*) was required to file an answer (*jawab*).²⁹⁶ The pursuit of this action was not merely a matter of agreement by the parties, as in the popular recognition of English law. Nor was it a matter of privilege granted by the grace of the sovereign power, as in the royal inquest. Rather, the Islamic judge was under a divine obligation to render justice in all cases brought before him.²⁹⁷ He could not even send the parties to arbitration without their consent.²⁹⁸ If the defendant was

action, by way of arbitration." *Id.* at 55.

295. See generally *id.* at 103 (stating that the uniformity and precise fixation of the assize and the matter of course and routine atmosphere that surrounded it were new).

296. See O. HOUDAS & F. MARTEL, *TRAITE DE DROIT MUSULMAN: LA TOHFAT D'EBN ACEM* 8-13 (Alger, Gavault Saint-Lager 1882); MILLIOT, *supra* note 148, at 728-29; 1 LOUIS MILLIOT, *RECUEIL DE JURISPRUDENCE CHERIFIENNE* 36-37 (1920). For an example involving the action for recovery of property (*istihqaq*), see 4 LAPANNE-JOINVILLE, *supra* note 152, at 170-71.

297. See MAWERDI, *supra* note 163, at 146-47.

298. See LE LIVRE DES MAGISTRATURES D'EL WANCHERISI, *supra* note 164, at 75; MAWERDI, *supra* note 163, at 173; cf. HOUDAS & MARTEL, *supra* note 296, at 20-21 (providing an exception in the case where the judge could not see a sure solution to the

recalcitrant, it was the right of the plaintiff to have the judge compel the appearance of the defendant to the point of bringing him in by force.²⁹⁹

The plaintiff had a right to trial, but did he have a right to trial by jury? The primary method of proof in Islamic law was testimony (*shahada*) through the use of witnesses (s. *shahid*).³⁰⁰ When proper witnesses were presented by the plaintiff or the defendant, the judge was required to use them as the means by which the parties proved their cases.³⁰¹ Malik, founder of one of the schools of law in Islam, insisted that the judge not render any decision without the authority of witnesses.³⁰² If it can be demonstrated that these witnesses anticipated the basic characteristics of the jurors of the English assizes, then the Islamic plaintiff had not only a right to trial but a right to trial by jury.

2. Witnesses Form a Body of Twelve People from the Neighborhood

In order for testimony to be valid in Islamic law, there had to be more than one witness because Islam followed a rule similar to the Roman law rule, *testis unus, testis nullus*.³⁰³ The Qur'an directs that one "get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her."³⁰⁴ This requirement of two witnesses was also accompanied by the requirement that the witnesses be honorable (*'adl*).³⁰⁵

The requirement that the two witnesses be honorable ordinarily

problem).

299. See HOUDAS & MARTEL, *supra* note 296, at 16-19; MILLIOT, *supra* note 148, at 730; 1 MILLIOT, *supra* note 296, at 35.

300. See MILLIOT, *supra* note 148, at 731-32.

301. See *id.* A good example of the process by which witnesses were used in Islamic law can be seen in the action for recovery of land. Except for the case in which the defendant acknowledged the plaintiff's right or the plaintiff could show he acquired the land from the defendant, the proof of one's right to property was made by a *mulkiyya*, which was a document of notoriety (*bayyina*) containing the attestation of witnesses that the claimant was the owner of the land. See 4 LAPANNE-JOINVILLE, *supra* note 152, at 172. The defendant also had the right to present a *mulkiyya* and, if he did so, the conflict between the two *mulkiyyas* was resolved by rules of preference (*murajjihat*). See *id.* at 180-87.

302. See HOUDAS & MARTEL, *supra* note 296, at 22-23.

303. See Emile Tyan, *Judicial Organization*, in LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW, *supra* note 9, at 236, 254.

304. QUR'AN, *supra* note 86, at 2:282.

305. In *An Introduction to Islamic Law*, Joseph Schacht stated that "[t]wo men or one man and two women, who possess the quality of *'adl*, are required as witnesses (*shahid*, pl. *shuhud*) in a lawsuit." SCHACHT, *supra* note 7, at 193.

was not difficult to satisfy in Islamic law. In the Islamic school of law called the Hanafi school, every Muslim was considered honorable unless his character was attacked.³⁰⁶ If this premise did not avoid an inquiry into each witness's character before he testified, it at least made the proof of character easy. In the Maliki school of law, however, the proof of character was more difficult, which made it harder to find eligible witnesses outside the cities.³⁰⁷ Therefore, in order to protect the system of justice against the insufficiency of evidence available through 'udul³⁰⁸ witnesses, another system for taking evidence from witnesses had to be devised.³⁰⁹ And indeed, in the eleventh century, a substitute form of proof appeared in the form of the *lafif*.³¹⁰

Proof by *lafif* witnesses³¹¹ appeared in the practice of Maliki law in the area of North Africa now known as Morocco. Although there were questions about its validity as a method of proof, it was used in the exceptional case where proof by 'udul witnesses was not available. Its usage was needed particularly in cases in which the facts in dispute were ascertainable only over time such as in cases of insolvency, inheritance, devolution, paternity, recovery of property, and the abandonment of a wife by her husband without maintenance.³¹² The

306. See MILLIOT, *supra* note 148, at 738, 751-52. The *Hedaya* stated Abu Hanifa's view that the apparent probity of a Muslim was sufficient because it was probable that the Muslim abstained from everything prohibited by Islam. Only when the defendant cast reproach on the character of the witness did the judge inquire into his character. See HEDAYA, *supra* note 79, at 355-56. The *Hedaya* also stated that Abu Yusuf and Shaybani, whose opinions were generally respected, required an inquiry up front. See NEIL B.E. BAILLIE, A DIGEST OF MOOHUMMADAN LAW 419 (1974). Abu Hanifa (150 H./767 A.D.) was the eponym of the Hanafi school of Islamic law; Abu Yusuf (182 H./ 795 A.D.) and Shaybani (189 H./804 A.D.) were two of his most famous disciples whom he gathered in a circle of scholars to form the Hanafi school. See Makdisi, *supra* note 7, at 104.

307. See MILLIOT, *supra* note 148, at 737-38. For the procedure by which the character of a witness was proved and the characteristics for which a witness would be recused, see 4 KHALIL BEN ISH'AQ, *supra* note 145, at 9-13.

308. 'Udul is the plural of 'adl, which refers to the honorable witness used in an Islamic court to provide evidence. 'Adl is also an adjective meaning honorable.

309. See MILLIOT, *supra* note 148, at 737.

310. See *id.* at 737-38.

311. The information on the *lafif* in this paragraph is drawn from 1 MILLIOT, *supra* note 296, at 116-24, and from MILLIOT, *supra* note 148, at 737-38. The importance of this institution for the study of the origins of the jury certainly requires a more detailed study than can be accomplished in the space of this Article. Since there is very little written on the *lafif* in western literature, I have taken the liberty of translating and setting forth these two sources in the Appendix. They provide further background for the points I have made in this Article, and they also list some of the Arabic sources with which to begin a scholarly study of the institution.

312. There was a direct connection here with the use of *lafif* witnesses in notarial practice for the same purpose.

lafif witnesses were considered the community (*jama'a*) of the locality, and the number generally required was twelve. These witnesses were not qualified as *'udul*, but they were nevertheless above reproach for such signs of baseness as lying, imbecility, injustice, drunkenness, or gambling. It was also required that they not have any relationship with or enmity towards the parties in the case. Thus, twelve *lafif* witnesses became a substitute for two *'udul* witnesses when the latter were lacking.

3. Witnesses Sworn to Tell the Truth About a Matter They Had Seen or Heard

Testimony (*shahada*) by a witness was a juridical act in Islamic law.³¹³ It was a proof that established a fact having legal effect within the Islamic community. To establish such a fact, the witness truthfully affirmed it directly (*shahadat al-batt*) (from his direct perception or from signs or traces that accompanied or followed the fact or even from mere common knowledge reported in the community) or affirmed that he had heard it from another (*shahada 'ala shahada*).³¹⁴ If the witness based his knowledge on signs or traces that pointed to the ultimate fact at issue, he had to affirm that he also had a conviction (*ghalib al-zann*) that the ultimate fact was true.³¹⁵ If the witness based his knowledge on the common knowledge reported in the community (*fasha, sama' al-fashw*), he still affirmed the fact directly and therefore had to affirm that he had a conviction that it was true.³¹⁶ In no case did he testify to facts that were then left to the appreciation of the judge for determination of the ultimate fact at issue.

The importance in Islam of obtaining the truth from a witness was demonstrated by the requirement that the testimony be sworn. The *Hedaya* stated that the word *shahada* expressed an oath and that it had to be used in giving testimony.³¹⁷ The sworn *shahada* formula, "I bear witness to God (*ashhadu lillah*)," is also the opening of the Muslim's testimony of faith, which is one of the five pillars of Islam.³¹⁸ Furthermore, the qualities required of a witness to ensure

313. See MILLIOT, *supra* note 148, at 732.

314. See *id.* at 733, 735-36.

315. See *id.* at 736. His declaration would be probative if he stated: "I have not seen or heard that; but I know it."

316. See *id.*

317. See HEDAYA, *supra* note 79, at 355.

318. BRINKLEY MESSICK, *THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY* 208 (1993).

truthfulness included: intellectual maturity, the ability to perceive, and the absence of prejudice and qualities that would suggest a lack of sincerity.³¹⁹

4. Witnesses Must Give an Answer

It was both a duty and a right for every person to give testimony concerning a known perceptible fact that created or transferred a right.³²⁰ It was a duty that weighed on the whole community and that was considered discharged when each person had acquitted himself of it according to the measure of his means.³²¹ The *Hedaya* quoted the Qur'an as mandating a duty to give testimony and making it unlawful to conceal testimony when a party demanded it.³²²

5. Testimony Binding on the Judge

One of the key characteristics of the jury in the English assizes was that the judge was bound by the jury's verdict. Similarly, in Islamic law, the judge was required to decide a case in accordance with the testimony of two honorable witnesses.³²³ The judge had no discretion in the matter; he had to accept the testimony of honorable witnesses. This requirement led one sixteenth-century judge to say: "The witness is the true judge, and the judge a simple executor."³²⁴ In Maliki law, this stricture on the judge's discretion reached its zenith. The Maliki judge was not allowed to accept the testimony of a witness not found to be honorable even if he was convinced of its

319. See MILLIOT, *supra* note 148, at 734-35.

320. See *id.* at 733.

321. See *id.*

322. See HEDAYA, *supra* note 79, at 353. For the passages in the *Qur'an*, see QUR'AN, *supra* note 86, at 2:282 to 2:283.

323. See MILLIOT, *supra* note 148, at 731.

324. *Id.* at 731 n.6 (quoting al-Miknasi (1515)) (author's translation). Another judge who was addressing two witnesses stated that he had neither called them nor did he reject them, but rather he was protected from divine punishment by them, and he admonished them to protect themselves (supposedly from the divine punishment they risked by imparting judgment). See 2 BRUNSCHVIG, *supra* note 152, at 207. The binding nature of the witnesses' testimony on the judge was alluded to in a passage in *Kitab Usul ad-Din*, which was brought to my attention and translated by George Makdisi:

When the chain of transmission of Traditions transmitted by a single transmitter is sound, and the texts of the traditions are not rationally absurd, they are necessarily to be followed as a course of action rather than as knowledge. In this they are tantamount to the testimony of witness-notaries to the judge, who must necessarily pass judgment in accordance with the testimony as given, even if he does not know their veracity in bearing witness.

⁶ABD AL-QAHIR AL-BAGHDADI (d. 429/1037), *KITAB USUL AD-DIN* 12 (Istanbul, Government Press, 1346/1928).

truth, and he was not allowed to reject that of an honorable witness even if he knew it to be untrue.³²⁵ This lack of discretion was part of the design of the Islamic legal system to be self-acting in order to protect the community from judicial arbitrariness as well as to protect the judge from community resentment against unpopular decisions.³²⁶

Testimony was binding if the witnesses were honorable, and honorability (*ʿadala*) was determined through a procedure called *tazkiya*.³²⁷ Instituted by an Egyptian *qadi* in the second Islamic century (eighth century A.D.), this procedure provided information on the moral standing of witnesses called to testify in court.³²⁸ If the judge verified the moral standing of an individual, he then recognized him as a reliable witness (*shahid ʿadl*, pl. *shuhud ʿudul*). Honorability required that the witness participate regularly in public prayer, have integrity well known in the marketplace, be scrupulous with what had been trusted to his custody, be constantly truthful, not have committed a serious sin or a major crime, and not be habitually culpable of smaller infractions.³²⁹

In the absence of witnesses determined to be honorable through the technical procedure of the *tazkiya*, witnesses of good social condition, called *lafif* witnesses, were permitted to give testimony in their place. Since the *lafif* witnesses replaced the *ʿudul* witnesses, their testimony also was binding on the judge.³³⁰ The judge may have had more leeway than in a *tazkiya* procedure to determine the capacity of *lafif* witnesses. In the case of a contradiction between two sets of *lafif* testimonies brought by each of the parties, it appears that the judge was permitted to look at the circumstances of the case in order to reach his own conclusion as to the sincerity of the

325. See Norman Anderson, *Muslim Procedure and Evidence*, 1 J. AFRICAN ADMIN. 3, 12-13 (1949); see also HOUDAS & MARTEL, *supra* note 296, at 22-23 (observing that a Maliki judge cannot reject the testimony of an honorable witness even if it is contrary to what the judge knows himself). *Shafi'i* law is not as strict. A *Shafi'i* judge is permitted to rely on his own knowledge of the facts in certain cases. See Anderson, *supra*, at 12.

326. See Anderson, *supra* note 325, at 4.

327. For a discussion of the function of *shahada*, see Farhat J. Ziadeh, *Integrity (ʿAdalah) in Classical Islamic Law*, in ISLAMIC LAW AND JURISPRUDENCE, *supra* note 108, at 73, 77-87.

328. See TYAN, *supra* note 155, at 238-39.

329. See MILLIOT, *supra* note 148, at 752.

330. See 1 MILLIOT, *supra* note 296, at 43 (stating that the probative value of the *lafif* witnesses was admitted as equal to that of the testimony of two *ʿudul* witnesses). Milliot cited a legal opinion (*fatwa*) of Lakhmi (a Maliki jurist from Qayrawan who died in 478/1085) concerning a question of heirship: Lakhmi stated that *lafif* testimony was accepted if it was not contradicted and the witnesses constituted the community (*jamaʿa*) of the locality. See MILLIOT, *supra* note 148, at 737.

witnesses.³³¹ But even in this case, it appears that the judge merely determined whether the witnesses could be reproached for being liars such as to disqualify them as witnesses. If they qualified as witnesses, the judge did not have the discretion to discard their testimony as not credible. The *lafif* testimony was a legal proof that was binding on the judge, and if it conflicted with another *lafif* testimony, the judge applied non-discretionary rules of preference (*murajjihat*) to determine which would prevail.³³²

The binding nature of testimony on the judge did not prevent it from being revoked by a retraction of the witnesses in the presence of the judge prior to his final decision.³³³ But once the judge rendered his decision on the basis of the testimony, it could not be nullified by a retraction. The witnesses had to atone for the injury caused by the false testimony, but the decision could not be reversed.³³⁴

6. Unanimous Verdict

Islamic law required that the twelve *lafif* witnesses all give identical testimonies. If the testimony of one witness differed from that of the others, the principle of the proof was that all the proof failed.³³⁵ This requirement of unanimity is amply illustrated by a case in the eighth Islamic century (fourteenth century A.D.) wherein a judge replaced a witness (*shahid*) in order to obtain a unanimous verdict:

In the year 730 the *amir* Qawsun, who had built a mosque with the help of the sultan near the Birkat al-Fil, wanted to

331. See 1 MILLIOT, *supra* note 296, at 123.

332. According to Lapanne-Joinville, the rules of preference for determining which of two conflicting sets of testimonies in an action for the recovery of property were preferable were as follows: (1) The proof that indicated the date of ownership was preferred to that which did not. (2) When the date was indicated in both, the older in time was preferred even if the other proof was more honorable. (3) When the date was the same in both, the proof with the greatest honorability (*mazidu 'l-adala*) of the witnesses was preferred. For example, the testimony of two *'udul* witnesses (*shahada 'adliya*) outweighed the testimony of twelve *lafif* witnesses (*shahada lafifiya*). (4) A proof that attested to ownership (*milk*) was preferred to one that attested only to possession (*hawz*). See 4 LAPANNE-JOINVILLE, *supra* note 152, at 181-84.

333. See MILLIOT, *supra* note 148, at 740.

334. See HEDAYA, *supra* note 79, at 372-73; HOUDAS & MARTEL, *supra* note 296, at 65; MILLIOT, *supra* note 148, at 740. False testimony was a *ta'azir* offense that was punished by *tashir*, the taking of the offender throughout the city and proclaiming he was not to be trusted. See MATTHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION 70 (1988). Even more severe was the *hadd* penalty for false accusation of unlawful intercourse (*qadhif*), which subjected the false accuser to 80 lashes. See SCHACHT, *supra* note 7, at 179.

335. See 1 MILLIOT, *supra* note 296, at 65-66.

purchase a bath (*hammam*) next to the mosque, but the *hammam* was part of a *waqf*. The *amir* then asked the chief judges, who turned the matter over to the Hanbali chief judge, Taqi al-Din Ibn 'Awad. Meanwhile, a side of the bath was knocked down, undoubtedly at the direction of the *amir*. At that point the Hanbali chief judge decreed that the *waqf* was void, because the *hammam* was in a state of ruin, and it was best that it be sold. The notaries were summoned to corroborate the ruined state of the building, but one of them refused to attest to this, saying that the building had been sound only the morning before. The objection was overcome by the dismissal of the recalcitrant *shahid* and his replacement by another. The judge then confirmed the now unanimous opinion, and the *amir* purchased the building.³³⁶

7. Case Submitted to a Jury upon a Judicial Writ

One characteristic that the English assize jury did not hold in common with the Islamic *lafif* concerned the method by which the case was brought to court and how the jury was empaneled. The assize of novel disseisin required the plaintiff to obtain a royal judicial writ that ordered the sheriff to impanel a jury.³³⁷ The method of using a judicial writ was necessary in England to institute the new use of the assize of novel disseisin if the plaintiff preferred it as an alternative to justice found in the courts of feudal lords and sheriffs.³³⁸ This method was not necessary in Islam where there was only one system of ordinary courts that provided the procedure for recovery of land in the action of *istihqaq*. In other words, the plaintiff in England needed the writ in order to remove jurisdiction from the local courts to the royal courts,³³⁹ whereas in Islam the plaintiff could go directly to the *qadi* without violating the jurisdiction of any other court.

The method of using a sheriff to empanel a jury is a difference from the Islamic procedure that is not as easily explained. In Islam, each party was entitled to present the proof of a set of *lafif* witnesses that the party assembled. How did this *lafif* procedure get translated

336. JOSEPH H. ESCOVITZ, *THE OFFICE OF QADI AL-QUDAT IN CAIRO UNDER THE BAHRI MAMLUKS* 150 (1984) (footnotes omitted).

337. See VAN CAENEGEM, *supra* note 1, at 261-62.

338. See SUTHERLAND, *supra* note 110, at 30-39 (discussing the possibility that the assize was established specifically for tenants against their feudal lords, or to exalt the king's authority by cutting off the feudal lord's authority, or merely to give better protection to freehold property through a formal judicial procedure in the king's courts).

339. See VAN CAENEGEM, *supra* note 1, at 102 (emphasizing the fact that the decision of the plaintiff started the process and that the royal writ was only the spring that set the mechanism in motion).

into the assize procedure of using a sheriff? Also, how did the permitted use of two sets of *lafif* witnesses (one for each party) in Islam get translated into the use of one jury in England? In fact, further study of the jury in England may reveal that the sheriff was not the primary person to pick the jurors but only to ensure that they were empanelled. Van Caenegem noted that there were cases in the early *Curia Regis Rolls* in which parties were allowed to select their own jury.³⁴⁰ Also, Islamic law did not recognize two sets of *lafif* witnesses as proof in a case. Rules of preference were used to determine which set of *lafif* witnesses would be considered the proof. Instead of a conflict of proofs, there was merely a contradiction between two declarations, one of which was considered to contain the truth and became the proof of the case.³⁴¹ Thus, Islam used as proof only one *lafif* as England used only one jury.

The structure of the *lafif* resembles the jury in nearly every detail as it appeared in England in the twelfth century. If one compares the nine characteristics of the English jury with the characteristics described above for the Islamic jury, the Islamic jury (1) was a body of twelve witnesses drawn from the neighborhood and sworn to tell the truth, (2) who were bound to give a verdict, (3) unanimously (and if twelve did not agree, more would be found until there were twelve who agreed), (4) about matter from what they had personally seen or heard, (5) binding on the judge, (6) to settle the truth concerning facts in a case, (7) between ordinary people, and (9) obtained as of right by the plaintiff. The only characteristic of the English jury that did not exist in Islam was the judicial writ directing the jury to be summoned and directing the bailiff to hear its recognition. No other institution in any legal system studied to date shares all these characteristics with the English jury.

The jury is one of the most important cornerstones of the common law and certainly the most famous. It appeared in the twelfth century in conjunction with the assize of novel disseisin, which introduced a new concept of possession as a presumption of ownership. At the same time, the action of debt introduced a new concept of property transfer upon sale. Each of these three

340. See *id.* at 102 n.2 (citing to *Introduction to the Curia Regis Rolls*, *supra* note 135, at 497, which puts these cases in the early part of the thirteenth century); see also 2 POLLOCK & MAITLAND, *supra* note 15, at 621 (observing that once the jury was summoned, the litigants were given the opportunity to challenge particular jurors); SUTHERLAND, *supra* note 110, at 65 (noting that the parties were invited to be present at the empanelling of the jury to offer challenges for cause against proposed jurors).

341. See MILLIOT, *supra* note 148, at 733-34.

institutions brought such a major change to the existing English legal system that a new legal system was born under the name of the common law. The first three Parts of this Article have examined each of these institutions to demonstrate the probability that each originated in Islamic law. One might conclude from this study that on a more global plane the common law could be the true offspring of Islamic law. Therefore, it is appropriate at this point to expand this comparative study from an analysis of particular institutions to a discussion of the major characteristics that define a legal system. In particular, what are the characteristics that distinguish the common law system from the civil law system, and where does Islamic law fit in this picture?

IV. A COMPARATIVE STUDY OF LEGAL SYSTEMS

A. *Differences Between the Common and Civil Law*

For a discussion of the major characteristics that distinguish the common and civil law systems, we are fortunate to have Mirjan Damaska's book, *The Faces of Justice and State Authority*.³⁴² His study demonstrates the remarkable differences in function and structure that exist between the civil and common law systems. The book does not address the Islamic law system, but if it did, we would have found not a third set of differences but rather a system that is very much akin to the common law and very different from the civil law. The following discussion proposes to fill this void in Damaska's study by applying Damaska's mode of analysis to Islamic law. After summarizing the major characteristics distinguishing the common law from the civil law, the discussion examines several of these characteristics individually in relation to Islamic law. The contrast with the civil law demonstrates just how close a kinship Islamic law enjoys with the common law.

1. Function: Activist v. Reactive

In regard to function, Damaska distinguished a legal system that is interventionist from one that is uninvolved. He called these states "activist" and "reactive" and noted that this "bifurcation is predicated on two contrary interpretations of the relation between state and society."³⁴³ The purpose of the activist state is "to pursue and impose

342. See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

343. *Id.* at 72.

particular views of the good society and to lead society in desirable directions."³⁴⁴ The extreme example "contemplates an omnivorous state—a Leviathan ready to swallow civil society completely."³⁴⁵ This view incorporates Thomas Hobbes's idea that power rules.³⁴⁶ The purpose of the reactive state, on the other hand, is to "support existing social practice" and to "be immune from self-conscious governmental direction."³⁴⁷ In the reactive state, government exists at most to promote "the invisible hand" of the market rather than intervening to manage social and economic life.³⁴⁸ This view reflects Adam Smith's idea that money rules.³⁴⁹ The major characteristics of each of these archetypes of function are described below.

The activist state, largely characteristic of the civil law system, is concerned with implementing the policies of its government.³⁵⁰ Officials are self-starting in that they institute, control, and terminate proceedings on their own—even in the absence of any actual

344. *Id.*

345. *Id.*

346. Hobbes stated:

The only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort, as that . . . they may nourish themselves and live contentedly; is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will. . . . This is more than Consent, or Concord; it is reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man. . . . This done, the Multitude so united in one Person, is called a COMMON-WEALTH, in latine CIVITAS. This is the Generation of that great LEVIATHAN. . . . For by this Authoritie, given him by every particular man in the Common-Wealth, he hath the use of so much Power and Strength conferred on him, that by terror thereof, he is inabled to forme the wills of them all, to Peace at home, and mutuall ayd against their enemies abroad.

THOMAS HOBBS, *LEVIATHAN* 227-28 (C.B. MacPherson ed., Penguin Books 1968) (1651).

347. DAMASKA, *supra* note 342, at 72.

348. *Id.* at 72 n.2.

349. According to Smith, each individual

generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.

ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 456 (R.H. Campbell et al. eds., Oxford Univ. Press 1976) (1776).

350. See DAMASKA, *supra* note 342, at 80-81.

controversy, complaint, or request.³⁵¹ Government manages the lives of its people and steers society towards the good life through its own comprehensive theory of what is best for its people.³⁵² Voices competing with government are reduced in favor of promoting a shared sense of harmony and cooperation.³⁵³ Under this model, the government needs a device such as decrees or legislation in order to direct its people, to tell them what to do, and to tell them how to behave.³⁵⁴ The judiciary exists more as a righteous than as an impartial decisionmaker in order to carry out the policies of the state; it is more concerned with ensuring accurate results rather than fair hearings.³⁵⁵ The doctrine of *res judicata* is weak; decisions of the highest authority can be altered on substantive grounds in light of subsequent knowledge.³⁵⁶ The decisionmaker's extraneous knowledge of the facts is acceptable, and his extraneous knowledge of the law is desirable.³⁵⁷ State officials control the fact-finding process.³⁵⁸ Parties are expected to cooperate with the state and to disclose evidence without the privilege against self-incrimination.³⁵⁹ Citizens other than parties may be involved in legal proceedings.³⁶⁰ Procedure is the handmaiden of substantive law—which itself follows state policy³⁶¹—and must be flexible in order to produce proper outcomes.³⁶² Rules of thumb, rather than unbending rules, point to a preference for consequentialism over formalism.³⁶³ There is no personal autonomy and therefore no bargaining for rights; there are advantages only from sharing in state interests.³⁶⁴ The opportunity to be heard is granted to provide information to the state rather than to protect individual rights.³⁶⁵ This state-dominated system promotes participation in the community.³⁶⁶

The reactive state, on the other hand, is largely characteristic of

351. *See id.* at 84-87, 154-59.

352. *See id.* at 80.

353. *See id.*

354. *See id.* at 82.

355. *See id.* at 148-49, 168-70.

356. *See id.* at 148-49, 178-80.

357. *See id.* at 170-71.

358. *See id.* at 160-62.

359. *See id.* at 164-65.

360. *See id.* at 153.

361. *See id.* at 148.

362. *See id.* at 150.

363. *See id.* at 150-52.

364. *See id.* at 83, 99-101, 152.

365. *See id.* at 153.

366. *See id.* at 81. The best examples of intensely activist states were the Soviet model and that of Mao's China. *See id.* at 194-99.

the common law system. It provides a framework for social self-management and individual self-definition³⁶⁷ and inserts itself primarily to resolve conflicts.³⁶⁸ In this role of conflict solver, it regulates the contest between two adversaries in an actual dispute.³⁶⁹ Because law tends to be outside or "above" the state, law is expressed as a network of personal rights and duties.³⁷⁰ Because people are skeptical of government as a creator of substantive policy, law is displaced in large part by contracts and other private arrangements and tends to address uncertainties or gaps in these arrangements.³⁷¹ In the reactive state, procedural law can be altered by bilateral stipulation as well as by unilateral waiver, and rights can be used as bargaining chips.³⁷² Consequently, legislation anticipates and furthers private arrangements without expressing values or policies.³⁷³ As the main, if not the only, branch of government,³⁷⁴ the judiciary exists primarily as an impartial rather than as a righteous decisionmaker to regulate and help resolve contests between parties to disputes.³⁷⁵ The doctrines of *res judicata* and collateral estoppel are strong.³⁷⁶ In strict contrast to the activist state, the decisionmaker's extraneous knowledge of the facts is not desirable, and extraneous knowledge of the law is not necessary.³⁷⁷ Parties are sovereign over the manner in which facts are ascertained and over legal issues, while the decisionmaker takes a passive stance.³⁷⁸ The principle duty of the decisionmaker is to see that the rules are observed and a verdict reached.³⁷⁹ Parties have a privilege against self-incrimination³⁸⁰ and also have standing exclusive of others.³⁸¹ Procedure is designed to

367. *See id.* at 73-75.

368. *See id.* at 73.

369. *See id.* at 77-79.

370. *See id.* at 75-77.

371. *See id.* at 75-76. In particular, "the legal process is largely a problem of identifying the implicit terms of a model contract." *Id.* at 98.

372. *See id.* at 76-77, 98-99.

373. *See id.* at 76.

374. *See id.* at 75; *see also id.* at 75 n.6 ("Although Western princes have legislated since the Middle Ages, they continued to be conceived primarily as judges until the sixteenth century." (citing 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 289 (1978))).

375. *See id.* at 135-36.

376. *See id.* at 145.

377. *See id.* at 137-39.

378. *See id.* at 111-16, 136-39.

379. *See id.* at 135.

380. *See id.* at 127.

381. *See id.* at 116-17.

assure a result in accordance with the substantive law,³⁸² but it also stands apart from substantive law in order to assure fairness, even at the risk of an incorrect result.³⁸³ Because private individuals or groups³⁸⁴ have personal autonomy to determine what to do with their lives,³⁸⁵ they manage their own lawsuits.³⁸⁶ They handle the initiation, termination, and definition of issues within their own lawsuits.³⁸⁷ Information presented to the decisionmaker in a case is subject to argumentation from the other side.³⁸⁸ This laissez-faire system opens itself to creative individualism.³⁸⁹

2. Structure: Hierarchical vs. Coordinate

In addition to these two archetypes of the function of a legal system, Damaska also identified two archetypes in a legal system's structure: the structure may be hierarchical or coordinate. The hierarchical ideal corresponds to conceptions of classical bureaucracy and "is characterized by a professional corps of officials, organized into a hierarchy which makes decisions according to technical standards."³⁹⁰ The coordinate ideal "is defined by a body of nonprofessional decision makers, organized into a single level of authority which makes decisions by applying undifferentiated community standards."³⁹¹ Let us explore briefly how Damaska defined each of these archetypes of the structure of a legal system.

The hierarchical system is typical of civil law countries of western

382. *See id.* at 101-03.

383. *See id.* at 136.

384. Damaska noted that reactive governments may promote individualism, but they have also promoted independent associations. *See id.* at 73-74.

385. *See id.* at 74, 104-05.

386. *See id.* at 104.

387. *See id.* at 109-16.

388. *See id.* at 102.

389. Damaska commented on this point:

Although the reactive state need not necessarily espouse epistemological skepticism, it seems most comfortable when anchored there. Where it appears that no wholly objective means exist to determine what values deserve to be promoted, perhaps even no objective way to establish which scientific views accurately mirror reality—a firm predicate for the formulation of state goals is missing. By default, as it were, the definition of life ambitions must be entrusted to individuals who, it is hoped, relish the excitement of choosing for themselves.

Id. at 75 (footnote omitted). One observer of American society, Alexis de Tocqueville, felt that this ability to choose life's ambitions defined its character. *See id.* at 90 n.34 (citing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 252 (Phillips Bradley ed. & Francis Bowen trans., Alfred A. Knopf 1945) (1835)). De Toqueville saw voluntaristic action as the inner dynamic of American society. *See id.*

390. *Id.* at 17.

391. *Id.*

Europe and of the Catholic Church.³⁹² In this archetype, the judiciary exists as a class of professionalized permanent officials subject to hierarchical authority and therefore dependent on a system of appeal.³⁹³ The focus is on power at the top.³⁹⁴ Routinization and specialization of tasks leads to emotional disengagement and institutional thinking.³⁹⁵ Dissent is nullified, and official discretion is anathema.³⁹⁶ There is a strong sense of order and a desire to promote uniformity.³⁹⁷ The normative standards, which guide official action, posit goals by which officials can assess the consequences of their decisions,³⁹⁸ thus making the hierarchical structure both legalistic³⁹⁹ and consequentialist.⁴⁰⁰ Procedure takes the form of a succession of methodological stages with review becoming routine and comprehensive and enforcement postponed until this review has taken place.⁴⁰¹ Piecemeal trials are encouraged because officials have developed a desire for reflection and clarity and therefore do not want the surprise of a day in court.⁴⁰² Judges must justify their findings of fact for scrutiny by the appellate courts.⁴⁰³ The succession of stages necessitates reliance on official documentation to ensure integration of the multistage process.⁴⁰⁴

By way of contrast, the coordinate system, typical of common law countries, is characterized by untrained and transitory

392. For a discussion of the appearance of many of the characteristics of this system in the judicial system of the late Roman empire, which ultimately were transplanted to the canon and civil law systems of Europe, see JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 32-34 (1960). The Catholic Church in the late eleventh century pioneered the Continental hierarchical bureaucratic apparatus of justice. See DAMASKA, *supra* note 342, at 186-88. However, even "[w]ell into the sixteenth century, European rulers were imagined primarily as judges or conflict resolvers: that the sovereign power is regulatory or legislative is a comparatively modern idea." *Id.* at 189 (citing 2 SKINNER, *supra* note 374, at 289).

393. See DAMASKA, *supra* note 342, at 20, 30 & n.18.

394. See *id.* at 29.

395. See *id.* at 19.

396. See *id.* at 19-20, 55.

397. See *id.* at 19-20.

398. See *id.* at 21-23.

399. Logical legalism is usually attributed to the rise of Italian universities in the late eleventh century, but logical legalism also appeared in the Catholic Church at this time. See *id.* at 31 & n.20.

400. See *id.* at 21-23.

401. See *id.* at 47-48. The multistage process in the hierarchical system works in an activist system to allow a change in decision if needed to implement policy when subsequent knowledge comes to light. See *id.* at 183.

402. See *id.* at 51-52.

403. See *id.* at 49.

404. See *id.* at 50. A bureaucratic maxim in Continental countries asserted "*quod non est in actis non est in mundo* (what is not in the file does not exist)." *Id.* at 33.

decisionmakers typified by amateurs such as jurors who take turns in administering justice for a limited time.⁴⁰⁵ The lack of a bureaucratic structure induces an overlap in functions, such as the testimonial and adjudicative tasks of the juror.⁴⁰⁶ For example, in the early common law, jurors could decide a case on the basis of their own knowledge of the facts in addition to the testimony of witnesses.⁴⁰⁷ Judges are experienced professionals who assist the inexperienced jurors.⁴⁰⁸ They are not superior to but rather in partnership with them.⁴⁰⁹ The judge is the moderator, supervisor, announcer, and enforcer, while the real adjudicator is the jury.⁴¹⁰ Officials are rough equals in a single echelon of authority with no real system of appeal.⁴¹¹ There is no hierarchy, but rather a decentralization of authority.⁴¹² When an overlap⁴¹³ of authority takes place, decisions are resolved by accommodation.⁴¹⁴ Because there is a single decisionmaking level, the doctrine of *res judicata* is favored.⁴¹⁵ Routinization of activity has little chance to develop, leaving greater latitude for emotional engagement.⁴¹⁶ Dissent is a feature of this system.⁴¹⁷ Rules are vague and invite discretion⁴¹⁸—another feature of this system.⁴¹⁹ A certain amount of disorder and inconsistency must be accepted.⁴²⁰ Decisionmaking becomes informed by undifferentiated or general community norms.⁴²¹ These norms are not necessarily those prevailing in society but may be the values and policies of a ruling group.⁴²² Decisionmakers are receptive to considerations of

405. *See id.* at 24. These amateur officials can handle the noisy squabbles generated by the disputes characteristic of a reactive system much better than the professionals in a hierarchical system. *See id.* at 215.

406. *See id.* at 39.

407. *See id.* at 39-40.

408. *See id.* at 25.

409. *See id.* at 38.

410. *See id.* at 39.

411. *See id.* at 25, 59.

412. *See id.* at 40 (citing *PLUCKNETT*, *supra* note 17, at 169).

413. One judge may grant bail or a stay even after his colleague on the bench has denied it. *See id.* at 40 n.46. Also, a party may institute a parallel action in another court. *See id.* at 25.

414. *See id.* at 25.

415. *See id.* at 59. The anticipated finality of the verdict enhances the confrontational aspect of a reactive system. *See id.* at 215.

416. *See id.* at 24.

417. *See id.*

418. *See id.* at 64.

419. *See id.* at 28, 45, 65.

420. *See id.* at 26.

421. *See id.* at 27.

422. *See id.*

“substantive justice.”⁴²³ It is better to be right in terms of reasonableness and fairness than to be consistent.⁴²⁴ One might say that the technical component of this approach is closer to pragmatic legalism than to the logical legalism of a hierarchical structure.⁴²⁵ The process takes place in a short period of time—one’s day in court—and appellate review is extraordinary.⁴²⁶ The adjudicator does not have to justify findings.⁴²⁷ When there is appellate review, it is only indirect, being a check on reasonableness rather than the propriety of a decision.⁴²⁸ At the same time, there is more reliance on deterrents for false testimony, such as prosecution for perjury.⁴²⁹ Without the apparatus of a bureaucracy to produce, preserve, and retrieve documents, oral testimony is more convenient.⁴³⁰

The four archetypes of function and structure summarized above were used by Damaska to classify the civil and common law systems. When these archetypes are used to classify the Islamic law system, they reveal a remarkable correlation between Islamic law and the common law and a corresponding polarity between Islamic law and the civil law.

B. The Function of Islamic Law

The characteristics of the Islamic legal system identify it as a reactive state. The discussion below describes these characteristics and compares them with their counterparts in the common law. The opposing characteristics of activist justice found in the civil law are provided by way of contrast.

1. Individual Self-Definition

A reactive state that enables people to manage their own lives promotes individualism. Schacht ascribed this characteristic to Islamic law.⁴³¹ First, he captured the essence of Damaska’s bifurcation between a reactive and an activist state by noting that one

423. *Id.* at 27-28, 64.

424. *See id.* at 28, 41-43.

425. *See id.* at 22-23, 28, 43, 54-56, 64-65.

426. *See id.* at 57-60, 62.

427. *See id.* at 60.

428. *See id.*

429. *See id.* at 61.

430. *See id.* In the absence of an official dossier, the adjudicator starts with a blank slate characteristic of the reactive system. *See id.* at 215. Also, the parties have the dominant role in proof-taking with information conveyed in a confrontational manner, which is characteristic of the reactive system. *See id.*

431. *See* SCHACHT, *supra* note 7, at 208-09.

case "is that of an objective law which guarantees the subjective rights of individuals; such a law is, in the last resort, the sum total of the personal privileges of all individuals."⁴³² In contrast, "[t]he opposite case is that of a law which reduces itself to administration, which is the sum total of particular commands."⁴³³ Then, Schacht confirmed that Islamic law belonged to the first type and that its character was private and individualistic, even though it strove to promote social justice.⁴³⁴

2. Justice, Not Morality

Chafik Chehata noted that the manner in which an act was qualified as morally good or bad in the spiritual domain of Islamic religion was quite different from the manner in which that same act was qualified as legally valid or invalid in the temporal domain of Islamic law.⁴³⁵ Islamic law was secular, not canonical.⁴³⁶ It was concerned with civil sanctions for failure to do one's duty, not with moral sanctions for having a bad intention.⁴³⁷ Thus, it was a system focused on ensuring that an individual received justice, not that one be a good person.⁴³⁸ This approach stands in marked contrast to that of an activist state in which government manages the lives of its people and steers society towards the good life through its own comprehensive theory of what is best for its people.

3. Law Above the State

The law in a reactive state tends to be above the state. The development of the common law through the decisions of judges necessarily required the judges to appeal to a law outside the legal system, which could be derived from their consciences reacting to the world around them.⁴³⁹ In Islam, God revealed his law through the

432. *Id.* at 208.

433. *Id.*

434. *See id.* at 208-09; *see also* SHERMAN A. JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* 185-224 (1996) (describing al-Qarafi's view that government intervention should be limited to what was absolutely necessary for the preservation of order and security, that it should be the exception rather than the rule, and that it was justified only to the extent that it promoted the efforts of the individual who preceded the state). Al-Qarafi was a thirteenth-century Maliki legal scholar. *See* JACKSON, *supra*, at 1-2.

435. *See* CHEHATA, *supra* note 7, at 11, 42-43.

436. *See id.* at 42.

437. *See id.* at 42, 45.

438. *See id.* at 42-43, 45.

439. *See* Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 947-49 (1923) (observing that "courts proceed in the order of (1) selection with reference to

Qur'an and the *sunna*, from which sources law could be developed through legal reasoning expressed in legal opinions (*fatawa*). Islamic and common law thus shared the same characteristic insofar as both appealed to a law higher than the state.

In applying law that tends to be above the state, the reactive state does not look to legislation and administrative regulation as primary sources of law. Rather, law must be developed through a process of legal reasoning from sources that tend to provide general principles of behavior rather than specific directives. It is interesting to note in this regard that case law developed in Maliki Islam in a way very similar to that in England. Judges decided cases on the basis of the traditional sources of Islamic law⁴⁴⁰ as well as other sources, including custom (*urf*),⁴⁴¹ necessity (*darura*), and preferred (*rajih*) or dominant (*mashhur*) opinions among the scholars (*fuqaha*).⁴⁴² These judicial decisions became the practice (*amal*) that was followed by subsequent courts and that acquired regulatory force even to the extent of prevailing over dominant legal opinions within the Maliki school of law in the latter half of the fifteenth century.⁴⁴³ In the next two centuries, the practice of the courts in England developed a similar approach when judges began to consider themselves bound by precedent.⁴⁴⁴

fixed precepts, (2) inductive or deductive selection, and (3) selection from outside of the legal system").

440. See Makdisi, *supra* note 7, at 103-07 (presenting the basic sources of Islamic law and schools of legal doctrine). The basic sources of Islamic law are: the Qur'an, *sunna* (the words and acts of the Prophet Muhammad as related in traditions called *hadith*), *ijma'* (consensus of the legal scholars), and *qiyas* (reasoning by analogy), as expounded in the works of the jurist-scholars (*fuqaha*). See *id.*

441. According to Milliot:

Custom [*urf*] is a solidified juridical practice, fixed by the repetition of precedents. In order for it to become jurisprudence [*amal*], it is necessary that the principle have been adopted by an imam or a qualified jurisconsult and that the judge, considering it in conformity with the general interest, have given it the consecration and sanction of his judgment.

1 MILLIOT, *supra* note 296, at 19 (author's translation).

442. See 1 *id.* at 18-21; HENRY TOLEDANO, JUDICIAL PRACTICE AND FAMILY LAW IN MOROCCO: THE CHAPTER ON MARRIAGE FROM SIJILMASI'S *AL-'AMAL AL-MUTLAQ* 9-14 (1981).

443. See 1 MILLIOT, *supra* note 296, at 19-21; TOLEDANO, *supra* note 442, at 9, 12, 14. The works containing these decisions were called *'amaliyat*. Milliot mentioned two famous collections: (1) the *'Amal Al-Fasi* of Abu Zayd 'Abd Ar-Rahman ibn 'Abd Al-Qadir Al-Fasi (d. 1096/1685); and (2) the *'Amal Al-Mouthlaq*, or *General Jurisprudence*, of as-Sidjilmasi (d. 1800). See 1 MILLIOT, *supra* note 296, at 21. Toledano added a third: the *Lamiyah* of al-Zaqqaq (d. 912/1507). See TOLEDANO, *supra* note 442, at 14.

444. See BERMAN & GREINER, *supra* note 2, § 25.4, at 586-89. The first systematic reports of cases began to appear in England in the sixteenth and seventeenth centuries. See *id.*

4. Individualism

The whole system of legal education in Islam in the Middle Ages was designed to promote individualistic thinking. The doctorate, which conferred the authority or license to teach, was based on academic freedom to pursue one's own research and profess one's original opinions freely, unhindered by the state.⁴⁴⁵ This license to teach appeared naturally in Islam because the law was fundamentally individualistic; conversely, when the license to teach was introduced to the ecclesiastical hierarchy of medieval Christendom, it appeared as an intrusive element because it clashed with the Church's authority to approve doctrine.⁴⁴⁶ Islam, in its reactive position as a promoter of individualistic thinking, not only permitted, but required the free play of opinions of the doctors of juridical theology;⁴⁴⁷ the Catholic Church, in its activist role as the successor to Christ's authority, insisted that the opinions of the doctors of theology, the professorial magisterium, would not be authoritative unless and until they were adopted by the pastoral magisterium, which belonged exclusively to the bishops in union with the pope.⁴⁴⁸

5. Freedom of Contract

Islamic law was characterized by an absence of formalism. Rules governing contract were flexible, permitting the contracting parties complete freedom to accomplish their needs.⁴⁴⁹ Furthermore, the focus of the judge was on civil and criminal matters (*mu'amalat*) and not on religious observances (*ibadat*).⁴⁵⁰ This focus on promoting the private arrangements of individuals and groups is central to the function of reactive justice.⁴⁵¹

445. See MAKDISI, *supra* note 12, at 28.

446. See *id.* at 28-29.

447. See George Makdisi, *Magisterium and Academic Freedom in Classical Islam and Medieval Christianity*, in ISLAMIC LAW AND JURISPRUDENCE, *supra* note 108, at 117, 123-26.

448. See *id.* at 126-30.

449. See MILLIOT, *supra* note 148, at 646.

450. See JACKSON, *supra* note 434, at 196-97. In Islamic law, limitations were placed on the scope of the legal process by limiting the operation of the *hukm* (binding legal ruling issued by a government official). See *id.* at 193-95. The law restricted the areas of subject matter in which a *hukm* could be granted to civil and criminal matters, thus preventing jurisdiction over religious matters. See *id.* at 195-96; see also *id.* at 196-207 (discussing jurisdictional limits of the *hukm* as to subject matter and implementation of rules by force).

451. See DAMASKA, *supra* note 342, at 75-77.

6. Impartial Judge

In accordance with reactive justice, the Islamic *qadi*, like the English judge,⁴⁵² existed primarily as an impartial umpire rather than a righteous decisionmaker. The duty of the *qadi* was to treat both parties fairly.⁴⁵³ Wancherisi, a sixteenth-century Maliki legal scholar, extolled the virtue of justice in a judge and quoted the Qur'an in saying that "Those who avoid equity are but wood for the fire."⁴⁵⁴

Judicial impartiality is a characteristic of reactive justice. It encourages procedural rules such as testimonial privileges. An activist state, on the other hand, is less likely to acknowledge rules that protect individual interests if they operate against "the attainment of accurate results on the merits."⁴⁵⁵ Damaska pointed to the *ancien régime* of France as an example of an activist state in its use of coercive measures to extract answers from criminal defendants.⁴⁵⁶ The Maliki school of Islamic law, on the other hand, required an admission to be voluntary; an involuntary admission was invalid even if it led to further evidence of the crime.⁴⁵⁷ In this way, the interest of the individual was protected even though the requirement operated against the attainment of accurate results on the merits.⁴⁵⁸

The Islamic judge was called upon to accomplish one main function: to settle the conflict between two parties. Even if there were contradictory testimonies, the settlement had to take place.⁴⁵⁹ This function was expressed in the term *qada'*, which means judgment in the sense of ending or settlement, and in the term *qata'a*, which means to cut.⁴⁶⁰ An activist state is more concerned with finding the

452. See 2 POLLOCK & MAITLAND, *supra* note 15, at 671 (stating that judges sit not that they may discover the truth but to "play the umpire"), cited in DAWSON, *supra* note 392, at 279 (alluding to the passivity of judges observing the "rules of the game" as umpires).

453. See SCHACHT, *supra* note 7, at 189.

454. LE LIVRE DES MAGISTRATURES D'EL WANCHERISI, *supra* note 164, at 33 n.3 (quoting QUR'AN 72:14-15) (author's translation).

455. DAMASKA, *supra* note 342, at 149.

456. See *id.* at 166 & n.34.

457. See Awad M. Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 91, 106-07 (M. Cherif Bassiouni ed., 1982) (detailing the right of the accused to remain silent).

458. Of course, even an activist state may protect against coerced testimony in some cases, such as situations in which the state has classified the violation of a procedural provision as a criminal offense. See DAMASKA, *supra* note 342, at 148-49.

459. See Baber Johansen, *Le Jugement Comme Preuve. Preuve Juridique et Verite Religieuse dans le Droit Islamique Hanefite*, 72 STUDIA ISLAMICA 5, 11-12 (1990).

460. See LE LIVRE DES MAGISTRATURES D'EL WANCHERISI, *supra* note 164, at 32-33 n.5.

truth of the matter. Continuing disagreement in a case suggests that it is not ripe for decision, and the judge may launch an investigation of his own or postpone his decision until he is "more amply informed."⁴⁶¹

7. Res Judicata

When the final judgment by a court constitutes an absolute bar to a subsequent action involving the same claim, the matter is considered *res judicata*. This principle of reactive justice, which helps settle conflicts by bringing closure to lawsuits, was adopted by English law for jury verdicts.⁴⁶² The opposing principle of activist justice is *rebus sic stantibus*, whereby decisions are rendered provisionally and may be overturned when there is an error in the judgment either on the facts or on the law.⁴⁶³ Soviet justice in its early years adopted this latter principle.⁴⁶⁴ Islamic law adhered firmly to a principle similar to *res judicata*—judgments were revocable for error of law but not for error of fact.⁴⁶⁵ Thus, even when witnesses retracted their testimony, a judgment could not be reversed.⁴⁶⁶

461. DAMASKA, *supra* note 342, at 169-70.

462. See VAN CAENEGEM, *supra* note 1, at 91; see also GLANVILL, *supra* note 16, at 35 (stating that once a suit was decided in the Grand Assize, it "shall on no account be revived again in the future").

463. See DAMASKA, *supra* note 342, at 178.

464. See *id.* at 179.

465. See Emile Tyan, *L'Autorite de la Chose Jugee en Droit Musulman*, 17 *STUDIA ISLAMICA* 81, 81-82 (1962). But see H.F. Amedroz, *The Office of Kadi in the Ahkam Sultaniyya of Mawardi*, J. ROYAL ASIATIC SOC'Y GR. BRIT. & IR. 761, 786-87 (1910) (finding for matters of law no evidence of the existence of an Islamic doctrine of *res judicata*). For a discussion of the matters of law in which the decision of the judge had to be reformed, see LE LIVRE DES MAGISTRATURES D'EL WANCHERISI, *supra* note 164, at 87-90; Tyan, *supra*, at 82-89.

Res judicata should not be confused with the doctrine of *stare decisis*. *Stare decisis* is the modern doctrine of the common law that in cases in which a court applies a principle of law to the facts of the case, it will adhere to that principle and apply it to all future cases with the same relevant facts. See BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). This doctrine was not adopted in England until the nineteenth century. See BERMAN & GREINER, *supra* note 2, § 25.4, at 586-89. *Res judicata* refers only to the irrevocability of a judgment in one and the same case.

466. See S. MAHMASSANI, *FALSAFAT AL-TASHRI FI AL-ISLAM: THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM* 199 (Farhat J. Ziadeh trans., 1961) (giving al-Qarafi's explanation that "[a] judgement is established by trustworthy statements and legal causes" while "[a] later allegation by witnesses that their testimony was false is an admission that they are impious, and the statements of such people cannot vitiate a judgement"); SCHACHT, *supra* note 7, at 196 (noting that another *qadi* can only reverse the judgment if it "amounts to a grave mistake in law"); Johansen, *supra* note 459, at 13-14 (stating that, although their testimony was not annulled, the witnesses who had lied could be punished and become responsible for the damages they had caused).

8. Judge as Blank Slate

The *qadi*'s own conviction about the truth in a case did not govern the outcome. His knowledge of the facts (*'ilm al-qadi*) was not allowed to substitute for that given by the contrary testimony of a witness.⁴⁶⁷ This characteristic of reactive justice stands opposed to the activist acceptance of the decisionmaker's extraneous knowledge of the facts.⁴⁶⁸ On the other hand, it is true that the Islamic jury called the *lafif* was a decisionmaker in Islam like the English jury, and it was composed of witnesses who gave testimony concerning perceptible facts that they knew.⁴⁶⁹ In this instance, Islamic law appears to have assumed an activist characteristic according to Damaska's schema, but it was no different than the English law of the twelfth century wherein the members of the jury were expected to testify from their own knowledge.⁴⁷⁰

The reactive idea that the judge be intelligent on the one hand and yet approach the contest with a blank slate on the other is expressed in the qualities required of a judge. In Islam, the *qadi* was expected to be perspicacious, wise, and prudent.⁴⁷¹ It was also important that the *qadi* know the law (*fiqh*) and the law as it was applied to individual cases (*'ilm*),⁴⁷² but this knowledge was understood differently by different authors. There was no agreement even on whether the judge needed to be literate.⁴⁷³ One opinion, although an isolated one, rejected knowledge (*'ilm*) as a necessary quality.⁴⁷⁴ Malik did not think anyone in his day had all the qualities sought in a judge, but he would have invested one as judge who had knowledge and scruples or, "[i]f he lacked knowledge, that he had scruples and judgment; for, with judgment, he could teach himself, and with scruples, he would be honest."⁴⁷⁵

467. See HOUDAS & MARTEL, *supra* note 296, at 23 (Maliki law); MILLIOT, *supra* note 148, at 728; see also 2 BRUNSCHVIG, *supra* note 152, at 207-08 (stating that for Islamic law generally the personal knowledge of the judge was accepted as determinative only by some jurists, while other jurists tolerated it only with important restrictions or dismissed it entirely).

468. See DAMASKA, *supra* note 342, at 137-39, 170-71.

469. See MILLIOT, *supra* note 148, at 733 (stating that it was the duty of every witness of a perceptible fact to give testimony).

470. See VAN CAENEGEM, *supra* note 1, at 91.

471. See LE LIVRE DES MAGISTRATURES D'EL WANCHERISI, *supra* note 164, at 40.

472. See *id.* at 44-45.

473. See *id.* at 38 n.4.

474. See *id.*

475. *Id.* at 42 (author's translation).

9. Passive Judge

The *qadi* took a passive stance in the conduct of a case. He was forbidden to suborn, harass, or confuse a witness; he had to refrain from giving verbal assistance; and he was expected to question a witness only after the witness's statement was complete.⁴⁷⁶ In an activist state, state officials control the fact-finding process. Continental decisionmakers, for example, could address questions to witnesses and take an active role during the presentation of the evidence.⁴⁷⁷ This process of seeking out the facts could lead the trier of fact or other official interrogator to challenge witnesses.⁴⁷⁸

10. Privilege Against Self-Incrimination

In Islamic law, the accused received the benefit of the doubt and was considered innocent until proven guilty.⁴⁷⁹ He was free to remain silent, and his silence was not to be held against him.⁴⁸⁰ This privilege falls within the sovereign prerogative of the defendant in a system of reactive justice,⁴⁸¹ but it contravenes policy in a system of activist justice in which the parties are expected to cooperate with the state to disclose evidence.⁴⁸²

11. Fairness over Truth

The notion that truth was not the most important feature of Islamic justice was evident in the distinction made between outward appearance (*zahir*) and interior reality (*batin*). It was only the *zahir*, that which was accessible to the observation of a third person, that was considered by the judge in the rules of law he applied.⁴⁸³ Formal rules of procedure that ensured the fair regulation of a contest between the parties were more important than the right result.⁴⁸⁴ This is truly a characteristic of reactive justice whereby procedure stands apart from substantive law to risk an incorrect result, if necessary, in

476. See MESSICK, *supra* note 318, at 208.

477. See Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 525, 545 (1973).

478. See DAMASKA, *supra* note 342, at 162.

479. See LIPPMAN ET AL., *supra* note 334, at 61-62; MILLIOT, *supra* note 148, at 753.

480. See MAHMOUD M. MOSTAFA, *PRINCIPES DE DROIT PENAL DES PAYS ARABES* 163 (1972). Confessions were required to be free and voluntary; torture was prohibited. See LIPPMAN ET AL., *supra* note 334, at 63-64, 72.

481. See DAMASKA, *supra* note 342, at 127.

482. See *id.* at 164-65.

483. See Johansen, *supra* note 459, at 5-6.

484. See SCHACHT, *supra* note 7, at 195 (stating that the emphasis in procedural law "lies not so much on arriving at the truth as on applying certain formal rules").

order to assure fairness. Contrary to the activist state, Islamic procedure was not consequentialist; it was not flexible in order to produce outcomes thought proper for state policies.

12. Individual Autonomy

In Islamic law every action had to have a claimant. No one was required to bring a dispute to the *qadi*, and the *qadi* could only adjudicate with respect to the actions that were brought to him.⁴⁸⁵ Islamic law was so keen on this principle that it was applied not only in the area of private conflicts but also in the area of public interests, such as the criminal law of theft and the municipal regulation of buildings interfering with public thoroughfares.⁴⁸⁶ A judgment was a judicial decision rendered following litigation before a judge and necessarily presupposed two conflicting claims without which a judgment could not be rendered.⁴⁸⁷

The claimant was also the master of the litigation. When the dispute was brought, the pleadings (*maqal*) defined the limits of the claim.⁴⁸⁸ The judge guided the flow of the proceedings with preparatory judgments (s. *hukm ibtida'i*), but this was only to ensure that the formalities prescribed for establishing proof were followed.⁴⁸⁹ The parties initiated, defined, and terminated their own cases. In an activist system, such as the civil process of the former Soviet Union, the judge takes vigorous control of the case and follows his own direction, even if this means disregarding the factual allegations of the parties and the prayer for relief.⁴⁹⁰ Members of the Soviet Procuracy could initiate and terminate cases on their own in order to further state policy interests.⁴⁹¹

In Islamic law, the judge was most interested in encouraging the parties to determine their own fates by settling their cases. Milliot reported the case of a *qadi* in Rabat who boasted that in six years he had rendered only six judgments but had resolved hundreds of matters by arbitrating settlements.⁴⁹² The Islamic judge was not allowed to force a settlement on the parties; rather, the preferred method of resolving cases was to obtain a voluntary agreement by the

485. See *id.* at 189-90.

486. See Tyan, *supra* note 303, at 262-63.

487. See *id.* at 262.

488. See MILLIOT, *supra* note 148, at 728.

489. See *id.*

490. See DAMASKA, *supra* note 342, at 202.

491. See *id.* at 203.

492. See MILLIOT, *supra* note 148, at 731.

parties.⁴⁹³ In the activist state of the *ancien régime* in France, on the other hand, civil litigants were not allowed free reign to settle their cases.⁴⁹⁴

On an institutional level, individual autonomy was promoted in Islam in the form of guilds. According to Damaska, a reactive government promotes not only individuals but also independent associations.⁴⁹⁵ Such associations were promoted in the twelfth century in England in the Inns of Court.⁴⁹⁶ In Islam, the same phenomenon existed in the *madrasas*, which were the precursors of the English Inns of Court.⁴⁹⁷ In contrast, an activist government dismantles or "swallows" voluntary civic associations because they weaken commitment to state goals.⁴⁹⁸

C. *The Structure of Islamic Law*

The structure of Islamic law as a legal system shared many characteristics of the coordinate ideal with the common law structure. These points are discussed below along with the opposing characteristics of the hierarchical ideal of the civil law system.

1. Untrained and Transitory Decisionmakers

This feature of the coordinate ideal was found in the jury of the common law and the *lafif* of Islamic law, both of which are discussed fully in Part III above. These decisionmakers stood in sharp contrast to the class of professionalized permanent officials subject to hierarchical authority in the civil law system.⁴⁹⁹

2. Overlap in Testimonial and Adjudicative Tasks

Maitland tried to distinguish jurors as judges of fact from witnesses,⁵⁰⁰ observing that although the jurors of old were called witnesses, they were not eyewitnesses.⁵⁰¹ In actuality, though, these jurors could be eyewitnesses. They had to have knowledge that could

493. See 1 MILLIOT, *supra* note 296, at 186-96.

494. See DAMASKA, *supra* note 342, at 110 & n.16.

495. See *id.* at 74-75.

496. For a source discussing the early history of the Inns of Court, see generally S.E. THORNE, *ESSAYS IN ENGLISH LEGAL HISTORY* 137-54 (1985).

497. See GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* 309-17, 350 (1981); Makdisi, *Origins of the Inns of Court*, *supra* note 10, at 12.

498. See DAMASKA, *supra* note 342, at 80-81.

499. See *id.* at 17.

500. See 2 POLLOCK & MAITLAND, *supra* note 15, at 622.

501. See 2 *id.* at 628.

be obtained through direct observation (that is, seeing or hearing) or indirectly through hearsay.⁵⁰² The common law jurors were both witnesses and judges of fact. Likewise, in Islam the *lafif* was composed of witnesses (s. *shahid*). Testimony (*shahada*) by a witness was a truthful affirmation from one's direct perception, from signs or traces that accompanied or followed the fact, from common knowledge reported in the community, or from hearsay.⁵⁰³ The *lafif* jurors were also judges of fact because their testimony was binding on the judge.⁵⁰⁴ Contrary to the overlap of testimonial and adjudicative tasks that occurred with the common law jury and the Islamic *lafif*, these tasks were separated in the hierarchical church courts even in the twelfth century.⁵⁰⁵

3. Judge as Moderator, Supervisor, Announcer, and Enforcer—not Adjudicator

According to Mawerdi, the functions of the *qadi* included the investigation and selection of witnesses, the assurance of a fair application of justice, the pronouncement of judgment to resolve differences between parties, the enforcement of parties' obligations, and the application of legal penalties.⁵⁰⁶ In performing these functions, however, the judge had to abide by the proof established by oath or by witnesses.⁵⁰⁷ The Islamic judge was not an adjudicator in the real sense of that term since he was bound by the findings of fact of a *lafif* in the same way that the common law judge was bound by the findings of fact of a jury.

4. No Appeal

Maitland affirmed that there was no system of appeal in the common law until the nineteenth century.⁵⁰⁸ In the twelfth century, there was a system of appeal in the hierarchical system of the canon law from archdeacon to bishop to archbishop to pope, but this system was not adopted by the king's courts.⁵⁰⁹ There were two remedies for

502. See VAN CAENEGEM, *supra* note 1, at 89-91.

503. See MILLIOT, *supra* note 148, at 733, 735-36.

504. See *id.* at 737.

505. See DAMASKA, *supra* note 342, at 30.

506. See MAWERDI, *supra* note 163, at 143-46.

507. See *id.* at 143, 145.

508. See 2 POLLOCK & MAITLAND, *supra* note 15, at 664 (observing that a means of appeal did not become readily available until after the merger of common law and equity in 1875); see also DAMASKA, *supra* note 342, at 43-44 (noting the dramatic swing in the direction of hierarchical bureaucratization at this time).

509. See 2 POLLOCK & MAITLAND, *supra* note 15, at 664.

bad verdicts: a verdict could be reversed through the process of attain, or a new trial could be awarded through the certificate of assize.⁵¹⁰ The former was a trial of a false verdict by a grand jury of twenty-four, and the latter was a retrial by the jury that gave the first verdict.⁵¹¹ A writ of error was also available to correct a mistake of law.⁵¹² The justices of the assize could be amerced for their errors and their errors corrected, but this procedure was concerned only with error of law and not with error of fact.⁵¹³ A coordinate system such as this contrasts with a hierarchical system wherein review is not only regular but also comprehensive as to fact, law, and logic.⁵¹⁴ The focus in a hierarchical organization is on quality control by superiors.⁵¹⁵

Islamic law also had no system of appeal. Shapiro explained this absence by the fact that the judges were insulated from the central political authorities and that there was no central religious hierarchy.⁵¹⁶ The lack of an appeals process did not mean that judicial decisions were unreviewable. The decision of a *qadi* could be reformed for error of law as was done in the common law system.⁵¹⁷ This reversal could be accomplished by the issuing judge, a second judge who was a contemporary of the issuing judge, or a successor judge.⁵¹⁸ In no case, however, could a decision be reformed for error of fact as is done in the hierarchical ideal described by Damaska,⁵¹⁹

510. See 3 WILLIAM BLACKSTONE, COMMENTARIES *389-90, *402-05; 2 POLLOCK & MAITLAND, *supra* note 15, at 665.

511. See 3 WILLIAM BLACKSTONE, COMMENTARIES *389, *404. The attain procedure appears to have been a royal favor that was purchased. See 2 POLLOCK & MAITLAND, *supra* note 15, at 665 n.1. Sutherland stated that in the certification process, a court other than the original court could reexamine the verdict, at which time both parties could put forward new arguments and evidence that had not been presented at the original hearing. See SUTHERLAND, *supra* note 110, at 75. The court could examine the law and procedure applied by the justices of the assize, "a business which might result in a reversal of the verdict under new and different coaching, and consequently bring a reversal of judgment." *Id.*

512. See 3 WILLIAM BLACKSTONE, COMMENTARIES *407. This procedure became available in the late thirteenth century. See SUTHERLAND, *supra* note 110, at 75. It did not issue as of right, however, until the eighteenth century. See DAMASKA, *supra* note 342, at 60 n.22.

513. See 3 WILLIAM BLACKSTONE, COMMENTARIES *407; 2 POLLOCK & MAITLAND, *supra* note 15, at 668-69.

514. See DAMASKA, *supra* note 342, at 48-49.

515. See *id.* at 49.

516. See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 221 (1981).

517. See LE LIVRE DES MAGISTRATURES D'EL WANCHERISI, *supra* note 164, at 87-90.

518. See David S. Powers, *On Judicial Review in Islamic Law*, 26 L. & SOC'Y REV. 315, 320-24 (1992).

519. See DAMASKA, *supra* note 342, at 183.

nor could the review be performed by a higher court constituted as an appellate court. Islamic judicial procedure did not offer the opportunity for serving the political purposes of a central hierarchical regime; it was coordinate in structure.

5. Dissent

Dissenting opinions were a strong feature of the common law with opinions delivered seriatim by the judges of England from at least the date of the yearbooks that showed whether the judges were unanimous or divided.⁵²⁰ Justice Brennan eloquently defended the practice of issuing dissents when he declared that judges have a duty to explain their decisions and that dissents contribute to the integrity of this process "by directing attention to perceived difficulties with the majority's opinion" and "by contributing to the marketplace of competing ideas."⁵²¹

In Islam, the advocate's training likewise focused on dissent (*khilaf*).⁵²² An advocate studied books on dissent to learn and practice the art of disputation whereby he might create new questions and develop new arguments.⁵²³ The jurisconsult who gave legal opinions was called a *mufti* and was expected and encouraged to base his opinion on his own personal research (*ijtihad*) into the sources.⁵²⁴ Because unanimous agreement or consensus (*ijma'*) following these efforts of *ijtihad* was the only way to determine whether a particular doctrine was orthodox, dissent not only played an important role in the determination of orthodoxy, it was prescribed as an obligation for every jurisconsult who found an opinion to be other than the truth.⁵²⁵

The encouragement of dissent, present in both the common law and Islamic law, was absent in the civil law system. French and German opinions did not report differences of opinion, and, in fact, the judges in both these civil law countries were subject to a duty of secrecy as to these differences.⁵²⁶

520. See Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 190-91 (1959).

521. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 434-35 (1986).

522. See MAKDISI, *supra* note 497, at 112.

523. See *id.*

524. See MAKDISI, *supra* note 12, at 30-31.

525. See Makdisi, *supra* note 447, at 123-24. For an explanation of how *khilaf*-works were used in Islam, see *id.* at 124-26.

526. See ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 1140-41 & n.53 (2d ed. 1977).

6. Day in Court

Legal proceedings in a coordinate system without appeal tend to be short. Trial by jury in the common law was linked to the notion of one's day in court.⁵²⁷ The speed with which the assize of novel disseisin took place was one of the reasons for its success.⁵²⁸ In Islamic law, the legal proceedings in a case took place before the parties and appear to have been relatively short as well.⁵²⁹ In Germany, on the other hand, a discontinuous procedure that rejected the day-in-court idea in favor of a succession of methodological stages produced a serious problem of delay.⁵³⁰

7. Prosecution for Perjury

Jurors in the English grand assize who were perjurers were punished strictly in order to deter such behavior.⁵³¹ They forfeited all their chattels and movable goods (*catalla et res mobiles*), lost their title as "lawful" men entitling them to be witnesses in court, incurred the lasting mark of infamy, and were imprisoned for at least a year.⁵³² Islamic law also punished false testimony.⁵³³ False testimony was a *ta'zir* offense that was punished by *tashhir*, the taking of the offender throughout the city while proclaiming he was not to be trusted.⁵³⁴ Even more severe was the *hadd* penalty for false accusation of unlawful intercourse (*qadhaf*), which subjected the false accuser to eighty lashes.⁵³⁵ This imposition of deterrents against false testimony was characteristic of coordinate officialdom more than of hierarchical authority.⁵³⁶

8. Oral Testimony

Both the common law and Islamic law elicited direct oral testimony as the primary means of establishing proof in legal

527. See DAMASKA, *supra* note 342, at 62.

528. See 2 POLLOCK & MAITLAND, *supra* note 15, at 47-49, 63; SUTHERLAND, *supra* note 110, at 34-35.

529. See MILLIOT, *supra* note 148, at 726 (describing the manner in which a case took place).

530. See VON MEHREN & GORDLEY, *supra* note 526, at 206-08.

531. See VAN CAENEGEM, *supra* note 1, at 91.

532. See GLANVILL, *supra* note 16, at 35-36.

533. See HEDAYA, *supra* note 79, at 372; HOUDAS & MARTEL, *supra* note 296, at 65; MILLIOT, *supra* note 148, at 740.

534. See LIPPMAN ET AL., *supra* note 334, at 70.

535. See SCHACHT, *supra* note 7, at 179.

536. See DAMASKA, *supra* note 342, at 61.

proceedings.⁵³⁷ In the civil law, the succession of stages in a case necessitated reliance on official documentation to ensure integration of a multistage process.⁵³⁸ In Continental law before the nineteenth century, for example, judges based their decisions exclusively on the record that was written by subordinate officials who heard the parties, the witnesses, and the lawyers.⁵³⁹

In both structure and function, Islamic law and the common law demonstrated a remarkable kinship, while the civil law was a stranger to both. The similarity between the first two legal systems in their structure and function confirms the similarities that have been demonstrated above in the particular areas of contract, property, and procedure. One question still remains to be answered. How did Islamic law—and particularly Maliki Islamic law, which dominated the areas of North Africa in the twelfth century—come to influence the England of King Henry II, which was dominated by the Normans in the twelfth century? The answer lies in Sicily, where the Normans had conquered the Muslims just a few short decades earlier.

V. THE OPPORTUNITY FOR TRANSPLANTS THROUGH SICILY⁵⁴⁰

Islamic law is a legal system with varying interpretations of the law in different juristic schools throughout the Islamic world. As indicated above, several characteristics of Islamic law that appeared in the English common law system belonged to the Maliki school of law. This school spread throughout North Africa and Spain during the Middle Ages and remained a stronghold of Islamic doctrine, especially during the twelfth century. In particular, Maliki doctrine flourished in Sicily and the area of North Africa now known as Tunisia—the only areas subject to Maliki law that were conquered by the Normans. As we shall see, the study of Sicily and the neighboring tip of North Africa in conjunction with Norman England in the twelfth century reveals a surprisingly interactive relationship between the two areas that made it possible for Maliki legal doctrines and institutions to make their way north to Norman England at that time.

537. See *id.* at 219; HENRY, *supra* note 27, at 21 (citing 2 POLLOCK & MAITLAND, *supra* note 15, at 604); MILLIOT, *supra* note 148, at 732; SCHACHT, *supra* note 7, at 192-93.

538. See DAMASKA, *supra* note 342, at 50.

539. See RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 392 (4th ed. 1980).

540. This Part develops the historical and geographical connection between Sicily and England expounded in my article entitled *An Inquiry into Islamic Influences During the Formative Period of the Common Law*. See Makdisi, *supra* note 108.

A. *The Maliki School of Law in Islam*

The area of Africa known as Ifriqiyya (now known as Tunisia) and its neighbor Sicily were controlled by the Muslims from the early ninth century until the Normans arrived in the twelfth century.⁵⁴¹ In

541. In the year 800 A.D. (184 H.), Ifriqiyya was granted to Ibrahim I b. al-Aghlab by the 'Abbasid caliph, Harun ar-Rashid, and remained with the Aghlabid dynasty until 909 A.D. (296 H.). See CLIFFORD EDMUND BOSWORTH, *THE ISLAMIC DYNASTIES: A CHRONOLOGICAL AND GENEALOGICAL HANDBOOK* 24-25 (1967). During this time, the religious leaders of the capital city of al-Qayrawan belonged to the Maliki school, and they were so strong that one of the Aghlabid rulers actually moved his residence out of that city to a nearby location. See CARL BROCKELMANN, *HISTORY OF THE ISLAMIC PEOPLES* 156 (Joel Carmichael & Moshe Perlmann trans., 1949). The Aghlabids conquered Sicily from the Byzantines between 827-878 A.D. (217-264 H.). See AZIZ AHMAD, *A HISTORY OF ISLAMIC SICILY* 1-17, 25 (1975); BOSWORTH, *supra*, at 24. In 909, the Fatimids, espousing the Isma'ili Shi'i school of law, overthrew the Aghlabids and occupied Ifriqiyya and Sicily. See BOSWORTH, *supra*, at 46-47. They made their base at al-Mahdiyya, about 60 miles to the southeast of al-Qayrawan, from which they were able to conquer Cairo in 969 A.D. (358 H.). See *id.* at 47.

Except for a short four-year period of Aghlabid rule after an anti-Fatimid uprising in Palermo in 913, the Fatimids ruled Sicily until 947; the Kalbites, a semi-independent dynasty that remained loyal to the Fatimids, ruled until 1044. See AHMAD, *supra*, at 25-28, 30-36. For an account of a naval victory of the Fatimids over the Byzantines allied with the Umayyads in 956-57 off the coast of Sicily and the subsequent arrival of a Byzantine ambassador at al-Qayrawan to demand an armistice from al-Mu'izz in exchange for payment of a tribute (*jizya*), see S.M. STERN, *An Embassy of the Byzantine Emperor to the Fatimid Caliph al-Mu'izz*, *HISTORY AND CULTURE IN THE MEDIEVAL MUSLIM WORLD*, ch. IX at 239-58 (1984). The qadi al-Nu'man ibn Muhammad, an intimate of the Fatimid Caliph al-Mu'izz, wrote around 962-963 that this was the first time that a sovereign of Byzantium ever paid a tax (*kharaj*) or a tribute (*jizya*) to a Muslim ruler. See *id.* at 244-45. The tribute was paid to the civil governor (*'amil*) of Sicily. See *id.*

In 972 (361 H.), al-Mu'izz, the Fatimid caliph, transferred his capital from al-Mahdiyya to Cairo, and he appointed Buluggin b. Ziri governor of Ifriqiyya. See AHMAD, *supra*, at 31; BOSWORTH, *supra*, at 26. This move left both the Kalbites in Sicily and the Zirids in Ifriqiyya with internal independence, although they were still externally dependent on the Fatimids. See AHMAD, *supra*, at 31. The population of Sicily at this time was mostly Muslim in the Val di Mazara on the western side, less so in the Val di Noto to the southeast, and primarily Christian in the Val Demone to the northeast. See *id.* at 37. There was also an increase in the Muslim population through immigration from North Africa so that at one time Sicily may have consisted of half a million Muslims. See *id.* The Zirids eventually moved the capital of Ifriqiyya back to al-Qayrawan. See BOSWORTH, *supra*, at 27. Between 1026 and 1035, a Zirid and Kalbite alliance carried out successful raids together against Byzantine territories. See AHMAD, *supra*, at 33.

The Zirid and Kalbite alliance broke up in 1035 when the Zirid al-Mu'izz tried unsuccessfully to aid a rebellion against the Kalbites. See *id.* In 1041 (433 H.), this same Zirid al-Mu'izz rebelled against the Fatimids and claimed Ifriqiyya once again for the 'Abbasids. See BOSWORTH, *supra*, at 27. The Zirid dynasty lasted for another century, although the Fatimids responded by encouraging bedouins to terrorize their towns and force an evacuation of the capital once again back to al-Mahdiyya. See *id.* In Sicily, the last Kalbite ruler was deposed in 1044. See AHMAD, *supra*, at 36. Three independent Arab emirs divided Sicily: Abd-allah in Mazzara, Ibn-al-Hawas in Castrogiovanni, and Ibn-at-Timnah in Syracuse. See EDMUND CURTIS, *ROGER OF SICILY AND THE*

Ifriqiyya, the Normans, under Roger II, occupied Jerba in 1135 and Tripoli in 1146.⁵⁴² After attempting unsuccessfully to take al-Mahdiyya in 1118 and again in 1123, Roger II finally succeeded in capturing it in 1148.⁵⁴³ In that same year, he also occupied Sus, Sfax, and Gabes.⁵⁴⁴ With the rise of the Almohad dynasty of Islam, the Normans lost Tripoli to the Muslims in 1154 and, following Roger II's death, lost al-Mahdiyya in 1160.⁵⁴⁵ In Sicily, the Norman conquest began in 1061 with the capture of Messina and concluded in 1091 with the capture of Noto.⁵⁴⁶ After this time, the Muslims never regained Sicily.

In Ifriqiyya, Fatimid Muslim rulers in the tenth and early eleventh centuries espoused the Isma'ili school of Islamic law.⁵⁴⁷ After the removal of the Fatimids in the middle of the eleventh century and the return of allegiance to the 'Abbassids, the Maliki school of law regained its authority in the tip of North Africa across the water from Sicily.⁵⁴⁸ It was against what was considered the conservative legalistic position of this school that Ibn-Tumart (d. 524/1130) led the Almohads in protest,⁵⁴⁹ but by this time, the Maliki school had already shaped the mode of Islamic legal thought that the Normans then encountered in the eleventh century. In fact, two contemporary Maliki scholars cited by Milliot⁵⁵⁰ for their work on the *lafif* were from Ifriqiyya. Al-Lakhmi (d. 478/1085) was from al-Qayrawan and lived in Sfax;⁵⁵¹ al-Mazari (d. 536/1141) was born in Mazara in Sicily and lived in al-Mahdiyya.⁵⁵²

In Sicily, the general Muslim population likewise followed the

NORMANS IN LOWER ITALY, 1016-1154, at 63 (1912).

542. See BARBER, *supra* note 113, at 232. Sicilians were encouraged to settle in Tripoli after it was taken. See DONALD MATTHEW, THE NORMAN KINGDOM OF SICILY 59 (1992).

543. See CURTIS, *supra* note 541, at 114-16. In the meantime, before al-Mahdiyya's ultimate capture, Roger II maintained a relationship with the Muslims, putting his own officials there in order to ensure payment for his grain. See MATTHEW, *supra* note 542, at 58.

544. See AHMAD, *supra* note 541, at 57.

545. See BARBER, *supra* note 113, at 236.

546. See *id.* at 225; CURTIS, *supra* note 541, at 63, 70. Palermo, with its 300 mosques, was captured in 1072. See CURTIS, *supra* note 541, at 67.

547. See BOSWORTH, *supra* note 541, at 46-47. The Isma'ili school was a heterodox (*shī'i*) school of Islamic law. See Makdisi, *supra* note 7, at 105.

548. See BROCKELMANN, *supra* note 541, at 206-07.

549. See BOSWORTH, *supra* note 541, at 30.

550. See the Appendix to this Article on the *lafif*.

551. See C. BROCKELMANN, GESCHICHTE DER ARABISCHEN LITTERATUR, Supplementband I, at 661 (1937).

552. See *id.* at 663.

Maliki school of Islamic law, apparently even before the middle of the eleventh century while it was under the rule of Fatimid sympathizers, the Kalbites.⁵⁵³ Some of the more important Maliki jurists in Sicily included Yahya b. ʿUmar (work popular in Sicily, d. 903), Maymun b. ʿAmr (disciple of Sahnun, d. 928), Diʿana b. Muhammad (one of the chief *qadis* of Sicily, d. 909), Abu Jaʿfar Marwazi (made his way to Sicily in 905), Luqman b. Yusuf (served fourteen years in Sicily, d. 930), Abu Muhammad Hasan b. ʿAli (authoritative work on the Maliki law of inheritance), Ibn Yunus (authoritative commentary on *al-Mudawwana*, d. 1059), ʿAbd al-Haqq b. Muhammad Qurashi (critical commentaries on Sahnun), Muhammad b. ʿAli at-Tamimi (renowned scholar of Maliki law and scholastic theology in Mazara who had studied in al-Mahdiyya, d. 1142), Ibn Makki (*qadi* in Sicily who migrated to Tunis), and Abu Bakr Muhammad b. Hasan ar-Rubaʿi (taught Maliki law in Sicily but later left for Ifriqiyya and Egypt, d. 1142).⁵⁵⁴ These and other scholars made Sicily an important center of intellectual activity and, through their travels, a mainstream of Islamic scholarship.⁵⁵⁵

The stage was set in Sicily and Ifriqiyya for a major transplant of ideas from Islam to the West when the Normans conquered these territories. The only factor that remained unknown was whether the West would be open to receive these ideas. Was Roger II, who became the first king of Sicily, a man to welcome or rebuff the culture, the customs, and the institutions of the Muslims?

B. *The Influence of Islam on Roger II in Sicily*

The Muslims, who ruled Sicily for over two hundred years before the arrival of the Normans, were enlightened rulers who had made the island "the centre of an Arab civilisation as splendid as that of Cordova itself."⁵⁵⁶ Fortunately, the advent of the Normans did not destroy this culture; with a genius for adaptation, the Normans integrated it with their own.⁵⁵⁷ The Muslims continued to practice

553. See AHMAD, *supra* note 541, at 37-38. One scholar has stated that the Muslim population of Sicily followed the Hanafi school of law, but this view has little support. See *id.* at 37.

554. See *id.* at 41-45, 76-77.

555. See *id.* at 41. The connections were especially strong with al-Qayrawan where the legal scholar, Asad b. al-Furat, compiled the famous *Asadiyya* and was appointed *qadi* in 818. See *id.* at 42-43.

556. CURTIS, *supra* note 541, at 62.

557. See BERMAN, *supra* note 1, at 414. This characteristic differentiated Sicily from Spain, where the Catholics were much less tolerant and assimilative. See AHMAD, *supra* note 541, at 68. Spain was no doubt a less encouraging environment for transplants of

their religion freely and to be governed by their own judges and laws.⁵⁵⁸ They, in turn, provided a large number of infantry troops as mercenaries.⁵⁵⁹ The genius of Norman administration was to incorporate native elements of government and administration into their own government in order to preserve continuity and identity among the peoples they governed.⁵⁶⁰

In thinking of Norman Sicily, one should keep in mind its close affiliation with Ifriqiyya. The kingdom of Sicily, extending into the boot of Italy and measuring about four-fifths the size of England, was predominantly African and Muslim and maintained close contacts with North Africa.⁵⁶¹ In fact, as noted above, for about twenty years during the Norman rule of Sicily, Roger II even occupied Ifriqiyya across the Mediterranean in North Africa.⁵⁶² Palermo, which became the seat of Roger II's government,⁵⁶³ was a mere 250 miles to the northeast of both al-Qayrawan and al-Mahdiyya, which alternated as the seat of the Muslim government. It was the combined presence of the Muslims in Ifriqiyya and Sicily that influenced the work of Roger II.

Roger II⁵⁶⁴ grew up imbued with Muslim culture. His father,

administrative mechanisms as a result.

558. See CURTIS, *supra* note 541, at 67-68.

559. See *id.* at 94-95.

560. Charles Homer Haskins believed that the Normanization of Sicily was impossible and that the Norman leaders were too wise to attempt it. See CHARLES HOMER HASKINS, *THE NORMANS IN EUROPEAN HISTORY* 225 (W.W. Norton & Co. 1966) (1915). Due in large part to their small numbers, they lost their identity within Sicily, and "there could be no general transplantation of Norman institutions." *Id.* at 224-25.

561. See *id.* at 222-23.

562. See *id.* at 222.

563. Countess Adelaide, Roger I's widow, ruled from 1101 to 1111, during which time Palermo was the seat of the government. See AHMAD, *supra* note 541, at 54-55. The transference from Messina to Palermo was actually made in 1105 when the court took up residence in the old palace of the emirs among a strongly Muslim population that made a lasting impression on Roger II:

The influences that surrounded Roger's boyhood and shaped his whole intellect and character came from the Moslem and Greek secretaries, eunuchs, servants, and officials who filled the court at Messina or Palermo, and the cosmopolitan populace of those cities. He grew up to regard the Greek and the Moslem as his friends, and the Norman feudatories as his enemies.

CURTIS, *supra* note 541, at 101-02. Among other contributions, the Muslims made Palermo preeminent in art and the refinements of life. See *id.* at 400.

564. Roger II was born on December 22, 1095, ruled from 1111 to 1154, and was crowned king at Palermo in 1130. See AHMAD, *supra* note 541, at 55. Curtis described Roger II as tall and stout with a leonine face and a loud, harsh voice. See CURTIS, *supra* note 541, 297-98. He depended more on his keen intellect than on his sword, but he was more feared than beloved. See *id.* at 298. Above all he was known for his justice. See *id.* at 103, 298. He was patient in inquiring into the customs of his peoples and in seeking

Roger I,⁵⁶⁵ had been born of the house of Tancred⁵⁶⁶ and conquered Sicily between 1061 and 1091 after Roger I's brother, Robert Guiscard,⁵⁶⁷ had started the conquest.⁵⁶⁸ Roger I incorporated many Muslims in his armies, and these soldiers were loyal to him. When Anselm, Archbishop of Canterbury, had an occasion to meet Roger in front of the gates of Capua in 1098, he found him accompanied by a large force of Muslim soldiers who declared that they could not turn Christian if they wished because they would be punished severely by Roger I for abandoning their religion.⁵⁶⁹ But Roger I's interest was far from that of a mere aggressor. He was more concerned with commerce and the corn trade with Ifriqiyya when he rejected the request of King Baldwin of Jerusalem that he join in the conquest of Muslim Africa.⁵⁷⁰ Roger I brought Sicily with its predominantly

counsel, and he was particularly adept in the art of government. *See id.* at 298-99.

565. Curtis described Roger I as

the Benjamin of the house of Hauteville; of a genius somewhat unlike that of [his brother] Robert, less far-reaching, of a more solid and perhaps constructive kind; with less of the knight-errant in him and more of the organiser, yet in his own way and on a smaller field he proved himself little less great than Guiscard. He is described by Malaterra as being of extreme beauty, of lofty stature, of graceful shape, eloquent in speech and cool in counsel, far-seeing in laying his plans, affable and open-hearted, strong of arm and a gallant fighter.

CURTIS, *supra* note 541, at 57.

566. Tancred, the father of Roger I, was born in the latter half of the tenth century, two generations after his Norse ancestors had sailed with Rollo up the Seine and established the duchy of Normandy. *See id.* at 39.

567. Curtis described Robert Guiscard as "the Joseph of the sons of Tancred," *id.* at 47, and from the words of the historian Anna Comnena as

a man of obscure fortune, desirous of dominion, crafty, strong-handed, greedy of others' possessions, most tenacious in following his object, and not to be thwarted by any means from the end he aimed at. In stature he dominated all men, his skin was ruddy, his hair blonde, his shoulders wide, his eyes a dead blue like the sea. His bearing was pleasant and polished; altogether from head to foot a most comely man; his voice like that of Achilles sounded like the noise of a great army.

Id. at 82.

568. *See AHMAD, supra* note 541, at 53; CURTIS, *supra* note 541, at 57; MATTHEW, *supra* note 542, at 17.

569. *See CURTIS, supra* note 541, at 95; *see also AHMAD, supra* note 541, at 68 (observing that Roger I forbade Catholic priests to convert his Muslim troops). On the other hand, Roger made an issue over one of his people having a leaning to be a Muslim, for which the man was burned at the stake. Interestingly, the Arabs hinted this occurred because Roger was also a secret Muslim. *See CURTIS, supra* note 541, at 259-61; *see also AHMAD, supra* note 541, at 58 (mentioning rumors among Roger's Muslim and Christian subjects about his being Muslim).

570. According to Curtis, Roger's reply to Baldwin was as follows:

If the other Franks should come here, I should have to supply them with armies, and ships for crossing. If they conquered the land and remained there, they would get the trade in the necessities of life out of Sicilian hands into theirs;

Muslim culture back into the mainstream of European politics just as his son was growing up.⁵⁷¹ He died on June 22, 1101, at the age of seventy and was buried at Mileto, a town on the Calabrian coast near Reggio.⁵⁷²

Continuing in the steps of his father, Roger II maintained an intimate relationship with his Muslim subjects, delighting in the company of Muslim poets and scholars.⁵⁷³ His court resembled that of a Fatimite caliph with its harem and eunuchs.⁵⁷⁴ As Ahmad has noted, Roger's court was dominated by Arab influence in many ways: Roger assumed the Arabic title *al-Mu'tazz bi-llah*—a title that appeared on his coinage and inscriptions; the Fatimid coin remained in use and its Norman counterpart was minted with a similar shape and with the same intrinsic value; his documents and decrees were written as often in Arabic as in Greek or Latin; Arabic documents that he did not sign bore his *'alama* (a distinguishing mark based on a Qur'anic verse) in Arabic—the same as other Muslim rulers; he wore the mantle of an oriental emir; his physicians and geographer were Arab; his court officials duplicated in many respects those of an Arab court; and the whole tenor of his life appears to have been oriental rather than western.⁵⁷⁵ Like his father, Roger II depended for his

and I should lose the receipts from the corn trade to them. Suppose their enterprise failed; they must return here; I should then have to expect hostile attacks in return; and trade and friendship between us and Africa would cease. Better to wait until we ourselves are strong enough to conquer Africa.

CURTIS, *supra* note 541, at 96.

571. See AHMAD, *supra* note 541, at 54.

572. See CURTIS, *supra* note 541, at 100. After Roger I's death, his Italian wife, the Countess Adelaide, became regent. Roger II's elder brother Simon died in 1103, making Roger II heir to his father's dominion. In 1113, Adelaide arranged to marry King Baldwin I of Jerusalem. See BARBER, *supra* note 113, at 227.

573. See CURTIS, *supra* note 541, at 309-19. Curtis stated:

Some fragments remain of the odes with which Arab poets eulogised the King, his sons, and his splendour, pitched in the note of Oriental imagery; it is not recorded whether Roger, like his son and grandson, understood Arabic, but it may be assumed that he was able to listen with pleasure to these courtier poets.

Id. at 310-11. A close friend of the King was the famous Arab geographer Idrisi, who wrote *The Book of Roger*, which described, among many other things, the world as being round. See *id.* at 314. This book was published in 1154, the year of the King's death. See *id.* at 313. Idrisi was born at Ceuta and studied at Cordova before he came to Roger's court around 1140. See *id.* at 311-12.

574. See HASKINS, *supra* note 560, at 230. Roger used the gala umbrella of the Fatimite caliphs when he went forth on religious ceremonies. See CURTIS, *supra* note 541, at 309.

575. See AHMAD, *supra* note 541, at 63-66, 75. Haskins described Roger's court as seen through the eyes of a Spanish traveler as follows:

Here, amid his harem and his eunuchs, the officers of his court and his retinue of Mohammedan servants, the king lived much after the manner of an Oriental

army on Muslim soldiers to a significant extent,⁵⁷⁶ and Muslims enjoyed full freedom of religion and the preservation of their local rights and customs.⁵⁷⁷

Roger II was adept at incorporating many Islamic elements into the government of Sicily, including the bureaucracy and fiscal arrangements established by the Muslims.⁵⁷⁸ A branch of the *curia*, known by the Arabic term *diwan*, acted as a central financial body for the kingdom.⁵⁷⁹ The registers used by the *curia* were known by the Arabic term *daftars*, and its officers and clerks were mostly Muslim.⁵⁸⁰

potentate. On state occasions he donned the purple and gold of the Greek emperors or the sumptuous vestments of red samite, embroidered with golden tigers and camels and Arabic invocations to the Christian Redeemer, which are still preserved among the treasures of the Holy Roman Empire at Vienna. And when, on festivals, he entered the palace chapel, Latin in its ground-plan, Greek and Arabic in its ornamentation, the atmosphere was likewise Oriental, . . . all executed with the fullest brilliancy of which mosaics are capable, while the stalactite ceiling, "dripping with all the elaborate richness of Saracen art," seems "to re-create some forgotten vision of the *Arabian Nights*."

HASKINS, *supra* note 560, at 243-44 (quoting the description of a traveler).

576. See HASKINS, *supra* note 560, at 231. The army of Roger II consisted mostly of Muslim infantry and horse-archers with the Muslim commanders forming a native aristocracy called *jund*. See CURTIS, *supra* note 541, at 308. Muslim engineers were highly valued for their war machines, such as movable towers and crossbows. See *id.*

577. See HASKINS, *supra* note 560, at 225.

578. See CURTIS, *supra* note 541, at 333-75, 418-25; HASKINS, *supra* note 560, at 223-35.

579. The *diwan*—the Arabic word for government or authority—was a governmental office that dealt with the management of the royal possessions through collecting descriptions of estate boundaries, maintaining lists of royal serfs, and keeping accountbooks. See MATTHEW, *supra* note 542, at 219. According to Matthew, when the term *diwan* first appeared in 1145, it translated the Latin *curia*, which, at the time, was used to describe "the persons about the king (the court), but also royal interests themselves, the fisc or state property." *Id.* at 220.

580. See *id.* at 219-23. Matthew discusses a document that was used to define land boundaries and then recorded in the boundary registers (*daftars*):

[A]n important document of December 1149 was issued in connection with a grant of property by the king to the monastery of Curcuro (near Palermo), and this is the only official document written entirely in Arabic to survive from the reign of Roger II. It was authorised by the caids Barrun [Thomas Brown?] and Otman (both Muslims), acting on a royal order granted in April which defined the size of the donation in land and villeins from the royal estate of Rahl al Wazzan. It was the caids' duty to send instructions for the holding of an inquest at Iato in order to mark out the bounds of the plot given to the monks. The determination of the jurors was recorded in writing, a copy was assigned to the monks as a title deed, and (here we have it for the first time) the bounds were also entered into the *daftars* or boundary registers kept in the office. All this executive action necessarily involved an understanding of Arabic witnesses, and competent staff in the relevant office to deal with it. The final document was issued with the 'alamas' of the two caids and the office motto of authentication.

Id. at 220. The Islamic element in this legal action is evident. Also evident is the similarity with the assize of novel disseisin which appeared later in England and apparently was used

A recent study by Hiroshi Takayama has concluded that the *duana de secretis*, otherwise known in Arabic as the *diwan at-tahqiq al-ma'mur*, was developed from an Arabic tradition of registers of land and villeins.⁵⁸¹ This system of registers gave the king a uniquely stable control of lands and inhabitants.⁵⁸²

The development of the office of the *diwan* was linked with George of Antioch.⁵⁸³ George of Antioch, who was a famous admiral⁵⁸⁴ during the reign of Roger II, had direct connections with the Islamic world. Before enlisting with Roger II in Sicily in 1112, George had served Temim, the Zirid prince of al-Mahdia, by whom he was charged with the administration of finances and under whom he became familiar with the seaports and the internal weaknesses of the Muslim states.⁵⁸⁵ George quickly rose in the favor of the king when he showed a genius for military and naval command, and he spent several years conquering the Muslims of North Africa in a naval department, the concept of which appears to have been borrowed wholesale from Islam.⁵⁸⁶

to record transfers in its early years. See SUTHERLAND, *supra* note 110, at 45 n.4 (describing the trouble judges had with the many cases in which the parties were willing to compromise or the defendant was willing to concede). We may have a case here that bridged the gap between the Islamic *istihqaq* and the English assize of novel disseisin.

581. See HIROSHI TAKAYAMA, *THE ADMINISTRATION OF THE NORMAN KINGDOM OF SICILY* 135 (1993). According to Takayama, "[t]he *duana de secretis* was an office in charge of special duties concerning land: it supervised all boundaries, royal domains, fiefs, and inhabitants in Sicily and Calabria; it always recorded their conditions in the registers of land (*dafatir*) to guard the lands and inhabitants of the kingdom." *Id.*

582. See *id.* at 164-65. For references to earlier studies that show the Muslim element to be more prominent than the Greek in the financial administration of Sicily, but which differ as to the specific nature of this element, see AHMAD, *supra* note 541, at 66. For descriptions of other institutions in Roger II's government, see HASKINS, *supra* note 560, at 227-29. Haskins discussed the specialized training and competence of the logothetes and emirs in the Sicilian *curia* that helped wrest power from the feudal baronage, the complicated nature of the chancery, the use of writs promoting administrative efficiency, and the professional class of royal justices. See *id.* Work such as that of Takayama on the *diwan* has helped to establish the Islamic origins of some of Roger's institutions, but there is still much work yet to be done to understand the true extent of Islamic influence during his reign.

583. See MATTHEW, *supra* note 542, at 222. Matthew assumes that George—one of the most powerful officials of Roger II's court—was in charge of the *diwan* based on evidence of a grant of land to a monastery signed by George that exhibits knowledge of the procedures used in the *diwan*. See *id.*

584. The term admiral comes from *amir* (sometimes written *emir*) in Arabic and means commander or sea-captain. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 28 (1993).

585. See CURTIS, *supra* note 541, at 113-14, 256-57; see also MATTHEW, *supra* note 542, at 211-12 (providing further information on George's background).

586. See CURTIS, *supra* note 541, at 244-54 (describing the close relationship of George's office with that of the king, the tribute of hostility and fear paid to George by

In addition to the Islamic influence seen in the financial and naval administrations of Sicily, there is also evidence that the judicial administration of the country was structured along Islamic lines. The greater towns appointed judges, but the judge was assisted by a jury of *boni homines* who were often influential Muslims of the vicinity.⁵⁸⁷ The judges decided property cases, witnessed sales and gifts, and disposed of small civil cases among the Christians in the same way as the *qadis* in Sicily⁵⁸⁸ continued to do for the Muslims.⁵⁸⁹

The king's writing office also became a power in the land.⁵⁹⁰ It was developed in the 1140s during which time Roger II issued an edict requiring the confirmation of old privileges in writing. This office employed many notaries and instituted better office organization. Matthew stated that "[t]he review looks like an attempt by those experienced in established administrative traditions to scrutinise privileges issued in less punctilious times by less professional scribes."⁵⁹¹ Who were the experienced scribes who performed this function if not the Muslim scribes whose notarial practice was well-known to be highly sophisticated?⁵⁹²

The influence of Islam on Roger II was significant in all aspects of his reign. His acceptance and adaptation of Islam for the needs of

Arab writers, the merciful treatment of Muslim inhabitants who were taken prisoner, the reestablishment of conquered towns under Muslim *qadis* and their rule of law as long as a poll tax (*jizya*) was paid to the king, and the general reputation for toleration at home and abroad that Roger II received due to the actions of his commander).

587. See *id.* at 347.

588. Palermo is an example of a town that had its own *qadis*, one of whom gave evidence in court in 1123 of an Arabic deed of sale. See MATTHEW, *supra* note 542, at 91-92.

589. See CURTIS, *supra* note 541, at 347. It would not be surprising if future research discovered that the *boni homines* who assisted the Christian judge were a replica of the *lafif* who assisted the Muslim judge. Haskins stated that some writers had assumed that the Sicilian jury was a direct importation from Normandy. See HASKINS, *supra* note 239, at 232. He found the information too scanty from which to draw any firm conclusions, see *id.*, but he did not think that "the recognition in the Norman kingdom of Sicily was anything more than an occasional expedient for the assistance of the fisc or of some favored church," *id.* at 234. Nevertheless, he found that "[t]he testimony of neighbors . . . was particularly valued in determining boundaries, which were regularly fixed by their evidence," that the Muslims served regularly with the Christians in this capacity, that they took a collective oath as to the term of the possession, and that a collective verdict could be confirmed by a party oath of 12 jurors. *Id.* at 233. These characteristics of the Sicilian jury resemble those of the jury of the English assize of novel disseisin as well as those of the *lafif* of the Islamic *istihqaq*.

590. See MATTHEW, *supra* note 542, at 211.

591. *Id.*

592. For a description of the Islamic notarial practice, see EMILE TYAN, *LE NOTARIAT ET LE REGIME DE LA PREUVE PAR ECRIT DANS LA PRATIQUE DU DROIT MUSULMAN* (2d ed. 1959)

his kingdom in Sicily provided a major opportunity for transplants to the West. "Nowhere else," Haskins remarked, "did Latin, Greek, and Arabic civilization live side by side in peace and toleration, and nowhere else was the spirit of the renaissance more clearly expressed in the policy of the rulers."⁵⁹³ Now came the opportune moment for the Norman King Henry II—whose reign began in England in the same year that the Norman King Roger II died in Sicily—to expand the influence of Islam from Sicily to England.

C. *The Influence of Sicily on Henry II of England*

England and Sicily were the only two states in the twelfth century that had Norman kings, and the Normans had a strong sense of nationality⁵⁹⁴ that can be seen in their common institutions. In particular, the reigns of King Roger II from 1130 to 1154 in Sicily and of King Henry II from 1154 to 1189 in England shared many features. Historians have often remarked on the similarity between these two states in the treasuries that administered taxation and finance, the high courts that administered justice, and the chanceries that directed and coordinated the work of the other departments.⁵⁹⁵

As Henry II's reign followed that of Roger II, he had the opportunity to learn much from the Sicilian king. Henry was an energetic man, known for his physical exploits and endurance, with a hunger for power and wealth that was tempered by his great interest in law.⁵⁹⁶ Charles Homer Haskins described him as brilliant and strong but intensely human, "[h]eavy, bull-necked, sensual, with a square jaw, freckled face, reddish hair, and fiery eyes that blazed in sudden paroxysms of anger."⁵⁹⁷ This man would have been drawn irresistibly to learn and appropriate the administrative mechanisms by which Roger II achieved his power, wealth, and success, even if he had had difficulty in seeking out this knowledge. There was no obstacle, however, to his learning the minute details of the

593. HASKINS, *supra* note 560, at 235; see also CURTIS, *supra* note 541, at 93 ("[Roger II] was faced by the fact that Sicily was a meeting place of races, civilisations, and tongues. On this fact he built a system of government in which power was based on the toleration of free intermingling of elements which could not be combined by force.").

594. See BERMAN, *supra* note 1, at 435.

595. See, e.g., *id.* at 442-44; Charles H. Haskins, *England and Sicily in the Twelfth Century*, 26 ENG. HIST. REV. 641, 643, 650-51, 664 (1911) (discussing the justiciarship); Haskins, *supra*, at 655-56 & n.195, 661-65 (noting the influence of the feudal registers of Sicily, which in at least one expressed view were of Arabic origin, on the military policy of Henry II); Haskins, *supra*, at 446-47 (discussing the chancery).

596. See BERMAN, *supra* note 1, at 438-39.

597. HASKINS, *supra* note 560, at 92.

administration of his Sicilian predecessor since the road to and from Sicily was well traveled.

The journey between Rome and Canterbury was normally seven weeks,⁵⁹⁸ and, even before Henry's and Roger's time, there was a steady flow of traffic between Normandy and Sicily.⁵⁹⁹ When the crusaders arrived, Sicily played a key role in the traffic between northern Europe and the Holy Land with its shipbuilding industry and its command of a sea-crossing passing through the straits of Messina.⁶⁰⁰ The growth of trade was spectacular in the twelfth century,⁶⁰¹ and Sicily served as a place of exchange for such items as cloth from Europe and spices and fabrics from Islamic lands.⁶⁰²

While Italian merchants were particularly adept at trade,⁶⁰³ Roger II was proficient in collecting taxes.⁶⁰⁴ Haskins noted that "[t]he income from Palermo alone was said to be greater than that which the king of England derived from his whole kingdom."⁶⁰⁵ This fact alone would have been enough to draw the attention of King Henry II in England to Sicily when he sought out ideas for improvement of his own kingdom.

598. CHARLES HOMER HASKINS, *STUDIES IN MEDIAEVAL CULTURE* 101 (1929). Urgent news could make it in four weeks. *See id.*

599. *See* AHMAD, *supra* note 541, at 69. In addition to human traffic, there was also a free flow of ideas from Islam to the West through Sicily and Italy, including translations of medical works from Arabic. *See id.* at 88-89. Even the Arabic language had an impact on the Sicilian dialect of Italian with the borrowing of about two hundred Arabic words pertaining to rural objects, urban industry, clothing, diet, and law and order. *See id.* at 92-93. For works on words of Arabic derivation occurring in European languages, see JEAN SAUVAGET, *INTRODUCTION TO THE HISTORY OF THE MUSLIM EAST: A BIBLIOGRAPHICAL GUIDE* 231 (2d ed. 1965).

600. *See* CURTIS, *supra* note 541, at 215-16; MATTHEW, *supra* note 542, at 75-76, 123.

601. *See* BARBER, *supra* note 113, at 61.

602. *See* HASKINS, *supra* note 560, at 232. The taste for eastern goods developed quickly in the west, *see* BARBER, *supra* note 113, at 64, but exotic food, silk, and dyestuffs were not the only products received from Islamic lands. Although paper was invented in China, the Arabs recognized its importance as an alternative to Egyptian papyrus. The first paper mill in Baghdad was built by the Arabs in 800, and paper was used in composing a document by the Normans in Sicily as early as 1090. From Sicily and Spain the use of paper then spread to western Europe. *See* W. MONTGOMERY WATT, *THE INFLUENCE OF ISLAM ON MEDIEVAL EUROPE* 25 (1972). For discussions regarding the influences of Muslim culture on Europe, *see* SAUVAGET, *supra* note 599, at 228-31.

603. *See* BARBER, *supra* note 113, at 61-62, 65; CURTIS, *supra* note 541, at 140-41. The Italians were predominant in the west in transportation and commercial techniques. *See* BARBER, *supra* note 113, at 72-74. Barber identified the *commenda* as one of the most precocious developments in the techniques of credit, *see id.* at 75, which, as Abraham Udovitch has suggested, probably originated from Islam, *see* UDOVITCH, *supra* note 14, at 171-72 & n.4 (1970).

604. *See* HASKINS, *supra* note 560, at 232-33.

605. *Id.* at 233. Roger II's wealth derived from agriculture and manufacturing, in addition to trade. *See id.* at 231-32.

Ties between the two kingdoms were also strengthened by a continuous interchange of administrative personnel, beginning in the reign of Roger II.⁶⁰⁶ As I have noted on a previous occasion, many officials made both England and Sicily their homes.⁶⁰⁷ Roger II's chancellor was Robert of Selby, an Englishman.⁶⁰⁸ Peter of Blois was a tutor of King William II of Sicily⁶⁰⁹ and a friend of King Henry II.⁶¹⁰ The relationship between these two kings was cemented further by the marriage of William to Henry's youngest daughter Joanna in 1177. It is speculated that the artists of the Winchester Bible may have gone to Sicily with Joanna and taken part in designing the mosaics of Monreale, a church that is considered one of the wonders of Sicily with 7600 square meters of mosaic decoration on its walls.⁶¹¹ Most striking of all, however, was the "ever-ready source of information" King Henry had in his special advisor, Master Thomas Brown.⁶¹²

Thomas Brown was born in England around 1120.⁶¹³ He first appeared in Sicily about 1137 and was likely the protégé of the chancellor Robert of Selby, who also came from England. In 1149, he appeared as Kaid Brun⁶¹⁴ in the *diwan*, the fiscal department of the Sicilian government, which took its origin from Muslim antecedents and retained its Muslim character and operation. The *diwan* kept records of boundaries, bought and sold land, recovered the king's

606. See Makdisi, *Origins of the Inns of Court*, *supra* note 10, at 14.

607. See Makdisi, *supra* note 108, at 144-45. According to Matthew, "[i]t is possible that the death of Henry I in England in December 1135 released several able men, and Roger's attractions for men of the Anglo-Norman realm would be understandable." MATTHEW, *supra* note 542, at 210. For accounts of English scholars who visited Sicily, see HASKINS, *supra* note 560, at 237-38; MATTHEW, *supra* note 542, at 116; and C.H. Haskins, *England and Sicily in the Twelfth Century*, 26 ENG. HIST. REV. 433, 435 (1911).

608. See HASKINS, *supra* note 560, at 229; MATTHEW, *supra* note 542, at 210.

609. King William II ruled Sicily from 1166 to 1189. William Stubbs has stated that William the Good was connected by blood very closely with the Beaumonts of Leicester and Warwick, a family which supplied Henry II with several ministers in his early years. . . . As his health failed he made a will, by which he left to Henry not only all the provisions collected for the expedition [Crusade], but a vast treasure besides, going moreover so far as to offer the succession to his crown to him or one of his sons [which proposal Henry declined].

WILLIAM STUBBS, HISTORICAL INTRODUCTIONS TO THE ROLLS SERIES 194-95 (A. Hassall ed., 1968) (footnotes omitted).

610. See STUBBS, *supra* note 609, at 194.

611. See MATTHEW, *supra* note 542, at 197-98, 205-06.

612. Haskins, *supra* note 607, at 438.

613. The information in this paragraph on Thomas Brown and the *diwan* is given in *id.* at 438-43, 652-53. For a further discussion of the importance of Thomas Brown as a confidant of both Roger II and Henry II, see CURTIS, *supra* note 541, at 269-70.

614. *Kaid* is the Arabic term for a leader.

property, enforced payments due him, and held court to determine boundaries and decide disputes. Brown was an important and trusted officer of the royal administration in this bureau. It appears that Brown was forced to flee Sicily for his life when King William I came to power in 1154. By 1158, Brown had arrived in England on the personal invitation of Henry II, and there he remained until his death in 1180. He obtained a position of considerable importance, enjoying a high degree of personal and official confidence from the king. He had a seat at the exchequer and kept a third roll as a check on the rolls of the treasurer and chancellor.

For King Henry II, who had a keen appreciation for new administrative devices that would bring him power and wealth,⁶¹⁵ Thomas Brown must have been an invaluable source of information. He could open the door to understanding the inner workings of the most powerful and wealthy government in Europe—the Sicily of Roger II.⁶¹⁶ The area of government that Thomas Brown knew best was the Islamic Sicilian bureau, which recovered land for the king of Sicily. What a surprise it must have been for Henry to discover that the secret to Roger's administrative prowess was Islamic in origin. As Haskins remarked, however, "[a] restless experimenter like Henry II was not the man to despise a useful bit of administrative mechanism because it was foreign."⁶¹⁷ Henry II had a rare opportunity to learn firsthand about the *istihqaq*, which was the Islamic procedure for recovery of land, and the *lafif*, which was the Islamic jury used to establish evidence in the procedure of *istihqaq*. Within eight short years after Thomas Brown appeared in England, the English assize of novel disseisin was decreed and the English jury in its modern form made its appearance.⁶¹⁸ King Henry II was the right person at the right time to seize the opportunity for transplants that revolutionized the world with the creation of the common law.

615. See HASKINS, *supra* note 560, at 93.

616. Charles Homer Haskins ventured to call Roger's kingdom the first modern state: Its kings legislated at a time when lawmaking was rare; they had a large income in money when other sovereigns lived from feudal dues and the produce of their domains; they had a well-established bureaucracy when elsewhere both central and local government had been completely feudalized; they had a splendid capital when other courts were still ambulatory. Its only rival in these respects, the Anglo-Norman kingdom of the north, was inferior in financial resources and had made far less advance in the development of the class of trained officials through whom the progress of European administration was to be realized.

Id. at 233.

617. Haskins, *supra* note 607, at 434.

618. It is estimated that the assize was enacted sometime between 1155 and 1166. See SUTHERLAND, *supra* note 110, at 2-3.

CONCLUSION

Until now, historical research has focused almost exclusively on Roman, Germanic, Anglo-Saxon, and other European legal systems as potential origins for the revolutionary changes introduced by King Henry II to English law in the twelfth century. Yet, despite hashing and rehashing the modes by which transplants could have taken place between these legal systems and English law, historians have had to admit that the fit is just not there. Consequently, some have suggested that King Henry II's great contribution in the assize of novel disseisin was really the product of original thinking through many wakeful nights.⁶¹⁹

This Article has proposed a wider sweep in the search for origins. The Islamic legal system was far superior to the primitive legal system of England before the birth of the common law. It was natural for the more primitive system to look to the more sophisticated one as it developed three institutions that played a major role in creating the common law. The action of debt, the assize of novel disseisin, and trial by jury introduced mechanisms for a more rational, sophisticated legal process that existed only in Islamic law at that time. Furthermore, the study of the characteristics of the function and structure of Islamic law demonstrates its remarkable kinship with the common law in contrast to the civil law. Finally, one cannot forget the opportunity for the transplant of these mechanisms from Islam through Sicily to Norman England in the twelfth century. Motive, method, and opportunity existed for King Henry II to adopt an Islamic approach to legal and administrative procedures. While it does not require a tremendous stretch of the imagination to envision the Islamic origins of the common law, it does require a willingness to revise traditional historical notions.

This Article barely has begun to explore the wealth of material that needs to be studied to establish the true nature of the transplants between Islam and England that established the foundations of the common law. It is a starting point from which I hope future scholars will venture to establish greater understanding of how the common law system was born and evolved.

APPENDIX: THE *Lafif*

The following two passages have been translated from the French to permit a more thorough understanding of the Islamic

619. See *supra* note 122.

institution in Sicily and North Africa that preceded the establishment of the jury in England in the twelfth century. Citations and footnotes have been omitted, and dates of death are provided according to the Islamic and western calendars.

1 LOUIS MILLIOT, RECUEIL DE JURISPRUDENCE CHERIFIENNE, 116-24 (1920) (footnotes and internal citation omitted):

Proof by *lafif* witnesses (*shahada* or *bayyinat al-lafif*), unknown in Algerian and Tunisian practice, has been revealed, one could say, by Moroccan practice. Thus, it is still very little studied. The nature of the institution is poorly indicated by the different translations that have been given of the expression *lafif*. Amar seems to confuse the *lafif* with the common report. Elsewhere, it is true, he compares it more exactly with the proof by turbe of ancient law in criminal matters and translates the expression *rism al-lafif* as "document of notoriety." This is similarly the version adopted by Houdas and Martel. It is, moreover, appropriate to recognize that the etymology of the term *lafif*, derived from the root *laffa* (envelop, roll, gather together, mix), can hardly furnish an indication of the meaning and significance of the institution.

It is not to the classical works: *Moukhtacar* of Khalil [767/1365], *Tohfa* of Ibn 'Asim [829/1426], *Risala* of Ibn Abi Zayd [386/996] and their commentaries, that we should look for information on the proof by *lafif* witnesses. The *lafif* of Moroccan practice is not a very orthodox institution, and the jurisprudence has been able to admit it through the doctrine only at a relatively recent period and at the price of most serious difficulties. "There are, says Al-'Arabi Al-Fasi [988-1052 H.], two sorts of proof by *lafif* witnesses: The first is the testimony of a group of non-*adoul* witnesses, in number sufficient to reach *tawatour*, which is a condition of the knowledge required (*'ilm*). This sort of *lafif* is not a customary institution, and its validity has been recognized by the 'ancient masters' (*moutaqaddimoun*). The second is an innovation of the 'modern masters' (*mouta'khhiroun*) who, in the absence of *adoul* testimony, have been led by necessity to enlarge the primitive institution and create a *lafif* testimony of a new genre, for fear that justice would shut down and that rights would be lost." It is therefore in the works of juridical practice—in the recent works of this category—that one must look for the theory of the *lafif*. The *Mi'yar* of Al-Wancharisi gives several fatwas on the matter, which Al-Mahdi Al-Wazzani has grouped in his *Mi'yar Al-Djadid*. Finally and especially, the commentary of the *Amal Al-Fasi* by As-Sidjilmasi deals with the matter in a long dissertation that reproduces

all its doctrinal developments.

In the beginning the *lafif* is combined with the tawatour, "which is the information given by a group of witnesses (in such a number) that it would have been absolutely impossible for them to get together to lie." This latter institution is justified historically by the prophetic tradition according to which Mohammad sent, one by one, emissaries to the different tribes to be informed. If he had not made use of their information, what would have been the usefulness of such a mission?—Thus, linking it with the *oucoul*, and consequently altogether orthodox, tawatour easily had to be admitted as doctrine in the absence of adoul and in case of the impossibility of procuring their testimony. It does appear, in effect, that it is to this role of complementary testimony that the usefulness of tawatour has been limited. It is what appears to us to follow from a citation of Abou-l-Hasan As-Saghir [719/1319]: "two adoul are indispensable, or else direct knowledge is not considered acquired (by the judge) unless the number of witnesses reaches tawatour."

The fixing of this number forms the core of an imposing controversy wherein the most different opinions are held. The most diverse numbers are cited and discussed, from the number 4 to the number 300 "and a fraction of ten." However, the dominant opinion is that the number, as imposing as it is, really matters little. The qadi must examine the circumstances of the case and draw presumptions from indications furnished by the facts. According to whether the circumstances are favorable or unfavorable to the testimony, "the conviction of the qadi can be carried by only four witnesses, or not be by forty."

Such is the institution of tawatour. If only for defining the rules more accurately and making them more practical, the jurisprudence inevitably had to intervene here and reform it. It is the reformed institution that the authors call the "*lafif*." In reality, then, there are not two different institutions, but one single institution, named differently at two moments in the history of Islamic law. This is why the *lafif* can be understood only if it is considered as a separate institution and approximated to tawatour. However, Islamic authors continually confuse the two institutions. The citations of As-Sidjilmasi in his dissertation intend the one as well as the other, and the division can be made only roughly. Generally then, one could say that the rules of the *lafif* proof remain strongly influenced by the rules of tawatour.

The evolution of tawatour—or the *lafif* of the first category—to the *lafif* of the second category is made only slowly. It is realized in

the eleventh century of the hegira when 'Abd Ar-Rahman ben 'Abd Al-Qadir Al-Fasi formulates in a very precise manner the new rules in his didactic poem, the *'Amal Al-Fasi*. On the other hand, it is certain that it is posterior to the fourth century of the hegira. In the unanimous opinion of the authors, the *lafif* is in effect an innovation of the mouta'khkhiroun. The "ancient masters" never recognized the *lafif* as valid except that which obeyed the rules of tawatour. Furthermore, it is not without resistance that the "last masters" have admitted the *lafif*. Ibn Al-Fakhkhar (419/1028), in a case for the recovery of property where the statement of the plaintiff was supported by testimonies of an adel and of a group of *lafif* witnesses, renders a fatwa by which he declares that in that case there is not a complete proof but only a grave presumption of a nature to shift the burden of proof and lead to the denunciation of the oath of the defendant. The same doctrine is maintained in different cases by Al-Lakhmi (478/1085) and Al-Mazari (536 H.) who require that the proof by *lafif* witnesses (21 for the first and 13 for the second of these authors) be supported by the oath of him who invokes it; which amounts once again to saying that the *lafif* has only the value of a simple presumption. Finally, from the author of the *'Amal Al-Fasi* we know that the *lafif* was not yet admitted in jurisprudence in the period when Abou-l-Hasan As-Saghir (719) lived. The controversy continues throughout the time of Ibn Farhoun (799) who, visibly favorable to the *lafif*, tries to class it among the *Ahkam As-Siasiya*, that is to say, the institutions that can vary according to political, social and economic circumstances. But the jurisprudence is fixed before the year 1000 according to 'Abd Ar-Rahman ben 'Abd Al-Qadir Al-Fasi.

Proof by *lafif* witnesses conserves the exceptional character of tawatour. Its usage is tolerated only among the Bedouins and when the services of the adoul cannot be compelled. Al-'Arabi Al-Fasi compares the *lafif* testimony to the testimony of women and children concerning facts that no other person than they could know. The combination of a citation of the son of Ibn 'Asim, concerning proof of imbecility and of discernment, with two other citations of a more general significance of Ibn Farhoun and Ibn Al-Djahm, reproduced in the *Mi'yar* of Al-Wancharisi and reported by As-Sidjilmasi, defines the character of the exception of the *lafif* proof. "Two adoul do not suffice here, says the son of Ibn 'Asim, because imbecility and discernment are not things that the senses of the witness perceive at a single time, but which he ascertains by small details in order to give witness subsequently at one time. For this reason, a greater number

of witnesses (four *adoul*) is required in order that there be a superabundance of these small details the deposition of which forms the whole." Ibn Farhoun sets forth the same requirement for the *istir'a'at*, citing the *Wathaiq* of Al-Djaziri. According to Al-Wancharisi, "the solution is the same and the number of witnesses is increased in every case where the testimony that carries conviction is not direct testimony (of the senses), such as in the cases of judicial insolvability, determination of heirs, paternity, recovery of property, hereditary devolution, abandonment of the wife by her husband without maintenance, testimony by hearsay . . . , etc. . . . That is what the word *istir'a'at* is understood to mean in the previously cited text of Al-Djaziri."

Thus, the *istir'a'at* are the documents drawn up on the deposition of *lafif* witnesses and concerning facts that the *adoul* could not, or cannot, generally know. It should not be forgotten that early on the *adouls* became professional witnesses, invested by the *qadis* with a veritable monopoly, and that it has been necessary from that time on to provide for the cases where their services could not be compelled. Thus the *istir'a'at* have taken a place in Islamic law analogous to that of the documents of notoriety in our modern law, and the *lafif* witnesses play the role of our witnesses of notoriety. In the absence of *adoul*, that is, the witnesses presenting all the required guarantees, any others whoever are taken, but then a greater number is required. The number compensates in this case for the lack of honorability. This testimony of notoriety is used very frequently in Moroccan notarial practice.

The number of *lafif* witnesses required is generally twelve. More are expected only in some exceptional cases: proof of discernment or of imbecility (sixteen to twenty witnesses). No satisfactory explanation for the fixing of this number is given by the authors. The discussion generally turns on the number of the *tawatour* and gives rise to abundant controversies. According to the author of the *ʿAmal Al-Fasi* "a number superior to 10 has been chosen because it is a round number and beneath this number one counts only by ones; then the ten was increased by the two witnesses required ordinarily for a *shahada*." Another explanation attempted by the same author: "given the great number of cases, and the slowness with which they are examined, and the difficulty of finding *adoul*; given, on the other hand, that it is difficult to procure a very great number of ordinary witnesses, one must be contented with a number that is neither very great nor very small." According to ʿAbd Al-Qadir Al-Fasi, "the limitation of the number of witnesses to twelve has no origin,

although it is mentioned in all the discussions concerning the number of the tawatour." As-Sidjilmasi seems closer to the truth when he says: "The number twelve has no other origin than an average taken for the number that is a condition of the knowledge (required of the witnesses). The number four is insufficient for reaching tawatour. The number five and higher numbers suffice. In sum, the minimum that is valid for the *lafif* proof is disputed by reason of the fact that a minimum is admitted for tawatour." The number twelve would be a sort of rough and ready compromise adopted by the practice, after many hesitations stemming from the troublesome memory of the controversies raised by the tawatour. By extension, the deposition of one adel and six *lafif* witnesses has been admitted as equivalent to the testimony of twelve *lafif* witnesses.

But "it is indispensable that the *lafif* witnesses be known as being of a good social condition." Al-^cArabi Al-Fasi requires that the *lafif* witness be of good life and customs, that is to say, that he have the *mor'owa* or its equivalent; at least, that no cause for reproach be imputable to him. According to Ali ben Haroun and Ibn Al-Abbar, these causes for reproach are: lying, imbecility, injustice, drunkenness, gaming and "other signs of baseness"; relationship, enmity. As-Sidjilmasi observes, not without a dig, that the combination of all these qualities of the *lafif* constitutes, in general, honorability, and reaches the conclusion: "The truth is that most often it is impossible in cases to combine all these conditions. The impossibility causes the impossible condition to fail and one reverts, considering the place and the time, to the least requirements; for necessity renders forbidden things licit."

Normally, upon the production of a *lafif* testimony, the *i'dhar* must be addressed to the adversary, and this latter must be put in possession of a copy of the document for examination and critique. By way of exception, the *i'dhar* is not addressed here. The great utility of the *i'dhar*, in the matter of testimony, is to provoke on the part of the adversary the critique of the witness and to put in operation the procedure of *tezkiya*. However, here, by its premise, the *tezkiya* is useless. Better still! because the *tezkiya* would result in transforming the *lafif* proof into a shahada of adoul. The *tezkiya* then is replaced by a symmetrical procedure: the *istifsar*, a true verification of testimonies by the qadi. "There is in that an incomplete *i'dhar* as there is an incomplete honorability."

We have already stated how and in what form the *lafif* testimonies are gathered. Here is the complete description of this procedure by As-Sidjilmasi: "He who wants to draw up a *lafif*

shahada gets together with the twelve witnesses, together or separated, according to the circumstances, before an adel appointed for the establishment of the testimonies. The witnesses depose before him. He draws up the document of *istir'a* in conformity with their depositions. Below the date he mentions the names of the witnesses. Then, below this first document, he draws up another containing the *tesdjil* of the qadi, that is to say, the given document of the authenticity of the above deed and of its validity for the qadi. He leaves a blank for the signature of the qadi. This latter recognizes the document, writes in his hand below the list of witnesses: "they have witnessed before one who has been appointed for this purpose. Authenticated," and apposes his paraph in the blank saved for this purpose in the second deed. Then, two adoul appose their paraphs at the bottom of this second deed to witness to its content. Very often, the qadi, below these two paraphs, gives official notice, if there is need, of the fact that the deed is good just as it is."

Such is the jurisprudence. It has been vigorously disputed. According to another jurisprudence, energetically maintained by 'Abd Al-Qadir Al-Fasi, the deposition of the witnesses has value only if it has been made before the qadi himself. It is the normal *ada*. If the adel who has received the depositions is not one of those who has certified the *khithab* of the qadi, there is, in effect, fraud on the part of the qadi since he, in this same *khithab*, affirms that the witnesses have deposed before his appointed one; the recording adel has been only a simple scribe. Finally, the deposition before an adel appointed for this purpose is only a reported testimony; and one knows that this form of testimony obeys special rules.

We will now cover the order of preference established by the court decision between the proof by adoul [s. adel] and the proof by *lafif* witnesses. The adoul are preferred by reason of the greater guarantees of morality that they present. The *lafif* testimony is only an exception, tolerated in cases where there is an impossibility of compelling the services of the adoul. From the sole fact that these latter have witnessed, suspicion can be raised against the adverse allegation proffered by the *lafif* witnesses.

In the case of contradiction between two *lafif* testimonies, the qadi reverts for his decision to the presumptions and to the indications resulting from the circumstances. In any case, the magistrate is never held to rely on the *lafif* testimonies produced. A citation of Al-Abbar summarizing a whole long discussion where, as always, the principles of the *lafif* are mixed with the rules concerning *tawatour*, is formal: "There is no place, in the matter of *lafif*, to

consider other than the proof carrying conviction of the sincerity (of the witnesses) regardless of what the number is. The decision is abandoned here to the *ijtihād* of the *qadī*, who renders an opinion according to the presumption and indications (of the cause). Given these presumptions, the conviction of sincerity can result, for example, from the deposition of four witnesses; it can also not be carried by the deposition of forty witnesses, if there are presumptions of lying."

Finally, *tawatour* seems to be placed absolutely at the summit of the hierarchy of testimonial proofs, by reason, no doubt, of the pure orthodoxy of its origins and of the considerable number of testimonies that it supposes gathered together. "As for *tawatour*, which realizes the condition of knowledge (required of the witnesses), it does not bear contradiction."

LOUIS MILLIOT, INTRODUCTION A L'ETUDE DU DROIT MUSULMAN
737-38 (1953):

Lafif testimony or testimony by *turba*⁶²⁰ is a limited inquest, a reform of *tawatur*, thought up by the practice to supplement the lack of testimony by the *ʿudul*, in case of established impossibility to report it. Only necessity has been able to admit, as presenting a guarantee of sufficient sincerity, the deposition of the man of good life and customs (*dhu mor'owa*). This was the work of a jurisprudence that became fixed in the 10th or 11th century at Fes after long doctrinal controversies. It is thus summarized in the manual *ʿAmal al-Fasi*: "the *lafif* testimony is that of the *bedouins*; it suffices to do the checking of it; the inquest of honorability (*tazkiya*) is not necessary." The commentary on this passage by *Sijilmasi* [1214/1800] reproduces a fatwa of *Lakhmi* (5th century) according to which, in the absence of *ʿudul*, the statement of the people of the country who testify in favor of an individual that he is the cousin of a dead man in the city and his heir, will be accepted, if it is not contradicted and if these people "form the *djamaʿa* of the locality." In the commentary of the following passage is found the significant information, by the *qadī* *Mandar ben Saʿid*, of a group of persons before whom the inhabitants of the place establish marriages and sales and who occupy first rank in reunions and feasts; and this experienced practitioner's advice: "Whoever is charged to judge in these localities must consider the testimony of the best among you; otherwise rights would perish and

620. An inquiry, inquest by *turba* is done by taking the testimony of local inhabitants to establish a point of customary law (*turba*, in Latin, meaning crowd).

justice would shut down.”

It is without doubt that in Morocco the practice of *lafif* was propagated, on account of the difficulty of finding ‘udul outside the cities, by using the organization of the djama’a. A transformation of tawatur, it is tied itself to a transformation of the testimony of the ‘udul. It was especially developed in the countries of Maliki obedience and principally in Morocco. According to al-Hadjdjuwi, “the institution of the *lafif* hardly accords with the Hanafi school because, in that discipline, all Muslims are considered as ‘udul witnesses.”

