

DEAD TRADITION: JOSEPH SCHACHT AND THE ORIGINS OF “POPULAR PRACTICE”

ZE'EV MAGHEN*
(Bar Ilan University)

Abstract

The theories of Joseph Schacht regarding the provenance and development of Islamic jurisprudence have been as widely criticized as they have been deeply influential. Schacht's detractors have, for the most part, taken issue with his modern version of *intiqād al-rijāl* (criticism of ḥadīth transmitters), by means of which he claimed to turn the previously accepted chronology of early Islamic legal evolution—Allāh→Muḥammad→Companions→Followers→*fiqh*—on its head. However, neither critics nor supporters of Schacht are wont to inquire into a more fundamental question: if prophetic exempla and scriptural dicta are, on Schacht's view, only secondary contributors to the formation of *sharī'a*, what then is the ultimate source of the “living tradition” and “popular practice” to which he assigns the *primary* role in that enterprise? This essay attempts to elicit a straightforward answer to that question from Schacht's elusive writings on the subject, and then puts that answer to the test with the help of two of the rare instances in which Schacht commits himself on this score regarding specific legal issues.

Demolition

The uprooting of the science of Islamic jurisprudence from its traditionally purported Qur'ānic and Ḥadīthic soil has been the work of a number of Western scholars over the course of the twentieth century, but the key figure, here as in many other arenas, is Joseph Schacht.¹ The late Norman Calder, who was largely in agreement

* I wish to thank Professor David Powers for his unstinting encouragement and invaluable assistance in bringing this article to completion. I extend my gratitude, as well, to the three anonymous readers for their constructive comments and criticisms, even though I have chosen to stand my ground on a significant number of issues (my justifications for doing so may be found in the relevant notes).

¹ Schacht-bashing has been a favorite sport in certain academic circles for several decades now. On top of legitimate criticism of his work, Schacht—like

with Schacht's fundamental approach, summarized this scholar's revolutionary achievements thus:

Joseph Schacht, following the methodological and historical presuppositions of Goldziher, in his study of early Muslim jurisprudence (1950), broke the historical link between ḥadīth and *fiqh*. He argued, against the implications of the Muslim hermeneutical tradition, that the structures of *fiqh* were initially independent of (and so, in time, provoked) the major corpus of ḥadīth literature.²

Harald Motzki, a serious critic of Schacht and of his *conclusio e silentio* (i.e., that legal ḥadīths not adduced in a juristic dispute did not exist prior to that dispute), also describes the project of this pivotal researcher as one involving a reversal of the traditional historiography and a severance of the direct tie between *sunna* and *fiqh*:

Schacht tried, through an analysis of the growth of traditions, to prove the theory that the "living tradition" of the ancient schools—originally anonymous and based primarily on independent reasoning (*ra'y*)—was disturbed and influenced by the imposition of prophetic traditions ... no earlier than the middle of the second [Islamic] century.³

many other brilliant and pioneering scholars of previous generations—has had to bear the brunt of the Sa'īdian onslaught against Orientalism, a withering campaign conducted by purveyors of "a paradigmatic doctrine possessed of a largely constant nature, having little to do with the particulars of diverse, positive scholarship" (to paraphrase and re-direct Wael B. Hallaq's description of Orientalism itself in "The Quest for Origins or Doctrine: Islamic Legal Studies as Colonialist Discourse," *Journal of Islamic and Near Eastern Law*, 2 [1] Fall-Winter 2002-3, p. 3. Hallaq correctly points out that it is "the unanimous scholarly view that Schacht's work defined the sub-field of Islamic legal Orientalism. He is perceived to be its father, so to speak, and to be rivaled by no other" [ibid., 14]). For many years now it has been the fashion in such circles to paint Schacht as nothing less than a witting agent of Western imperialism, and in this manner to assail his scholarship by impugning his motives and worldview. I wish to dissociate the present effort in the strongest terms from such assertions, and from the persistent trend that buoys them along. This essay is indeed highly critical of (what it claims to be) one of Schacht's central theses. At the same time its author has learned much of what he knows—or thinks he knows—about Islamic law from Schacht himself and from Schacht's many students, and still has a great deal more to learn from both. The arguments presented over the ensuing pages should in no way be construed as denying or belittling Schacht's tremendous contributions to the field of Islamic legal studies.

² Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), vii.

³ Harald Motzki, *Die Anfänge der Islamischen Jurisprudenz: Ihre Entwicklung in Mekka bis zur Mitte 2./8. Jahrhunderts* (Stuttgart: Deutsche Morgenländische Gesellschaft, 1991), 25. At the time of this writing, I had yet to gain access to Marion H. Katz's translation of this book.

Although most famous for subverting conventional perceptions of Ḥadīth, Schacht did not neglect to extend his approach to Muslim scripture as well. Foreshadowing Wansbrough, he repeatedly emphasized his theory (which, in Juynboll's words regarding Schacht's overall style, "sounds more like a statement" than a theory)⁴ that the same disjunction is no less characteristic of the relationship between Qur'ān and *fiqh*:

During the first two centuries of Islam there came to be formed a central core of ideas and institutions which went far beyond the mere contents and *even the implications* of the Koran.⁵

Mohammedan law did not derive directly from the Koran but developed ... out of popular and administrative practice under the Umayyads, and this practice often diverged from the intentions and even the explicit wording of the Koran... [T]he present chapter will show that apart from the most elementary rules, norms derived from the Koran were introduced into Muhammadan law almost invariably at a secondary stage... Even as regards questions which presuppose the rules given in the Koran, we notice that anything which goes beyond the most perfunctory attention given to the Koranic norms and the most elementary conclusions drawn from them, belongs almost invariably to a secondary stage in the development of the doctrine.⁶

The legal subject matter in early Islam did not primarily derive from the Koran or from other purely Islamic sources.⁷

Schacht has been followed (and preceded)⁸ passively and actively in this conceptualization of Islamic legal development by numerous scholars, some of whom treat his views as axiomatic. Michael Cook and Patricia Crone, basing themselves almost entirely on Schacht,

⁴ G.H.A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Ḥadīth* (Cambridge: Cambridge University Press, 1983), 4.

⁵ Joseph Schacht, "The Law," in G. E. von Grunebaum ed., *Unity and Variety in Muslim Civilization* (Chicago: University of Chicago Press, 1955), 65. Emphasis added.

⁶ Joseph Schacht, *The Origins of Muḥammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 224 and 227.

⁷ Cited in Motzki, *Die Anfänge*, 262. Many more quotes could be added to this effect, and Schacht often repeats himself verbatim in diverse works. Either Schacht or his publishers spell the Prophet of Islam's name in at least three different ways.

⁸ See, for instance, Margoliouth's declaration that "[T]he Koran could not by itself serve as a code, or even as a basis of legislation." D.S. Margoliouth, *The Early Development of Mohammedanism* (London: Williams and Norgate, 1914), 65. Emphasis added. See also Ignaz Goldziher, *The Zahiris: Their Doctrines and their History* (Leiden: E.J. Brill, 1971), 43-52.

can state that “[t]he role of scripture in early Islamic law appears to have been minimal,” and “One is tempted to say that the halakha [i.e., the *shari‘a*] of Iraq is as innocent of scripture as the scripture of Syria is innocent of halakha.”⁹ (More recently, Crone declared that “Schacht underestimated the discontinuity to which he drew attention: of rules based on the Qurʾān from the start we no longer possess a single clear-cut example”).¹⁰ Eventually, John Wansbrough would claim that the Qurʾān itself was not even redacted in time to function as a source of inspiration for the lion’s share of early Islamic jurisprudence.¹¹ Calder, skeptical and independent, nevertheless believed that the conclusions of both Schacht and Wansbrough on this subject “are likely to be in their outlines and in their implications broadly correct.”¹² He elsewhere confirmed: “Wansbrough has argued persuasively for the separate development of law and scripture, the latter, at least in its canonical form, later than the former...”¹³ In his chapter on “The Origin of Norms,” Calder writes (echoing Schacht in “The Law” and elsewhere):

The final stage in the articulation of an ideal system of authority, an overarching structure of unity that embraced and permitted the actual diversity of the legal system, is represented in the notion of scriptural sanction. *Chronologically the last stage*, this became, ideologically, the first principle of Islamic justification.¹⁴

The Schachtian outlook—refined, modified and extended by many important scholars—represents the culmination of the application of methods of higher and lower criticism to the sacred historiography of Islam, a process that has undermined (at least in academic circles) many of the fundamental premises of that faith. What for centuries God was thought to have united, man has put asunder: the linear progression of, and very relationship between, the supposedly seminal *uṣūl al-fiqh* (sources of Islamic jurisprudence) has been resoundingly shattered.

⁹ Patricia Crone & Michael Cook, *Hagarism: The making of the Islamic World* (Oxford: Cambridge University Press, 1977), 30.

¹⁰ Patricia Crone, “Two Legal Problems Bearing on the Early History of the Qurʾān” in *Jerusalem Studies in Arabic and Islam*, 18 (1994), 10-11.

¹¹ John Wansbrough, *Quranic Studies: Sources and methods of Scriptural Interpretation* (Oxford: Oxford University Press, 1977).

¹² Calder, *Studies*, viii.

¹³ *Ibid.*, 187.

¹⁴ *Ibid.*, 218. Emphasis added. Calder actually bests Schacht in the late dating of the advent of genuine *fiqh* activity (*ibid.*, 219).

Reconstruction

Where do Joseph Schacht and the scholars who have embraced his thesis think Islamic jurisprudence and positive law came from, if not from Qurʾān and Ḥadīth? What are the substitute historical processes with which Schacht attempts to fill in what Noel Coulson aptly refers to as the “void which is assumed, or rather created” by his own thesis?¹⁵ Schacht’s supporters have largely side-stepped this issue, while his premiere critics—Sezgin, Juynboll, Azmi, Motzki, Abbott, Coulson, Hasan, Fück—preoccupied with the controversy surrounding the antiquity and authenticity of Ḥadīth, rarely broach (and never delve into) this essential question, even though it may represent a far more effective line of attack than the strategies they generally employ.

Once one has dispensed, as Schacht and others have, with the traditional account, whence may the deliberations of *fiqh* and the conclusions of *shariʿa* be ultimately derived? A comprehensive solution to what Goldziher has called “one of the most attractive problems of this branch of Islamic studies”¹⁶ continues to elude modern scholarship, at least partially because (as we have just indicated) modern scholarship continues to evade *it*. Nevertheless, while penetrating analysis of this conundrum remains scarce, there does exist a broad sense in the professional literature that the general direction of inquiry should be *outward*. Describing Schacht’s seminal contribution to the field, Crone makes clear that the claim of Qurʾān-Ḥadīth-*fiqh* discontinuity goes hand-in-hand with assertions of considerable outside influence on the formation and maturation of the Muslim law code:

It [*viz.*, Schacht’s *Origins*] showed that the beginnings of Islamic law cannot be traced further back in the Islamic tradition than to about a century after the Prophet’s death, and this strengthened the *a priori* case in favor of the view that foreign elements entered the Shariʿa. Schacht was himself a *zealous adherent of this view*; it is his numerous writings on the subject which currently define it.¹⁷

¹⁵ Cited in David Powers, *Studies in Qurʾan and Ḥadīth: The formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986), 3.

¹⁶ I believe this statement originally appears in his *Introduction to Islamic Theology and Law*, trans. Andras and Ruth Hamori (Princeton: Princeton University Press, 1981), but it is in any case cited by Schacht in “Fikh,” *Encyclopedia of Islam*, second edition (henceforth *EI2*). See also Ignaz Goldziher, *Muslim Studies*, trans. C. R. Barber and S. M. Stern (Chicago: Aldine Publishing, 1971), vol. 2, 81, where he calls the same issue “an important question of cultural history, which calls for a monograph.”

¹⁷ Patricia Crone, *Roman, provincial and Islamic law* (Cambridge: Cambridge University Press, 1987), 7.

Indeed, Schacht himself ties the two assertions together: “[T]he riddle of the origins of Muhammadan jurisprudence, once the obviously artificial theory of the Muhammadan lawyers was disregarded, seemed to postulate the unknown quantity of foreign influences as the easiest explanation.”¹⁸

The issue, however, is not so simple: Schacht confuses us. In his two *magna opera*—*An Introduction to Islamic Law* and *The Origins of Muhammadan Jurisprudence*—very little is said directly about the phenomenon of imitation or importation of foreign notions or institutions, and even less (one is tempted to say none) is supported by evidence, textual or otherwise.¹⁹ Instead, as is well known, Schacht credits what he refers to as the “practice” (*sunna*, *amal*) or the “living tradition” of the “ancient schools of law” with the begetting of Islamic jurisprudence.

The real origins of *fiqh*, for him [explains Calder], lay in the ‘living tradition’ of local schools, i.e. in a juristic adaptation of real social norms, which was only gradually transformed into the structures of the classical hermeneutical nexus.²⁰

Schacht’s discussion of this concept, at once tortuously involved and painfully vague, leaves the reader scrambling for solid ground.²¹ What exactly is this “living tradition,” and where did it come from? Is

¹⁸ Joseph Schacht, “Foreign Elements in Islamic Law,” reprinted in Ian Edge (ed.), *Islamic Law and Legal Theory* (Aldershot: Dartmouth, 1996), 4.

¹⁹ This, despite Schacht’s own “teaser” regarding *Origins*: “The difficulties inherent in both problems, the problem of origins and the problem of foreign elements, have lately been reviewed by Professor Bousquet in a paper in which he aptly speaks of the mystery surrounding the genesis of Muḥammadan legal science. A solution of this mystery, such as I have attempted in my forthcoming book on *The Origins of Muḥammadan Jurisprudence*, will, I hope, enable us to approach the problem of foreign elements in ancient Islamic law from a new angle.” Schacht, “Foreign Elements...” 4.

²⁰ Calder, *Studies*, vii.

²¹ The following involves an attempt to portray the enigmatic and problematic nature of Schacht’s presentation of this subject. While I have tried to simplify my analysis of *his* analysis, the difficult nature of the latter has inevitably led to the difficult nature of the former. Also, it should be noted that Schacht nowhere addresses directly and systematically the “case in favor of the view that foreign elements entered the Shari‘a” of which he was (according to Crone) such a “zealous adherent” and which (she says) is “currently defined” by his “numerous writings on the subject.” In fact, one must cull terse and scattered references from a variety of works in order to cobble together a more-or-less coherent exposition of Schacht’s view on the question of foreign borrowing. In short, the reader should prepare for some ten pages of rather rough going.

Calder's explanation of Schacht's conception—"a juristic adaptation of real social norms"—accurate? If so, what exactly is meant by "real social norms"? And of *whose* social norms are we speaking, and how, and why, and when were they adapted? Schacht never says (nor does Calder), or rather, he seems to be saying a number of contradictory things, all of them revolving around the term "practice":

1) Sometimes by "practice," Schacht intends "the popular and administrative practice of the late Umayyad period" developed by the first official *qādis* or judges appointed by that dynasty, who, utilizing the judicial method of *ra'y* (independent reasoning), "by their decisions laid the basic foundations of what was to become Islamic law."²² Upon *what* were they exercising their *ra'y*? Schacht attempts to answer this:

The earliest Islamic *kadis* gave judgment according to their own discretion, or 'sound opinion' (*ra'y*) as it was called, *basing themselves on customary practice* which in the nature of things incorporated administrative regulations, and taking the letter and the spirit of the Koranic regulations and other recognized religious norms into account as much as they saw fit. The customary practice to which they referred was *either that of the community under their jurisdiction or that of their own home district*, and in this latter case conflicts were bound to arise.²³

Thus, this late Umayyad "popular *and* administrative practice" arises out of an earlier "customary practice" which itself incorporated (presumably even earlier) "administrative regulations" as well as "Koranic regulations," and which may indicate either the local Muslim practice (where did *it* come from?) or that of the judge's hometown. Our confusion has not been alleviated, and will now be compounded.

2) Schacht also uses the term in question to refer to the "popular practice" or "recognized practice" (of the inhabitants of a given region? of the Muslims in general?) surveyed, and sometimes "declared undesirable," by the later stage of "specialists from whom the *kadis* came increasingly to be recruited" who flourished from the end of the first century AH onwards:

These pious persons surveyed all fields of contemporary activities, including the field of law; not only administrative regulations but *popular practice* as well. They considered possible objections that could

²² Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), 25. "Using the judicial method of *ra'y*" is, especially in the earliest period, probably a fancy way of saying they used their judgment.

²³ *Ibid.*, 27. Emphasis added.

be made to *recognized practices* from the religious and, in particular, from the ritualistic or the ethical point of view, and as a result endorsed, modified or rejected them. They impregnated the sphere of law with religious and ethical ideas, subjected it to Islamic norms, and incorporated it into the body of duties incumbent on every Muslim. In doing this they achieved on a much wider scale and in a vastly more detailed manner what the prophet in the Koran had tried to do for the early Islamic community of Medina. As a result the *popular and administrative practice* of the late Umayyad period was transformed into the religious law of Islam. The resulting ideal theory still had to be *translated into practice*; this task was beyond the power of the pious specialists and had to be left to the interest and zeal of the caliphs, governors, *kadis* or individuals concerned. The circumstances in which the religious law of Islam came into being caused it to develop, *not in close connection with the practice*, but as the expression of a religious ideal in opposition to it.²⁴

We shall address momentarily some of the issues raised by what is, at least for the present writer, this truly dizzying passage (how could the task be “beyond the specialists” and have to be “left to the interest and zeal of the ... *kadis*” if—as we have just read above—the specialists *were* the *kadis*?). For now, it is sufficient to note the thickening mist of perplexity caused by the increasingly variegated employment of the term “practice,” from amongst the instances of which arrayed above we may perhaps pick up yet another sense of the term in the Schachtian lexicon:

3) The “idealized practice” of the “good old time”—the late Umayyad period—which was “opposed to the realities of the actual [evidently Abbasid] administration.”²⁵ (Is this “idealized practice” the same as—or what was eventually to become—the “living tradition” of the “ancient schools of law”? Did it arise in *opposition* to the “popular and administrative practice of the late Umayyad period,” which in turn emerged from the *ra’y* of the first Umayyad *qadis*, itself based upon local “customary practice”? If so, then in what sense did the decisions of those same early *qadis*, “lay the basic foundations of what was to become Islamic law” [as Schacht avers earlier]?).²⁶

4) Schacht also uses “practice” to mean the specifically Medinan scholarly consensus (*ijmā‘ ahl al-madīna*) or “practice of Medina” (*‘amal ahl al-madīna*) recognized as a legitimate source by the Mālikī school.²⁷

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid., 25.

²⁷ Schacht, *Introduction*, 61-2. For this seminal tendency in early Islamic legal

5) Finally, Schacht employs the term “practice” to denote pre-Islamic *sunna*, sometimes genuinely Arabian (and carried over and eventually incorporated into Islam as the Prophet’s *Sunna*), other times a retroactive peg onto the *jāhiliya* of an outlying “local” custom that had insinuated itself into the Islamic system at a later stage, after the expansion and conquest.²⁸

All these many “practices,” whose individual meanings and relationships to one another are not entirely clear, are tied together in Schacht’s schema by the good offices of the first *fuqahā’*:

The agent that blended these several ingredients until they became fused into one homogeneous whole was the activity of the early specialists in Mohammedan religious law at the end of the first and at the beginning of the second century of the hegira in Iraq, Syria, and Medina.²⁹

We shall not, however, dwell further upon what Schacht’s all important “practice” *is*—even within the confines of the above definitions, as we have seen, it is not an easy task to discover this—but rather upon the more essential question of where he thinks it *came from* (although in some ways this is the same question).

As we have seen, according to Schacht, the injection of Qur’ānic legal concepts and prescriptions into the stream of development of Islamic jurisprudence occurred in almost all cases only “at a secondary stage.” Even with regard to the exceptions he envisions—laws relating to divorce and remarriage, the presumption of intercourse, the oath of abstinence and the “share of the grandfather,” to all of which he is willing to grant a modicum of “direct descent” from scriptural prescriptions—Schacht nevertheless insists that “anything which goes beyond the most perfunctory attention given to the Koranic norms and the most elementary conclusions drawn from them, belongs almost invariably to a secondary stage in the development of doctrine.”³⁰ The Qur’ān, that is, became legally relevant—began “disturbing” already extant opinions that were initially based on “the rough and

development, see Yassin Dutton’s *The Origins of Islamic Law: The Qur’an, the Muwatta’ and Madinian ‘Amal* (Surrey: Curzon Press, 1999).

²⁸ Schacht, *ibid.*, 15. See also Schacht, “Law,” 67. For this last, compare G.J. Vajda’s statement, cited below, that “[t]his is not the only example of the attribution to paganism of a custom that the Muslims were reticent to acknowledge as having Jewish origins.”

²⁹ Schacht, “Law,” 72.

³⁰ Schacht, *Origins*, 227.

ready practice”—as late as the middle of the second century AH, and certainly no earlier than the turn of the first.³¹ As Schacht writes,

An important aspect of the activity of the ancient schools of law was that they took the Koranic norms seriously *for the first time*. In contrast with *what had been the case in the first century of Islam*, formal conclusions were now drawn from the essentially religious and ethical body of Koranic maxims...³²

This formulation raises a number of problems. What—in Schacht’s understanding—was the impetus of the first Umayyad *qāḍīs*, working already in the late *first* century, to “[take] the letter and the spirit of the Koranic regulations and other recognized Islamic religious norms into account”?³³ Why was their “main concern ... in the intellectual climate of the late Umayyad period ... naturally to know whether the customary law conformed to the Koranic and generally Islamic norms”?³⁴ Whence this “natural intellectual climate” if the Qur’ān to date had played such a negligible role? What were these “recognized Islamic norms” if (as we have just read) “Koranic norms [were taken] seriously for the first time” only in the second *hijrī* century? What was that “letter and spirit of the Koranic regulations” if “[d]uring the greater part of the first century of Islam law, in the technical meaning of the term, did not as yet exist” and “fell outside the sphere of religion,”³⁵ and if “the legal subject matter in early Islam did not primarily derive from the Koran or from other purely Islamic sources”?³⁶ Does Schacht intend us to understand these “[k]oranic and generally Islamic norms” (not to mention the “letter” of Qur’ānic law!) purportedly taken into account by the *qāḍīs* as just so many rarefied and undefined ideas about proper behavior floating around in the Islamic atmosphere for the entire first century AH—general principles along the lines of *al-amr bi’l-ma’rūf wa’l-nahy ‘an al-*

³¹ See Motzki, *Die Anfänge*, 24-5, who confirms this dating. “Disturbing” is Motzki’s term. “The rough and ready practice” is Schacht’s. The impressive fleshing out of this aspect of Schacht’s thesis by Marion Homes Katz (of whom more later) places the generation of “literalists” who forced their teachers to find Qur’ānic foundations for their rulings between the end of the first and beginning of the second Muslim century. See Katz, *Body of Text* (Albany: State University of New York Press, 2002), chapter 2.

³² Schacht, *Introduction*, 29. Emphasis added.

³³ *Ibid.*, 26.

³⁴ *Ibid.*

³⁵ *Ibid.*, 19.

³⁶ Motzki, *Die Anfänge*, 262.

munkar (commanding the good and forbidding the evil) and the like?³⁷

More importantly, what is this “local” or “customary practice” of the outlying regions which the (earliest) Umayyad *qādīs* were forced to take into account, and which eventually (so Schacht would also have it) metamorphosed into the “living tradition” of the “ancient schools of law”? If it does not originate in the Qur’ān or Ḥadīth, where did it come from? Is it pre-Islamic Arabian *sunna* which—having survived intact the Qur’ān and the birth of Islam—continued to function as the confessional and societal norm under Islam with the tacit approval of Muḥammad, the Companions and Successors; expanded outward with the conquering *umma*; and eventually found its way into the “living tradition” and the earliest law books? Is it, rather, the *sunna* of the *rāshidūn* caliphs (the election of the third of whom might have been the occasion of the first specifically Islamic use of the term “*sunna*”) which was then gradually adopted by the early authorities and finally projected back onto the Prophet himself in the late Umayyad period?³⁸ Or is this “local-custom-becoming-*fiqh*” rather *the age-old custom of the non-Muslim populations inhabiting the conquered regions where the ancient, geographically-based schools of law first emerged?*

In his *Introduction* and *Origins* Schacht appears to answer “yes” to all of these questions (admittedly, he occasionally tries to show why a given model fits the circumstances of a particular law and not others). The last option, however—that which posits the surrounding *non-Islamic* cultures as a source of “practice”—receives the shortest shrift. Interestingly, in Calder’s assessment of his overall approach, Schacht looks far less the “zealous adherent” of foreign borrowing than in Crone’s depiction (above):

To a general theory of origins based on practice, Schacht added a number of concessions to foreign influences (predominantly Roman or Jewish).³⁹

This sentence is intriguing for two related reasons. First, it assigns

³⁷ For an exhaustive study of the role of this notion in the evolution of Islamic law, ideology and ethos, see Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge: Cambridge University Press, 2000).

³⁸ For an informative analysis of Schacht’s theory on this point, see M.M. Bravmann, *The Spiritual Background of Early Islam* (Leiden: E. J. Brill, 1972), 123-38.

³⁹ Calder, *Studies*, 199. Calder himself was not, for the most part, a proponent of theories of foreign borrowing.

a very minor role in Schacht's conception of Islamic legal evolution to the process of alien influence (Calder's subsequent note sends the reader to the entry "foreign influences" in the index of *Origins*, which includes seven, usually one-sentence references to the issue). Second—and this goes to the root of the matter—Calder is here setting up Schacht's "practice" and his notion of foreign borrowing as *opposites*, as two distinct elements in the forging or "condensation" of formal *fiqh*, the latter element alien, the former (the "practice") somehow indigenous to Islam.

A careful reading of Schacht's other relevant articles and monographs does not support Calder's interpretation on either of these counts. Already in *Introduction*, Schacht ascribes the emergence of most of Islamic law to "the widespread adoption, if regarded from one angle, or survival, if regarded from another, of the legal and administrative institutions and practices of the conquered territories."⁴⁰

In this way concepts and maxims originating from Roman and Byzantine law, from the Canon law of the Eastern Churches, from Talmudic and Rabbinic law, and from Sassanian law, infiltrated into the nascent religious law of Islam during its period of incubation, to appear in the doctrines of the second century A.H.⁴¹

Whereas such overt declarations are scarce in *Introduction* and *Origins*, in his later essays Schacht frequently acknowledges the importance of the same "widespread adoption of legal and administrative institutions of the conquered territories,"⁴² and indeed, begins to sharpen his focus. While in the above excerpt (from *Introduction*) he speaks with equal confidence about the contributions of Eastern Christian and Eastern Jewish law, in ensuing efforts Schacht can already draw a clear distinction: "The question of a possible influence on the part of the canon law of the Eastern churches has hardly been studied by specialists so far. Influences of *Talmudic* on ancient Islamic law, on the contrary, have often been pointed out and are easy to account for."⁴³ In general, he began to emphasize that:

⁴⁰ Schacht, *Introduction*, 19.

⁴¹ *Ibid.*, 21.

⁴² Joseph Schacht, "Pre-Islamic Background and Early Development of Jurisprudence" in Majid Khadduri and H.J. Liebesny (editors), *Law in the Middle East* (Washington: Middle East Institute, 1955), vol. 1, 35. Motzki also points out that neither *Origins* nor *Introduction* deal with questions of borrowing from alien sources (Motzki, *Die Anfänge*, 48), although this is not entirely true, as we have just seen.

⁴³ Schacht, "Foreign Elements..." 4. We will mention below some of the pre-

The first stages of the development of Mohammedan religious law are characterized by a far reaching *reception* of the most varied elements; its substratum is to a great extent *not originally Islamic*, let alone Koranic. The essential contribution that Islam made toward the formation of its sacred law *was not material* but formal...⁴⁴

As for this “formal” element, Schacht whittles it down considerably, as well, when he, following Goldziher, attributes an “appreciable amount” of Islamic legal usage to foreign origins, including technical nomenclature and methodology.⁴⁵ Even *ijmāʿ* (juristic consensus) is of alien extraction.⁴⁶

Schachtian scholars who had “often pointed out” such Jewish influences, and analyze the “ease” with which such influences were accounted for.

⁴⁴ Schacht, “Law,” 65. Emphasis added.

⁴⁵ “Fiqh” in *EI2*, 886. Already in *Introduction*, 20, Schacht had spoken of “the reception of legal concepts and maxims, extending to methods of reasoning and even to fundamental ideas of legal science.”

⁴⁶ Snouck-Hurgronje wants to see the influence of the Christian doctrine of infallibility here, although he at least provides for the possibility that “the same needs gave rise to the same solutions”—a point we shall touch upon momentarily in this note. See *Oeuvres choisies/Selected Works*, ed. G. H. Bousquet and J. Schacht (Leiden: E. J. Brill, 1975), 275. Schacht—following Goldziher (*Muslim Studies*, vol. 2, 79) and others—posits a derivation for *ijmāʿ* from the Roman “*Opinio Prudentium*” (Schacht, *Introduction*, 20 and “Foreign Elements...” 9; and see Powers, *Studies*, 76, note 77 for a bibliography on the question of Byzantine-Roman influence), while Crone—who elsewhere points out that such a Roman institution never existed (Crone, *Roman*, 11)—prefers (as usual) to see Jewish influence here (Cook and Crone, *Hagarism*, 180, n. 11). She fails to name the supposedly analogous Talmudic notion, but is perhaps referring to the rabbinic idea that *minhag Yisra'el din hu*, “the custom of Israel is law,” or to the concept of *yakhid ve-rabim halakha ke-rabim* (“when there is a single opinion and [opposing it] multiple opinions [among judges/scholars], the decision is according to the multiple opinion”—see *Berakhot* 9a), also coined in Pentateuchal language simply as “*aharay rabim lehatot*” or “follow the majority.” I suppose this idea—which, incidentally, disappeared for all intents and purposes with the demise of the Sanhedrin in the fifth century CE—is as close to *ijmāʿ* as, say, the *iqṭāʿ* is to European feudalism or the *shūrā* to modern democracy. Since every society the world over has, for instance, the institution of marriage, it is certainly natural that they will almost all evolve regulations and recommendations regarding the treatment of the “weaker” spouse. This in no way means that if two societies both limit the number of wives permitted (even to an identical number), that we should be led to speculate that one adopted this norm from the other, or both from a common source (see Vesey-Fitzgerald’s comment on this temptation, below, note 156).

Similarly, that a legal system would develop the position that a consensus of jurisprudential opinions carries legal force is far from remarkable; indeed, it is quite natural and is what universal human common sense demands. There is no defensible reason to deny the presence of such common sense to the ranks of the early *fuqahāʿ* (although especially Goldziher seems often to imply just this). Why,

That which remains, after the Schachtian analysis, of a genuinely Islamic contribution to *fiqh* appears to be a nebulous “fundamental attitude that already exists in the Koran and continues through the whole history of Islamic religious law.”⁴⁷ Schacht nowhere identifies the nature of this persistently hovering “attitude,”⁴⁸ or explains how it functions to unite all of these imported elements to make of Islamic law “a unique phenomenon *sui generis*.”⁴⁹ He does state that this supposed centripetal intellectual-ideological force managed invariably to “permeate [the alien elements] with what was felt to be true Islamic spirit, until their foreign origin, short of a searching historical analysis, became well-nigh unrecognizable.”⁵⁰

What, then, in Schacht’s conception, is left to Islam? What legal elements may still be regarded as authentic historical products of Qur’ānic prescription or exhortation, or as enacted or inspired by the exemplary conduct of the Prophet and his Companions, or at least as the outcome of the accumulated *internal* experience of the Islamic *umma*? The answer implied by the sum total of Schacht’s remarks (for this they are, in most cases, and not rigorously defended theses) is: an extremely exiguous amount. The preponderance of legal content (as well as “form”), he confirms, is “not originally Islamic.”⁵¹ The *ra’y* of most of the Umayyad *qāḍīs*, Schacht’s primary *internal* starting point for what would become Islamic law, clearly was not

therefore, Snouck-Hurgronje, Crone, Schacht and others consistently seek outside sources and influences for such predictable and universally necessary legal principles—all the more so when the proposed foreign source is far from identical to the Islamic precept/practice—is a mystery to me (nevertheless, much has been written on this subject, and the present footnote does not presume to have encompassed the manifold issues connected with it even slightly. See Judith Romney Wegner, “Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts,” in Ian Edge (ed.), *Islamic Law and Legal Theory* [Aldershot: Dartmouth, 1996], esp. 49-54. I do not agree with all of Wegner’s conclusions, but her essay is erudite and highly informative. I find her—and Wansbrough’s—comparison between *ijmā’* and the Talmudic “*Ha Kol*” particularly unconvincing).

⁴⁷ Schacht, “Law,” 65.

⁴⁸ If he means by this only a general sentiment that pleads “our laws should be our own, or should be conducive to monotheism, or justice”—then what has he said?

⁴⁹ Schacht, “Law,” 65. He does, however, often repeat the evasive, not to say platitudinous, claim that “this distinctive character [of Islamic law] does not preclude the possibility of more or less extensive influences.” “Foreign Elements...” 6.

⁵⁰ *Ibid.*, 65.

⁵¹ *Ibid.*

based on the Qur'ān, “owing to the scarcity of legislative material in the Kur'an and the dearth of ancient precedents.”⁵² Had it been so based, in Schacht's view, why would he aver elsewhere that these *qādis'* decisions—crystallized and consolidated into “the popular and administrative practice of the late Umayyad period”—provoked the later religious scholars to react by evolving methodologies and positive law “not in close connexion with the practice, but as the expression of a religious ideal in *opposition* to it”?

Neither can this religiously idealistic reaction (that of the fledgling *fuqahā'*) truly represent reliance on the Qur'ān in Schacht's view, as by the time its exponents flourished (the “secondary stage”) any purported derivation from this scriptural source is defined by him as a post-facto attribution lacking the chronological-legal reality of cause and effect. Rulings and observances of this period, says Schacht, were *projected backward* onto accommodating Qur'ānic verses. This obviously means that these rulings and observances were *already extant* prior to their pseudo-derivation from the Qur'ān, and thus their original impetus must have come from elsewhere (in another context, of course, Schacht calls this historical “deception” of ex-post-facto pegging onto scripture “Ḥadīth”—meaning, essentially, the literature of *asbāb al-nuzūl* or “circumstances of revelation”—and gives it, as well, no value in the earliest development of Islamic law). At no stage, then, of early Islamic legal development—neither that of the original Umayyad judges nor that of the later specialists and schools—can we say that norms were genuinely derived from the Qur'ān, Ḥadīth or any other Islamic source. The upshot of Schacht's view is that it has almost all been “received” from the outside.

Schacht concedes the pre-Islamic Arabian origins of several *fiqh* norms—especially those regarding inheritance law—but, of course, this is no more an Islamic source than the others. As for “practice” (which term, as we have noted, can be applied in the Schachtian lexicon to any of the above-mentioned phenomena/processes as well), it should be pointed out that in this term's fifth use as “local custom,” it does not truly indicate a source (as Calder would have it), but rather begs the question: *what is the source of the practice?* Schacht is steadfast in his avoidance of this conundrum, but some idea of what he intends by this usage may be gleaned from the following extract:

⁵² Entry “Fīḫ” in *EI2*, 886.

Mohammedan religious law as a whole ignored custom [read: practice] as an official source of law, however much customs of varied provenance had contributed to forming its raw material. Most of these elements, it will be remembered, had been effectively disguised and clothed in an Islamic garb by the Traditionists.⁵³

The juxtaposition of these two sentences represents Schacht's clearest statement regarding the ultimate meaning of "practice." This meaning is internally consistent with Schacht's overall conception. According to his own claims, the "living tradition" of the ancient schools of law is a product of ongoing *ra'y*. Now, *ra'y*, the "sound opinion" of early Umayyad *qādīs* and their successor "specialists," obviously did not function in a vacuum. One does not bring one's "independent reasoning" to bear upon nothing, nor exercise one's discretion outside the confines of certain parameters. As Wael Hallaq has shown, it is fallacious to conceive of the eponyms of the four Sunnī schools as absolute *mujtahids*, originating norms *ex nihilo* with no reference to previous judicial authorities or to the *mos maiorum* of the *ṣahāba* and *tābi'ūn*.⁵⁴ Reasoning, legal or otherwise, is without exception a processing of precedent (even—in the Islamic case—when it is not specifically *Prophetic* precedent). Schacht recognizes this: the specialists whose work was eventually transformed into Islamic law "based themselves on customary practice."⁵⁵

⁵³ Schacht, "Law," 81. Compare, in order better to appreciate the implications of this statement, the excerpt cited above in which Schacht discusses the clothing of acquired norms in Islamic garb to the point where "their foreign origins become well-nigh unrecognizable."

⁵⁴ Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), esp. 24-56. Al-Shāfi'ī often accuses the *ahl al-ra'y* of just such an offense, but this is propaganda—unless, of course, the crime of which he is really accusing them is the *borrowing from foreign sources* of both positive law and jurisprudential technique. See Schacht, *Origins*, 69. The notion of an initial stage in Islamic legal history of "relatively unrestricted discretionary *ra'y*" which was "eventually set aside ... in favor of a more constrained, text oriented approach to the exposition of law ... guided not by intuition but by *dalil*" (Bernard Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihad*," in Ian Edge (ed.), *Islamic Law and Legal Theory* [Aldershot: Dartmouth, 1996], 276) seems to me to require qualification. Even the earliest questions put to the likes of Abū Ḥanīfa, Abū Yūsuf, Mālik and Ibn al-Qāsim using the formulation "*a-ra'ayta...*" are clearly not seeking answers based on "intuition" alone, nor are these the types of answers given. The reasoning of these founding fathers was exercised *on* something, whether that something was scriptural dicta or information about the rulings or praxis of earlier generations (*sunna*), and whether these seminal *uṣūl* are explicitly and regularly mentioned in the course of their "*fatāwa*" or not. Religious scholars (and especially religious

Whose customary practice? Not that derived from the Qur'ān (there was almost none of this, he assures us), nor that evolved by the *qādīs* (the religious law ultimately *opposed* them), and only occasionally that based on the practice of surviving Arabian *jāhili* institutions. Rather, the environment in which *ra'y*-leading-to-practice-leading-to-the-living tradition flourished was quite clearly (in Schacht's schema) that of the *indigenous systems of the conquered territories*.⁵⁶ Elsewhere Schacht has defined the twin concepts of *'urf* and *'āda* as “the local customary law that has existed from time immemorial [i.e., prior to the advent of Islam] in the different Muslim lands.”⁵⁷ In *Introduction*, he explicitly identifies *'amal* (“judicial practice”) with “the conditions prevailing in fact” in conquered territories, and thereby implicitly identifies *'amal* (which *he* translates as “practice”) with *'āda*, not on the theoretical plain, but in historical Islamic reality.

Thus we may conclude, *pace* Calder (and cutting through the vagaries and inconsistencies characterizing Schacht's treatment of this issue), that when Schacht speaks of the “practice” which functioned as the foundation of *fiqh*, most of the time he is referring (consciously or not) to the *historical reality of imitation or borrowing*, and that to his way of thinking, the vast majority of Islamic legislation—content as well as form—is of foreign provenance.

As in the case of his inversion and pulverization of the *uṣūl al-fiqh*, here, too, Schacht is both anticipated and succeeded by scholars who support the notion of heavy outside influence on the formation of Islamic jurisprudence and positive law. For Goldziher it was “obvious” that the primitive desert Arabs “would adopt from their new surroundings as much of the customary law of the conquered lands as could be fitted in with the conditions created by the conquest...”⁵⁸ “[T]he stubborn antagonism of Islam to the rest of the

legal scholars) are not prophets, and do not arrogate to themselves the kind of Weberian “charisma” that allows prophetic figures—as vessels of the deity—to introduce new and unprecedented notions and practices.

⁵⁵ Schacht, *Origins*, 69.

⁵⁶ Richard Bulliet's *Islam: The View from the Edge* (New York: Columbia University Press, 1994) presents what is, to my mind, a more cogent analysis of the way in which contact with the inhabitants of the conquered territories may have led to the creation of Ḥadīth literature: not so much through the *imitation* by Muslims of the concepts and institutions of the locals, but as a result of the need to respond to *questions* put to the veteran believers by local converts to the new religion.

⁵⁷ “Sharī‘ah,” *Encyclopedia of Islam*, first edition (henceforth *EII*), 324.

⁵⁸ Entry “Fīkh,” *EII*, 102.

world,” he writes elsewhere, “its inflexible protest against the influence of foreign elements, is an illusion...”⁵⁹ Goldziher also saw as “proven” the “thorough-going adoption of Roman law by the jurists of Islam,” not to mention his own suggestion that *fiqh-fuqahā*’ and the Hebrew *ḥokhma-ḥakhamim* are both influenced by the Latin *prudentia-prudentes*.⁶⁰ In his *Muhammedanische Studien*, Goldziher credits Roman, Byzantine and Persian influence with the creation of *fiqh* methodology, calling the latter “as little a product of the Arab spirit as are grammar (*nahw*) and dogmatic dialectics (*kalām*).”⁶¹

Remarking upon al-Ṭabarī’s claim that in *jāhili* society a menstruating woman was isolated from the community, G. Vajda ventures: “Ce ne serait pas le seul exemple de la transposition dans le paganisme d’une coutume dont les Musulmans ne tenaient pas à reconnaître la provenance juive.”⁶² R. Dozy and C. Snouck Hurgronje (Schacht’s mentor) have posited the direct and antithetical influence respectively of Jewish Temple ideas on the development of the Muslim sanctuary at Mecca.⁶³ D.S. Margoliouth affirms, on the one hand, that it is “characteristic of Moslem studies that they take very little from outside; they develop on independent lines.” He nevertheless goes on to claim that “the general method of jurisprudence, principles for reconciling conflicting passages in the sacred book, and deducing unforeseen consequences” of *the Jews* “appears to have been the genesis of the second source of Law [i.e., Ḥadīth].” He even raises the possibility that the term “Ḥadīth,” denoting “narrative,” is a direct translation of the Hebrew *Mishna*.⁶⁴

⁵⁹ Ignaz Goldziher, “The Principles of Law in Islam,” in H.S. Williams (ed.), *The Historian’s History of the World* (New York: Hooper and Jackson, 1908), 298.

⁶⁰ Entry “Fikḥ” in *EII*, 102.

⁶¹ Goldziher, *Muslim Studies*, vol. 2, 79-80. For an extensive discussion of the relationship between Judaic and Islamic jurisprudential methodology, see Wegner, “Islamic and Talmudic Jurisprudence...”

⁶² G.J. Vajda, “Juifs et Musulmans selon le Hadīth” in *Journal Asiatique*, 179 (Jan.-Mar., 1937), 75. Translation: “This is not the only example of the attribution to paganism of a custom that the Muslims were reticent to acknowledge as having Jewish origins.”

⁶³ Cited in G.R. Hawting, “The Origins of the Muslim Sanctuary at Mecca,” in G.H.A. Juynboll (ed.), *Studies on the First Century of Islamic Society* (Carbondale: University of Southern Illinois Press, 1982), 25-47, at 33.

⁶⁴ Margoliouth, *Early Development*, 74-5. “Ḥadīth” is related, etymologically, to the Hebrew *khadash* (“new”), but both are obviously derivatives of older Semitic languages. It is true that “*shana*” and its Aramaic sister “*tana*” do contain

Many scholars influenced by Schacht have also supported and extended the “massive importation” postulate. The disclaimers of these authors—coupled as they are with confident declarations regarding the large amount of borrowing that “must” have taken place—make for frustrating reading. Coulson, a critic but nevertheless a follower of Schacht, while speaking of “a wide reception of foreign elements in the substantive law proper,”⁶⁵ admits that “because of the lack of contemporary sources, the precise measure of this [foreign] influence cannot be known.” “But,” he continues notwithstanding, “it *must* have been considerable.”⁶⁶ Crone and Cook state unequivocally that “Islam acquired its classical rabbinic form in the shadow of Babylonian Judaism” and developed according to the “Judaic model,” even though they go on to cite “the paucity of evidence for the concrete character of inter-communal relations.”⁶⁷ Islamic salvation history and hermeneutic techniques were adopted and adapted by Islam in “a fairly uncomplicated process of direct appropriation,” proclaims Wansbrough, who nevertheless acknowledges on the same page that “I have examined these [calques], but am unable to conclusively identify one single path of diffusion.” He adds, “I feel no special compulsion to apologize for the conjectural nature of my own efforts to depict the origins of Islam.”⁶⁸ (While it is true that there have been scholars—premiere among them M. Y. Kister—who have tentatively mapped out certain possible “paths of diffusion” of a small number of institutions from Judaism to Islam with the help of *mukhā-lafa* [“conscious contrast”] and *lā tashabbahu* [“do not assimilate”] texts, even these scholars cannot—and do not—claim that such

the meaning “tell, teach, state”—and just as often “study, repeat” (from *shnayim* meaning “two”)—and thus may be compared to the use of “*haddathanā*” in the *isnād*. *Shnayim* is, of course, connected to the Arabic root with the same meaning: *th.n.*²

⁶⁵ N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 28.

⁶⁶ Coulson, *History*, 28. Emphasis added.

⁶⁷ Cook and Crone, *Hagarism*, 30 and note 12 there.

⁶⁸ Wansbrough, *Qurʾānic Studies*, xi. Schacht himself appears to be unconcerned with identifying potential paths of diffusion: “[A]t the period in question, [Iraq] was deeply imbued with the spirit of Hellenistic civilization and at the same time contained great centres of Talmudic learning. These are all the data we need in order to account for the existence of concepts and maxims of Roman jurisprudence in early Islamic legal science, and the regular occurrence of parallels in Talmudic law.” Geographical proximity, this seems to say, is all that need be shown. Schacht, “Foreign Elements...” 7.

material constitutes hard evidence of actual encounters or direct influence).⁶⁹

Of course, if we want to truly understand and effectively scrutinize what Schacht and others have in mind when they speak of “a far-reaching reception of the most varied elements” from foreign sources into the Islamic legal system, we must narrow such scholars down to particulars, to concrete examples. We shall now attempt to do so in Schacht’s specific case, for the purpose of which it is first essential to discover to what extent Schacht applied his discontinuity and inversion model to *ritual* matters.⁷⁰

Like many of his Western colleagues, when Schacht says “Islamic law” he means civil and criminal law, and it is about this that he writes. It can be said with confidence that in his major works, he almost never touches upon what he himself refers to (and excludes from consideration as) “the cult and ritual and other *purely religious* duties.”⁷¹ Nevertheless, Schacht does manage to address our question, although the answer he gives is, once again, confusing. In *Introduction*, Schacht appears to exclude ritual jurisprudence and positive law from his overall scheme of Qur’ān-*fiqh* discontinuity:

⁶⁹ See M. Y. and Menahem Kister, “Al Yehudei Arav—He‘arot,” *Tarbitz*, 49 (5739 [1980]) and the first author’s “Do not Assimilate Yourselves,” and see especially, in this connection, note 123, below. For an excellent and informative survey of the issues (and literature) surrounding the possible mutual influence between Jewish and Islamic law in general, see Gideon Libson, “Ha-Zika bayn Ha-Mishpat Ha-Ivri la-Mishpat Ha-Muslimi,” *Mahanayim* 1 (5752 [1993]). At the time of this writing, I have yet to see Libson’s latest work—*Jewish and Islamic Law: A Comparative Study of Custom During the Geonic Period* (Cambridge, MA: Islamic Legal Studies Program, Harvard University, 2003)—which will no doubt constitute a major contribution to all discussions of this sort.

⁷⁰ Powers, after analyzing a number of the problems with Schacht’s thesis—including his treatment of the Qur’ān—affirms that, “It follows from the preceding remarks that anyone who wants to shed light on the origins of Islamic positive law ought to begin with the Qur’ānic legislation in the field of family law, inheritance, or ritual.” Powers’ work tackles the penultimate option; in what follows we shall be concerned with certain aspects of the final one. See Powers, *Studies*, 7.

⁷¹ Schacht, *Introduction*, 76. Emphasis added. For example, despite the immense amount of material devoted to *tahāra* or purity law in the classical legal texts, in the entirety of *Origins*—full of exempla from multiple categories and sub-categories of *fiqh*—we must make due with one terse discussion of a purity-related issue, and this only because the author devotes a few pages to Shi’ism (see Schacht, *Origins*, 261). The remainder of the *‘ibādāt* do not fair much better.

It is indeed obvious that many rules of Islamic law, particularly in the law of family and the law of inheritance, *not to mention worship and ritual*, were based on the Koran from the beginning, and occasionally this can be positively proved.⁷²

Azmi, for one, certainly reads Schacht this way, and criticizes him accordingly.⁷³ The above excerpt, however, is not the last word on the subject. As David Powers has noted,⁷⁴ Schacht stands on the brink of self-contradiction when he writes elsewhere:

This [*viz.*, that “norms derived from the Koran were introduced into Muḥammadan law almost invariably at a secondary stage”] applies not only to those branches of law which are not covered in detail by the Koranic legislation ... but to family law, the law of inheritance, *and even cult and ritual*.⁷⁵

Elsewhere, as we have seen, Schacht states that only well into the second century AH were “Koranic norms taken seriously for the first time” by the “ancient schools of law,” and applied, *inter alia*, to “worship and ritual.”⁷⁶ This is difficult: Schacht both pronounces “cult and ritual” direct products of the Qur’ān “from the beginning,” and, at the same time, asserts that norms derived from the Qur’ān—“even cult and ritual”—were introduced into Islamic law “at a secondary stage.” Which of these Schachtian positions is, as it were, *nāsikh*, and which is *mansūkh*?

Fortunately, we are in possession of evidence which can help us get to the bottom of the matter. If the *‘ibādāt* are indeed included in Schacht’s overall schema of severance and reversal, we should—according to the logic outlined in our investigation thus far—find him attributing many Muslim “purely religious duties” to alien origins, and that is exactly what we do find: “The influence of Talmudic law manifested itself above all in matters of ritual and worship,”⁷⁷

⁷² Schacht, *Introduction*, 18. Emphasis added.

⁷³ M.M. Azmi, *Studies in Early Ḥadīth Literature* (Beirut: Khayats, 1968), 215ff and 251ff.

⁷⁴ Powers, *Studies*, 7. John Burton points out this discrepancy as well, in *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990), 211. Burton supports and even extends the overall severance principle—see his *The Collection of the Qur’ān* (Cambridge: Cambridge University Press, 1977), 72ff.

⁷⁵ Schacht, *Origins*, 225. Emphasis added.

⁷⁶ Schacht, *Introduction*, 29.

⁷⁷ “Fīḫ” in *EI2*, 887.

he affirms, and “[t]he influence of Jewish law is particularly noticeable in the field of religious worship.”⁷⁸

Schacht almost never illustrates such blanket statements with concrete examples. The rare occasions on which he does so should therefore command our close attention, as they afford us an opportunity to observe what we have described as his general theory of importation at work in particular instances, and to employ these instances as test cases for his overall thesis.⁷⁹ In the remaining pages, then, we shall carefully examine two of these illustrative examples, both of which concern aspects of *ṭahāra*, the Islamic code of ritual pollution and purification. We shall leave no stone unturned or route unexamined in our attempt to establish or disestablish Schacht’s specific claims of alien influence in connection with the cases adduced.

Man’s Best Friend

The first case involves canine impurity.⁸⁰ The dog is a defiling animal in Islamic law, according to three and a half⁸¹ of the Sunni *madhāhib*,

⁷⁸ Schacht, *Introduction*, 21. Again, Schacht has been preceded by others in this outlook: Wensinck avers that the “current in early Islam tending to follow the Jewish customs in ceremonial law was very strong” (Entry “Nadjis” in *E11* and *E12*). According to Goldziher, “The receptive character that marks the formation and development of Islam also found expression, naturally first of all in matters of ritual, in borrowings from Jewish law.” (Entry “Fiḫh” in *ibid.*). “Many scholars,” sums up Wegner, “including Snouck Hurgronje, Fitzgerald, Schacht and Liebesny, have proposed or assumed that, in searching for early influences on Islamic law (beyond pre-Islamic Arabian custom), Jewish law is an obvious starting point.” Wegner, 38.

⁷⁹ The devil, it has been said, is in the details. I can conceive of no more legitimate and effective manner in which to test the validity of a general theory than by isolating specific instances where it is purported to apply and subjecting them to extensive and meticulous scrutiny. Of a surety, there is no presumption in what follows to invalidate Schacht’s entire thesis on foreign borrowing (or on Ḥadīth-*fiqh* severance) with the help of a handful of examples (even though it should be stressed that said examples involve highly confident and widely encompassing proclamations on Schacht’s part concerning—especially in the second instance—relatively large domains of Islamic law, and thus are far from being just “details”). The assertions we shall examine represent, as we have said, some of the rare cases in which Schacht commits himself on particular issues in this connection. It is hoped that future scholarship will identify other such instances and place them under the microscope, thus adding to—or subtracting from—the conclusions reached here.

⁸⁰ I use the term “canine” in this article to mean “of or pertaining to the dog,” and not “possessing the four pointed teeth of the predator” (*kull dhī nāb min al-sibāʿ*).

⁸¹ Amongst the Ḥanafī, Shāfiʿī and Ḥanbali scholars I have encountered there

a purveyor of the sort of *najāsa* (“tangible” impurity) that contaminates ablution water and invalidates prayer, as well as defiling *thawb* and *muṣallā* (clothing and prayer venue).

If a dog licks at a bowl of ablution (or drinking) water, the contents must be spilled out, and the bowl must be washed seven times, the first (and, according to some, the last) time with earth. This is not the case with the pig (the bowl need not be washed even once—except in the eyes of the Shāfi‘īya)⁸² nor with other predatory land animals (the contents need not be spilled out at all).⁸³ Dogs communicate *najāsa*, not just through saliva (to *wuḍū’* water) but also through contact with any part of their bodies, to people, places and garments: “‘Alī b. Ibrāhīm ... from Abū ‘Abd Allāh, who said: if a dog touches your garment, then if it [the garment? the “dog stuff” that rubbed off?] is dry, rub it, and if moist, wash it. Then you may resume your prayer.” “Ḥammād b. Īsā ... from Muḥammad b. Muslim, who said: I asked Abū ‘Abd Allāh about the case of a dog that came into contact with any part of the body of a man. He replied: he must wash the spot which the dog touched, and then he must *repeat* his prayer.”⁸⁴ Indeed, according to some traditions and authorities, contact

seems to be essential unanimity—punctuated only by differences of degree—on the ritually threatening or problematic nature of the dog. The Mālikiya appear to be about equally divided, though even those who declare the dog pure agree that a bowl lapped at by a dog must be washed seven times—as it were, *bi-lā kayfa*.

⁸² The Shāfi‘īya require the heptamerous lustration for swine, as well.

⁸³ The *su’r* or “leftover” water of a dog specifically is a massive issue in Islamic purity jurisprudence: “*wa-ammā al-kalb fa-ikhtalafa fihī ikhtilāfan kathīran min ajli’ l-Hadīth al-wārid bi-ghuṣl al-inā’ min wulūghihī fihī saba’ marrāt*” (Abū al-Walīd Muḥammad b. Aḥmad b. Rushd al-Qurṭubī [not to be confused with Averroes himself, nor with the famous thirteenth century legist and Qur’ān commentator of the same *nisba*, Abū ‘Abd Allāh Muḥammad b. Aḥmad al-Qurṭubī], *Al-Muqaddimāt al-Mumahhidāt li-Bayān mā Iqṭaḍathu Rusūm al-Mudawwana min al-Aḥkām al-Shar‘īyat wa’l-Taḥṣīlāt al-Muḥkamāt li-Ummahāt Masā’ilihā al-Mushkilāt* [Beirut: Dār al-Gharb al-Islāmī, 1988], 1, 88). See also Muḥammad b. Idrīs al-Shāfi‘ī, *Kitāb al-Umm* (Beirut: Dār al-Fikr, n.d.), 1, 19; Nawawī, *Sharḥ*, 1, 520; Shams al-Dīn al-Sarakhsī, *Mabsūṭ* (Beirut: Dār al-Ma‘rifa, 1989) 1, 48. Ibn Ḥazm, *Muḥallā*, 1, 122. There is, of course, a great deal of inter- and intra-scholastic *ikhtilāf al-fuqahā’* on this question. The Ḥanafīya take the strictest position overall (as they often do in purity law, contrary to their tendency in many other fields of *fiqh*), the Mālikīya the most lenient. Some Ḥanafī authorities require five washings of the bowl, others three. Given the lengthy disputes surrounding such subjects in the jurisprudential literature, the best one can offer—here as in other areas—is a distillation.

⁸⁴ *Al-Kāfi*, 1, 60. See also *Mudawwana*, 1, 115-7. Cf. ‘Abd al-Razzāq al-San‘ānī, *al-Muṣannaf* (Beirut: Dār al-Kutub al-‘Ilmiya, 1972), 1, 95 (47: 452-3).

is not required: “A dog prowling close to a believer makes his *ṣalāt* void.”⁸⁵ The dog is an ‘*ayn al-najāsa*, that is, an intrinsically and unalterably impure and contaminating organism (the Ḥanafīya hold that dogs are characterized only by *ḥukm najāsa* or a temporary, contingent “state” of impurity—an opinion for which they are regularly ridiculed by scholars of the Shāfi‘ī and Ḥanbali schools, who ask whether the Ḥanafī jurists think that one can “wash away” the dog’s *najāsa* with a bath).⁸⁶ On the Shī‘ī side of the divide, Abū Sahl inquired of Abū ‘Abd Allāh (the sixth Shī‘ī Imām Ja‘far al-Ṣādiq) regarding dogs: “Is the dog forbidden (*ḥarām*)?” The Imām answered: “It is ritually contaminating (*najis*).” Abū Sahl repeated his question thrice, and each time the Imām replied: “It is ritually contaminating.”⁸⁷ The Shī‘ī-Persian literature of *mas’ale gu’i* (illustrating legal problems using tales from everyday life) knows a story about a group of *madrasa* students in nineteenth century Yazd who drenched a dog in water and set it free in the room of one of their peers, where it shook off its inherent impurity—“conducted” by the water—onto all that the poor *tālib* owned (a “purity prank,” if you will). Despairing, the victim shut his eyes and prayed, “*Inshā’ Allāh būz būd!*”—may God will, it was only a goat!⁸⁸

Schacht is sure that the ritually defiling status of the dog in Islamic law is a product of Jewish influence. He states unequivocally:

Muhammadan law at the beginning regarded dogs as *res in commercio*. According to the Iraqians, who have retained the common ancient doctrine, (a) the sale of dogs is valid, and (b) if a man destroys a dog he is responsible for its value to the owner. *The idea of the ritual uncleanness of dogs was taken over from Judaism.*⁸⁹

⁸⁵ See entry “Kalb” in *E11* and *E12*.

⁸⁶ See, e.g., ‘Alī b. Muḥammad b. Ḥabīb al-Māwardī, *Al-Ḥawī Al-Kabīr* (Beirut: Dār al-Fikr, 1994), vol. 1, 371-5.

⁸⁷ Muḥammad b. Ḥasan al-Ḥurr al-‘Āmilī, *Wasā’il al-Shī‘ā ilā Taḥṣīl Masā’il al-Sharī‘a* (Beirut: Dār Iḥyā al-Turāth al-‘Arabī, 1982), 1, 1016.

⁸⁸ Ruhollah Khomeini, *Resālat-i-Tawḍīḥ-i-Masā’il* (1941), trans. J. Borujerdi (pseudonym), *A Clarification of Questions* (Boulder: Westview Press, 1984), xi. According to Sunni law, no creature can transmit its impurity onward to other objects (nevertheless, Reader #1 recalls—and was kind enough to share with me—a story told by the second Supreme Guide of the Muslim Brotherhood in Egypt about how Nāṣir’s minions “tortured” him by wetting a dog and placing it in his prison cell, where it would shake off its impurity onto the cramped *muṣallā* and thereby prevent *ṣalāt*). Even in the Shī‘ī purity code, this route of defilement is iffy. *Mas’ale gu’i* literature is usually employed to discourage exaggerated piety or strictness.

⁸⁹ Schacht, *Origins*, 216. Emphasis added. There is no elaboration on this single sentence.

Once again, Schacht is not working in a vacuum. Goldziher asserted confidently that the impure status of the dog in *fiqh* literature was the result of “conscious contrast” (*mukhālafā*) on the part of Muslim legists or other pious persons to the elevated position of the same animal in Zoroastrian funerary rites,⁹⁰ where the “look of a dog” (*sag-dīd*) banishes the corpse demoness and purifies the dead body.⁹¹ In his article “Islamisme et Parsisme,” Goldziher wonders why

[à] l'époque du Prophète, le chien n'était pas encore méprisé; les fidèles avaient a son égard des sentiments beaucoup plus tendres que ne le fait supposer le mépris dans lequel il tomba durant les générations suivantes.⁹²

(It is ironic that Goldziher, the father of Western Ḥadīth criticism for whom so many traditions were fabricated products of much later legal and doctrinal polemics, here relies on a series of ḥadīths—and only the convenient ones⁹³—to paint a picture of the esteemed position of the dog amongst the first Muslims). His “quickly found” solution to this problem is, as we have said, the antithetical influence on post-conquest Islam of the phenomenon of the *sag-dīd*:

La réponse est vite trouvée, quand on pense a l'estime dont cet animal jouissait chez les Parsis au milieu desquels les musulmans s'établirent

⁹⁰ “Nadjis” in *EII*, 822 (reprinted in *EI2*).

⁹¹ See Jamshid Choksy, *Purity and Pollution in Zoroastrianism: Triumph over Evil* (Austin: University of Texas Press, 1989), 18.

⁹² Goldziher, “Islamisme...” 18. Translation: “During the period of the Prophet, the dog was not yet despised. The believers had much more tender feelings for it than one would have thought given the extent of the derogation of the dog in the following generations.” The dog appears twice in the Qur’ān, once as a simile for the man who turns away from God’s revelations (7:176) and once as the watchdog of the Seven Sleepers (18:18-26). In the former passage, the reference is not truly negative (“he is like a panting dog: whether you chase it away or leave it alone, it still keeps panting”), and in the latter account it is not truly positive (the only function of the dog in the anecdote is as an insignificant member of the party, “stretching out his paws on the threshold” [verse 18], who some—apparently foolish—people include in the count of the cave’s inhabitants [verse 23]). To use the narrative of the Seven Sleepers as an example of the positive attitude toward dogs in early Islam—as do both Goldziher and Schacht—is, to my mind, unconvincing. (The root *k-l-b* is also found in 5: 3, where it is used to permit that which is caught by “those beasts and birds of prey which you have trained as hounds”).

⁹³ He ignores, for instance, a well-known tradition in which the Prophet orders the killing of all dogs, then makes an exception (grants a leniency—*rakhkhaṣa*) for hunting and herding dogs (*kalb al-ṣayd wa-kalb al-ghanam*). Muslim, *Ṭahāra*, 27: 280. See also Dāraqūṭnī, *Ṭahāra*, 21: 5, where the Prophet refuses to visit the homes of the Anṣār because they keep dogs.

... La tradition musulmane, voulant faire opposition à l'estime religieuse que l'on avait pour cet animal, fit remonter au Prophète la mesure de l'extermination des chiens et rendit méprisable pour des motifs religieux un animal domestique autrefois si estimé.⁹⁴

Goldziher's theory on this matter is mentioned by Wensinck (in the article "Nadjis" in the first and second editions of *The Encyclopedia of Islam*), who adds that "[i]t must not, however, be forgotten that the Jews also declared dogs impure animals."⁹⁵ In his own study on the subject of Islamic purity law, however, Wensinck is far less equivocal:

... Das beweist so gut wie sicher, daß in diesem Punkt das jüngere System vom älteren abhängig ist. Was die Auffassung der Unreinheit von Hunden und Schweinen betrifft, kann das auch als sicher gelten.⁹⁶

Schacht, as we have seen, was as definite as Wensinck in this regard. As convinced as Goldziher was that canine impurity in Islam represented a reaction to Zoroastrianism, Schacht was no less positive that "[t]he idea of the ritual uncleanness of dogs was taken over from Judaism." To support his theory/statement, Schacht sends us in the accompanying footnote to Henri Lammens' *Etudes sur le siècle des Omayyades*. Here is the totality of what this referent contributes:

Voici donc les déclarations, mises par le hadîth dans la bouche du Maître: "Les anges évitent les demeures renfermant une image, une clochette ou un chien". Remarquons-le en passant: le Qoran ne se montre pas plus hostile au chien qu'à l'âne; bien au contraire! Nous croyons surprendre ici l'influence des néophytes juifs sur la formation du hadîth.⁹⁷

⁹⁴ Goldziher, "Islamisme..." 20. Translation: "The answer is quickly found when one remembers the esteem in which this animal was held by the Parsis, in the midst of whom the Muslims settled... Muslim tradition, seeking to oppose the religious esteem afforded this animal, attributed to the Prophet himself the decree on the extermination of dogs, and made this domestic animal hateful for religious reasons."

⁹⁵ "Nadjis" in in *EII*, 822 (reprinted in *EI2*).

⁹⁶ Arent Jan Wensinck, "Die Entstehung der Muslimischen Reinheitsgesetzgebung," *Der Islam*, 5 (1914), 64. Translation: "...This proves without doubt that concerning this point the younger system [Islamic *ṭahāra*] depends on the older system [Jewish purity law]. Concerning the understanding of the impurity of dogs and pigs, this [dependence] may be taken as certain."

⁹⁷ H. Lammens, *Etudes sur le siècle des Omayyades* (1930), 362. Translation: "These are thus the declarations put in the Prophet's mouth by the Ḥadīth: 'The angels do not visit houses wherein are images, a bell or a dog.' It should be noted in passing that the Qur'ān is no more hostile to the dog than to the donkey; on the contrary, we believe that we see here the influence of Jewish neophytes on the formation of Ḥadīth."

Neither here nor elsewhere does Lammens mention anything about canine impurity in the *shari'a* (or the *halakha*), writing only about the angels' reluctance to visit a home in which dogs are kept. But he does at least assert Jewish influence on the negative Islamic attitude to dogs and their domestication. Having adduced no evidence for this proposition, Lammens sends the reader, in a footnote to the last sentence above, to an article published by R. Krauss in *Revue des études juives*, "La Defense d'Elever du Menu Betail en Palestine et Questions Connexes" (The Prohibition on Raising Small Livestock in Palestine and Related Questions).

Now, this last article has nothing to do with purity issues, which are nowhere mentioned in it. What is more, in the section on canines in Krauss' essay to which Lammens specifically refers us, not only is the (supposed) Talmudic ban on raising dogs declared "[pas du tout une] prohibition *religieuse* ... mais une mesure de police inspirée par la crainte de la férocité du chien et de sa morsure,"⁹⁸ but the remaining pages of this section of Krauss' article are devoted specifically to demonstrating that in most cases Jewish law has no problem at all with dogs being raised in the home, that in fact "les Juifs avaient des chiens dans leurs maisons" (a *Tanna* is even quoted to the effect that "chaque Israelite a son chien"), and that the overall Judeo-classical attitude to man's best friend is that he is just that.⁹⁹ Thus, the source where the "buck stops" does not prove Lammens' claim—it directly refutes it—and it has nothing whatsoever to do with Schacht's assertion, which is left with no leg to stand on.

There is good reason for the paucity of evidence tying canine *najāsa* in Islam to the ritual impurity of dogs in Jewish law: dogs are in no way, shape or form impure according to Jewish law. I have been able to discover no basis for the assertions of Wensinck and Schacht in this matter. It is true that dogs are not a permitted *food* for Jews (as they were not, I would imagine, for quite a few of the other peoples encountered by the early Muslims), but this is irrelevant: there is no

⁹⁸ R. Krauss, "La Defense d'Elever du Menu Betail en Palestine et Questions Connexes," *Revue des études juives* 12 (1925), 54. Translation: "[not at all] a religious prohibition... but a police measure inspired by the fear of the ferocity of the dog and its bite." Indeed, in the *halakha*, the dog's bark is worse than its bite: the rabbis are most concerned about the barking of a dog frightening a pregnant woman and causing her to miscarry (Baba Qama 83a).

⁹⁹ Krauss, "La Defense...", 21-4.

relationship between the Biblical-Talmudic dietary laws and the Biblical-Talmudic purity code.¹⁰⁰ No living creature (save the “naked ape” himself)—whether gastronomically permissible or not—is ever considered ritually contaminating by Jewish law. Maimonides:

There is no species of living creature which can ritually contaminate whilst still alive, or become ritually contaminated whilst still alive, with the sole exception of human beings; all other living creatures are pure. While they live they do not contaminate anything else, nor can they be contaminated by anything else, but only the human being can contaminate whilst alive or become contaminated whilst alive.¹⁰¹

Now it is possible to argue that the intent of Schacht and Wensinck was that Muslim legists extrapolated from the Jewish *dietary* prohibition against eating dogs, to the majority Islamic view that dogs are *ritually* unclean. This is an implausible scenario for a variety of reasons, the discussion of which would take us beyond the scope of the present essay,¹⁰² but a particular analysis by al-Shāfi‘ī of the impure and contaminating ritual status of dogs and pigs is, I think, highly instructive in this regard:

If it is asked [*fa-in qāla qā’il*]: How is it that you have determined regarding the dog and the pig, if these two drink from a vessel, that the vessel cannot be purified except through being washed *seven* times, while in the case of carrion or some blood falling into [the water], *one* washing is sufficient to purify the vessel, as long as there is no visible trace (*athar*) of these last two substances remaining [in the liquid]?

It is said to him [in response], in accordance with the [words of] the Messenger of God: (al-Shāfi‘ī said): We were told by Ibn ‘Uyayna

¹⁰⁰ This is an easily demonstrable dichotomy (despite the Biblical usage “*tame*” common to both unkosher and impure species) of which many an erudite scholar—and chief among them the anthropologist Mary Douglas, author of *Purity and Danger*—is apparently unaware. In the case of Islamic law, this same issue is slightly more complicated, primarily because the *eating habits* of predators prohibited as food tend to make them *purveyors* of *najāsa* via expectoration, according to many exponents.

¹⁰¹ *Haqdamā Le-Seder Ṭaharot* (found in most standard editions of the Talmud as a preface to the sixth Mishnaic order). This point is easily proven by a swift reading of the Book of Leviticus, especially the eleventh chapter. Similarly, all animals that die a natural—non-slaughter induced—death (aside from aquatic species) are *equally* contaminating. A dead dog is no more or less ritually threatening than a dead cow.

¹⁰² I address some of these issues in depth in “First Blood: Purity, Edibility and the Independence of Islamic Jurisprudence” forthcoming in *Der Islam*, 2004.

from Abū'l-Zinād [?] from al-A'raj from Abū Hurayra, that the Messenger of God said: "If a dog laps at the bowl of one of you, he should wash it seven times." We were told by Mālik from Abū al-Zinād from Abū Hurayra, who said: the Messenger of God said: "If a dog *drinks* from the bowl of one of you, he should wash it seven times." We were told by Ibn 'Uyayna from Ayyūb b. Abi Tamima from Muḥammad b. Sīrīn from Abū Hurayra, that the Messenger of God said: "If a dog laps at the bowl of one of you, he should wash it seven times, on the first or seventh time with dust/earth [*turāb*]."

(Al-Shāfi'ī said): Thus we rule with regard to the dog according to what the Messenger of God has directed, *and as for the pig, if its status is no worse than that of the dog, neither is it any better*, and therefore we rule on the latter by analogy to the former [*fa-qulnā bi-hi qiyāsan 'alayhi*].¹⁰³

Note that al-Shāfi'ī felt the need to derive the relatively severe impurity of the pig from the comparably severe (and essentially *sunna*-based) impurity of the dog, despite the fact that the Qur'ān (like the Pentateuch) explicitly stipulates the legal *inedibility* of the pig (more than once) but nowhere mentions the same regarding the dog. If it were possible to extrapolate from dietary status to purity status in Islamic law¹⁰⁴ (or if Islamic *ṭahāra* prescriptions can be said to have emerged—directly or by way of the Qur'ān—from the Pentateuchal/Talmudic laws of *kashrut*), then al-Shāfi'ī, who with all his zeal for Ḥadīth reports nevertheless gave precedence to derivations from Qur'ānic verses when such were possible, certainly should have argued *the other way*. At the very least, he could have utilized the Qur'ānic dietary proscription of the pig to *bolster* his *qiyās* (analogical) argument

¹⁰³ Shāfi'ī, *Umm*, 1, 19-20. Note that in Jewish sources we do find depictions of dogs drinking from water intended for purification (see, e.g., Talmud Ḥullin 107a), but such scenarios are employed by the rabbis for the diametrically antithetical—or rather, for an entirely unrelated—purpose: water which is so undrinkable (because salty, bitter or malodorous) that a dog would not deign to imbibe it, may not be utilized for ritual handwashing.

¹⁰⁴ My analysis here certainly does not exhaust this question. Like most areas and issues in *fiqh*, it is extremely hard to lay down laws and principles that hold true for all cases or are accepted by all authorities. Although I believe it can be shown that the majority of *fuqahā'* do not, ultimately, perceive a direct connection between questions of an animal's edibility and its essential purity, nevertheless, there would appear to be contrary tendencies, as well. For a passage arraying the position of exponents of various *madhāhib* on this relationship—in the context of a Shāfi'ian polemic—see *Umm*, 1, 19-20. Katz comments on the term *ṭayyib* as a bridge between the realms of purity and dietary law on 120-1 of *Body of Text*. Another term that appears to bridge the two categories is *khabth* or filth, which is used of both inedible (or at least disgusting) and *najāsa* substances.

based on Prophetic tradition.¹⁰⁵ But he doesn't. He finds no support for his position in Muslim scripture, and so must combine *naql* and 'aql (Hadīth and logic) to make his case. Now, if this eminent *faqīh* perceives no connection between the *Qur'ānic* dietary prohibition of a pig and that same animal's purity status, what shall we say about his (and his colleagues') conceivable attitudes toward the legal effect on the same of the *Biblical* dietary prohibition of the pig? Could this last possibly have constituted the source of Islamic swine *najāsa*, and then—in turn—of canine *najāsa*?

Interestingly, certain later scholars did indeed adduce the Qur'an in this connection, but their use of the verses prohibiting the consumption of pig-flesh proves even more conclusively that *fiqh al-tahāra* never envisioned an extrapolation from legal inedibility to legal impurity. Al-Shāfi'i, it will be recalled, had stated that "we rule with regard to the dog according to what the Messenger of God has directed, and as for the pig, if its status is no worse than that of the dog, neither is it any better, and therefore we rule on the latter by analogy to the former." In an attempt to support and amplify al-Shāfi'i's claim in this regard, al-Sarakhsī (a Ḥanafī jurist) points out that, nay, the pig would even appear to be far worse-off in terms of overall status than the dog, since the Qur'an goes to the trouble of prohibiting its consumption specifically (*innamā ḥarrama 'alaykum al-mayta wa'l-dam wa-laḥam al-khanzīr*—2:173), and since God threatens to transform those who incur his wrath into apes, swine, and devil worshippers (*al-qirada, al-khanzīr wa-'abad al-ṭāghut*—5: 60), whereas no such regulations or sentiments are found in Islamic scripture regarding the dog. Now, here we have al-Sarakhsī face-to-face with Qur'anic verses which—were dietary status in any way related to purity status in Islamic legal thinking—he easily could have used to support the *najāsa* of the pig *directly*: God forbade its flesh, thus it is ritually unclean. But no such idea entered his head, any more than it did al-Shāfi'i's. He was forced to make a *ra'y* argument whose launch-point is specifically the *sunna*-based impurity of the *dog*, and whose deployment of Qur'anic verses is confined to an argument *a fortiori*: if dogs—which the Qur'an does *not* perceive negatively—are impure, how much more so swine, which *are* prohibited as food and used as negative metaphors by Muslim sacred

¹⁰⁵ Just as he employs *ra'y* arguments, later in the same chapter, toward the same end.

writ.¹⁰⁶ Like al-Shāfi'ī before him, al-Sarakhsī does not consider employing a dietary verse to (directly) prove a purity point. (Nor should we forget, that had either of them done so, Schacht would have almost certainly dismissed this move as a retroactive assignment of an already extant “practice” to a scriptural base).

Finally, in the matter of Qur'ānic exegesis and the ritual status of the dog, it should be noted that attempts *were* made by certain *muḥaddithūn* (Ḥadīth transmitters), *mufasssīrūn* (scriptural exegetes) and *fuqahā'* to trace their opposing positions on canine *najāsa* directly to the Qur'ān—or at least to base their discussions of this question around it. But the verse they invariably utilized for this purpose involves as un-Jewish and as anti-*halakhic* a pursuit as can possibly be found: hunting.¹⁰⁷

They ask you regarding what is made lawful for them. Say: The good things are made lawful to you. And those beasts and birds of prey which you have trained as hounds (*ma 'allamtum min al-jawāriḥ mukallibīn*), you teach them what Allāh has taught you; eat of that which they catch for you and mention Allāh's name over it, and observe your duty to Allāh. Lo! Allāh is swift to take account. (5: 4).

As the eleventh century CE Shāfi'ī jurist al-Māwardī sums up the debate about dog defilement centering upon this verse, many jurists of the Mālikī *madhhab* adopt the minority position (as we saw above) that the dog is a pure animal. They argue, *inter alia*, that God would not have permitted the use of dogs (included among the “predators trained as hounds”) for hunting purposes were they *najis*, because

¹⁰⁶ Sarakhsī, *Mabsūt*, 1, 48. Interestingly, the Shāfi'ī school is the *most* liberal in matters of dietary law, permitting a wider range of creatures than any other *madhhab*. The Shāfi'īya are the only *fuqahā'* to allow consumption of the fox. See Michael Cook, “Early Islamic Dietary Law,” in *Jerusalem Studies in Arabic and Islam*, 7 (1986), 217-77, esp. 259. In the end, dog impurity is actually given *more* potency than that of the pig, at least in the context of Mālik's use of the concept *ta'abbud* (see, e.g., *Mudawwana*, 1, 116). A few sources make the Qur'ānic prohibition against consuming swine-flesh a divinely legislated “conscious contrast” (*mukhālaifa*) to the purported *jāhili* tendency to eat pigs (see, e.g., *Gharīb al-Qur'ān*, 4, 76). This is probably an example of Vajda's camouflage process, above, note 62.

¹⁰⁷ So illegal and inconceivable is hunting from the Judeo-classical perspective, that even Esau—whom his father Isaac favored “because he had a taste for game”—is depicted in rabbinic literature as a combination Robin Hood-William Tell, who could fire off an arrow with such precision that it would slice the jugular vein of the animal he was tracking according to all the finer points of Jewish ritual slaughter!

(a) one must not derive benefit from an impure thing, and (b) contact with the dog's mouth would then "corrupt" (*afsada*) the game. Al-Māwardī has nothing but contempt for these arguments. In the first place, he points out, there is absolutely no problem with deriving benefit from impure things—witness a *mayta* (an animal that died a natural death), the hide and hair and many other parts of which may be used for a variety of purposes, despite its being *najis*. Secondly, al-Māwardī marvels that the Mālikī scholars are unaware that impurity cannot be transmitted from an *ʿayn al-najāsa* (an intrinsically impure substance/organism, like the dog) onward to anything else.¹⁰⁸ He then imagines that someone parries this last refutation by saying that the dog's saliva (*lu'āb*) will certainly seep into the flesh and veins of the prey on the way back, and thus *ʿayn al-najāsa* itself will dissolve permanently into the meat. Al-Māwardī answers this potential objection by adducing what is evidently a widely accepted Shāfiʿī claim: that while the dog as a whole is *najis*, its mouth and the juices thereof—through a special *rukḥṣa* (dispensation) from God to hunters—are pure. And so the argument proceeds.... For our purposes it is sufficient to observe that neither the attack nor the defense in this case touches on issues that are even remotely related to matters historically preoccupying Jews and Judaism.¹⁰⁹

Moreover: were the implication of Schacht and Wensinck that the *fuqahāʾ* somehow transformed the Jewish dietary interdiction into the uniquely potent *najis* status of the dog, the question would remain: why the dog? If Jewish forbidden food leads to Islamic *najāsa*, then why not take the pig—the outstanding mascot-villain from time immemorial of the Jewish dietary system—as the fulcrum for *fiqh* analogies? Why specifically the dog? Among the manifold species explicitly proscribed in the Bible as legally inedible, the dog is not even mentioned, nor does the ban on its consumption diverge in nature or potency from that of any other animals that neither chew their cud nor walk on split hooves. Why wasn't the camel, for instance, which is *specifically* prohibited as food by the Pentateuch, turned into dromedary *najāsa* in *fiqh al-ṭahāra*?¹¹⁰ Why not the rabbit, or

¹⁰⁸ For the widely accepted, though unwritten, rule that such a transmission is impossible in the context of *ṭahāra* law, see Maghen, "Close Encounters..."

¹⁰⁹ Al-Mawardī, *al-Ḥāwī*, 1, 371-4. On hunting dogs versus non-hunting dogs see also Bukhārī, *Kitāb al-Dhabāʾih*, 10.

¹¹⁰ There was an attempt to declare camels contaminating, but it ultimately failed. Nor was this attempt connected to the question of the camel's legal edibility.

the hoopoe, both of which are *explicitly* declared legally inedible—side-by-side with swine—in the books of Leviticus and Deuteronomy?¹¹¹ Why the dog, which is never so much as mentioned in the Torah or Talmud in connection with purity problems *or* dietary laws? Indeed, the reason why the biblical and rabbinic texts do not bother to discuss the dog as a forbidden food is no doubt not only because it neither sports split hooves *nor* chews its cud (unlike those conceivably confusing creatures—such as the pig—that possess only one of these characteristics), but also due to the fact that few people in the region considered eating dogs in the first place. Thus a direct and “conscious” declaration regarding the prohibited dietary status of the canine—and the odium and stigma that occasionally accompany such a declaration in Judeo-classical literature—was unnecessary and avoided.

Were one to argue that the dog was singled out as *najis* by the *fuqahā'* from among the long series of unkosher animals listed in the Pentateuch as a result of some of this animal's problematic habits, such as loitering around trash heaps or devouring corpses strewn on the battlefield; or because the dog was neither fully domesticated (by virtue of which it might have been the subject of leniency due to its constant presence—*rukḥṣa li-ʿumūm al-balwa*) nor fully wild (by virtue of which it would have been of little interest due to the rarity of contact) but somewhere in between; or even just because of the dog's denigrated status in general—were one to argue that any or all of these criteria helped the *fuqahā'* select the dog specifically from amongst all of the unkosher animals enumerated in the Torah or avoided by Jews, then the question immediately arises: *what need would there be of Judaism?* The Arab-Muslims of the Ḥijāz, or of Iraq or Syria or Egypt, were certainly as familiar with such canine qualities and conduct as any of their neighbors were, and could easily have come to their own conclusions without the help of Hebrews, ancient or contemporary.¹¹² For all of the above reasons, then, it is unlikely that Schacht and Wensinck were referring to the *dietary* status of dogs in Jewish law when they spoke of Islamic *ṭahāra* borrowing canine *ritual uncleanness* from the Jews.

¹¹¹ My knowledge of Arabian fauna is limited, but if these creatures are featured in the Biblical text, then they were unquestionably encountered by Muslims invading the Fertile Crescent.

¹¹² Reader #1 has informed me that Calder advances a similar argument regarding borrowing in general. See Calder, *Studies*, chapter 8.

As for the more “cultural” side of things, it should be stressed again that the Judeo-classical attitude to the dog was not monolithic. Of course, the Bible is full of references in the style of Goliath’s taunt to David, “Am I a dog, that thou comest to me with sticks?” or Avner’s resentful retort to Ish-Boshet, “Am I a dog’s head in Judah?”¹¹³ and the like. It would probably be difficult to find an ancient or modern literature that *didn’t* employ the simile of the stray dog negatively. But by the time of the Talmud (canonized nearly a millennium later than such biblical statements, on the brink of the emergence of Islam), even this natural disparagement apparently had faded: we may add to the numerous citations provided by Krauss (above) regarding the positive rabbinic approach to the dog, the exhortation in the tractate of *Pesakhim*, 113a: “Rav said to Rav Asi: do not live in a town where no horses neigh nor dogs bark” (*amar lei Rav leRav Asi: lo tadur bemata delo tsanif bah sussei velo navakh bah kalba*).¹¹⁴

Thus, I would argue, Schacht paints himself into a corner, all possible routes of what he claims to be the transfer of canine ritual impurity from Judaism to Islam having been blocked off either by historical realities, or by his own theories and conceptions. Indeed, Schacht (I would contend) ends up destitute of any means at all by which to explain the presence of the notion of dog *najāsa* in Islam. For according to his outlook:

1) *Canine impurity could not have come from the Qur’ān*, both because al-Shāfi’ī and al-Sarakhsī were unable to derive it thence (as we saw), and because Schacht would not have believed them if they *had* been able to—he would have declared their enterprise ex-post-facto pegging;

¹¹³ 1 Samuel, 17: 43; 2 Samuel, 3: 8.

¹¹⁴ Much evidence can be adduced in both directions: the Talmud claims (Sanhedrin 108b) that the animals on Noah’s ark were separated into male and female quarters, and no mating took place throughout the journey—except in one case: the male dog leapt over the gender barrier and had his way with the bitch. As punishment for their ancestor’s transgression, dogs ever since copulate in the most humiliating fashion of any creature—back to back. On the other hand, Rabbi Akiba’s father-in-law was called nothing less than “Kalba Savu’a,” the rabbis (Gittin 56a) speculating that he received this nickname because any dog (*kalba*) that came to his doorstep went away satiated (*save’a*) (this may mean, however, that even a species as lowly as the dog was not neglected by the great luminary’s father-in-law).

2) *Canine impurity could not have genuinely emanated from the Prophet's sunna*—Schacht built his career upon showing this to be the case (especially in the matter of legal Ḥadīths); ... and, according to the realities of history,

3) *Canine impurity could not have come directly from Biblical dietary laws*, because

a) early Muslims sitting and studying the intricate culinary proscriptions of Leviticus; making complicated cross-disciplinary extrapolations and analogies from those same dietary laws to the impurity of certain beasts (while their rabbi-tutors were momentarily distracted?); *not* being subsequently told by their Jewish/convert teachers that said extrapolations and analogies were erroneous (or being told, but stubbornly moving ahead with their misconceived interpretations anyway); and finally—in the capacity of a “Judaizing party”¹¹⁵—returning to their Muslim milieu and managing to convince four-fifths of their fellow jurists and co-religionists that this new notion (which was not, in fact, Judaic at all) should be introduced into the *sharī'a*—all of this is, of course, quite absurd;¹¹⁶

b) Jewish converts to Islam, had they felt the need to bring some of their erstwhile religion's provisions into their new faith, certainly would not have picked “do not eat dogs”—as this was neither a Biblical clause nor in any way a significant Jewish custom or symbol—nor, had they done so, would such converts have had any reason to extend this dietary prohibition to determinations regarding impurity or prayer preclusion, for Judaism could never, and did never, do likewise; and also,

c) If a Muslim were—for whatever reason—willing to derive purity prescriptions from dietary prescriptions, then why do so from the Bible, when similar Qur'ānic dietary restrictions (of, e.g., the pig) were there for the taking, available for immediate exegesis?

Finally, 4) *Canine impurity could not have come from the Talmud or from seventh-to-tenth century CE Jewish practice*, simply because there *was* no such notion or observance to be found in either of those

¹¹⁵ Wensinck's “*judaisierende Richtung*”—of which more below.

¹¹⁶ Even Schacht admits: “That the early Muslim specialists in religious law should *consciously* have adopted any principle of foreign laws is out of the question” (Schacht, “Law,” 71).

frameworks. Thus, this Islamic legal provision (canine impurity) could not have come from the Qurʾān or from the *sunna* (according to Schacht's own outlook), nor could its source be in Biblical or Rabbinic Judaism (according to the realities of history).

It is clear, at any rate, that *pace* Schacht, neither the ritual, nor the dietary, nor the cultural attitude of Judaism can be forced to account for the Islamic position that the dog is “a fundamentally unclean animal,” that “everything a dog touches or licks is rendered impure” and that “a dog prowling close to a believer makes his *ṣalāt* void.”¹¹⁷ Goldziher's theory—of “conscious contrast” (*mukhālafa*) to the positive ritual uses of the dog in Zoroastrian Iran—though speculative and highly problematic, is at least more plausible than Schacht's derivation of canine *najāsa* from the Jews.¹¹⁸

Where did Schacht get the idea that dogs were ritually unclean according to Jewish law? As we saw, the source he cites never mentions canine impurity in *halakha* (how could it?), and it is almost impossible to imagine a legal scholar of Schacht's stature confusing the statements made in Lammens' (or Krauss') article with claims about the dangerous *ritual* status of dogs in Jewish law. Perhaps he was following Wensinck (as others have done for almost a century regarding many *tahāra* issues).

It is more likely, however, that both Schacht and Wensinck consulted Sephardic Jews. Jews from Middle Eastern lands are almost invariably possessed of the mistaken notion that dogs are impure according to Jewish law.¹¹⁹ This is without question the result of generations spent

¹¹⁷ “Kalb” in *EI2*. The Ḥadīth also specifies a black dog in this connection, together with a woman and a donkey (their presence can render prayer invalid). This last may possibly have Jewish overtones. See Muslim,—*alāt*, 269-71, and 265. Keeping dogs in the house “*min ghayr ma'nā/hāja*” (as al-Shāfi'ī puts it) is probably a recent phenomenon in nearly all countries.

¹¹⁸ Goldziher just as easily might have posited *mukhālafa* in the face of Egyptian beliefs about the nobility and/or semi-divinity of dogs.

¹¹⁹ The author's grandfather on his father's side was an Iranian Jew. Coming to visit Philadelphia soon after fleeing the Islamic revolution of 1979, he accompanied his grandson to synagogue on the Sabbath. The rabbi graciously invited the nonagenarian and progeny to his house for *Kiddush* after services. Upon arrival, my grandfather was shocked to his depths as the rabbi's Newfoundland-St. Bernard greeted us at the door and was all but embraced by his owner. “*Najes!*” yelled my grandfather (in the Persian pronunciation): Impure! An argument ensued which ended with some twenty texts spread across the lunch table—written by both Ashkenazic *and* Sephardic authorities—in which there could be found (of course) no mention of the impure status of the dog (my

living as a minority among majority Muslim communities, for whom dogs emphatically *were* impure. Thus, far from serving as an example of *Jewish* influence on *Islamic* attitudes to the dog, Schacht's statement about the derivation of canine *najāsa* probably evinces the opposite phenomenon: *Islamic* influence on *Jewish* attitudes to the dog.

Most fascinating in this regard is a ruling found in the well-known sixteenth century Jewish legal handbook, the *Shulḥan 'Arukh* (*Oraḥ Hayim*, 160: 10), a work which emerges for the most part from the Sephardic/Eastern milieu and tradition and is relied upon especially by Jews of that heritage. The ruling provides that “water which was licked at by a dog” (*mayyim sheh ha-kelev likek mehem*) is “considered by some to be invalid [for *neṭilat yadayim*, the ritual washing of hands].” Here, almost verbatim, we have the formulation found time and again in the Ḥadīth and *fiqh* books regarding canine *su'r* (“*idhā walagha al-kalb fī inā' aḥadikum*”).¹²⁰ Since late *halakhic* works rarely hand down rulings that lack Talmudic bases, one of the commentators on the *Shulḥan 'Arukh*—the *Magen Avraham*—dutifully discovered a source for the venerated code's ruling on the contamination imparted by dogs to water, referring the reader to a passage in the *Tosefta*, an ancient compilation of extra-Mishnaic material redacted (or at least collected) no later than the end of the rabbinic period (ca. fifth century CE). Now, this latter source would unquestionably constitute incontestable proof of Schacht's position—for it would demonstrate that the aspect of dog defilement most on the minds of the *fuqahā'* was taken over wholesale and verbatim from Jewish law—were it not for one minor snag: it isn't there. The source does not exist. So much is admitted outright by the renowned Rabbi Yeḥiel Mikhal Epstein, nineteenth century author of a super-commentary on the *Shulḥan 'Arukh*, the *'Aruch HaShulḥan* (*Hilkhot Neṭilat Yadāyim*, 160: 10), who nevertheless clings to the ruling itself:

grandfather, as usual, remained adamant. The rabbi probably shouldn't have played with the dog anyway—not because it was ritually contaminating but because animals are basically *muktza*, that is, among those objects not to be touched/moved on the Sabbath—but that is another matter). Since then I have heard similar sentiments regarding the “*tum'ā*” of the canine voiced by countless oriental Jews, hailing from all parts of *Dār al-Isām*.

¹²⁰ I am convinced that *walagha* and *likek* are close etymological relations, both of which may have contributed, along with (or instead of) the Sanskrit *lih*, to the English “lick.”

The essential aspect of the law is that water [earmarked for hand-washing] is pure, regardless of which animal drank from it, whether cattle or beast or fowl; however, when it comes to dogs and pigs, it is best to be stringent [and desist from washing with water they have licked] for such water has become disgusting and deserving of disposal (*nim'asu ve-hava lay ke-shofkhin*). And [support for the exceptional character of the dog and the pig in this regard] has been adduced in the name of the Tosefta. *And I haven't found this in the Tosefta.*

Intrigued, the author of the present essay traced the *Shulḥan 'Arukh's* ruling regarding the problematic effect of dogs on water as far back as it will go, landing in early eleventh century North Africa, at the Kairouan residence of the famed Rabbenu Ḥananel ben Ḥushiel. It is his classic commentary on the Talmud (to *Para*, 9: 3) that contains the earliest mention anywhere in Jewish literature of this issue. Should we be surprised?

*Splish Splosh, Washing and Praying*¹²¹

It has not been my intent to deny that the perception of dogs as impure may have entered the Islamic milieu and legal framework from an outside source, but only to deny that Schacht had any basis for identifying that source as he did. Few if any ideas or institutions are thoroughly “original.” Most if not all of the conceptions, strictures and folkways of a given human collective are ultimately derived, in some fashion or another, from those of surrounding and preceding communities (this may even be an acceptable statement from a Muslim theological point of view, given the plethora of claims in the classical sources to the effect that Islamic law and belief is *muṣaddiqun li-mā bayna yadayhi*—“a confirmation of that which came before it”). Therefore the real question, if we want to talk about the authenticity and independence of a particular element of society or religion, is not so much *whence* as it is *whither*. That is, regardless of whether, or from whom, a given notion or institution has been adopted (because almost everything in life and history is to one degree or another

¹²¹ “In the city of sand, their [“Mahound’s” followers’] obsession with water makes them freakish. Ablutions, always ablutions, the legs up to the knees, the arms down to the elbows, the head down to the neck. Dry-torsoed, wet-limbed and damp-headed, what eccentrics they look! Splish, splosh, washing and praying.” Salman Rushdie, *The Satanic Verses* (London: Viking Press, 1988), 104.

“adopted”), the real issue is what is *done* with that notion or institution once it is brought on board by the host confession or community.

For instance, there are some who claim that Judaism did not originate the notion of a messiah, but that this idea was taken over from the Zoroastrian Saoshyant myth, encountered by Jews during Israel’s sojourn in Babylon after the destruction of the First Temple. Now, supposing, for the sake of argument, that this assertion is correct: the next question we ought to ask is whether—after bringing the messianic concept back to Judea in the sixth-fifth century BCE “Return to Zion” (or continuing to mature and ripen the same in the later academies of Babylon)—the Jews and their texts subsequently cultivated and elaborated this new idea *under the continual influence of Zoroastrianism*, which hovered over all of their thinking and doing in this matter, the ever-present mentor-tutor; or whether, on the contrary, the Zoroastrians and their literature—once having made their seminal contribution to what would become this burgeoning field of Jewish (and eventually Christian) thought and spirituality—bowed low, took their exit gracefully and had little or no effect on the ensuing internal development of the messianic idea in Judaism. If the latter is the case—that is, if Jews did *not* continue to consult or to be impressed by Zoroastrian perspectives after the moment of adoption (or, put another way, if they did not absorb the entire intricate eschatological system of Zoroastrianism lock, stock and barrel), but only took over the basic concept of a Redeemer and thereafter creatively evolved an entire complex cosmology of last things betwixt and amongst themselves—then one would certainly be justified in classifying the resultant Jewish messianism as independent, unique, *sui generis*. If the former is the case—that is, if Jewish thought, feeling, debate and even action regarding messianic matters were somehow closely supervised or at least continually influenced all along the way by Zoroastrians or Zoroastrianism, for decades and generations after the initial reception of the raw idea (or if Judaism had indeed assimilated the *entire* system of Zoroastrian messianism in one fell swoop, and not just the elementary notion of a savior in the End of Days)—then not only could we not speak of originality or uniqueness, but we would probably be justified in using terms like “self-effacing imitation” or “cultural servitude.”

It is with this important distinction in mind that we now turn to Schacht’s second assertion regarding matters of Muslim *ṭahāra* and its provenance, compared to which his attribution of canine impurity

to Jewish sources is modest and minimalist. Regarding the preeminent *wuḍūʿ* (ablutions) verses of the Qurʾān, Schacht declares—without adducing any evidence or conducting any “searching historical analysis”¹²² here or elsewhere—that:

The regulation in Sura 5 v. 8, of the late Medina period, already betrays Jewish influence: “Ye, who believe, when you prepare for the *salat*, wash your faces and your hands up to the elbows and rub your head and your feet up to the ankles.” Muslim regulations for purity based on this passage and the next verse v. 9 (in part identical with iv. 46) *developed in all details under the influence of the corresponding regulations of Judaism* but on the whole are less exacting than the Jewish system.¹²³

¹²² Schacht, “Law,” 65: “[The powerful absorption and adaptation mechanism of Islam managed consistently to] permeate [the alien elements] with what was felt to be true Islamic spirit, until their foreign origin, *short of a searching historical analysis*, became well-nigh unrecognizable.”

¹²³ “Wuḍūʿ” in *EII*, 1140. Emphasis added. Schacht follows Flügel’s numbering, whereas in most editions of the Qurʾān (which follow the Egyptian edition), the verses in question are not two, but one: 5: 6, not 5: 8-9. The only support Schacht offers for this statement is: “The material for the study of [the origins of Muslim purity regulations based upon these verses] is contained in an unusually comprehensive body of traditions, in the transmission of which Aḥmad b. Ḥanbal had a particularly large share; in it we find on the one hand a, to some extent, antinomian tendency and on the other an endeavor to regulate everything in minute detail, and lastly the harmonizing tendency of the moderate elements.” Schacht says nothing further, but can only be referring here to the numerous polemics in Ḥadīth literature on purity that Wensinck, Vajda and others—basing themselves on a few *mukhālaḥa* references found therein to the supposed overstringencies of the Jews—have described as indicative of the struggle between a “Judaizing party” (or “school”—German: “Richtung”) and its opponents. Now, since in the case of ninety-nine percent of these *aḥādīth* neither side of the *ikhtilāf* or polemic actually adduces Jewish practice or recalls Jewry in any way, the extrapolation from the one percent onto the ninety-nine percent certainly does not appear to be justified. Indeed, there is room to argue that since in the one percent, those Companions represented as attempting to introduce a Jewish custom are often defeated through the expedient of accusing them of just that illegitimate action—introducing a Jewish custom—the *lack* of such an accusation in the other ninety-nine percent of the polemics appears to militate against the possibility of one of the participants constituting a genuine “Judaizing party.” For if they were such, then why did the opposing side neglect to unsheathe the handiest weapon available, and accuse them of Judaization? Such a riposte to the “evidence” he adduces would probably leave Schacht unmoved, however, for he appears to be willing to build his thesis of foreign provenance on the one percent alone, if necessary, as he has written elsewhere: “Whether these [outside] influences amount to little or much is irrelevant; the important fact is that they did happen” (Schacht, “Foreign Elements in Ancient Islamic Law,” *Memoires de l’Academie Internationale de Droit Compare* [1950], 140). In a later recension of this same article he echoes and clarifies (or does he?) this statement: “We are not concerned

here with assessing the extent of the borrowings which Islamic law may have made from Talmudic and from Roman law, but with investigating the problem of whether such borrowings, as far as legal science is concerned, may possibly have taken place." Schacht, "Foreign Elements..." [Edge version]).

Additionally, even in the few cases in which Jews *are* mentioned in these traditions, it is not at all certain that their appearance in a given ḥadīth represents an actual encounter with historical Jews or with bona fide Jewish notions, sources or institutions. For example, in the context of a discussion about objects or substances (including parts of the body) which when touched do or do not obligate one to perform or repeat the ritual ablution, al-Shāfi'ī records the following ḥadīth: *Rawā al-'Alā 'an abīhi 'an Abi Hurayra anna Rasūl-Allāh ṣalla Allāhu 'alayhi wa-sallam qāla: a'fū al-liḥya wa-khudhū min al-shawārib wa-ghayyarū al-shayb wa-lā tashabbahū bi'l-yahūd.* "'Alā transmitted from his father from Abū Hurayra, that the Messenger of God said: Allow your beards to grow abundant and long, clip your mustaches and pluck out your hoary hair—do not resemble the Jews.'" (Shāfi'ī, *Umm*, 1, 36). Norman Calder (either he or I have translated this ḥadīth incorrectly) has the following to say about its significance :

A rare acknowledgement of alien influence is found in a ḥadīth cited by Shāfi'ī, *Umm*, i. 18.5-6. 'The Prophet of God said "Let your beards grow, and your mustaches; and dye your grey hair; do not resemble the Jews.'" Here the influence is adversative, and signals once again the difficulties of any claim that parallels indicate influence, for opposites also might indicate influence. That the reference is to the externals of Jewish appearance, and not to the structures of Jewish law, is also significant. (Calder, *Studies*, 217, n. 47).

Anyone knowledgeable about the "externals of Jewish appearance" in history will immediately see the problem here (the fact that Jews grew their beards long in the Roman, Byzantine and Muslim Middle East—as they did at all other times and places—is attested by numerous sources, including not a few Islamic ones) and it is certainly significant that virtually the same ḥadīth appears in Muslim's compendium and other sources with one important difference: "the Jews" are replaced by "*al-majūs*" (the Magians/Zoroastrians)—a ubiquitous interchangeability which speaks volumes about the unreliability of such *aḥādīth* as indicants of historical influence (Muslim, *Tahārah, Bāb al-Fiṭra*, 16:260. *Fiṭra* ḥadīths are here subsumed under the rubric of purity, as they are in the *Musnad* of Ibn Ḥanbal, as well). There are many examples of such misleading pseudo-historical references (as well as a small number which are probably *not* misleading: see Kister, "Do not Assimilate..."). Also, in view of the fact that in such ostensible "*lā tashabbahū*" situations, the supposed "Judaizing party" almost always *loses*, it is hard to understand how such *denouements* can be adduced as evidence of Muslim purity regulations having "developed in all details under the influence of the corresponding regulations of Judaism"? Or if by claiming that "the material for the study of [Islamic purity dicta's] origins is contained in an unusually comprehensive body of traditions" Schacht intends not the *tahāra* code's ensuing "develop[ment] in all details" but rather the locus of *original entry* of Jewish purity concepts into Islam—the Qur'anic verses which "already betray Jewish influence"—then why is he sending us to Ḥadīth? One is at a loss to see how, according to Schacht's own schema, one might utilize *aḥādīth* in order to illuminate the origins of norms already explicitly delineated in the Qur'an! For

There are several elements in this passage that require our attention. First, Schacht here posits Jewish origins for the preeminent purity verses in the Qurʾān. Since he elsewhere “notes in passing” that “Mohammadan religious law shows no traces of foreign influences that might have touched the Arabs in pre-Islamic times...,”¹²⁴ and moreover nowhere gives any indication that he would have subscribed to the revisionist theory of post-Arabian Qurʾān redaction subsequently put forth by Wansbrough,¹²⁵ we must assume that in the first part of his above-excerpted statement (“The regulation in Sura 5 v. 8, of the late Medina period, already betrays Jewish influence”) Schacht is envisioning a cross-cultural transmission involving Medinan Jews and either the Prophet himself or some of his Companions or Successors.

Second, and more intriguingly, Schacht here provides us with an excellent example of how his aforementioned “limping between two opinions”¹²⁶ regarding the application of his own severing-borrowing schema to *ritual* matters, expresses itself with relation to a specific area of ceremonial law. On the one hand, he affirms that later Muslim regulations for purity are “based on this passage and the next verse.” On the other hand—in the following sentence—he declares that these same regulations “developed in all details under the influence of the corresponding regulations of Judaism.” How are we to understand

all of these reasons, the sole reference Schacht provides to back up his sweeping declaration that most of Muslim purity material comes from Judaism, is eminently unhelpful. Schacht’s claim that Muslim purity rules are “on the whole less exacting” than their supposed Jewish counterparts is also incorrect, and is dealt with below.

¹²⁴ Schacht, “Law,” 71. A strange notion, but one which is supportable if you conclude that all the foreign-sounding elements in the Qurʾān are later “infiltrations” (to employ Schacht’s terminology). Only, if so, what are they doing in the Qurʾān? After all, Schacht (unlike Wansbrough) regards Islamic scripture as a product of the pre-Umayyad *ḥaramayn*, where it was also redacted.

¹²⁵ By describing the passage in question as “Medinan,” Schacht clearly indicates that he still adheres to traditional Islamic historiography at least to *this* extent. See also, in this connection, his statement to the effect that “[i]n doing this [the specialists] achieved on a much wider scale and in a vastly more detailed manner what the *prophet in the Koran had tried to do for the early Islamic community of Medina.*” (Schacht, *Introduction*, 27. Emphasis added). Examples of this sort abound in his writings.

¹²⁶ To paraphrase Elijah, 1 Kings 18:21. It will be recalled that we earlier discussed Schacht’s apparent self-contradiction in connection with issues of “worship and ritual,” and the question of whether his theories of discontinuity and foreign borrowing were intended to cover this area of Islamic law as well.

this double attribution? Are Muslim laws of pollution and purification an example of those aspects of “worship and ritual” that were “based on the Koran from the beginning”? Or are they, rather, an instance of those “norms derived from the Koran”—“including cult and ritual”—which were “introduced into Muḥammadan law almost invariably at a secondary stage” after being borrowed from the local custom of the conquered communities? Schacht seems to be saying that they are *both*—nor does he explain anywhere how these two processes might work in tandem. Given his overall approach, we should, then, probably understand him here as asserting that Muslim purity regulations, having been absorbed to a large extent from the “practice” of Judaism during the open and flexible mid-to-late Umayyad *ra'y* period of the ancient schools, were then retroactively projected onto Qur'ānic verses via suitable exegesis and *asbāb al-nuzūl* activity.

This brings us to the most significant aspect by far of Schacht's terse analysis: the complete confidence with which he asserts that the elements of Islamic purity jurisprudence and positive law connected to and derived from these verses are influenced “in *all* details” by what he is sure are the “corresponding” Judaic discussions and rulings. To make a statement like that without adducing (anywhere in his numerous writings) even one example as reinforcement is to invite a serious audit, which we shall now conduct.¹²⁷

Let us first have a look at the three verses in question (two in *Sūrat*

¹²⁷ Once again, Schacht was preceded and followed by similar assessments. A few examples will suffice: Wensinck stated, “The Muslim laws of purification (*Reinheitsgesetz*) are connected, as is probably known, with the Jewish ones.” (“Die Entstehung...” 62). Elsewhere he asserts: “As for excrements and several kinds of secretions of the body, the theory and practice of the Jews and Christians sufficiently explain the attitude of Islam in this respect.” (s.v. “Nadjis” in *EII* and 2). In Erwin Rosenthal's *Judaism and Islam* the author sums up a sole modest paragraph on Islamic purity as follows: “In principle, the laws governing *ṭahārah* are the same [as those of Judaism], as is the term itself.” Erwin I.J. Rosenthal, *Judaism and Islam* (London: Thomas Yoseloff, 1961), 20. In *Roman, Provincial and Islamic Law*, Crone digresses to speak briefly about Jewish influence on Islamic jurisprudence. Noting the “obvious” structural similarity between *sharī'a* and *halakha*, Crone goes on to state: “Since the order of the subjects in the Mishna and the Muslim lawbooks is related, while in a subject such as ritual purity there is virtual identity of both overall category and substantive provisions, it evidently was not by parthenogenesis that the similarity arose; and it takes little knowledge of Jewish law to see its influence in the most diverse provisions of Islamic law.” (Crone, *Roman*, 3. Emphasis added). The comparison of the subject order in the *fiqh* texts to that of the Mishna is baseless.

al-Mā'ida, as well as the “partially identical” verse in *Sūrat al-Nisā'* to which Schacht alludes):

O ye, who believe, when you prepare for the *ṣalāt*, wash your faces and your hands up to the elbows and wipe your head and your feet up to the ankles. And if you are sexually polluted (*junuban*), purify yourselves (5: 8/5: 6).

And if you are sick, or on a journey, or one of you cometh from the privy, or you have had contact with women (*lāmastum al-nisā'*), and you find not water, then go to clean, high ground and rub your faces and your hands with some of it... (5: 9/ 5: 6).

O ye who believe, draw not near unto prayer when ye are drunken, till ye know that which ye utter, nor when you are sexually polluted (*junuban*), save when journeying upon the road, till ye have bathed. And if ye be ill, or on a journey, or one of you cometh from the privy, or ye have touched women, and you find not water, then go to clean, high soil and rub your faces and your hands therewith... (4: 46).¹²⁸

Is Schacht correct in claiming that the provisions or clauses found in these Qur'ānic verses “already betray Jewish influence”? More importantly, is there any basis for his conclusion that “Muslim regulations for purity *based on* this passage and the next verse”—that is, the manifold aspects of the *tahāra* code ostensibly *extracted* from these passages by means of a variety of exegetical, hermeneutic and analogical procedures—“developed in all details under the influence of the corresponding regulations of Judaism”?¹²⁹

¹²⁸ I have used Marmaduke Pickthall's *The Meaning of the Glorious Qur'ān* (New Delhi: UBS Publishers, 1996), with certain adjustments suggested by Katz.

¹²⁹ It has been suggested by Reader #2 that Schacht's second sentence, here under review—“Muslim regulations for purity based on this passage and the next verse ... developed in all details under the influence of the corresponding regulations of Judaism”—“also suffers the interpretation that the *verse itself* and its various items are borrowed from Jewish law, and does not necessarily refer to future development.” Although I have myself pointed out (above) that Schacht's formulation is ambiguous, I respectfully submit that it cannot suffer such an interpretation. The full passage under scrutiny consists, as we have seen, of two sentences. The first of these does indeed make the explicit claim that verse 5: 8 “already betrays Jewish influence,” and I have endeavored to tackle this assertion at length below. The second sentence does not, naturally enough, repeat this same point, but rather advances an *additional* claim: that the “Muslim regulations for purity” (by which Schacht indubitably intends the manifold *furū'* of this fundamental precept) which are *based on* the verse in question and which evolved *out of* it, “developed in all details under the influence of the corresponding regulations...”, this latter clause clearly referring to nothing other than “future development,” that is, to the ensuing growth and metastasis of the Islamic purity code—a code at least purportedly derived almost in its entirety from this one verse (as we shall see immediately).

In order to comprehend just how sweeping Schacht's statement is on this score, we should first point out the following:

1) Without delving into any of the complicated exegesis and *ikhtilāf al-fuqahā'* (juristic disputes), it may be said that Muslim religious scholars have traditionally utilized what Schacht refers to as verse 5: 9 in order to fill in the perceived lacuna of what Schacht refers to as verse 5: 8 (in most later editions of the Qur'ān both are part of the same verse, 5: 6). The first verse, after all, does not stipulate any of the *causes* of ritual defilement (*nawāqīd al-wuḍū'*, violators of ritual fitness) that would require the believer to perform the various washings and/or wipings described therein.¹³⁰ The content of the second verse is therefore projected backward onto the first (logically enough, given that rubbing with earth is advanced as a *substitute* for washing with water), so that we are now able to understand that the scripturally defined "events" necessitating re-purification by means of *wuḍū'* are: urination and defecation ("coming from the privy"); touching women; and major—usually sexually induced—impurity (this last being derived from the explicit mention of *janāba* in the parallel verse, 4: 46).¹³¹

2) The jurists, scriptural exegetes, Ḥadīth transmitters, and *shurrāḥ* (interpreters of Ḥadīth) did not stop there, however, but further extrapolated from the above three archetypal "*wuḍū'* violators"—explicitly delineated in the Qur'ān—to a number of other analogous "events." Responding to the call of nature, for instance, is almost invariably extended and conceptualized to include *khurūj al-khārij min al-sabīlayn*, "whatever emerges from one of the two orifices [phallus/vagina/ureter/anus]," thus providing for the addition of, e.g., semen and flatulence (and worms) to the list; the parameters may be further stretched to encompass the set of bodily orifices as a whole, thereby allowing for the inclusion of regurgitation and saliva (this

¹³⁰ Other than sleep—if the words *idhā qumtum ilā ṣalāt* are read "when you awaken for prayer." If understood as "when you *prepare* for prayer" (as Schacht renders it, above) then the beginning of the verse appears to be requiring *wuḍū'* prior to every prayer, regardless of whether or not the believer has experienced a *ḥadath* (a defiling "event") in the interim. This debate—whether genuinely textually based or a product of opposing "living traditions"—is conducted throughout the Ḥadīth and *fiqh* literature. The upshot seems to be that no ablutions are required unless one has specific knowledge that he has lost his pure status via some prayer-precluding bodily incident. For this dispute, see Katz, *Body*, 60-75.

¹³¹ For this procedure see, e.g., Muḥammad b. Jarīr al-Ṭabarī, *Jāmi' al-Bayān 'an Ta'wil Āy al-Qur'ān* (Beirut: Dār al-Fikr, 1995), vol. 5, section 6, 122.

last especially among animals) as possible *nawāqid al-wuḍūʿ*; and the category is occasionally even generalized to the pores and to cuts in the skin, thus subsuming secretions such as sweat and blood under this ever widening rubric.¹³² All of these sub-classifications undergo mitosis themselves and blossom into vast and intricate flow-charts of discussion and debate, each of which takes up dozens if not scores of pages in the average work of *fiqh*. No less than this minor defilement—the call of nature—the major defilement of *janāba* (sexually induced impurity) is subject to extensive and in-depth analysis as well, its spin-off subjects spilling out onto countless pages of juristic deliberation.

3) Not only the *violators* of ablution, of course, but also the manifold issues surrounding the proper execution of the purification procedure itself—whether *wuḍūʿ* or *ghusl*—are almost all “based upon” the verses Schacht cites.¹³³ These include topics ranging from when and under what circumstances one should perform ablutions; the correct definition of the “parameters of the face”; the quantity and quality of the water utilized; the multi-faceted discipline of post-evacuation etiquette; the voluminous subject of the “meeting of the two circumcisions” (sexual intercourse)—and much more. Nor is that the end of the matter. As derivatives of, and necessary elaborations upon, the above topics, we have massive *fiqh* discussions revolving around hundreds of the minutest details regarding *maḍmaḍa* (gargling), *istinshāq* (snuffing water into the nose), *istinthār* (blowing water out

¹³² In most cases this tendency toward categorization and analogy is reigned in before it gets as far as, say, the nostrils or the tear ducts, and vomit is often excluded (see, e.g., Muḥammad b. al-Ḥasan al-Shaybanī, *Kitāb al-Ḥujja ‘alā Ahl al-Madīna* [Beirut: ‘Alam al-Kutub, 1984], 1, 19). Even perspiration is declared by the majority of *fuqahāʿ* to be clean—see, e.g., Muwaffaq al-Dīn ibn Qudāma, *Kitāb al-Mughnī*, ed. Muḥammad Rashīd Ridāʿ (Cairo: Dār al-Manār, 1367 AH), 1, 49; Mālik b. Anas, *Al-Mudawwana* (Beirut: Dār al-Kutub al-‘Ilmiya, 1994), 1, 132; Shāfi‘ī, *Umm*, 1, 4 and 33; Ja‘far Muḥammad b. Ya‘qūb b. Ishāq, *Al-Uṣūl min al-Kāfi* (Beirut: Dār al-Ta‘rif, 1401 AH), 1, 52-3. Nor is this process of extension to general principles the only—or even the most popular—method of filling up the list of *ahdāth*, as we shall see below. It matters not whether we envision the *mufasssirūn* and/or *fuqahāʿ* being initially stimulated by the nature of the text to make these extrapolations, or having evolved these issues and categories from a different launch-point altogether and then inserted them retroactively back into the text—either way, their activity is covered by Schacht’s “Muslim regulations for purity based on this passage and the next verse,” and either way, he is attributing them to Judaic sources.

¹³³ Certain aspects of *wuḍūʿ* procedure are based solely on the example of the Prophet or a select few Companions, especially ‘Umar and ‘Alī.

of the nose), *niyya* (declaration of sacred intent), head-wiping, beard-moistening, spaces in between fingers/toes, rinsing up to the two bones at the knot of the sandal straps or (alternately) up to the calves, *miswāk* (tooth-stick), the prescribed order and prescribed number of washings for each limb, what happens if one violates that order, water which “jumps” from one limb to another, the fate of “used” water (a massive topic in its own right), whether one must rinse one’s hands (“mundanely”) before performing *wuḍūʿ*, ablutions with snow, ablutions with “sunned” water, ablutions with stagnant water, ablutions with water drawn from a well in which mice (or men) have drowned, whether a believer who wipes his head while standing in the rain fulfills the obligation of *mashʿ al-raʿs*, how a double amputee should perform *tayammum*, what happens if a foot is washed and then chopped off for stealing (does the body’s general purity remain?), whether ablutions must be performed before every prayer, or only once a day, or only after an ascertainable *ḥadath* (defiling “event”), sock-sandal-shoe-slipper-galoshes-garment-glove-turban-kerchief-veil-cast wiping, which acts are *wājib* in *wuḍūʿ*, which *sunna*, which *mustahabb*, *makrūh* (*karāhat al-taḥrīm*, *karāhat al-tanzīh*), *harām*, etc.—all of these and countless other topics are seen by Muslim jurists as direct outgrowths of, or at least as integrally connected to, the verses Schacht is referencing.

4) Finally, a notorious syntactical ambiguity in the first verse—“...wash your faces and your hands up to the elbows and wipe your heads and your feet up to the ankles”—where, depending upon the Arabic case-ending modifying the word “feet”, God could be commanding either the *washing* or the *wiping* of those extremities during ablutions, has engendered (or functioned as a post-facto peg for) a well-known juristic battle of epic proportions, both between the *fuqahāʿ* of different Sunni *madhāhib* and, more ominously, between the legists of Shiʿism and those of the *Ahl al-Sunna*, in a conflict that raged on for centuries and may even have spilled out onto the stage of Islamic political history.¹³⁴ Perhaps no other sub-topic in the Islamic purity code is granted as much space in the tomes of *fiqh* than the rancorous debate over *mashʿ al-ghusl al-rijlayn* (wiping versus washing the feet) and its offshoot, the question of *mashʿ alā al-khuffayn* (when and whether one may wipe one’s boots instead of one’s feet).¹³⁵

¹³⁴ Katz, *Body*, 84-6.

¹³⁵ For this lengthy and often vehement argument (conducted to this day on

Now, Schacht was no doubt aware of the elementary hermeneutic maneuvers outlined in paragraphs 1 and 2 above, as well as of the inexorably metastasizing subject matter highlighted in paragraph 3 and, of course, of the famous foot-wiping controversy described in paragraph 4. If so, then he surely must have known that in pronouncing “Muslim regulations for purity based on this passage and the next verse” to have been “developed *in all details* under the influence of the corresponding regulations of Judaism,” he was essentially relegating some nine-tenths of Islamic *tahāra* jurisprudence and positive law to thoroughgoing foreign (specifically: Jewish) provenance—and nearly ten-tenths if we include the dog.

All of this is unfounded, and most of it is clearly and demonstrably wrong. Of the manifold issues and rulings just outlined, which Companions, Successors, commentators and jurists teased out of the clauses in 5: 6 and 4: 46 with the help of analogy, prophetic exempla and creative category construction, not one (with the possible exception of seminal contamination) is ever entertained in Jewish legal literature. Nor need we go as far afield as the aforementioned exegetical extrapolations of the *fuqahā* to see the fallacy: a straightforward examination of the fate of the explicit scriptural clauses in 5: 6/4: 46 *themselves*, exposes Schacht’s claim as groundless. Since this claim was advanced specifically with respect to the ablutions for *aḥdāth* (defiling “events”)—in the context of an encyclopedia article on that subject—let us scrutinize one each of the prayer-preclusive “events” and corresponding ceremonial solutions enumerated in the verse under investigation, the latter half of which (sometimes printed as a separate verse) reads as follows:

And if you are sick, or on a journey, or one of you cometh from the privy, or you have had contact with women, and you find not water, then go to clean, high ground and rub your faces and your hands with some of it.... (5: 9/5: 6).

It is unanimously agreed among the interpreters and jurists of all schools that the first two items—sickness and travel—are not pollutive *aḥdāth*, and that the conjunction “or” between the words “on a journey” and “one of you cometh” must therefore be understood as “and.” Thus the beginning of our verse should be read: “If you are sick, or on a journey, and [in one of these contexts] one of you came

not a few Internet sites), see John Burton, “The Qur’ān and the Islamic Practice of Wuḍū’” *BSOAS* 51 (1988), 21-58.

from the privy or had contact with women (*aw jā'a aḥadun minkum min al-ghā'iṭ aw lāmastum al-nisā'*)..."¹³⁶ The *aḥdāth* directly delineated in our verse—which Schacht ascribes to the impact of Jewish elements and sources—are therefore: urination, defecation, and the touching of women. Let us look at the last of these (although a review of each of the other two would produce similar results),¹³⁷ searching for evidence of possible Judaic influence.

¹³⁶ Nevertheless, most *fuqahā'* tend to extend the prescriptions regarding these two specific contexts—illness and travel—to normal, stationary conditions (that is, at home and healthy) as well.

¹³⁷ The Muslim jurisprudence and positive law on impurity arising from urine/urination and feces/defecation have no counterparts in Biblical, Talmudic or any other genre of *halakhic* texts. There is a lone instance in the classical Islamic sources of what Wensinck (and Calder) would, and Vajda did, perceive as an illustration of Jewish → Muslim *antithetical* influence in the matter of attitudes to urine: a ḥadīth asserting that “if the skin of one of the Banū Isrā'īl was bespattered with urine, he would excise that portion of his flesh with a cutter (*qaraḍahā bi' l-maqāriḍ*)” (Muslim, *Ṭahāra*, *Bāb al-Mash' alā al-Khuffayn*, 22: 273; G. Vajda, “Juifs et Musulmans selon le Hadith,” *Journal Asiatique*, 179 [Jan.-Mar., 1937], 75). As in the case of the previously cited *fiṭra* ḥadīth, in which the believers are urged to “grow your beards: do not resemble the Jews,” here, too, this purportedly age-old Israelite practice is employed as a foil for proper Muslim conduct. And just as, *pace* Calder, the first ḥadīth represents no conceivable historical reality, so, too, in this case, Vajda appears to be mistaken: there almost certainly were no “Israelites” in history who acted in this manner, though we do have a *baraita* to the effect that if one stands and urinates and bespatters himself, he should wash off the urine, see Kister, “‘Al Yehudei Arav...’”, 239, n. 38, who strangely does not adduce our ḥadīth (mention should also be made of a Mishna in Tractate Yoma (3: 2) which reminisces that “this was the general principle in the Temple: whoever [whichever priest] ‘covered his feet’ [*maysekh raglav*, evacuated] required [full] immersion, and whoever ‘made water’ [*matil mayyim*, micturated] had to sanctify the hands and feet [*ta'ün kidūsh yadayim ve-raglayim*],” though this, too, ultimately cannot have impacted our question). The fictitious nature of the Israelites in this ḥadīth is clear, among other reasons, because cutting oneself is expressly prohibited in Jewish law, a grave biblical interdiction tied to a hermeneutic rendering of Genesis 9: 5: “And surely your blood of your lives I will require.” Reading further in—*aḥīḥ* Muslim and elsewhere, one discovers that even were there a connection of some sort between the statements in the *baraita* and the ḥadīth about “bespattering,” both of them partake of an older and fiercer pan-Near-Eastern debate about whether men should micturate standing or sitting. They certainly have nothing whatsoever to do with *ṭahāra*, whether on the Jewish or the Muslim side, and if Vajda, like Goldziher, is seeking “antithetical influence,” an Islamic ruling in deliberate contrast to the purificatory powers of bull’s urine (*gomez*) in Zoroastrianism is there for the taking.

Antithetical influence or “conscious contrast” (*mukhālafa*) is, at any rate, an extremely problematic notion, especially as utilized by the great orientalists. All too often forgotten by them in their identification of supposed instances of inverted

Mulāmasa (lit. “touching another”) is a provision that, as far as I am aware, is unique to the Islamic purity code.¹³⁸ In no other ritual system with which I am familiar does bodily contact with a non-menstruating member of one’s own class or community consistently induce ceremonial contamination. At any rate, it is certain that no such notion or institution exists anywhere in Jewish law or life. Nor can the claim be effectively made that early Muslims somehow translated the Jewish practice of “distancing” (*harḥaka*) women *during menstruation* into the Islamic institution of ritual defilement resulting from palpation of the opposite sex *at all times*. That this is impossible we know from the ample evidence in Ḥadīth

impact is the fact that the community ostensibly engaging in deliberate contraposition must harbor particular predilections in the first place, prior to its exposure to the “offending” other, in order that it may be “offended” at all, and in order that it may choose those specific areas and practices, from among the vast panoply encountered, that it wishes to condemn or eliminate via contradictory legislation. At any rate, if *mukhālaḥa* is at all historical, it certainly is not so here, in the case of the imagined self-mutilating Israelites, where the Muslims would have had to first exaggerate or even invent a Jewish practice, and then oppose their own invention.

Kister (*ibid.*, n. 39) also adduces a lone example of purported Jewish influence in the matter of cleaning feces off of one’s legs, but one certainly imagines that Muslims did not need Jews to teach them something that dogs do instinctively, and the ḥadīth he quotes probably runs aground on the same shoals as the previous two (the beard and the “bespattering”). Among Jews, unlike in the *sharīʿa*, defecation had no impact on one’s ritual fitness. As for the encounter with solid *animal* waste, *fiqh* discussions on subjects ranging from the excrement of edible beasts versus that of inedible beasts; to the offal of carnivorous versus herbivorous creatures; to the amounts of ordure that make for defilement; to the presence of pigeons in mosques and the consequent danger of dung from the air; and much, much more—all of these concerns have no counterparts of any kind in Jewish sources, where fecal classification, on the rare occasions on which it occurs and is related in any way to prayer, has nothing to do with the power of one or the other type of waste to alter the supplicant’s ceremonial state.

The vastness and complexity of the independent Islamic legal treatment of these two *a’yān al-najāsa/nawāqīḍ al-wuḍūʿ* (urine/urination and feces/defecation) is specifically what leads us to employ the *third* option (touching women) for purposes of exemplifying what we see as Schacht’s misrepresentation of the facts. To survey the scores of pages of argument, counter-argument, exegesis and analogy in the juristic texts comprising the sub-fields of *fiqh* urinalysis and/or scatology—not to mention the manifold *aḥādīth* adduced by all sides, and their individual manipulation, refutation and redirection—would put us far beyond the scope of this essay. The “touching women” clause, though itself the subject of considerable deliberation, is nowhere near as elaborated as the first two.

¹³⁸ For brief discussions of *mulāmasa* see Katz, *Body*, 86-92; and Maghen, “Close Encounters...” 385-9. This provision should not be confused with the type of sale of the same name prohibited by the Prophet.

literature that certain circles in the early generations of Islam were broadly familiar with the Judaic laws of *nidā* (lit. “banishment” during menses), and that the prevailing elements in such circles—and, ultimately, all exponents of Islamic law together with them—*specifically rejected* any imitation of the traditional Jewish extension of *nidā* laws from the mere avoidance of intercourse to the sweeping prohibition against touching menstruating women in any fashion:

Among the Jews, when a woman began to menstruate, they would send her out of the house, and they would not eat with her, and would not drink with her, and would not remain with her in their houses (*lā yu'ākiluhā wa-lā yushāribuhā wa-la yujāmi'uhā fi'l-buyūt*).¹³⁹

‘Ā’isha said: I used to drink while a menstruant and pass the cup to the Prophet, and he would place his mouth on the spot where my mouth had touched and drink. I would also chew the meat off of a bone [*ata’arraqu al-‘arq*] while a menstruant and pass it to the Prophet and he would place his mouth on the spot where my mouth had touched [and nibble].¹⁴⁰

From Nadba, the servant-woman of Maymūna [the Prophet’s widow]: Maymūna sent me to the house of Ibn ‘Abbās [for some purpose], and I went in, and there in his house I happened to see two separate beds [*firāshān*], and I went back to my mistress and said: It appears to me that Ibn ‘Abbās and his wife are quarreling [*mā arā Ibn ‘Abbās illā muhājiran li-ahlihi*—see *al-Nisā’* 4: 34: “As for those wives from whom you fear rebellion, admonish them and banish them to beds apart...”]. Maymūna sent to the daughter of Mushraḥ the Kindi, the wife of Ibn ‘Abbās, to see what was what, and she replied: No, no! We’re not quarreling, I’m just in the midst of menstruation! Then Maymūna sent to Ibn ‘Abbās, asking: Can I interest you in a *sunna* of the Messenger of God? The Messenger of God [she continued] would embrace his wives when they were menstruating, and they would wear a piece of material [*khirqā*] down to their knees, or the mid-thigh.¹⁴¹

¹³⁹ Jalāl al-Dīn al-Suyūṭī, *Al-Durr al-Manthūr fi’l-Tafsīr bi’l-Ma’tūr* (Cairo: n.p., 1314 AH), 1, 258. Although the third verbal form of the root *j-m-‘* often indicates intercourse, that is not the case here. See also, for this ḥadīth, Ignaz Goldziher, “Usages Juifs d’après la Litterature des Musulmans,” *Revue des Etudes Juives* 28 (1894), 83-7. We do have evidence that at certain places and times, some Jewish communities were (almost) as strict in this matter as depicted in this tradition.

¹⁴⁰ Muslim, *Hayd*, 3: 300; see also Nasā’ī, *Tahāra*, 176.

¹⁴¹ Ibn Ḥanbal, 6: 336. The restriction of this restriction to the avoidance of the private parts is widely attested in both Ḥadīth and *fiqh*. Here, however, it must be admitted that we may have alighted unwittingly on evidence that—while it does not support Schacht’s alien influence thesis—might conceivably provide ammunition to Wensinck and others who put forth the idea of a “Judaizing party.” For the same Ibn ‘Abbās who is portrayed in this tradition as having adopted a very Jewish sounding practice, is also (as we shall see below) the champion of

The *ḥadath* of *mulāmasa*, by contrast, is brought on by an act as simple as touching one's wife's elbow (or that of one's concubine, sister or even mother), kissing her cheek, grazing her stomach, stepping on her foot—anything.¹⁴² Clearly, the origins of the Islamic purity precept of *mulāmasa* cannot be sought in an imitative *expansion* of the law of menstruation, for if there *was* a Muslim adoption and adaptation of *halakhic* practice in the matter of menses, it was clearly characterized by *contraction* of the observance.

Let us assume, however, for the sake of (an even less plausible) argument, that Companions, Successors and/or later Muslim believers were, in a conducive set of socio-cultural circumstances, duly impressed by (what may perhaps have been) a certain Jewish reticence to engage in public displays of affection with their spouses, and that the Muslims carried over and metamorphosed this behavior into the purity precept of *mulāmasa*.¹⁴³ Given such a highly improbable scenario, did the newly arrived precept continue to grow and develop “in all details” under the tutelage or influence of the “corresponding regulations of Judaism”? This is easily checked.

the dissenting position that the Qur'ānic provision of *mulāmasa* does not refer to simple male-female touching, but only to full-fledged intercourse. Is this coincidence, or are we justified in imagining some suggestive consistency here: Ibn 'Abbās the Judaizer (the advocate of the legitimacy and sometimes even the necessity of borrowing precepts from the Jews) strictly observing Jewish rules regarding menstruation, while at the same time fiercely rejecting the validity of a type of ritual contamination (mere contact even with non-menstruating women) of which his Jewish (or once Jewish) acquaintances had never heard. (It is significant that those who took up Ibn 'Abbās's struggle in this matter over the following generations were specifically Ḥanafis). This, of course, is pure speculation, but a survey of Ibn 'Abbās's many other rulings and a comparison-contrast analysis of these with *halakha* might serve to strengthen or dismiss it. Either way, none of this has anything to do with Schacht's proposition about the Jewish influences over the evolution of the clauses in 5: 6/4: 46.

¹⁴² First degree relatives induce defilement according to a large minority of jurists, and there is dissension regarding other aspects of this statement, too, as we shall see.

¹⁴³ In truth, although speculations could be made in different directions based on a variety of factors, we possess no hard evidence that Jews were any less affectionate in public with their mates than other peoples in the centuries corresponding to the early Islamic period. Religious male Jews have, in certain lands at certain times, avoided public contact with their wives, lest by touching them and then ceasing to touch them (at the onset of their periods), the menstrual cycle of the woman be advertised abroad. However, even if Jewish couples were less publicly affectionate, how one would get from observing such modest behavior to the Qur'ānic *ḥadath* of *mulāmasa* is difficult to see.

Between the Mālikī, Shāfi'ī and Ḥanbalī *madhāhib*¹⁴⁴ a vigorous and exponentially ramifying set of debates took place regarding *mulāmasa*, beginning in the *Mudawwana*, *Muwattā'*, *Aṣl* and *Umm* in the eighth and ninth centuries CE and continuing down to the *Muhadhdhab*, *Ḥāwī*, *Muḥallā*, *Mabsūṭ* and *Majmū'* (among scores of other works) in the eleventh, twelfth and thirteenth. These semi-syllogistic and often dizzyingly tortuous arguments revolved around questions like: are passion and pleasure (*shahwa*, *ladhdha*) prerequisites for contracting the impurity of *mulāmasa*? Are intention and intensity (*qaṣd*, *shidda*) necessary to activate this clause and cancel one's *wuḍū'*? What if you kiss your wife, but only out of respect (*karāma*)—must you repeat your ablutions? What if you kiss your grandmother, but unexpectedly find a modicum of titillation in this? What if you seek erotic pleasure from a sensual encounter (a hug, a kiss, a light caress) but in the end it leaves you cold? What if you have no such intention, but find yourself excited nonetheless? Does it make a difference in terms of ritual consequences if one actively reaches out and touches (*lāmis*), or, alternately, passively allows oneself to be touched (*malmūs*)? What of egalitarianism: is the prayer-preclusive “event” of *mulāmasa* a two-way gender street? Is a woman's *wuḍū'* violated when she comes into contact with a man? With her husband? With her father? Her brother? Her infant son (*ṣabī*)? Are first degree relatives (*dhāt raḥim maḥārim*) a purity problem? What of those who possess only a temporary or contingent propinquity (*maḥram bi-ishtirāṭ*), such as one's sister-in-law, mother-in-law or a female polytheist (if a man divorces his wife, his former sister-in-law becomes permitted to him; if the pagan woman converts to Islam, she will no longer be forbidden to the Muslim man)—may a believer platonically palpate such ladies with ceremonial impunity? What if he touches a member of the same sex, especially “a beautiful, beardless boy” (*amrad jamīl*), with amour aforethought? Without? What if the encounter involved a hermaphrodite? A beast? A genie?¹⁴⁵ An old hag (*'ajūz shawhā*)? A dead woman? A *piece* of a dead woman? Is it only contact with the limbs involved in the performance of *wuḍū'*?

¹⁴⁴ We are reserving the Ḥanafī outlook on this subject for use in another context, below.

¹⁴⁵ On the presence and function of *jinn* in the deliberations of *fiqh*, see the brief remarks of Goldziher in *Introduction to Islamic Theology and Law*, 63-5 and accompanying notes, and Sulaymān al-Jamal, *Sharḥ Sharḥ al-Minhaj* (Cairo: Maṭba'at Muṣṭafā Muḥammad, n.d.), 1, 69-70.

that can undermine the same, or does any spot on the body nullify one's purification? Does a garment covering the skin present a "barrier" (*ḥā'il*) the presence of which serves to nullify the nullification? Does it matter whether the garment is thick or thin? Made of wool or silk? One-ply or two? If one is aroused by just *looking* at his/her neighbor, does this invalidate one's ritual readiness for prayer? What if s/he looks at a reflection in a pond? At a picture? If s/he reads an especially vivid description? And so on (we have listed less than a third of the sub-topics tackled by the *fuqahā'* in the context of disputes over *mulāmasa*).¹⁴⁶

Here, then, are the "details" to which Schacht was specifically and directly referring, which purportedly were so pervasively influenced by "the corresponding regulations of Judaism." Of course, not one of the issues enumerated above possesses the faintest echo anywhere in the law or lore of Judaism: neither in the Bible, nor in the Mishna, the Gemara, the Midrashim, the Tosefta, the Geonim, the Rishonim—nowhere are subjects of this sort ever entertained in Jewish literature. Needless to say, the rules of *mulāmasa* also cannot be "on the whole less exacting than the Jewish system", as Schacht avers regarding the regulations growing out of verses 5: 6/4: 46.¹⁴⁷

Moving on to the second scriptural item we will examine, the reader will recall that if one has indeed come into contact with a member of the opposing gender (or with a member of the same gender to whom one is sexually attracted, according to about one third of the authorities)—as well as if one has "come from the privy"—s/he must repeat her/his lustrations prior to engaging in the next prayer session. But what if there is insufficient water available for the purpose? The

¹⁴⁶ Such discussions may be found in more-or-less systematic formats in, e.g., Ibn Qudāma, 1, 192-7; Muḥammad b. Aḥmad b. Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid* (Beirut: Dār al-Fikr, n.d.), 1, 29-32; Abū Zakariyā' Yahyā Muḥyī al-Dīn al-Nawawī, *Kitāb al-Majmū'* (*Sharḥ al-Muhadhdhab*) (Cairo: Al-Azhar, n.d.), 2, 23-50; and throughout the literature.

¹⁴⁷ The question of whether one may recite the *shmā'* prayer whilst lying in bed and touching one's wife does come up in the Talmud (I thank Reader #2 for reminding me of the location of this discussion: Berakhot 24a), and the conclusion is in the affirmative, *inter alia* because *ishto ke-gufo*, "his wife is like himself" (they have become "one flesh," as the Book of Genesis predicted/enjoined—and perhaps the implication is that he is, for this reason, not particularly aroused by this proximity). None of this has anything to do with purity, of course, or with the Muslim notion that even hours *prior* to prayer, one's ritual fitness is impaired by contact with members of the opposite sex, a concept Judaism never even considered.

tail end of our purity verse (5: 6/4: 46) provides a solution for this no doubt oft-encountered problem:

And if you are sick, or on a journey, or one of you cometh from the privy, or you have had contact with women, and you find not water, then go to clean, high ground and rub your faces and your hands with some of it (*fa-tayammamū ṣa'īdan ṭayyiban fa-mṣahū bi-wujūhikum wa-aydikum minhu*)...

Wensinck was much impressed, and would impress his readers, by the fact that in the purity codes of both Judaism and Islam, sand/earth (Heb. *ʿafār*, Arab. *raml/turāb*) may take the place of water for ritual washing/bathing.¹⁴⁸ Why Muslim Arabs would need Jewish precedent to determine that when water is unavailable sand is a decent substitute is not clear, especially since in the Jewish case this substitute is suggested not in connection with purity or ritual status, but solely for the sake of procuring *yadāyim nekiyot* or “clean hands”).¹⁴⁹ Wensinck's poor case, however, is not the crux of the problem. The crux of the problem lies, as before, in Schacht's blanket assignment of the subsequent juristic elaboration of this scriptural directive to Judaic auspices. We now look as briefly as possible at the ersatz purification procedure known as *tayammum* (sand-rubbing) to see if Schacht's borrowing thesis can find a home anywhere therein.

One would never suspect it based on the simple and straightforward formulation of the Qur'ān—if you can't find water, then use sand—but from the earliest period, the *fuqahā'* and proto-*fuqahā'* have devoted immense amounts of time and energy to the elucidation of the “concession” (*rukḥṣa*) or “exemption” (*ʿudhr*) of sand-rubbing, expatiating at great length on subjects like: With what substances may one execute *tayammum*, i.e., what exactly is the meaning of the “*ṣa'īdun ṭayyibun*” of the verse? Does it refer to earth alone, or is anything that *grows out of* the earth included under this rubric, as well? What about non-organic objects attached to, and rising up from (“*ṣa'ada*”), the ground? Can one do *tayammum* with grass? On trees? Against the wall of a house (as the Prophet reportedly did)? Using one's shirt? Do those who permit the performance of *tayammum* with one's shirt do so because of the layer of dust that invariably accumulates upon this garment, or, alternately, because one's shirt is supported by one's body, which in turn has two feet planted firmly

¹⁴⁸ “Die Entstehung...” 68.

¹⁴⁹ See Talmud Berakhot, 15a.

on the ground? If for the latter reason, then (theoretically now) can one perform *tayammum* on his shirt while jumping? If for the former reason—that is, if the permission to “rub” with all sorts of objects is based upon the assumption that *dirt* gathers upon them, and therefore the only material employable for *tayammum* is still earth—then what types of earth are acceptable for this purpose? There ensues in most works of *fiqh* a detailed analysis of the many and varied types and textures of soil and sand which might be effectively employed for this make-up abstersion.¹⁵⁰

Scripture commands the believer to “wipe his face and hands” with some of the dust: which way should the Muslim wipe his face—from top to bottom or bottom to top? What is meant by “hands”: up to the wrist? Up to the elbows? Up to the shoulders? What if he pats the earth with the backs of his hands instead of his palms? If he rubs with one finger? With two fingers? With his thumb? Does *tayammum* “lift” abstract impurity, like *wuḍūʿ*, or is it merely an extenuation that temporarily permits prayer without affecting the ritual state of the worshipper? If the latter is the case, then must one perform sand-rubbing before each individual prayer session, or can a single *tayammum* cover an entire day’s worth of devotions—as long as a defiling “event” does not interfere—as is the case with *wuḍūʿ*? Can one combine prayer services (like *maghrib* and ‘*ishāʿ*’) relying on a *tayammum*-based ritual detersion? Is sand-rubbing useful for supererogatory supplications? How about for a combination of extra-curricular prayers and mandatory *ṣalāt*? How sick does one have to be to qualify for the exemption of *tayammum*, and what illnesses are we talking about? How many parasangs from a settled community must one travel in order to be considered “on a journey”? *Tayammum* triage: What if one encounters a *junub* (a sexually impure person),

¹⁵⁰ An analysis which put the present writer in mind of *Seven Pillars of Wisdom*, in which T. E. Lawrence writes at length and in a vivid manner of the different species of sand and rock encountered in his trips across Arabia. The delineation of different types of sand in the literature on *tayammum* is one more nail in the coffin of Schacht’s assertions. While such punctilious sand classification is appropriate to the semi-nomadic tribes of the desert peninsula and *bilād al-shām*, it is no coincidence that the Israelite mountain men (and later urban Jews) never evolved a taxonomy of sand: they knew of only one kind, that by the sea in Philistine territory, as numerous as the grains of which the Lord regularly promised to make them. The Arabs would not and did not employ metaphors like “as numerous as the sand by the sea,” if only because they were surrounded on all sides by a great deal more sand than that, and of much greater variety.

a *ḥā'id inqata'a damuhā* (a menstruant whose flow has ceased), and a *mayta* (a corpse) all at once, and there is only enough water for a single purification: who should get the water, and who make due with sand?¹⁵¹

We could continue. An exhaustive summary of the legal literature on *tayammum* would proceed for many pages, and—what is most important for our purposes—never once overlap with any issue touched upon by the Talmud or Jewish law. The eminent Damascene Shāfi'i jurist, Abū Zakariyā' Yaḥyā Muḥyi al-Dīn al-Nawawī (as one example among many) has upwards of *thirty thousand words* to say on the subject of *tayammum*.¹⁵² How these thirty thousand words could possibly have “developed in all their details” under the influence of the three Talmudic words: *kol mīdī de-menākī* (“any substance that cleans”) is certainly a puzzlement.¹⁵³

Indeed, it is difficult to know where to begin in order to refute Schacht's assertion of cross-the-board *halakhic* influence on *shari'a* in matters of *ṭahāra* (or Crone's claim that “in a subject such as ritual purity there is virtual identity of both overall category and substantive provisions” between the Jewish and Muslim systems),¹⁵⁴ since the preeminent characteristic of the relationship between the Judaic and Islamic purity codes is neither sameness, nor oppositeness, nor even the alleviation of the former by the latter, but rather *complete and total non-sequitur*. That is, if we look at the range of issues covered

¹⁵¹ It is by no means my intent in enumerating all of this legal minutiae to join certain scholars of previous generations in disparaging the hair-splitting “casuistry” or “sophistry” of the *fuqahā'*. On the contrary, as an observant Jew, I have a hard time comprehending scriptural or legal precepts which are *not* articulated down to their most minute and even theoretical cases and circumstances.

¹⁵² Al-Nawawī died in 676/1277. His discussion of *tayammum* spans pages 193-336 of the second volume of his *Kitāb al-Majmūc'*.

¹⁵³ Berakhot, 15a. It has been suggested, by Goldziher, Margoliouth, Wegner and others, that the dialectical *methodology* of *fiqh* is influenced—or even borrowed—from the Jews. While certain of the formulations and the structure of the argumentation summarized in this short survey of *mulāmasa* and *tayammum* may ring familiar to the ears of those who have studied Talmud, nevertheless, one should be wary of hasty conclusions. We cannot pursue this question here, but it is extremely important to remember that Schacht's claim in this instance is not that “Muslim regulations for purity based on this passage and the next verse developed in all details under the influence of the corresponding *methodologies* of Judaism,” but rather that they “developed in all details under the influence of the corresponding *regulations* of Judaism.”

¹⁵⁴ See above, note 127.

by Judaic and Islamic purity jurisprudence (or even just by Jewish and Muslim literature on preparations and fitness for prayer), the phenomenon that strikes us first and hardest is that the vast majority of subjects of concern to each system are not only a matter of indifference to the other—they are entirely *unknown* to it. Between the underlying postulates and fundamental algorithms of the two codes there exists not even a surface resemblance, and the same is true, not surprisingly, for the vast majority of “substantive provisions” (*furūʿ*) that emerged from such “overall categories” (*uṣūl*).¹⁵⁵

¹⁵⁵ The Jewish purity code is based on a specific number of ultimate sources of ritual pollution. They are: the human corpse, the animal corpse, the corpses of “creepers” (*shratzim*), semen, water used in purification (*mei khatat*), sacrifices of purification, menstruants/menstrual blood, excessive or strange genital flows of the male or female (*zav, zava*), childbirth, and leprosy. The transmission of defilement from these “fathers/first principles of impurity” to a wide variety of targets, flows forth and branches out in thousands of directions through hundreds of different media and according to innumerable types of processes. Biblical-Talmudic purity law spends most of its time dealing with tortuous scenarios regarding the transmission of ritual pollution from persons to things, from persons to persons, from things to things and from things to persons through a vast network of conduits and facilitators (through contact, beverages, “outweighing,” “leaping,” carrying, “piling,” through stone, wood, holes, air, food, bodily fluids, due to pressure, by virtue of “overhang,” through “supporting,” etc.) and according to a complex hierarchy of pollutive potency beginning with *avot* (“fathers”), which transmit their extremely contagious impurity onward to *vladot* (“offspring”), thence to *rishonim le-tum’a* (“first derivatives”), *shniyyim le-tum’a* (“second derivatives”), *shlishiyyim le-tum’a* (“third derivatives”), etc. Less than half of the aforementioned underlying sources of defilement in *halakha* are of interest to *fiqh al-tahāra*, which is also relieved of any apparatus of ritual “contagion”: in the Islamic system there is no type of exposure or event that serves to alter the state of a person, place or thing, such that it becomes a “carrier” of contamination and can communicate its pollution onward—while this is the central axiom and underlying “issue” of the Jewish code.

The Islamic purity system revolves around the pollution of *najāsa* substances, *aḥdāth* (polluting or precluding “events”) and *janāba* (sexual impurity). Of the twelve or so types of *najāsa* substances (urine, feces, blood, pus, semen, pigs, dogs, carrion, wine, a “marred egg,” etc.) only two—semen and carrion—pose any ritual threat to Jews (and regarding the first of these there is a fierce debate amongst the *fuqahāʾ* on the Islamic side). The presence of feces on one’s person, or in the immediate vicinity, does pose a problem for Jewish prayer. Of the fifteen or so types of *aḥdāth* (urination, defecation, bleeding, flatulence, regurgitation, laughing, sleeping, fainting, anger, touching the genitals, palpating women, ingesting camel flesh, eating cooked food, etc.), many of them subject to juristic dispute), *not one* can cause pollution or prayer preclusion to the Jew (there are certainly things which shouldn’t be done *during* prayer by Jews, especially prayer in phylacteries, including passing gas or touching generally covered—and therefore sweaty and dirty—parts of the body. But not only is none of this

Now it is true that there are, from among all of the manifold roots and branches summarized above, a mere couple of instances in which we might perhaps be able to speak of “the corresponding regulations of Judaism” (keeping in mind, however, that even such meager “correspondence” says next to nothing about actual historical *influence*)¹⁵⁶: 1) a minority of Jews at a small number of places during

connected in Judaism to purity law, but if and when anything of the sort does occur, no “status” is violated, prayers remain valid (with a few minor exceptions), and no repetition is required—as it is when *wuḏū'* is violated by any of these “events” in the Islamic case, such violation and repetition being the preeminent focus of Muslim discussions of *ṭahāra*). Of those incidents which produce *janāba*—menstruation, sexual intercourse, ejaculation and childbirth—Judaism agrees on three out of four. At most, then, we can speak of overlap in perhaps twenty percent of the provisions (and even among that twenty percent, the resemblance is largely superficial: think of similar sounding words in unrelated languages). When we remember that in Islamic law, blood is a ritual pollutant, whereas in Judaism it is a ritual *detergent*; or that in Jewish law, a human cadaver is the “father of the fathers of all impurity,” whereas in Islam it is the only type of corpse which is specifically *non*-contaminating (according to the majority of jurists)—then we might reasonably claim that Judaic purity law has more in common with the Greek, Zoroastrian or Hindu than with the Muslim system. And if we recall that regarding substances such as urine, feces, blood, pus, vomit, and even milk—as well as acts such as urination, defecation, exsanguination, regurgitation, flatulence, sleeping, fainting, touching women, and their ceremonial solutions, especially *wuḏū'*, *ghusl* and *tayammum*—the Jewish provisions, in the rare instances in which they exist, are invariably far *less* stringent than the Islamic ones, Schacht’s description of the supposed transposition from *halakha* to *shari‘a* as following the path of *rukhsa* (amelioration)—“[the Muslim provisions are] on the whole less exacting than the Jewish ones” (“Wuḏū” in *EII*)—while correct on some counts, is on the whole wide of the mark. If, finally, we take into consideration that for the average Israelite contamination was an exceptional event, occurring at most several times per week due to sexual intercourse or contact with dead things (and once a month for a week or more in the case of women), whereas for the average Muslim—male or female—contaminating objects are ubiquitous and defiling events must necessarily take place at least three or four times daily, then it is clear that Islamic *ṭahāra* is not, as Michael Cook (relying on Wensinck) put it, “a kind of Jewish law made easy” (Cook, “Early Islamic Dietary Law,” 260).

Aside from the fact that they both deal with a few common issues—some of which, like menstruation, parturition, lustration and carrion are known to practically every purity system the world over—the Jewish and Muslim purity codes part company at the most basic level, and go their separate ways from then on. Even by virtue of the fact that Jews and Muslims are both *human*! Let alone that they emerge from the same geographical region and Semitic tradition—we would expect their purity systems to be *less* disparate than they are. It is, thus, inaccurate to talk of identity or striking similarity between these two codes.

¹⁵⁶ Well has Vesey-Fitzgerald remarked that “the procedure even of some very eminent writers, has been to string together a list of resemblances, sometimes

a few periods of history *may possibly* have washed their legs (in addition to their hands, but not their heads) prior to prayer; and they may have done so either before the coming of Islam—or, alternately, only in its wake (and thus, perhaps, under *its* influence)¹⁵⁷; and 2)

real but generally superficial and too often imaginary; and then to assert that such resemblances are in themselves proof of borrowing by the later from the earlier system.” S.V. Fitzgerald, “The Alleged Debt of Islamic to Roman Law” in Ian Edge (ed.), *Islamic Law and Legal Theory* (Aldershot: Dartmouth, 1996), 13.

¹⁵⁷ The jury is still out. See Meir Bar-Ilan, “Rekhizat Raglayim lifnei HaTefilla” in *Mahanayim* 1 (5752). While ablution is certainly not a uniquely Muslim institution—most religions/cultures the world over naturally use(d) water to ritually cleanse themselves—the specific acts in their specific order involved in the *wuḍūʿ* ceremony belong to Islam alone (Ibn al-ʿArabī is correct to say that “[w]uḍūʿ is a fundamental of religion, the purification of the Muslims, and unique to this one people throughout all the worlds”—al-Qurṭubī, *Jāmiʿ al-Aḥkām al-Fiqhīya* [Beirut: Dār al-Kutub al-ʿIlmiya, 1994], 1, 66). The most that can be said—and Wensinck says it (“Die Entstehung...” 63)—about the Jewish connection is that there may be instances in the Talmud where particular rabbis or *kohanim* (priests) washed their hands, feet and even faces (the Bible, of course, already has Aaron and sons “wash their hands and feet” before approaching the altar—Exodus 30: 20, and see the Mishna, Yoma 3: 2). Wensinck elsewhere concedes that parallels just as close are to be found in Hymyaritic inscriptions (see *Muḥammad and the Jews of Medina* [1908, trans. Wolfgang Behn, Berlin: Klaus Schwarz Verlag, 1975], 83, n. 1). Long before the priests, guests arriving at Abraham’s, Lot’s, Joshua’s and many other domiciles in the Bible washed their feet—not only for practical, dust removing reasons, but also, most probably, to indicate that they were planning to stay a while: it would appear to have been an expression of respect for the host and his hospitality. At any rate, as a regional custom arising out of common climate and conditions, there is no reason to assume that foot washing wasn’t shared by most inhabitants of the ancient Near East.

Wensinck’s article (“Die Entstehung...”) dealing primarily, as it does, with water issues—and having functioned for many decades, as it has, as the fundamental demonstration of *fiqh al-ṭahāra*’s ostensible reliance on Judaism—we should perhaps say a few words about its contribution here, for although Wensinck’s efforts and erudition are both highly admirable, the examples he brings to illustrate the sizable extent of Jewish influence on the *ṭahāra* system are poor, while his overall methodology is, I believe, seriously flawed. One example of each problem will have to suffice.

Wensinck writes that “[d]etailed questions about water for washing purposes, which arose after Muḥammad’s death, can *definitely* be traced back to Jewish influence” [emphasis added]. He then spends the next few paragraphs adducing evidence to show that in both purity systems, the question of exact quantities of water required for washing did come up (“Die Entstehung...” 65-7). Why this is an occasion for surprise, or why it in any way indicates influence, I do not know. It seems to me not only natural but almost inevitable that if ritual ablutions are prescribed, the issue of how much water to use for them will arise. Since we are not dealing with washing for cleanliness—in which case one would employ each time the exact amount of water necessary to remove the dirt—but with sacred

the Jewish *ba'al kerī*—the man with an emission—had to bathe and wait till sunset before entering the Temple (and, according to a minority rabbinical position, should still immerse himself today prior to praying), just as the Muslim believer who ejaculates must redo *wuḍū'* (and *ghusl*) and one who encounters semen should wash it off (according to all but the Shāfi'īya, who declare semen pure as snow).

But that is where the comparison ends. To the rest of the hundreds, if not thousands, of “Muslim regulations for purity based on this passage and the next verse,” there simply are no “corresponding regulations of Judaism” in whose shadow *fiqh al-ṭahāra* somehow might have “developed in all details.” Not only has neither Schacht

ceremony, at least an approximate measure must be given, otherwise no devotee would know what to do (al-Māwardī on *tayammum*, sand-rubbing: “It is an expedient for ritually purifying ‘formal’ defilement [*najāsa ḥukmīya*, i.e., *ḥadath*], and therefore *no choice must be given* [the believer] between different media of purification, just as in the case of *wuḍū'* itself [*wajaba an lā yaqī'u al-takhyīr fī mā yataṭahhar bi-hi k' al-wuḍū'*]”—Abū al-Ḥasan 'Alī b. Muḥammad al-Māwardī, *al-Hāwī al-Kabīr* (Beirut: Dār al-Fikr, 1994), vol. 1, 289. Al-Māwardī means that whereas in the case of “tangible” impurity the obligation is to eliminate it physically—and therefore one employs the rational criterion of measurement: “however much water suffices to wash off the *najāsa*”—in the case of “abstract” impurity, where no such rational criterion can be employed, a set amount of water, or sand, must be determined). Furthermore, ritual is an important, perhaps the most important, medium of communal coherence. If one group of believers sprinkles just a few drops on each limb, while another pours out ten gallons on themselves, the unifying nature and purpose of ritual are lost.

As Wensinck states, the rabbis agreed on a forty *se'a* minimum for the *mikveh*; Islam's requirement—though couched in the same terminology of measurement (the *sā'* unit; a fact which should impress no-one familiar with Semitic etymology and philology)—is quite different:

'Abd Allāh b. Muḥammad told us ... from Abū Ja'far, that he and his father were at the house of Jābir b. 'Abd Allāh, and there were some [other] guests present [*wa-ʿindahū qawm*]. These latter asked him about *ghusl*, and he replied: A *sā'* [of water] is sufficient for you. One of the guests said: That is not sufficient for *me*! Jābir upbraided him: [*A sā'*] was enough for him who was more hirsute and better than you [*kāna yakfī man huwa awfā minka shaʿran wa-khayrun minka*—the Prophet]. And Jābir donned his garment and led us in prayer. (Bukhārī, *Ghusl*, 4: 252, see also the preceding ḥadīth there, and Bukhārī, *Wuḍū'*, 49: 200; see also on this matter *al-Kāfī*, 1, 21-2).

The *fuqahā'* thus set the *maximum* volume of water for *ghusl* at approximately 1/40 of the amount prescribed as a *minimum* by the Talmud. Is this “definitive” influence? Similarly, Wensinck points to the fact that both Islam and Judaism prefer flowing to stagnant water for ritual bathing (p. 66). Who wouldn't? These two issues are instances of what the author designates as *aber treffendere Parallelen* (“striking parallels”) (p. 65).

nor anyone else presented compelling evidence to the effect that the *wudū'* passages of the Qur'ān in their raw form “betray Jewish influence”; but, as we have argued above (using the example of the purported infiltration of the messianic concept from Zoroastrianism into Judaism), even if any evidence did exist of a Jewish role in creating amongst early Muslims a perception of the ritual uncleanness of certain acts or things—or of the methods by which the contamination imparted by such acts or things might be rectified—the truly significant question would still remain open: what did the “borrowing” community *do* with the new notion or institution subsequent to the initial “importation”? Did its legists continue to return regularly and seek guidance from the “lending” community’s legists and/or its texts (or even just its practitioners), developing their system “in all details under the influence of the corresponding regulations” of that same lending community? Schacht states unequivocally that they did. And as we have tried to show in the beginning of this essay, Schacht *had* to state that they did: because his own thesis leaves virtually no room for any other option.

But Schacht is wrong. The Muslims did not continue returning to their Jewish neighbors, or subjects (or converts, or texts), in order to develop every jot and tittle of their vast purity system under rabbinic auspices, or even in light of rabbinic principles (whether general legal or *ṭahāra* specific). It would have turned out quite differently had they done so.¹⁵⁸ Rather, Islam embarked on an entirely independent jurisprudential journey, in a completely new and as yet untraveled direction, a journey that saw the creation of unique problems, authentic solutions, indigenous outlooks and original methodologies, most of which had, and still have, no counterpart anywhere else in the world, let alone in Judaism. And if Schacht is wrong in *this* case—one of the very few cases in which he committed himself to a concrete illustration of this central element of his theory—we may certainly be forgiven for raising doubts about the theory itself.

Conclusion: Dead Tradition

To call a legal tradition “living” is to imply that it grows and develops, and does so to a large degree autonomously. Like a living organism,

¹⁵⁸ On the lack of relation between the two purity systems, see above, notes 137 and 155; see also Hava Lazarus-Yaffe, “Bayn Halakha ba-Yahadut le-Halakha ba-Islam,” *Tarbitz*, 51 (1982).

it undeniably takes in nutrients and stimuli from the surrounding environment, but immediately upon entry, these new arrivals are swept into the tradition's continuously flowing, energetic and tumultuous mainstream of rumination, adaptation, assimilation and exploitation. The receiving body never stops working, never stops processing. And whether the original seed is indigenous, or is grafted onto the tradition from the outside, organic growth is predicated upon consecutive and cumulative acts of cultivation, the *istinbāṭ* and *istithmār* that Bernard Weiss has aptly dubbed "human husbandry."¹⁵⁹ Now, Schacht often sounds as if this is just the phenomenon or process he is envisioning when he describes the formative period of Islamic jurisprudence. We have argued, however, that his claims—when cross-referenced with one another and taken as a whole—do not allow for anything of the kind. In the matter of the extensive corpus of *fiqh al-ṭahāra* based upon the premiere purity verses of the Qur'ān, Schacht makes this clear: for where is the independent growth and organic development in his conception of *this* phenomenon?

In the first stage, "pre-assembled" purity notions—built up over centuries of activity and deliberation in the Israelite-Jewish milieu—were (Schacht claims) imported into the Qur'ān. Were they thereafter, at least, internally processed by Islam? Hardly. Schacht will conceive of little or no immediate processing of Qur'ānic legal material by Muslim commentators or legists, as we have repeatedly seen. On his view these scriptural formulations lay dormant, as it were, for decades, until *qādīs*, specialists, *muḥaddithūn*, *mufasssīrūn* and/or *fuqahā'* found their way back to them, in search of a convenient and reliable pedestal upon which to set down aspects of their intricately developed code of ritual purity. But lest we imagine that at least this latter code was the product of vigorous and continuous internal intellectual activity in Islam (as it certainly appears to be in the sources), Schacht blocks this option as well: there was (again) no Qur'ān- or Ḥadīth-based intellectual activity in the interim, and the code itself was (*had* to be) borrowed from the outside. Certainly, this scenario is what Schacht has in mind when he speaks of the *furū'* ("regulations") of Islamic *ṭahāra* having "developed in all details under the influence of the corresponding regulations of Judaism": not a *continuous* elaboration of purity prescriptions by the *fuqahā'* under the *continuous* influence or "supervision" of Jewish elements

¹⁵⁹ Weiss, "Interpretation...", 273 (and see note 54, above).

of one kind or another—for this would be absurd, as well as antithetical to his thesis of discontinuity—but, essentially, a “one-time” importation of the entire pre-grown institution: roots, branches and fruit.

Far from continuous indigenous Islamic processing, then, according to Schacht’s outlook, both the *earlier* infiltration into the Qur’ān of (what he imagines to be) the *basic* Judaic *notion* of privy-produced impurity, as well as the *later* infiltration into *fiqh* of the more *elaborate* Judaic *system* of privy-produced impurity¹⁶⁰—both of these infiltrations, as Schacht seems to conceive them, were more-or-less instantaneous affairs: two static entries of two pre-fabricated institutions at two different points along the line of early Islamic legal history; two separate gifts on silver platters from the Jews. And while these “gifts,” these institutions, were unquestionably the results of a process of continual thought and development in the system of the *giver*, they just as definitely represent a *discontinuous* and essentially *unrelated* pair of phenomena in the system of the receiver. Imagine the following (obviously implausible) scenario: a student in a literature class taught by a renowned novelist is given by his teacher a short story that the teacher himself has written. The student goes home, reads the story, puts it down and doesn’t give it another thought until the semester ends, when he discovers at the last minute that he must hand in a lengthy term-paper on the story. The author-teacher, anticipating the predicament of the poor, pressured student, has been writing the requisite term paper himself all semester long—about his *own* story—and now presents it to the student, allowing him to hand it in for a grade. In this scenario, the student received two “contributions,” the second of which certainly evolved from the first from the point of view of the teacher, but was essentially *unrelated* to the first from the point of view of the student. The latter engaged in no autonomous or continuous intellectual activity, digested nothing, processed nothing, developed nothing.

If the Qur’ān did indeed lie dormant in the decades following its reception or redaction (or revelation), then there is very little vigor to be found in the first stages of Muslim religious thought. If the “living tradition” of the ancient schools is based on “practice,” which Schachtian term is—in many, if not in most cases—just another word for intermittent imitation or importation, then such tradition is not

¹⁶⁰ Again, this is entirely hypothetical: neither the notion nor the system of privy-produced impurity existed in Judaism.

living at all, but dead. If the jurists and traditionists depicted in Ḥadīth and *fiqh* literature arguing legal issues amongst themselves are, in reality, only marionettes (or “parties”) mouthing the ready-made and opposing positions of their respective Iraqi or Syrian neighbors, then there is little dynamism or life at all to speak of in early Islamic jurisprudence.

I would like to conclude by suggesting what may be a more fruitful conception of what took place at this pivotal point during the formative period of Islamic jurisprudence, turning for assistance in this endeavor to what is perhaps the most impressive and edifying attempt yet to illustrate elements of Schacht’s theory in action. In *Body of Text*, Marion Holmes Katz utilizes Ḥadīth interlocutions regarding a number of controversial issues in order to portray—as well as tweak and critique—the process of “return” to Qur’ānic exegesis featured in Schacht’s so-called “secondary stage.” Her most compelling argument involves the aforementioned stormy debate between washers and wipers of feet during *wuḍū’*. She shows that there were foot *wipers* (such as al-Ḥasan al-Baṣrī, ‘Ikrima and al-Sha‘bī) whose position probably reflected a reliance on a straightforward reading of scriptural syntax from the earliest period. This “textual” position was, however, soon forced to defend itself against a burgeoning tendency among Muslims to *wash* their feet during ablutions, a tendency Katz claims most likely reflected “popular practice.” The requirement to *wash* the feet was eventually extracted exegetically by its upholders—who now resorted to the Qur’ān for reinforcement—from the same verse upon which *wiping* had originally been based, by means of some fancy alternative parsing. Despite several attempts to return to a simpler reading of the text (and thus to *wiping*), this “forced” interpretation eventually won the day (except among the Shī‘ā).¹⁶¹

Katz’s analysis makes adjustments in the Schachtian thesis, ultimately supporting it by filling in some of its holes. What is important for our purposes here is that she fleshes out an example of a “popular practice” that seeks to insinuate itself into what came to be seen as the “official” Muslim legal milieu, and acquire legitimacy therein through retroactive insertion into the Qur’ān. What does Katz think is the ultimate *source* of this practice—the widespread practice in the second half of the first century AH of washing, and not *wiping*, the feet? Although she is more willing than Schacht was to envision

¹⁶¹ Katz, *Body*, 75-8.

legal evolution based directly on the Qurʾān from the very outset (as in the case of the original “wipers”), still, when it comes to the roots of the “popular practice” (of washing) which rose to *challenge* the initial Qurʾān-derived observance (of wiping), she is evasive in a typically Schachtian manner. She certainly cannot intend that this “practice” of washing was *genuinely* derived from Muslim scripture (as was wiping), for she herself describes the “washing” derivation as forced, as a post-facto pegging of an already established precedent, as a “highly artificial solution that scarcely conforms to the standard of perfect eloquence and clarity that believers understand to be exemplified by the Qurʾānic text.”¹⁶² And indeed, throughout most of her book Katz remains as elusive as Schacht regarding the nature and sources of what she variously refers to as “socially evolving law,” “established popular practice,” “strong ‘living tradition,’” “received practice” or “popular predilection.” Only once does she venture to characterize this phenomenon:

One obvious conclusion is that self-conscious and systematic juristic discussion of the rules relating to pollution and ablution was preceded by the emergence of a *quite coherent and unified tradition of popular practice* whose authority was such that it generally prevailed in the face of theoretical challenge. This “living tradition” was perhaps more closely identified with the crystallizing concept of Prophetic *sunna* than with the vigorous exegesis of the Qurʾānic text, *but it was fundamentally independent of either*. This is not to say that this popular practice may not have been ultimately rooted in implicit understandings of the Qurʾānic text, with which it was generally compatible, or in authentic living memories of the practice of the Prophet’s example; however, it was apparently generated neither from *Ḥadīth* in the textual sense or [*sic*] from conscious engagement with the word of the Qurʾān.¹⁶³

This passage can be evaluated, to my mind, in two directions. At first glance, it would appear to be an attempt by Katz to have it both ways, much like Schacht when he describes Muslim purity regulations as being “based on this passage and the next verse” while simultaneously “develop[ing] in all details under the influence of the corresponding regulations of Judaism.” How a given practice can be both “rooted in implicit understandings of the Qurʾānic text—or in authentic living memories of the practice of the Prophet’s example” and yet at the same time “fundamentally independent of either,” is hard to say.

¹⁶² *Ibid.*, 76.

¹⁶³ *Ibid.*, 97.

Or maybe it isn't. I think there is another way to explain the seeming equivocation in Katz's above description. This option is left open to us because, unlike Schacht, who openly attributes "elements of popular practice" to outright importation from foreign sources, Katz never commits herself in a similar fashion, and indeed criticizes the "early Orientalist scholars of Islam" who "saw the Islamic law of ritual purity largely as a derivative offshoot of earlier religious traditions."¹⁶⁴ What, then, is Katz envisioning? What kind of practice is *not* a product of alien influence—on the one hand—but is both "fundamentally independent" of Qur'an and *sunna* and yet somehow "loosely" based on one or both of them—on the other? I would venture the following hypothesis, using the example of the famous foot washing/wiping controversy, which is as uniquely and exclusively Islamic a legal issue as may be found anywhere.

The original impetus for purifying the feet was a revelatory or scriptural injunction, meaning that in (what all but Wansbrough and his followers would concede to be) the earliest phase of Islamic legal development, a directive was put abroad in the fledgling community of believers to the effect that the feet—along with the hands and head—should be cleansed (probably wiped) prior to prayer. Also, the early Muslims, whenever or wherever they lived, unquestionably witnessed their spiritual leader(s) carrying out this directive in a given manner or manners. In this sense, the practice in question can indeed be said to have been "rooted," ultimately, in Qur'an and *sunna*.

As the Islamic empire expanded, however, the tribesmen of Arabia found themselves in entirely new surroundings and situations. Any number of factors related to these changing circumstances easily could have accounted for the emergence of differences of opinion regarding how this pristine commandment (of feet cleansing before prayer) should properly be implemented. While it is doubtful that any religion or culture encountered by the conquering Muslims could have *directly* induced a debate over *mash* versus *ghusl*—because (*pace* the implications of Schacht) they simply harbored no opinion whatsoever on the matter—it certainly *is* possible that Muslims relocating, for example, to a more affluent or "sophisticated" region might have begun to be loathe to perform prayers with as much dust on their feet as would not, perhaps, have bothered their co-religionists who remained in less "cultivated" areas. Alternately, other internal legal

¹⁶⁴ *Ibid.*, 5.

controversies unfolding parallel to this one—such as, for instance, whether one should pray wearing shoes or not—may have had their own effect upon the positions taken up in the wiping/washing debate. Be that as it may, the new tendency to wash instead of wipe—the emergent “popular practice”—though not derived *directly* from the scriptural impetus (thus allowing for Katz’s “fundamental independence” from the Qur’ān), was also not a product of alien influence, but rather represented a continuous, internal Islamic development. When this new and pious preference (“Woe unto the heels from the Fire!”¹⁶⁵) eventually sought re-entry into the Qur’ānic verse that spawned the earlier version of itself, the fit was “forced” *not* because the practice was foreign; the practice was ultimately native, but it had meanwhile “grown.” It had evolved along with the stormy career of the fledgling *umma*.

Let us return to another clause of verse 5: 6/4: 46, that of *mulāmasa*, and try our hand again. One of the major questions wrestled with by the *fuqahā’* regarding this purity prescription (a question we left off mentioning in our discussion of it, above) concerns its quiddity: the Shāfi‘īya, Mālikīya and Ḥanābila mostly agree that the Qur’ānic phrase “... *aw lāmastum al-nisā’*...” signifies: “if you have *touched* women,” following the literal denotation of the Arabic root *l-m-s*. The Ḥanafīya, on the other hand, have never been willing to grant that mere skin contact—kissing, caressing, even foreplay—constitutes a defiling *ḥadath*, and they traditionally have rendered the phrase “... *aw lāmastum al-nisā’*...” as: “if you have *had intercourse* with women,” following what they claim to be the well-established figurative sense of the verb in classical Arabic. One of the many *aḥādīth* that accompany the ensuing debate on this subject reads as follows:

...from Sa‘īd b. Jābir, who said: they were discussing *lams* [= *mulāmasa*] and a group of the *mawālī* [clients] claimed: it is *not* intercourse, whereas a group from among the Arabs asserted: it *is* intercourse. [Sa‘īd b. Jābir] said: I went to Ibn ‘Abbās and told him: a group of *mawālī* and Arabs had a dispute regarding the meaning of *lams*, the *mawālī* saying, “It is not *jimā’* [coition]” while the Arabs countered, “It is *jimā’*.” [Ibn ‘Abbās] said: Which side were you on [*min ayy al-fariqayn kunta*]? I replied: I sided with the *mawālī*. He said: You lost [*ghulibta*]. For the words “*mass*” and “*lams*” and “*mubāshara*” connote coition, but

¹⁶⁵ A common warning in the Ḥadīth aimed at those who wipe instead of washing.

God euphemizes what He wishes with what He wishes [*wa-lākin Allāh yaknī mā shā'a bi-mā shā'a*].¹⁶⁶

The identification of the two rival parties to the debate as *mawālī* and Arabs is probably not insignificant. In other versions of this ḥadīth, where only three Companions are arguing the same question, Ibn ʿAbbās emerges and puts an end to the palaver with the pronouncement: “The two *mawlās* are mistaken, and the Arab is correct (*akhṭaʿa al-mawliyān wa-aṣāba al-ʿarabī*).”¹⁶⁷ The thinly veiled hint would appear to be that only *genuine* Arabs and *original* Muslims, reared in the geographic cradle of the language and present from the early moments of revelation, are equipped to understand the Qurʾān properly, to comprehend its nuances and instinctively “sense” the correct meaning of a given phrase or passage. Only the artificial, and therefore *superficial*, grasp of the joiner, of the comparatively late-coming “client,” would lead to the type of crass, immature literalism that translates “*aw lāmastum al-nisā*” as “if you have *touched* women.” Any real Arab knows—*feels*—that the meaning is “if you have *lain* with women.”

In an attempt to reconstruct the historical trends possibly reflected by, and perhaps telescoped in, this ḥadīth (again with Katz’s model in mind), let us envision the following hypothetical set of developments: the scriptural provision of *mulāmasa* was initially understood, at or around the time of its promulgation, to refer to intercourse (a figurative connotation or association indeed appropriate to the largely poetic prose style of the Qurʾān). The exponents of this position in our ḥadīth, and in other reports regarding the debate over this question, appear to be somewhat older than their opponents, perhaps representing an earlier stage in the perception of this precept. It is, moreover, difficult to imagine mere contact with, or kissing of, a licit woman making much of an impression in the comparatively liberal atmosphere of Ḥijāzī society (the nonchalant attitude to such encounters is, at any rate, pervasively on display in the Ḥadīth literature, not to mention in purported *jāhili* poetry). The hair-splitting minutiae involved in the elaboration of the various types of touching under the various types of circumstances along with their appropriate ritual “penalties” (partially outlined above), certainly strikes one as anomalous in the

¹⁶⁶ Bayhaqī, 1, 125; Ṭabarī 5, 142 (no. 7596). Attention should also be paid, in this connection, to the fifteenth version of no. 7597, 144.

¹⁶⁷ al-Sanʿānī, *al-Muṣannaf*, 1, 102.

environment of the Companions and Successors. Ibn ‘Abbās, for his part, would have none of it.¹⁶⁸

Advance some decades or generations, and now many Muslims are living in the more “civilized” and luxurious surroundings of the conquered towns of Sassan and Byzantium. Dress is less casual than before, it covers more skin, and may even include veils for women. Muslims—including (and perhaps especially) many of the new converts—are more urbane, as well as more “religious,” that is to say, more meticulously observant than their predecessors.¹⁶⁹ In such conditions, it is easy to envision zealous neophytes (“*mawālī*”) extending the established notion of impurity incurred through sexual congress to encompass any contact with the exposed parts of a woman’s body, an occurrence which, now that the dress code and social norms have changed, has become more exceptional and therefore more remarkable than in the Days of the Arabs. According to these daintier and more-pious-than-thou types, *all* trans-gender touching is *mulāmasa* and cancels *wuḍū’* (*janāba* is still reserved for actual intercourse). And behold—they exclaim, with the righteous fervor

¹⁶⁸ By speaking of the Ḥadīths cited above as possibly “telescoping” a certain historical process or legal evolution, my intent is, *inter alia*, that they may represent a superimposition of sorts of a later development (the “stricter” take on *mulāmasa*) onto an earlier position, thus staging an argument where one had yet to arise. It is thus conceivable that in the generation of Ibn ‘Abbās, the more expansive interpretation of *mulāmasa* had not yet entered anyone’s mind.

¹⁶⁹ This is a common and, I think, well-documented phenomenon in early religious communities: by the third or fourth generations, the faith and its laws are less amorphous and more developed, so adherents *can* be more observant (the fluidity and confusion that reigned earlier, in contrast, is well-attested by the sources in the case of Islam). Also by that time, the direct, continuous human link to the founders/framers is severed, and the sole remaining tie to the charismatic moment of Eliade’s “sacred time” is the text and its provisions. Without the framers to guide their reading, the text is taken more literally, and without the fluid spirit and “naturalness” of the founders, the provisions harden and crystallize. For these and many other reasons, it makes sense to speculate that those of the *tabi’ū tabi’in* and their children who *had* predilections toward piety, were probably more punctilious and stringently observant than their great-grandparents had been. Abū ‘Ubayda asked the Prophet: “Is there anyone better than us [viz., Companions] who adopted Islam and fought shoulder to shoulder with you?” “Yes,” replied Muḥammad. “A people will come after you, who believe in me without seeing me” (*qawm yakūnūn min ba’dikum yu’minūna bī wa-lam yarawnī*)... “The best of creatures in matters of faith,” announced the Prophet on another occasion, “is a people that will come after me. They will find scrolls upon which is writing, and will believe in that which is in them.” (*Mishkāt al-Maṣābiḥ*, 1, 93 (19) and 43 (11)).

of the fundamentalist literalist—the black-on-white witness of scripture itself! For the Qur'ānic diction is: “*aw lāmastum al-nisā*” —if you have *touched* women!¹⁷⁰

The older, more experienced Muslims (epitomized by Ibn ‘Abbās and the Ḥanafīya) see this as pure ignorance, and are disgusted: were these young upstarts only better versed in Arabic language and literature (as well as in the niceties of Qur'ānic parlance and the circumstances of the Prophetic revelatory experience), they would know that in the context of the verse in question, *lams* can only mean *jimā*' (coition). It may be just this frustration of the elders with the ignorance and consequent stringency of succeeding generations that is reflected in a scene described by ‘Abd b. Ḥamīd, in which Ibn ‘Abbās is besieged by so many challengers to his figurative/metaphorical interpretation of the verb *lāmasa*, that he finally sticks his fingers in his ears (*waḍa‘a aṣba‘ayhi fī udhunayhi*) and shouts: “Nay! But it is *nīk!*”¹⁷¹

Here again, as in our speculative reconstruction of the social-historical evolution of the foot-wiping controversy, we can envision a process whereby (1) a thoroughly unique and independent Qur'ānic provision is (2) taken along by the Muslims on their campaigns of expansion where it is (3) metamorphosed by new circumstances and new believers, and (4) ultimately returns home to its scriptural mother, into whose womb it attempts to re-enter through the expedient of a literalism. The entire process is a continuous, essentially *internal* one, not just ending with the Qur'ān, but *beginning* with it. Thus, while such a schema does provide for Schacht's late, “secondary stage” inception of literalist pegging to scriptural verses, it has no need of what is in his eyes its natural corollary: conspicuous importation, both at the outset and along the way (nor does it jibe with Crone's claim that “of rules based on the Qur'ān from the start we no longer possess a single clear-cut example”).¹⁷²

¹⁷⁰ An alternate scenario, whereby these same eager believers are perusing/ declaiming the Qur'ān and come upon 5: 6/4: 46, where they suddenly notice that the term employed is “*lāmastum*” and this sets them wondering why the law is the way it is—while not impossible, is, I think, far less likely.

¹⁷¹ Aḥmad b. ‘Alī b. Muḥammad b. Ḥajar al-‘Asqalānī, *Subul al-Salām: Sharḥ Bulūgh al-Murām* (Cairo: Al-Maktaba al-Tijāriya al-Kubrā, n.d.), 1, 65. If the last term was considered as crude at the time as it is today, this would add greatly to the vociferous tone of the exclamation.

¹⁷² See above, note 10.

The point of such hypothetical reconstructions¹⁷³ is only that no direct outside influence is required in order for a scripturally based observance to undergo manifold and divergent permutations over space and time. Religious communities (especially nascent religious communities) unquestionably experience a sufficient amount of *internal* dynamic development—sometimes triggered by external encounters, sometimes not—to account for much if not most of the legal dialectic and evolution evidenced in their literature. A practice originally rooted in the Qurʾān could not help but develop and change once released from the rigid grip of the text into the world of fluid reality with all its variety and vicissitudes. When the metamorphosed version of the original practice was eventually read back into the relevant passage of the seminal text—by those purists or “essentialists” who wished to ground their lifestyle in the pristine well-spring of revelation—this reading naturally appeared forced. But this is not because the mature practice was fundamentally foreign to the text; not because it was derived, as Schacht would have it, from alien sources, and grafted onto Islamic classical constructs. The sacred text was indeed the precept’s cradle. But the precept has since grown—continuously, indigenously, autonomously, *independently*—and cannot easily fit back in. *Washing* the feet may have had a harder time fitting into the *wuḍūʿ* passage than *wiping* them, but this should in no way lead to the idea that the latter was “of the body” whereas the former was not (and Katz indeed avoids such a conclusion). They were both, I would argue, equally offspring of their scriptural parent, though one stayed close to home and close to infancy, and the other played prodigal son and rapidly matured as a result of its adventures. Things that grow, often grow apart; but what is important is that they *grow*—that they are living, not dead.

¹⁷³ Not only are these re-enactments speculative, but I have found at least one source which—if reliable and not purely polemical—militates for the reverse historical process: “Aḥmad [b. Ḥanbal] said: ‘The Madinans and Kufans continued to hold that kissing is included in the category of *lams* and violates prayer fitness, until latter times when Abū Ḥanīfa came among them, after which they said: [kissing] does not violate *wuḍūʿ*’ (Ibn Qudāma, 1, 192).