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Islamic Legal Maxims as Substantive Canons of Construction: Ḥudūd-Avoidance in Cases of Doubt

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Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt

Intisar A. Rabb*

Abstract

Legal maxims reflect settled principles of law to which jurists appeal when confronting new legal cases. One such maxim of Islamic criminal law stipulates that judges are to avoid imposing *ḥudūd* and other sanctions when beset by doubts as to the scope of the law or the sufficiency of the evidence (*idra'ū ʾl-ḥudūd biʾl-shubahāt*): the "*ḥudūd* maxim." Jurists of all periods reference this maxim widely. But whereas developed juristic works attribute it to Muḥammad in the form of a prophetic report (*ḥadīth*), early jurists do not. Instead, they cite the maxim as an anonymous saying of nonspecific

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provenance in a form unknown to *ḥadīth* collectors of the first three centuries after Islam's advent. This difference in the jurists' citations of the maxim signals a significant shift in claims to legal authority and the asserted scope of judicial discretion, as jurists debated whether and how to resolve legal and factual doubt. While political authorities exercised increasingly wide discretion over criminal matters and used it to benefit the elite, most jurists promoted an egalitarian "jurisprudence of doubt" through insisting on criminal liability for high-status offenders and heightening claims of the authoritativeness and scope of the *ḥudūd* maxim as a *ḥadīth*.

Keywords

ambiguity, doubt, criminal law, *ḥadīth*, *ḥudūd*, interpretation, legal maxims, lenity, *qawāʿid fiqhiyya*, *shubha*/*shubahāt*

Indeed, avoidance of ḥudūd *in cases of doubt*
Inna daraʾa ʾl-ḥudūdi biʾl-shubahāt

Is a ḥadīth *told by all transmitters of reputed clout….*
La-ḥadīthun rawāhu kullu ʾl-thiqāt….[1]

1. Introduction

Given the appearance or accusation of criminal misconduct, how does a judge really *know* when to punish the accused, and what should she do in cases of doubt? Consider this case:

> During the time of the Muslim polity's fourth caliph ʿAlī, Medina's patrol found a man in the town ruins with a blood-stained knife in hand, standing over the corpse of a man who had recently been stabbed to death. When they arrested him, he immediately confessed: "I killed him." He was brought before ʿAlī, who sentenced him to death for the deed. Before the sentence was carried out, another man hurried forward, telling the executioners not to be so hasty. "Do not kill him. *I* did it," he announced. ʿAlī turned to the condemned man, incredulously. "What made you confess to a murder that you did not commit?!" he asked. The man explained that he thought that ʿAlī would never take his word over that of the patrolmen who had witnessed a crime scene; for all signs pointed to him as the perpetrator. In reality, the man explained, he was a butcher who had just finished slaughtering a cow.

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[1] Abū ʾl-Ḥasan al-Shantarīnī (d. 542/1147), *al-Dhakhīra fī maḥāsin ahl al-Jazīra*, ed. Iḥsān ʿAbbās (Beirut: Dār al-Thaqāfa, 1979), 7:355-7 (s.v. al-Ḥakīm Abū Muḥammad al-Miṣrī).

> Immediately afterward, he needed to relieve himself, so entered into the area of the ruins, bloody knife still in-hand. Upon return, he came across the dead man, and stood over him in concern. It was then that the patrol arrested him. He figured that he could not plausibly deny having committed the crime of murder. He surrendered himself and confessed to the "obvious," deciding to leave the truth of the matter in God's hands. The second man offered a corroborating story. He explained that *he* was the one who had murdered for money and fled when he heard the sounds of the patrol approaching. On his way out, he passed the butcher on the way in and watched the events previously described unfold. But once the first man was condemned to death, the second man said that he had to step forward, because he did not want the blood of *two* men on his hands.[2]

In answer to the question of when a judge knows when to apply a criminal sanction, most legal systems require knowledge beyond a reasonable doubt, that is, virtually incontrovertible proof of the alleged crime's commission through evidence that directly points to the accused as actual perpetrator. One byproduct of this requirement is a principle that punishments are to be avoided whenever there is ambiguity or doubt as to the textual basis, evidence, or criminal culpability of the accused. At common law and in medieval Europe, this took on various forms.[3] In modern American law, it is expressed in a legal maxim called the "rule of lenity."[4] In Islamic law, we may call a parallel expression

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[2] Ibrāhīm b. Hāshim al-Qummī (d. mid-3rd/9th c.), *Qaḍāyā Amīr al-Muʾminīn ʿAlī b. Abī Ṭālib*, ed. Fāris Ḥassūn Karīm (Qum: Muʾassasat Amīr al-Muʾminīn, 1382/[2003]), 88-9, 238 (paraphrased). Both Sunnī and Shīʿī scholars cite this as an example of clever *ḥudūd* jurisprudence. See Ibn Qayyim al-Jawziyya (d. 751/1350), *al-Ṭuruq al-ḥukmiyya*, ed. Muḥammad Jamīl Ghāzī (Cairo: Maṭbaʿat al-Madanī, 1978), 82-4 (quoting *Qaḍāyā ʿAlī* and *ʿAjāʾib* [*aḥkām Amīr al-Muʾminīn = Qaḍāyā ʿAlī*, as given in the edition of Muḥsin Amīn al-ʿĀmilī, *ʿAjāʾib aḥkām Amīr al-Muʾminīn ʿAlī b. Abī Ṭālib* ([Qum?]: Markaz al-Ghadīr lil-Dirāsāt al-Islāmiyya, 2000)]); al-Ḥurr al-ʿĀmilī (d. 1104/1692), *Wasāʾil al-Shīʿa*, ed. ʿAbd al-Raḥīm al-Rabbānī al-Shīrāzī (Tehran: al-Maktaba al-Islāmiyya, 1383-1989/[1963-4 - 1969]), 2:172, no. 2.

[3] For the development of reasonable doubt jurisprudence in the English common law and in continental European law, see now James Q. Whitman, *The Origins of Reasonable Doubt* (New Haven: Yale University Press, 2008) (discussing the emergence of the reasonable doubt doctrine as a version of lenity in England and Continental Europe); see also John Langbein, *The Origins of the Adversary Criminal Trial* (Oxford; New York: Oxford University Press, 2003), 334-6 (detailing the methods by which court officials in England avoided prosecuting criminals as a precursor to the formalized rule of lenity).

[4] See *United States v. Santos*, 553 U.S. __ [128 S. Ct. 2020], *6 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to

the "*ḥudūd* maxim," which directs judges to "avoid (imposing) fixed criminal sanctions (*ḥudūd*) in cases of doubt or ambiguity (*idraʾū ʾl-ḥudūd biʾl-shubahāt*)."

The *ḥudūd* maxim is a central principle of Islamic criminal law applied to situations where a judge has no firm textual or evidentiary basis for imposing a criminal punishment. In the above case, the textual basis was thought to be certain, as murder is clearly prohibited and as guilt is usually established through confession or witness testimony.[5] But an evidentiary doubt arose as soon as the real perpetrator stepped in. ʿAlī released the first man and pardoned the second—perhaps because the facts surrounding the case had become irresolvably doubtful without a failsafe means to validate one story over the other. What is the legal basis for such practices and how prevalent are they in Islamic law?

The overwhelming majority of late-medieval and contemporary jurists—both Sunnī and Shīʿī—view the *ḥudūd* maxim as a sound prophetic *ḥadīth*.[6] Its prophetic pedigree is significant because *ḥadīth*s

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them.") (citations omitted); *United States v. Wiltberger*, 18 U.S. 35, 43 (1820) ("The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself."). Cf. William N. Eskridge et al., *Legislation: Statutes and the Creation of Public Policy*, 3rd ed. (St. Paul, MN: West, 2001), Appendix B, 23 (defining the rule of lenity as the legal maxim "against applying punitive sanctions if there is ambiguity as to underlying criminal liability or criminal penalty"); Jabez Gridley Sutherland, *Statues and Statutory Construction*, ed. Norman J. Singer (Chicago: Callaghan, 1992), § 59.03 (defining the rule of lenity as a canon of statutory construction providing that "penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed).

5) Mālikīs hold that guilt can be established by "strong" circumstantial evidence, as in pregnancy of an unmarried woman as evidence of fornication or adultery (*zinā*). On evidentiary rules, see Ṣubḥī Maḥmaṣānī, *Falsafat al-tashrīʿ fiʾl-Islām*, 5th ed. (Beirut: Dār al-ʿIlm lil-Malāyyīn, 1980 [1st ed. 1946]), 325-76 (English trans., Farhat Ziadeh, *The Philosophy of Jurisprudence in Islam* (Leiden: Brill, 1961)); and the sections on evidence in general works of Islamic criminal law, e.g., ʿAbd al-Qādir ʿAwda, *al-Tashrīʿ al-jināʾī al-Islāmī* (Beirut: Dār al-Kitāb al-ʿArabī, 1968); Ramsīs Behnām, *al-Naẓariyya al-ʿāmma lil-qānūn al-jināʾī* (Alexandria: Munshaʾāt al-Maʿārif, 1968); Cherif Bassiouni, ed., *The Islamic Criminal Justice System* (London; New York: Oceana Publications, 1982).

6) See below, pp. 30-34. NB: Though the term "Shīʿī" can refer to Zaydīs, Ismāʿīlīs, and Twelver or Ithnā ʿAsharīs; and although all can be considered in some sense Shīʿī and the latter two Imāmī, for shorthand, I use the term Shīʿī (without qualification) to refer to the Twelver-Imāmīs, who comprise the majority of the Shīʿa. When mentioning other Shīʿī

form an authoritative source of Islamic law. They are taken, alongside the Qurʾān, to legislate mandatory fixed sanctions for certain grave offenses. It is the ability to appeal to the Prophet's normative instructions that provides jurists with firm legal bases for adjudication, especially in the sensitive area of criminal law. Thus, the prophetic provenance of the *ḥudūd* maxim may be considered to have facilitated, indeed anchored, the jurisprudence of Islamic criminal law.

But the maxim was not always prophetic. *Ḥadīth* scholars of the early period (i.e., the first three centuries after the Hijra) typically did not regard it as such. Neither did jurists who applied it during the same period. It is curious then that in later juristic works the maxim achieves such prominence as a prophetic *ḥadīth*. What does this say about the legal basis for the practice of *ḥudūd*-avoidance and the role of legal maxims in early Islamic law more generally?

One view of legal maxims is that they reflect substantive canons of construction. These are presumptions about the meaning of a text drawn from substantive and structural concerns rather than just linguistic rules of thumb.[7] An example of a linguistic rule is that jurists

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groups, I typically refer to them by the designations for which they have become best known, i.e., Ismāʿīlīs and Zaydīs.

7) Legal scholars categorize maxims in various ways. In Islamic law, a common strategy is to divide maxims between textual principles of interpretation drawn from the field of jurisprudence and accordingly called interpretive canons or maxims (*qawāʿid uṣūliyya*), and principles more closely related to the structure or substance of positive law and called here substantive canons or maxims (*qawāʿid fiqhiyya*). In addition, grouped under the rubric of substantive maxims are five universal maxims that most jurists list as embodying meta-rules of law along with judicial maxims that govern rules of procedure and evidence. See, for example, Abū ʿAbd Allāh al-Maqqarī (d. 758/1357), *al-Qawāʿid*, ed. Aḥmad b. ʿAbd Allāh b. Ḥamīd (Mecca: Jāmiʿat Umm al-Qurā, Maʿhad al-Buḥūth al-ʿIlmiyya wa-Iḥyāʾ al-Turāth al-Islāmī, 198-), 212; Miq4dād al-Suyūrī (d. 826/1423), *Naḍd al-Qawāʿid al-fiqhiyya ʿalā madhhab al-Imāmiyya*, ed. ʿAbd al-Laṭīf al-Kūhkamarī et al. (Qum: Maktabat Āyat Allāh al-ʿUẓmā al-Marʿashī, 1403/1982-3), 90-114; Zayn al-Dīn b. Nujaym (d. 970/1563), *al-Ashbāh waʾl-naẓāʾir*, ed. Muḥammad Muṭīʿ al-Ḥāfiẓ (Damascus: Dār al-Fikr, 1983), 1:17-9. For other divisions, see, e.g., Jalāl al-Dīn al-Suyūṭī (d. 911/1505), *al-Ashbāh waʾl-naẓāʾir*, ed. Muḥammad al-Muʿtaṣim bi-ʾllāh al-Baghdādī (Beirut: Dār al-Kitāb al-ʿArabī, 1998), 35, 201, 299, 337; Nāṣir Makārim Shīrāzī (d. 1305/1887-8), *al-Qawāʿid al-fiqhiyya* (Qum: Madrasat al-Imām ʿAlī b. Abī Ṭālib, 1416), 1:26-7 (five categories). For overviews of Islamic legal maxims, see Wolfhart Heinrichs, "*Qawāʿid* as a Genre of Legal Literature," in Bernard Weiss, ed., *Studies in Islamic Legal Theory* (Leiden: Brill, 2002) (and sources listed therein); Mohammad Hashim Kamali, "Legal Maxims and Other Genres of Literature

should follow the plain meaning of the text unless clear indicators require a departure from that meaning. By contrast, substantive rules impose interpretive requirements, such as narrow construction, for certain areas of law such as criminal law. In this context, Islamic legal theory specifies that only God can impose and has imposed fixed punishments for certain grave offenses; it follows that *ḥudūd* punishments cannot apply without a clear statement that a certain activity falls within the ambit of the prohibition.[8] Moreover, the extremely harsh nature of *ḥudūd* punishments marks them as deterrents against moral offenses.[9] In significant ways, the *ḥudūd* maxim captures these ideas of divine legislative supremacy and deterrence theory, and translates them into a canon of narrow construction for matters relating to criminal law.

This essay traces the transformation of the maxim from its earliest appearance to its later conception. I first examine the maxim as it appears in *ḥadīth* collections during the first three centuries AH, then I assess its parallel appearances in juristic works, where citations of it

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in Islamic Jurisprudence," *Arab Law Quarterly* 20, 1 (2006): 77-101; Wolfhart Heinrichs, art. "*Ḳawāid Fiḳhiyya*," *EI*²-Supplement (Online Edition: Brill, 2008).

In American law, divisions similarly fall along linguistic and substantive principles of interpretation, the definitions of each revealing significant differences compared to Islamic law. Linguistic and jurisprudential principles generally are much more fluid and less systematic than the ones articulated in the *uṣūl al-fiqh* literature. Substantive principles arise from precedents and policies drawn from the common law, other statutes, or the U.S. Constitution. See, e.g., Eskridge et al., *Legislation*, 818-9; see also ibid. 920 (adding a category of "extrinsic aids" for interpretation drawn from the same sources as those of substantive canons but specifying linguistic principles). For other divisions and treatments, see, e.g., Edward L. Rubin, "Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross," *Vanderbilt Law Review* 45 (1992): 579-91, esp. 580 (linguistic canons); James J. Brudney and Corey Ditslear, "Canons of Construction and the Elusive Quest for Neutral Reasoning," *Vanderbilt Law Review* 58 (2005): 1-116 (summarizing major theories).

8) See, e.g., Abū ʾl-Ṣalāḥ al-Ḥalabī, *al-Kāfī fī ʾl-fiqh*, ed. Riḍā Ustādī (Iṣfahān: Maktabat al-Imām Amīr al-Muʾminīn ʿAlī al-ʿĀmma), 404 (noting the Shīʿī view that *ḥudūd* violations are acts known rationally to be major moral offenses (*qabāʾiḥ*) that also warrant a punishment as specified by God); Māwardī, *Ḥāwī*, 1:101 (citing the similar Sunnī view of a 3rd/9th century scholar, Ibn Qutayba (d. 276/889), that *ḥudūd* are "punishments with which God deters people from committing prohibited [acts] and encourages them to follow His commands"). See also the overviews of Islamic criminal law listed in note 5.

9) See, e.g., al-Sharīf al-Murtaḍā (d. 436/1044), *Intiṣār*, ed. Muḥammad Riḍā al-Sayyid Ḥasan al-Kharsān (Najaf: al-Maṭbaʿa al-Ḥaydariyya, 1971), 252; Māwardī, *Ḥāwī,* 1:99.

differ significantly. Only after this period do *ḥadīth* collectors and jurists alike begin to ascribe prophetic origins to the maxim. Accordingly, I examine later *ḥadīth* collections only to uncover entirely new versions of the maxim as a *ḥadīth* now attributed to the Prophet. Finally, I turn to the later juristic sources to consider new legal conceptions and applications of the maxim. It is here that we can readily observe the firm entrenchment of the maxim in Islamic criminal jurisprudence, after it was transformed from an anonymous principle into a rule that was regarded as both a central canon for resolving legal doubt and a prophetic *ḥadīth*.

II. The *Ḥudūd* Maxim as a *Ḥadīth*?[10]

A. Early Ḥadīth *Collections*

Ḥadīth scholars and critics of the first three centuries AH adduce several versions of the *ḥudūd* maxim—none of them in the form that came to be popularized as above. Only two of the six canonical Sunnī *ḥadīth* collections—those of Ibn Mājah and Tirmidhī—record a version. The earlier collections of ʿAbd al-Razzāq al-Ṣanʿānī and Ibn Abī Shayba contain an additional five.[11] All attribute the maxim to various Companions and to early jurists.[12] With one exception, none of these scholars seriously thinks that this was a prophetic statement. The single

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[10] Detailed references for each *ḥadīth* version of the *ḥudūd* maxim, along with the collections in which they appear and the full chains adduced for each are listed in the Appendix. This section will reference only works and the death dates of traditionists mentioned in the text where specifically relevant to the argument.

[11] The *Muṣannaf*s of ʿAbd al-Razzāq and Ibn Abī Shayba are illuminating because they record statements from their teachers and from earlier jurists; they do not confine themselves to authenticated prophetic reports as the canonical collections mainly attempt, especially the principal two, the *Ṣaḥīḥ*s of Bukhārī and Muslim. They also preserve records of 1st/7th- and early 2nd/8th-century written works and teachings. See Harald Motzki, *Die Anfänge der Islamischen Jurisprudenz. Ihre Entwicklung in Mekka bis zur Mitte des 2./8. Jahrhunderts* (Stuttgart/Leiden: Brill, 1997), trans. Marion Katz, *The Origins of Islamic Jurisprudence: Meccan Fiqh Before the Classical Schools* (2001), esp. 51-73.

[12] That is, Companions ʿUmar, ʿĀʾisha, Ibn Masʿūd, Muʿādh b. Jabal, and ʿUqba b. ʿĀmir, as well as jurist Ibrāhīm al-Nakhaʿī (d. *ca.* 96/717) and traditionist Ibn Shihāb al-Zuhrī (d. 124/742). See Appendix.

attribution to the Prophet is a weak one, according to Aḥmad b. Ḥanbal and most other traditionists.[13] The other four canonical collectors do not mention the maxim. And there appear to be no records of the statement in Shīʿī sources of the time.[14]

In sum, no *ḥadīth* collector of the early period reliably traced the *ḥudūd* maxim to the Prophet. Moreover, there is no record at all in extant *ḥadīth* compilations from the first three centuries of what was to become the standard version of a common "prophetic" maxim (*idraʾū ʾl-ḥudūd biʾl-shubahāt*).[15] Only later—beginning in the mid-4th/10th century—do we find attributions of the maxim to the Prophet, and even then, not reliably.[16]

What we are left with then is this picture: In collections of traditions from the first three centuries AH, we find versions of the *ḥudūd* maxim that differ from what would become the standard formulation. Few thought those versions to be of prophetic origin and none thought the standard formulation to be prophetic. It is not that no one knew of the standard version in that early period. As elaborated below, that version circulated simultaneously amongst scholars familiar with versions

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13) Of the *ḥadīth* scholars surveyed here, Ibn Mājah is the only one who attributes the report to the Prophet (by way of Abū Hurayra); Aḥmad b. Ḥanbal and later *ḥadīth* critics reject this version (or its attribution to the Prophet) as inauthentic because of a problematic link in the chain of transmission. See Aḥmad b. Ḥanbal, *Musnad*, ed. ʿAbd Allāh al-Darwīsh (Beirut: Dār al-Fikr, 1991), 5:416; see also Appendix.

14) That is, not as a *ḥadīth*; it is apparent, however, that the maxim is recognized through language echoing the standard formula at least as early as the 3rd/9th century. See Qummī, *Qaḍāyā*, 253-4 (quoting ʿAlī ruling's that the *ḥadd* does not apply to a man accused of illicit sexual relations: *udriʾ ʿanh al-ḥadd*).

15) For a similar observation, see Maribel Fierro, "When Lawful Violence Meets Doubt," 215-9, hypothesizing that the failure to include the maxim indicates a position against the practice of *ḥadd* avoidance. However, as I discuss below, inclusion seems less a matter of support than factors relating to circulation and requirements of *ḥadīth*-authenticity; the maxim was widely used in a standard form by contemporary jurists without any of them asserting that it was a prophetic *ḥadīth*. It thus makes sense that the maxim would not appear in canonical or any other earlier *ḥadīth* collections as a prophetic *ḥadīth*.

16) Sunnī collectors Ibn ʿAdī (d. 365/976), Dāraquṭnī (d. 385/995), and Bayhaqī (d. 458/1066) record chains that attribute the *ḥadīth* mostly to Companions. Ismāʿīlī collector Qāḍī Nuʿmān (d. 363/974) lists no chain, and Imāmī collector Ibn Bābawayh (d. 381/991-2) attributes the saying to the Prophet without a chain. Whenever there is some hint of prophetic attributions, *ḥadīth* critics typically assail them for weak links in the chains of transmission.

contained in the books of both *ḥadīth* and law. Instead, traditionists of the early period affirmatively regarded these statements as non-prophetic. Where then did they come from?

B. Scholarly Perspectives on the Ḥudūd *Maxim as a* Ḥadīth

Joseph Schacht and Maribel Fierro astutely have doubted the prophetic provenance that later jurists attached to the *ḥudūd* maxim as a *ḥadīth*. Accordingly, they engage in critical attempts to locate its origins by time and place.[17]

Schacht traces its origins to second-century Kufa. According to his common link theory, the report would have been introduced in the time of the famous Medinese traditionist Ibn Shihāb al-Zuhrī (d. 124/742); he is the lowest common link in a chain that proliferates from him to Yazīd b. Ziyād and other Kufan traditionists.[18] Zuhrī, Yazīd, or later traditionists would have initiated and consistently spread the chain leading up to Zuhrī because the earlier "fictitious part" (i.e., the Prophet—ʿĀʾisha—ʿUrwa—Zuhrī) was regarded as particularly strong and reliable, thereby lending authority to the statement appended to a reliable *ḥadīth* chain. Moreover, one might add that at least some early transmitters of this *ḥadīth* should have come from Medina, where the

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17) Joseph Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950) 180-9 (section on "Legal Maxims: Pt. 2, Ch. 6); Fierro, "When Lawful Violence Meets Doubt."

18) See Appendix (*isnād* map). Schacht posits that a common link in transmission chains indicates that a report emerged at the time of the common link and was later attached to more authentic chains of different versions of the same report. Finding that most common links occur in the first half of the 2nd/8th century, Schacht concluded that Islamic law could not have been older than that period. Schacht, *Origins*, 171-75. For an elaboration of this theory, see G.H.A. Juynboll, "Some *Isnād*-Analytical Methods Illustrated on the Basis of Several Woman-Demeaning Sayings from *Ḥadīth* Literature," in *Ḥadīth*, ed. H. Motzki (Aldershot; Burlington, VT: Ashgate/Variorum, 2004), 175-216. For criticisms of this theory, see Motzki, *Origins*, 25-6; M. Mustafa al-Azami, *On Schacht's Origins of Muhammadan Jurisprudence* (Riyadh: King Saud University; New York: John Wiley and Sons, 1985), 154-205; see also G.H.A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance, and Authorship of Early Ḥadīth* (Cambridge; New York: Cambridge University Press, 1983), 214 ("The common link, if there is one, is often only a useful tool from which to distill an approximate chronology and possible provenance of [a] *ḥadīth*."); ibid., 217 (adding that the common link phenomenon was buried under accretions and concluding that it is a rarely noticeable phenomenon therefore of limited utility).

Prophet and his followers—said to have articulated the saying—lived; and that if the Medinese Zuhrī indeed heard the saying from earlier authorities, he would not have been the only one, such that more chains with Medinese authorities are to be expected. The absence of non-Kufan transmitters in the chain, other than Zuhrī, would support Schacht's idea that the statement is of Kufan stock and was projected back to Medinese authorities before being ascribed to the Prophet.

This absence is not, however, quite as absolute as appears from the chains that Schacht analyzed. When the full range of the *ḥadīth* collections of the period are taken into account, a slightly different picture emerges. Specifically, from the Medinese Zuhrī, the chain fans out to non-Kufan traditionists ʿUqayl and Burd.[19] Nevertheless, the presence

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[19] These two traditionists are Shāmī. Abū Khālid ʿUqayl b. Khālid b. ʿAqīl (d. 144/761-2) is from Ayla (in present-day Aqaba, Jordan) and Abū ʾl-ʿAlāʾ Burd b. Sinān (d. 135/752) was originally from Damascus before he moved to Basra. See Ibn Saʿd (d. 230/845), *al-Ṭabaqāt al-kubrā*, ed. ʿAlī Muḥammad ʿUmar (Cairo: Maktabat al-Khānjī, 2001), 7:519 (ʿUqayl); Abū ʾl-Ḥajjāj al-Mizzī (d. 742/1341), *Tahdhīb al-Kamāl fī asmāʾ al-rijāl*, ed. Bashshār ʿAwwād Maʿrūf (Beirut: Muʾassasat al-Risāla, 1992), 20:242-5, no. 4000 (ʿUqayl), 4:43-6, no. 655 (Burd); Shams al-Dīn Muḥammad b. Aḥmad al-Dhahabī (d. 748/1348), *Tadhkirat al-ḥuffāẓ*, ed., Zakarīyā ʿUmayrāt (Beirut: Dār al-Kutub al-ʿIlmiyya, Muḥammad ʿAli Bayḍūn, 1998), 1:161-2 (ʿUqayl); idem, *Siyar aʿlām al-nubalāʾ*, ed. Ḥusayn al-Asad Shuʿayb al-Arnaʾūṭ (Beirut: Muʾassasat al-Risāla, 1981), 6:151, no. 64 (Burd).

Additionally, there are references to a potentially non-Kufan Yazīd b. (Abī) Ziyād, whose identity is confused in the sources—which variously cite him as Basran, Damascene, or Kufan. Further, there is a Medinese Yazīd who is confused with the Damascene one. (The sources are uncertain as to whether the proper name is Yazīd b. Ziyād or Yazīd b. **Abī** Ziyād, or whether those were two different people who transmitted to and from some of the same traditionists.) In sum, there were four potential candidates of known traditionists named Yazīd b. (Abī) Ziyād who lived at the time of the one found in these chains, each from one of the aforementioned regions. The Yazīd in the chains for our report of the *ḥudūd* maxim is not the Basran or the Medinese, neither of whom transmitted traditions to prominent traditionist Wakīʿ b. al-Jarrāḥ as did the Yazīd in the *ḥudūd* maxim chains. Instead, he may have been the unreliable Damascene who transmitted from Zuhrī and to Muḥammad b. Rabīʿa, as in one chain for the *ḥudūd* maxim. On the Damascene Yazīd, see Ibn Abī Ḥātim (d. 327/939), *al-Jarḥ waʾl-taʿdīl* (Hyderabad: Maṭbaʿat Jamʿiyyat Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1970), 9:262-3, no. 1109 (*ḍaʿīf*); Ibn ʿAdī (d. 365/976), *al-Kāmil fī ḍuʿafāʾ al-rijāl*, ed. al-Lajna min al-Mukhtaṣṣīn bi-Ishrāf al-Nāshir (Beirut: Dār al-Fikr, 1984), 7:2714-5 (*munkar al-ḥadīth*); Ibn al-Jawzī, *Kitāb al-Ḍuʿafāʾ waʾl-matrūkīn*, ed. Abū al-Fidāʾ ʿAbd Allāh al-Qāḍī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1986), 3:209, no. 3781; Mizzī, *Tahdhīb*, 32:134-35 (*munkar al-ḥadīth*); Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, ed. Muṣṭafā ʿAbd al-Qādir ʿAṭāʾ (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 11:285, no. 8037.

of an overwhelming majority of Kufan transmitters after the early Medinese part of the chain (as noted, the Prophet—ʿĀ'isha—ʿUrwa—Zuhrī) suffices for Schacht's point that the maxim may have originated or at least proliferated most pronouncedly in Kufa.

Schacht believed this scenario to reflect a trend shared by many legal maxims, generally as sayings of Iraqi origin.[20] For him, Kufan traditions of this type were normally ascribed to Ibrāhīm al-Nakhaʿī (d. *ca*. 96/717), as here, then projected back to Ibn Masʿūd and earlier authorities all the way back to the Prophet. But his stated assumptions about early Islamic law led him to conclude that any such ascription to Ibrāhīm must have been categorically false, as was the ascription of any *ḥadīth* with legal import to any figure in the 1st century AH. For Schacht, Islamic law—and especially criminal law[21]—was too unsophisticated to have "be[en] possible in the first century;" non-ritual law was non-existent; and consequently any figure or legal doctrine attributed to that period, he "dismiss[ed] ... as legendary."[22] Accordingly, this maxim could not be traced back to the "legendary" Ibrāhīm; instead, at most, it was attributed to him by his pupil, Ḥammād b. Abī Sulaymān (d. 120/738), whom Schacht considers the first fully historical Iraqi

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He may also have been the reliable Kufan, who transmitted from Zuhrī and to Wakīʿ, as noted in *most* chains for the *ḥudūd* maxim. On the Kufan Yazīd, see Ibn Abī Ḥātim, *al-Jarḥ wa'l-taʿdīl*, 9:262, no. 1107; Mizzī, *Tahdhīb*, 32:130-1, no. 6988; Ibn Ḥajar, *Tahdhīb al-Tahdhīb*, 11:284, no. 8035. This puzzle about just which Yazīd it was is an example of the proliferation of names on the basis of corruptions in oral and written transmission (though there were often other reasons for confusion); it was frequently impossible to tell which traditionist was meant when copying *ḥadīth*s from written works. Accordingly, here, it is impossible to tell conclusively which of the Yazīds the traditionists thought transmitted the text—the Damascene or the Kufan, the son of Ziyād or Abū Ziyād—as these lived at the same time and place, transmitted to some of the same traditionists, and thus were regularly confused in the sources.

20) Schacht, *Origins*, 184 (describing "a considerable number of legal maxims").

21) Idem, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 187 ("There exists ... *no general concept of penal law* in Islam. The concepts of guilt and criminal responsibility are little developed, that of mitigating circumstances does not exist; any theory of attempt, of complicity, of concurrence is lacking. On the other hand, the theory of punishments, with its distinction of private vengeance, *ḥadd* punishments, *taʿzīr*, and coercive and preventative measures, shows a considerable variety of ideas.") (emphasis in original).

22) Idem, *Origins*, 235-36.

jurist and the "foremost representative of the Kufian Iraqian school in the generation preceding Abū Ḥanīfa."[23] He concludes that the trajectory of the maxim must have been as follows:

> The maxim 'restrict *ḥadd* punishments as much as possible' started as an anonymous saying, was then ascribed to the 'Companions and Successors' in general, then to a number of individual Companions, and finally to the Prophet ... . The maxim cannot be older than the end of the period of the Successors. As an anonymous slogan, the maxim is introduced with the words 'they used to say'; this is one of the formulas used of ancient opinions.[24]

In a recent review of Schacht's theories on this maxim, Fierro agrees with his placement of the maxim in Kufa but disagrees with his conclusions about dating:

> I find it difficult to conciliate what Schacht says in the section on Ibrāhīm al-Nakhaʿī with what he had said earlier [in his chapter on legal maxims]. If the legal maxim "restrict *ḥadd* punishments as much as possible" belongs to the realm of "ancient opinions" circulated by the end of the period of the Successors, then Ibrāhīm al-Nakhaʿī (d. *ca*. 96/717) could well have transmitted it on his own (hence the fact that he used the [anonymous] formula *kāna yuqālu*) and Ḥammād just took it from him. Thus, I see no problem in considering that the legal maxim already circulated at the times of Ibrāhīm al-Nakhaʿī.[25]

Unlike Schacht, Fierro distinguishes between two iterations of the maxim—one that advocates *ḥudūd* avoidance "as much as you can" (*mā ʾstaṭaʿtum*) and another—the standard version—that invokes it in the presence of "doubt and ambiguities" (*biʾl-shubahāt*).[26] In this way, she

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23) Ibid., 237-40 (quoted and discussed in Fierro, "When Lawful Violence Meets Doubt," 221).

24) Ibid., 184 (cited and discussed in Fierro, "When Lawful Violence Meets Doubt," 220).

25) Fierro, "When Lawful Violence Meets Doubt," 221.

26) Her more detailed categories differ from mine, see ibid., 219-20, but this basic distinction is germane to the discussion here. I would group the *ḥadīth* versions into three broad categories of content. The first prescribes *ḥudūd* avoidance given some "exculpating cause" or "to the extent possible," as in versions 1, 3, and 5, which have questionable attributions to Ibn Masʿūd or to Ibrāhīm al-Nakhaʿī. The second category requires *ḥudūd* avoidance typically in the presence of *shubha* or *shubahāt*, as in versions 4, 6, and 7, with questionable attributions to the three Companions Ibn Masʿūd, Muʿādh b. Jabal, and ʿUqba

concludes that the dating was different from the one that Schacht would have proposed had he made this distinction and seen to which end the jurists employed each. In other words, Fierro argues that Schacht, if he allowed the possibility of a first-century dating, would have agreed with her dating had he noticed this distinction between versions.

The distinction is important, as we can observe jurists referencing the latter version rather than the former. If we were to take Schacht's translation "restrict *ḥadd* punishments *as much as possible*" (emphasis added) as an indication of the version of the maxim that he was reviewing, then he missed the presence and thus import of the existence of two different formulations. More likely, he merely adopted a single translation of the various formulations of the *ḥadīth*-cum-maxim. This we can assume, because we know that he had access to sources referencing both formulations, as in Abū Yūsuf's *Kitāb al-Kharāj*. Accordingly, when he referred to Ibrāhīm al-Nakhaʿī, he seems to have had in mind either the "as much as you can" or the *biʾl-shubahāt* version, without distinguishing between the two; and on his theory, either or both would be the oldest form(s) of the maxim as one of the anonymous "ancient sayings." While such conflation may be a reasonable strategy in some contexts where a single *ḥadīth* has different wording, here, it obscures a material difference. Fierro has one view of the importance of disaggregating the two for dating, and my study takes another view of the significance of this distinction for early Islamic legal practices.

For Fierro, the "as much as you can" version came first, and the "doubts and ambiguities" version followed later in an attempt to curtail the arbitrariness of the former. In her estimation, *ḥudūd* avoidance was

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b. ʿĀmir (version 4) and with other attributions to Zuhrī (version 6) or ʿUmar (version 7). The third category combines the first two and/or offers a rationale for *ḥudūd* avoidance, as in versions 2 and 8. Version 2 is noteworthy because it becomes the most oft-cited (in later works) and most widely diffused, with eight independent chains in contrast to the single chains of all other versions. This version combines the "as much as possible" and "ambiguity" language with a rationale explaining why *ḥudūd* sanctions should be avoided. It alone appears at all levels of the *ḥadīth* collections—the pre-canonical, canonical, and post-canonical collections of ʿAbd al-Razzāq, Ibn Abī Shayba, Tirmidhī, Dāraquṭnī, and Bayhaqī; it also appears in juristic works as early as Abū Yūsuf's *Kitāb al-Kharāj*. Most *ḥadīth* scholars reject the single strands connecting any version of the *ḥadīth* back to the Prophet, but find that the attributions to ʿĀʾisha or later transmitters, such as Zuhrī, or jurists, like Ibrāhīm al-Nakhaʿī, to be sound. For details, see Appendix.

quickly linked with "concern for people of high social standing," which "must have been influential in the formulation of the principle *idraʾū al-ḥudūd bi-l-shubuhāt*." With this concern at the back of the minds of the elite, she elaborates, "[t]he only way for Muslims of high social status to escape the *ḥudūd* penalties was to create a culture of indulgence in which every possible means was to be used in order to avoid the punishment, as reflected in the ["as much as you can"] formula ... ."[27] To that end, she relates several stories from later historical reports that she takes as proof that "the general and indiscriminate import of that saying ... was the oldest formula ... ."[28]

> She then describes a sea change:
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> By the second half of the second/eighth century, that formula must have been seen as no longer acceptable: *ḥudūd* had to be taken seriously, especially under pressure from the 'pious opposition' ... . A new wording was necessary, one that eliminated its indiscriminate and arbitrary character, while still allowing for possible ways of escaping the penalty, especially when a clever jurist was able to find a 'hole' in the law.[29]

She postulates that this led to the Ḥanafī circulation of the standard formula (*idraʾū ʾl-ḥudūd biʾl-shubahāt*) in Kufa. As corroborating evidence, she relies on two central observations. First, the standard version "is explicitly associated with the two most important pupils of Abū Ḥanīfa, Zufar and Abū Yūsuf"—who continued to benefit from the earlier and more flexible formulation.[30] Second, this version comes at times with a telling addendum instructing judges to overlook the faults of those of high station. In sum, she concludes, elite Ḥanafī jurists who stood to benefit from a broad disregard of *ḥudūd* laws are the ones responsible for circulating the maxim, and "concern for [such] people of high social standing ... must have been influential in the formulation" of the maxim as a prophetic *ḥadīth* with the standard formula (*idraʾū ʾl-ḥudūd biʾl-shubahāt*).[31] Before addressing these ideas in detail, we turn

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27) Ibid., 236 (*idraʾū ʾl-ḥudūd ʿan al-muslimīn mā ʾstaṭaʿtum*).
28) Ibid.
29) Ibid.
30) Ibid., 222-6, esp. 222-3 (discussing Zufar's case); see also ibid., 231-2 (discussing Abū Yūsuf's case).
31) Ibid., 222, 236.

to the view of the maxim amongst Ḥanafīs, and importantly, other jurists as well. The aim is to provide a framework for assessing theories of the maxim's dating and function.

III. The *Ḥudūd* Maxim amongst Early Jurists

A. Ḥanafis and the Use of the Maxim in Iraq

Abū Ḥanīfa's circle expounded and applied the maxim early on in the form that has been popularized amongst most subsequent jurists: *idraʾū ʾl-ḥudūd biʾl-shubahāt*. But it is not clear that they did so because of a concern with social class, and it seems very clear that they were not the ones concerned with producing a prophetic attribution. The sources suggest that Abū Ḥanīfa himself used the maxim in this popular form, and we know that his principal associates applied it. Thus, Shaybānī adduces examples in his *Kitāb al-Āthār*—applying the principle and pointing to the position of his teacher Abū Ḥanīfa, who in turn drew on opinions of Ibrāhīm al-Nakhaʿī.[32] Also, as noted above, Abū Yūsuf mentions the popular version—alongside other versions—in his *Kitāb al-Kharāj*.[33] Moreover, there are colorful stories of instances in which Abū Yūsuf and Zufar applied the maxim.

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32) Muḥammad b. Ḥasan al-Shaybānī (d. 189/804), *Kitāb al-Āthār*, ed. Khadīja Muḥammad Kāmil (Karachi: Idārat al-Qurʾān waʾl-ʿUlūm al-Islāmiyya, 1998-9), 136 (*bāb dirāʾ* [*sic*] *al-ḥudūd*) (citing version 2, see Appendix). Shaybānī does not mention the standard version in this work, where he records traditions that he learned from Abū Ḥanīfa, but tells us that his teacher adopted a variant of version 2, where Ibrāhīm al-Nakhaʿī attributes the saying to ʿUmar. There is a problem in his citation: the content is consistent with ʿAbd al-Razzāq's record of a report from Ibrāhīm al-Nakhaʿī (on anonymous authority), but the chain is consistent with Ibn Abī Shayba's attribution of the report to Ibrāhīm al-Nakhaʿī from ʿUmar. Nevertheless, the basic point is there that Abū Ḥanīfa adopted the maxim.

33) Abū Yūsuf records several versions: a form of the standard version (which he attributes to "Companions and Successors") along with a few others, for which he provides familiar *isnād*s. See Abū Yūsuf, *Kitāb al-Kharāj*, ed. Muḥammad Ibrāhīm al-Bannāʾ (Cairo: Dār al-Iṣlāḥ, [1981]), 303 (Arabic text: *idraʾū ʾl-ḥudūd biʾl-shubahāt mā ʾstaṭaʿtum, waʾl-khaṭaʾ fī ʾl-ʿafw khayr min al-khaṭaʾ fī ʾl-ʿuqūba*, combining the standard version with the appendage that appears in various *ḥadīth* versions (*ma ʾstaṭaʿtum*) plus the rationale adduced in the last part of version 2 (*al-khaṭaʾ fī ʾl-ʿafw* ...)); ibid., 305 (Arabic text: *idraʾū ʾl-ḥudūd ʿan al-muslimīn mā ʾstaṭaʿtum, fa-idhā wajadtum lil-muslim makhrajan fa-khallū sabīlahu fa-inna ʾl-imām la-in yukhṭiʾ fī ʾl-ʿafw khayrun lahu min an yukhṭiʾ fī ʾl-ʿuqūba*, i.e., version 2,

For example, in a case involving Hārūn al-Rashīd, this famous ʿAbbāsid caliph attempted to protect a young family member (possibly his son) from punishment for committing a sex crime (*zinā*). According to the story, Abū Yūsuf was a poor, orphaned, no-name jurist who came to Baghdad after Abū Ḥanīfa's death. One of the local leaders had violated an oath, and was looking for a juristic opinion as to what to do in expiation for what was widely regarded as a weighty sin. When the leader encountered Abū Yūsuf, the jurist told him that he had not technically violated his oath, and no expiation was due. Pleased, the man gave Abū Yūsuf a sizeable sum of money and secured a house for him in town close to his own.

One day, this same man went to Hārūn and found him depressed. The caliph explained that his sadness had to do with a religio-legal matter for which he needed the aid of a jurist to render an opinion, so the man immediately suggested Abū Yūsuf. When the latter came, he noticed a young man with an air of royalty who appeared to be locked in his room. The young man gestured at Abū Yūsuf in an appeal for help, but the jurist could not make out what he wanted. He proceeded to his appointment with the caliph.

"What is your opinion," Hārūn asked, "concerning an *imām* who witnessed [another] man committing *zinā*; must [the perpetrator] receive the *ḥadd* punishment?" Surmising that the caliph must have been referring to one of his family members—the same young man whom he had passed on the way—Abū Yūsuf replied, "No." Hārūn prostrated (in joy). Abū Yūsuf explained that his opinion was consistent

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together with the familiar *isnād* transmitted directly to Abū Yūsuf rather than through the intermediate Wakīʿ: Yazīd b. Abī Ziyād—Zuhrī—ʿUrwa—ʿĀʾisha); ibid., 303 (Arabic text: *idraʾū ʾl-ḥudūd ʿan ʿibād Allāh mā ʾstaṭaʿtum*, i.e., version 3 together with the truncated *isnād* (al-Aʿmash—Ibrāhīm [al-Nakhaʿī]), as appears in Ibn Abī Shayba's version); ibid., 304-35 (Arabic text: *la-an uʿaṭṭil al-ḥudūd fī ʾl-shubahāt aḥabb* (or *khayr*) *min an uqīmahā fī ʾl-shubahāt*, i.e., version 7, also with the *isnād* later identified by Ibn Abī Shayba (Manṣūr—Ibrāhīm (al-Nakhaʿī)—... —ʿUmar)). The saying appears in other editions with formulations close to the standard one, that is, using *shubahāt*; but this is likely an interpolation of what later came to be so standard that the copyist easily thought it belonged in the wording. See, e.g., the edition of Aḥmad Muḥammad Shākir (Cairo: al-Maṭbaʿa al-Salafiyya, 1347/[1929]), 181 (Arabic text: *idraʾū ʾl-ḥudūdʿan al-muslimīn* [*biʾl-shubahāt*] *mā ʾstaṭaʿtum* ..., with brackets in original text and a note from the editor that the *shubahāt* phrase inside the brackets appears in a Taymūriyya manuscript of this work).

with the Prophet's instructions to "avoid *ḥudūd* punishments in cases of doubts or ambiguities (*idraʾū ʾl-ḥudūd biʾl-shubahāt*)." Judicial knowledge is insufficient evidence to establish a crime, he said; with no direct or corroborating evidence (i.e., a confession or four eye-witnesses to the act), the matter was sufficiently doubtful to avoid the *ḥadd* sanction. (We are reminded of Ali's decision regarding the murder in Medina told at the outset, minus the intrigues and favors of royalty.) In gratitude, the caliph bestowed upon Abū Yūsuf a considerable amount of money and favor on behalf of the offending prince. According to the lore, this episode eventually led to Abū Yūsuf's judicial appointment and ensured his continuing elite status.[34] The anecdote is obviously a stylized narration; its effect is to feature the *ḥudūd* maxim in popular form as prophetic.[35]

The maxim also appears in an episode involving Zufar b. Hudhayl (d. 158/774), one of the main students of Abū Ḥanīfa after the "two Companions" Abū Yūsuf and Shaybānī. For Zufar, the maxim became a cause for opprobrium on the part of a man named ʿAbd al-Wāḥid b. Ziyād. According to the story, when he encountered Zufar, ʿAbd al-Wāḥid rebuked him by saying that "you all [i.e., Zufar and the early Ḥanafīs] have circulated a saying (*ḥadīth*) amongst the people that is laughable." "And what is that?" Zufar asked. ʿAbd al-Wāḥid responded that "you say '*idraʾū ʾl-ḥudūd biʾl-shubahāt*,' but when you are faced with the most significant (or harshest) punishments, you rule that they are to be imposed despite the existence of *shubahāt*." Zufar asked, "How

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34) This story is repeated relatively frequently in the literary sources. See Qāḍī al-Tanūkhī (d. 384/994), *Nishwār al-muḥāḍara wa-akhbār al-mudhākara*, ed. ʿAbbūd al-Shāljī (Beirut: Dār Ṣādir, 1971-73), 252-4 (for an English translation, see D.S. Margoliouth trans., *The Table Talk of a Mesopotamian Judge* (London: Royal Asiatic Society, 1922), 136-7); see also Ibn Khallikān (d. 681/1282), *Wafayāt al-aʿyān* (Beirut: Dār al-Thaqāfa, [1968]), 6:381-82; Ibn al-Wardī (d. 749/1349), *Taʾrīkh Ibn al-Wardī* (Najaf: al-Maṭbaʿa al-Ḥaydariyya, 1969), 1:281 (reporting this event under the year 181 AH); see also Abū ʿAbd Allāh al-Yāfiʿī (d. 768/1366-7), *Mirʾāt al-jinān waʿibrat al-yaqẓān fī maʿrifat ḥawādith al-zamān* (Beirut: Muʾassasat al-Aʿlamī lil-Maṭbūʿāt, 1390/1970), 1:383 (quoting Ibn Khallikān and reporting this event under the year 182 AH).

35) Scholars recently have taken note of this story in contexts discussing the *ḥudūd* maxim. See Fierro, "When Lawful Violence Meets Doubt," 231-2; Christian Lange, *Justice, Punishment and the Medieval Muslim Imagination* (Cambridge: Cambridge University Press, 2008), 192.

so?" ʿAbd al-Wāḥid responded, "The Prophet said that a Muslim is not to be put to death for the homicide of a non-Muslim (*kāfir*), but you say that he is, in the case of *dhimmī*s." Here, Zufar is said to have retracted an early Ḥanafī ruling that a Muslim could receive the death penalty for intentionally killing a non-Muslim.[36]

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Fierro uses such cases recounting the application of the *ḥudūd* maxim to develop a theory that the maxim was a principle employed (or perhaps designed) to benefit the upper-class and that this was done under the aegis of prophetic attribution. Thus, it serves as a boon for Abū Yūsuf personally and professionally, and it is food for thought for Zufar concerning an outlying early Ḥanafī position. But there are good reasons to discount the prophetic attribution in Abū Yūsuf's story. It is told some two centuries after the events it relates at a time when the maxim, as we shall see, is firmly embedded in Islamic tradition as prophetic.[37] Abū Yūsuf does not himself refer to the maxim as a prophetic saying in his *Kitāb al-Kharāj*. There, the maxim is an anonymous saying in its standard formula and is otherwise attributed to Companions in different formulations, through various chains of transmission. As for Zufar, Fierro wonders whether ʿAbd al-Wāḥid chastised Zufar because of his associates' incoherent application of the maxim or because of their (presumed) prophetic attribution. So far as I can tell, this question does not seem to arise here, as Zufar does not attribute the saying to the Prophet in the story. ʿAbd al-Wāḥid refers to the saying as a *ḥadīth*, but there is no indication that he means this in the later Sunnī technical sense of the term as a prophetic statement. Instead, we must

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36) Abū Bakr al-Bayhaqī, *al-Sunan al-kubrā*, ed. Muḥammad ʿAbd al-Qādir ʿAṭā' (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 8:31, no. 15,700; see also Shams al-Dīn al-Dhahabī (d. 748/1348), *Siyar aʿlām al-nubalā'*, ed. Ḥusayn al-Asad Shuʿayb al-Arnaʾūṭ (Beirut: Muʾassasat al-Risāla, 1981), 8:40-1 (entry for Zufar b. Hudhayl, reporting the story as related by ʿAbd al-Raḥmān al-Mahdī [d. 198/813]). Fierro cites this same story as it appears in Dhahabī. Fierro, "When Lawful Violence Meets Doubt," 222 (citing Dhahabī, *Siyar*, 8:38-41, as well as Bayhaqī, *Sunan*, 8:31). For the early Ḥanafī rule that a Muslim is eligible for the death penalty for killing a non-Muslim, see Shaybānī, *Āthār*, 218-9 (mentioning *muʿāhad*, *naṣrānī*, *yahūdī*, from the first three caliphs; and *mājūs* according to Abū Ḥanīfa).

37) This is outlined in Parts IV and V below. For citations of the maxim as a prophetic *ḥadīth* in other non-legal works, see Fierro, "When Lawful Violence Meets Doubt," 226.

conclude that Abū Ḥanīfa and his associates most likely cited and discussed the maxim in its standard form as an anonymous saying (as did Abū Yūsuf in *Kitāb al-Kharāj*, his teacher Abū Ḥanīfa, and his teacher's teacher Ibrāhīm al-Nakhaʿī). There is no reliable evidence that they attributed it to the Prophet. All contemporaneous indications suggest that they did not. What is certain is that this was a legal maxim that was applied by Ḥanafīs in Kufa, as Schacht and Fierro concluded. Did it spread beyond their circle?

B. Other Early Jurists

Sources indicate that the maxim was applied elsewhere in Iraq, Syria, the Ḥijāz, and the other major centers of the Islamic world.[38] In Iraq, the maxim found broad application by Sufyān al-Thawrī (d. 161/778), a contemporary of Abū Ḥanīfa and his associates, who operated outside of their circle in Iraq and was considered to be a founder of his own school. He held, for instance, that the *ḥadd* punishment for fornication or adultery (*zinā*) is to be averted from a man who has intimate relations with his *mukātaba* (a slavewoman who has a contract for freedom and for whom relations with her master are thus illicit).[39] He also said that the same *ḥadd* punishment is to be avoided by reason of *shubha* from a man who has sexual relations with a slavewoman whom

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38) Though early sources for practices in Mecca and Syria are sparser than those for Medina and Iraq, there are indications that jurists followed practices of *ḥudūd* avoidance in cases of doubt there as well. For example, ʿAbd al-Razzāq tells us that ʿUmar b. ʿAbd al-ʿAzīz (r. 99-101/717-720), who lived in Medina and then in Syria, along with some others, avoided determining that there was *ḥadd* liability for *zinā* in the case of a woman who married (or had intimate relations with) her slave, though this was prohibited by ʿUmar b. al-Khaṭṭāb and ʿAṭāʾ. She had been married before, and so she was eligible for the stoning punishment for *zinā*. As such, ʿUmar b. ʿAbd al-ʿAzīz declared that he would have stoned her if it were not for her ignorance of the law; instead, he commanded her to sell the slave to someone who would remove him far from the vicinity. ʿAbd al-Razzāq, *al-Muṣannaf fī ʾl-ḥadīth*, ed. Ḥabīb al-Aʿẓamī (Beirut: al-Maktab al-Islāmī, 1392/1972), 7:210. Wakīʿ (d. 306/918) also cites instances of *ḥudūd* avoidance on the part of the Syrian Umayyad judge Faḍāla b. ʿUbayd al-Anṣārī, for instance. Wakīʿ, *Akhbār al-quḍāt*, ed. Saʿīd Muḥammad al-Laḥḥām (Beirut: ʿĀlam al-Kutub, 2001), 617. Similar instances of Awzāʿī's practices in this regard appear in Ibn Qudāma's *Mughnī* and Ibn Ḥazm's *Muḥallā.*

39) ʿAbd al-Razzāq, *Muṣannaf* (1972), 8:430 (*yudraʾ ʿanh al-ḥadd*).

he purchased with capital supplied by his business partner.[40] No *ḥadd* sanction would be due in either case because both defendants would have gained partial ownership of the slavewomen and thus would have had a reasonable basis for believing that sexual relations with each were licit. There are several other scenarios to which Thawrī applied the maxim, often in a way that closely echoed the language of the standard formula.[41]

Medinese jurists also applied the maxim. Mālik invoked it, holding that the *ḥadd* punishment for *zinā* is to be avoided where a man has sex with a slavewoman without having the full ownership interest that would permit him to do so legally.[42] Another instance of *ḥudūd*-avoidance concerned the question of whether a man incurs *ḥadd* liability for *zinā* in a case where he denies that he consummated his marriage despite his having been alone with his wife after the wedding. If he did consummate the marriage and then was proved to have had intimate relations with another woman, the act would be adultery and the punishment stoning; if not, the act would be fornication and the punishment flogging. Ibn al-Qāsim (d. 191/806), Mālik's student and the most important jurist in forming early Andalusian Mālikī law, told Saḥnūn, who transmitted the version of the *Mudawwana* in which this story appears, that Mālik did not speak to this precise issue, but that on a related matter, he had cited the *ḥudūd* maxim in its popular form (*idraʾū ʾl-ḥudūd biʾl-shubahāt*) on anonymous authority. Applying that principle here, Ibn al-Qāsim noted that, by the operation of this maxim, the *ḥadd* punishment is to be avoided until and unless the accused

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40) Ibid., 8:255 (*duriʾa ʿanh al-ḥadd biʾl-shubha*).

41) In many of these cases, he applied the principle without citing the maxim or language close to it. For instance, he avoided imposing the *ḥadd* punishment on a man who consummated a marriage with a woman who never agreed to the marriage in the first place and where there were no witnesses or any other signs of a valid marriage, ʿAbd al-Razzāq, *Muṣannaf* (1972), 6:207. For other instances of Thawrī's *ḥadd*-avoidance, see Muḥammad Rawwās al-Qalʿahjī, *Mawsūʿat fiqh Sufyān al-Thawrī* (Beirut: Dār al-Nafāʾis, 1990), 241-4.

42) See Mālik b. Anas, *Muwaṭṭaʾ*, narration of Yaḥyā b. Yaḥyā al-Laythī, ed. Bashshār ʿAwwād Maʿrūf (Beirut: Dār al-Gharb al-Islāmī, 1996), 3:393 (holding that if a man permits his slavewoman to have sex with another man, even though this is illegal, the *ḥadd* punishment is to be avoided: *duriʾa ʿanh al-ḥadd*, and that if a man has sex with his son or daughter's slavewoman also, the *ḥadd* sanction is to be avoided: *yudraʾ ʿanh al-ḥadd*).

admits to consummating the marriage or until and unless witnesses can be found to testify to such an admission.[43]

In Egypt, we also find that Shāfiʿī applied the maxim. For example, in his *Kitāb al-Umm*, he invokes it in a case of conflicting testimony concerning stolen goods. If a thief steals and four witnesses testify against him, two saying that the item stolen was a certain garment of one value and the other two saying that it was a different garment of some other value, does the *ḥadd* punishment for theft (hand amputation) apply? On the one hand, the two sets of testimony are sufficient to establish that the thief has committed a crime, but on the other hand, the conflict creates a doubt as to *which* item was stolen. In such cases, Shāfiʿī held, the punishment is waived "because we avoid *ḥudūd* punishments in cases of doubt," and this is a "strong" case of doubt.[44] However, the thief does not get off scot-free; he is to pay the lesser of the two values in restitution to the owner.[45] Also in Egypt, al-Layth b. Saʿd is said to have applied the maxim as well, though without citation to its popular form.[46]

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43) Saḥnūn, *al-Mudawwana al-kubrā* (Beirut: Dār Ṣādir, n.d.), 16:236 (*yuqāl idraʾū ʾl-ḥudūd biʾl-shubahāt*); see also ibid., 16:276 (used in a similar formula (*qad qīla idraʾū ʾl-ḥudūd biʾl-shubahāt*) in considering whether grandparents could be held liable for stealing money from their grandchildren).

44) Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820), *Kitāb al-Umm*, ed. Aḥmad Badr al-Dīn Ḥassūn (n.p.: Dār Qutayba, 1996), 7:52-3 (*min qibal annā nudriʾ al-ḥudūd biʾl-shubha wa-hādhā aqwā mā yudraʾ bih al-ḥadd*). Shāfiʿī spent time first in the Ḥijāz, then Iraq and Yemen, and the end of his days in Egypt; his *Umm* is based on his older work written in Baghdad, *al-Ḥujja*, and it contains his later, sometimes revised, opinions in the *fiqh* chapters. His application of the *ḥudūd* maxim may well go back to his earlier opinions in the Ḥijāz—where he studied under Mālik, amongst others—or Iraq—where he interacted with prominent members of *ahl al-raʾy*—both of whom employed the maxim.

45) Ibid.

46) Al-Layth b. Saʿd (d. 175/791), who was highly regarded by Shāfiʿī, was called the "Imām of Egypt" during his lifetime. He received his *fiqh* training in Mecca and Medina (under Mālik) but subsequently charted his own path. He is said to have avoided imposing *ḥudūd* punishments when a perpetrator was ignorant of the illegality of the crime, e.g., a man marrying two sisters or taking on a fifth wife (see Ibn Ḥazm, *al-Muḥallā biʾl-āthār*, ʿAbd al-Ghaffār Sulaymān al-Bindārī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1988), 11:247) (cited in Qalʿahjī, 218), or taking money from the spoils of war to which he was not entitled (see Muwaffaq al-Dīn Ibn Qudāma, *Mughnī*, ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fattāḥ Muḥammad al-Ḥulw (Cairo: Hajr, 1986), 8:470; Muḥammad b. Aḥmad al-Qurṭubī, *al-Jāmiʿ li-aḥkām al-Qurʾān* (Cairo: Dār al-Shaʿb, [1961?]), 4:260), because of

In Baghdad some decades later, Aḥmad b. Ḥanbal cited the maxim. In the form of a prophetic *ḥadīth*, he thought—like other early *ḥadīth* scholars—that the saying was of dubious authenticity. He noted nonetheless that the Prophet had applied the principle to a woman suspected of *zinā* who claimed she was raped. That is, the Prophet declined to punish her for having illicit sexual relations given the possibility of a lack of voluntariness on her part.[47] It is unclear whether Ibn Ḥanbal regarded this report from the perspective of a *ḥadīth* scholar or a jurist, and this ambivalence later reveals itself in his school's traditionist jurisprudence, which—as we will see—takes on differing degrees of opposition to the *ḥudūd* maxim (at least as a prophetic *ḥadīth*).

Finally, the maxim is attested in the ʿAlid community in Kufa as well.[48] It is listed in the works of ʿAlī's judgments collected there in the third century. In one case, a man gave his wife a slavewoman and then had sex with her. When the woman complained to ʿAlī, accusing her husband of illicit sexual relations, it became apparent to her that the man was eligible for the *ḥadd* sanction. Fearing the harsh consequences against him, she fell on her sword—perjuring herself, retracting the testimony, and thereby avoiding the *ḥadd* punishment.[49]

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The preceding discussion indicates that the maxim was widely applied in the major regions of the Muslim community where the law was

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the presence in each case of a doubt as to culpability. In the first cases, ignorance of the law diminishes culpability for clearly prohibited acts, while in the last case, the fact that a man has some ownership interest in the spoils of war exculpates him from the accusation of stealing from property to which he is not entitled at all.

47) Ibn Ḥanbal, *Musnad*, 5:416.

48) For discussion of the canonical Shīʿī *ḥadīth* collections, see below, note 62.

49) See Qummī, *Qaḍāyā*, 253-4 (*fa-udriʾ ʿanh al-ḥadd*). One source has it that ʿAlī advised his faithful companion, Mālik al-Ashtar, to follow the wisdom of the *ḥudūd* maxim, in a celebrated letter of investiture and advice upon sending him to be governor of Egypt. See Ibn Shuʿba (d. end of the 4th/10th or 5th/11th century), *Tuḥaf al-ʿuqūl*, ed. ʿAlī Akbar al-Ghaffārī (Tehran: Maktabat al-Ṣadūq, 1376): 126-49, 128. This source is dubious, and the maxim does not appear in the "canonical" version of the letter recorded in al-Sharīf al-Raḍī (d. 406/1015), *Nahj al-balāgha*, ed. Ṣubḥī al-Ṣāliḥ (Beirut: Dār al-Kitāb al-Lubnānī, 1967), 426-45, letter no. 53. At most, this indicates that the maxim was known in the circles that the relatively unknown figure Ibn Shuʿba frequented in the 4th/10th or 5th/11th century.

elaborated. Several jurists relied on the standard version, but none of them understood it to be a prophetic *ḥadīth*—at a time when most *ḥadīth* scholars doubted its prophetic attributions and jurists did not bother to cite any. This is particularly striking in the case of Shāfiʿī, whose work of legal theory, *al-Risāla*, emphasizes appeals to textual sources (Qurʾān and *ḥadīth*, especially, as well as consensus).[50] If his insistence on these bases is taken at face value to be an indispensable feature of his jurisprudence, we would expect him to attribute the maxim to the Prophet if he thought it was a *ḥadīth* or else to rely on it as an expression of consensus. His use of the maxim without such attribution may be taken as an indication that he did not believe it to be a prophetic *ḥadīth*. He instead applied it as a legal maxim grounded in other authority, perhaps a type of implicit consensus. On this account, he would have taken the maxim to express a self-evident or self-authenticating practice reflecting the consensus of common precedent.

Numerous reports indicate that there was a widespread practice of *ḥudūd* avoidance that predated the jurists of the end of the 1st and 2nd centuries AH, during the time when we have firm textual-historical evidence of juristic uses of the maxim (that is, beginning with Ibrāhīm al-Nakhaʿī). It is perhaps on that basis that Shāfiʿī and others avoided *ḥudūd* punishments in certain situations, following the earlier widespread practice.[51] This would explain why, in applying the principle, Shāfiʿī simply says that "*we* avoid *ḥudūd* punishments in cases of ambiguity" (emphasis added), indicating that this is an axiomatic, widely

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50) See Shāfiʿī, *Risāla*, ed. Muḥammad Nabīl Ghanāyim and ʿAbd al-Ṣabūr Shāhīn (Cairo: Markaz al-Ahrām lil-Tarjama waʾl-Nashr, Muʾassasat al-Ahrām, 1988). This is not to signal agreement with Schacht's assumption that a jurist will use a *ḥadīth* if he or she knows it. Rather, it is to argue precisely the opposite, by noting that there was a material change between early forms of authority to which jurists appealed (where there was no absolute need to cite principles deemed to be Sunna in the form of a prophetic *ḥadīth*, particularly where they were so widely diffused so as to be considered self-evident practices attested by continuous community practice), and a later, increasing reliance on *ḥadīth*s used to claim or bolster one's arguments against divergent views and practices.

51) They may have done so out of a notion that the practice traced back to the Companions and even the Prophet. See Jonathan Brown, "Critical Rigor vs. Juridical Pragmatism: How Legal Theorists and *Ḥadīth* Scholars Approached the Backgrowth of *Isnād*s in the Genre of *ʿIlal al-ḥadīth*," *Islamic Law and Society* 14, 1 (2008): 1-41.

circulating principle requiring no attribution. If accurate, this fits easily with the idea of a legal maxim in the sense of a formalized substantive canon with deep—but anonymous—roots. In other words, this maxim is functioning, as do legal maxims in other legal spheres, as a kind of "super-precedent" for which specific attribution is either unnecessary or uncommon.

After the traditionist triumph culminating in the 4th and 5th centuries AH, this state of affairs changed. By then, the *ḥudūd* maxim had become the central principle of Islamic criminal law, and it usually appeared with new prophetic attribution amongst its proponents.

IV. Splicing Maxims for a Touch of Class

The prophetic attributions begin in the 4th/10th century.[52] As noted, Dāraquṭnī (d. 385/995) and Bayhaqī (d. 458/1066) copied the earlier *ḥadīth* versions, but the chains had by then acquired prophetic origins. During the same period, Ismāʿīlī, Sunnī, and Imāmī Shīʿī contemporaries recorded formulations that *begin* with the standard version: Qāḍī Nuʿmān (d. 363/974), Ibn ʿAdī (d. 365/976), and Ibn Bābawayh (d. 381/991-2), respectively.[53] The formulation of Qāḍī Nuʿmān and Ibn ʿAdī is of particular interest. At first blush, it seems to combine two different ideas of *ḥudūd* avoidance and *ḥudūd* enforcement. And the combined formulation figures into Fierro's theory that the maxim emerged as a tool used originally to benefit the elite.[54] The Qāḍī

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52) In another realm detailed below, that of the jurists, we find a prophetic attribution in the work of Ḥanafī jurist Jaṣṣāṣ (d. 370/981), *Aḥkām al-Qurʾān* (Cairo: al-Maṭbaʿa al-Bahiyya, [1928?]), 3:330.

53) See Qāḍī Nuʿmān, *Daʿāʾim al-Islām*, ed. Āṣif b. ʿAlī Aṣghar Fayḍī (Cairo: Dār al-Maʿārif, 1960), 2:466, no. 1653 (cited in Ḥusayn b. Muḥammad Taqī al-Nūrī al-Ṭabarsī, *Mustadrak al-Wasāʾil* (Muʾassasat Āl al-Bayt li-Iḥyāʾ al-Turāth, [1407/1986-7], 18:26, no. 21,911)). For Qāḍī Nuʿmān's biography and life as a judge in the early Fāṭimid empire, see Ismail K. Poonawala, "al-Qāḍī al-Nuʿmān and Ismāʿīlī Jurisprudence," in *Mediaeval Ismāʿīlī History and Thought*, ed. Farhad Daftary (Cambridge: Cambridge University Press, 1996), 117-43.

54) See Fierro, "When Lawful Violence Meets Doubt," 233 (arguing that the cases she lists where high-status offenders used the *ḥudūd* maxim to escape punishment provide the background "context [that] makes sense of Ibn ʿAdī's variant of the saying … ." Fierro also uses this variant as evidence in support of her notion that the "as much as you can" formulation preceded the standard version of the *ḥudūd* maxim (*bi-ʾl-shubahāt*): "By the second

Nuʿmān-Ibn ʿAdī formulation goes as follows: "Avoid criminal penalties in cases of doubts or ambiguities and overlook the faults of the nobles, except as concerns criminal penalties (*idraʾū ʾl-ḥudūd biʾl-shubahāt, wa-aqīlū ʾl-kirām ʿatharātihim illā fī ḥadd min ḥudūd Allāh*)." The first part is the standard *ḥudūd* maxim, and we will call the second part the *aqīlū* (overlook) saying.

It is doubtful that this maxim existed in this form in the early period. With one known exception (discussed below), we have no contemporaneous reports of it, as the above survey of early traditionists and jurists reveals. There are questionable references to its presence in Ibn ʿAdī's works; many scholars attribute the saying to one of his otherwise unknown writings—usually without a transmission chain—and the maxim is not to be found in his book on *ḥadīth* transmitters, *al-Kāmil*, where we might expect it.[55] Signifantly, as discussed below, Qāḍī

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half of the second/eighth century, that formula ["as much as you can"] must have been seen as no longer acceptable: *ḥudūd* had to be taken seriously … . A new wording was necessary, one that eliminated its indiscriminate and arbitrary character, while still allowing for possible ways of escaping the penalty, especially when a clever jurist was able to find a 'hole' in the law." Ibid., 236. I take her to mean that the standard formulation as well as the combined version adduced by Ibn ʿAdī were the new formulations that restricted the maxim from the "culture of indulgence in which every possible means was to be used in order to avoid the punishment" and prevented "Muslims of high social status to [continue] to escape the *ḥudūd* penalties" on the basis of the "as much as you can" formulation. Ibid.

55) The attribution of this saying to Ibn ʿAdī is problematic. ʿAynī is the earliest reference I have identified and the only one to give a chain of transmission (see Appendix, Version 11), though he does not provide his source. See Badr al-Dīn al-ʿAynī (d. 755/1451), *ʿUmdat al-qārī* ([Cairo]: Idārat al-Ṭibāʿa al-Munīriyya, 1348/1929-30), 20:259. Several authors cite a work ascribed to Ibn ʿAdī with a simple attribution to Ibn ʿAbbās, e.g., Jalāl al-Dīn al-Suyūṭī, *Jāmiʿ al-aḥādīth* (Beirut: Dār al-Fikr, 1998), 1:135, no. 793 (*fī juzʾ lah min ḥadīth ahl Miṣr waʾl-Jazīra ʿan Ibn ʿAbbās*), whence al-Muttaqī al-Hindī (d. 975/1567), *Kanz al-ʿummāl* (Aleppo: Maktabat al-Turāth al-Islāmī, 1969?), 5:309, no. 12,972 (same), and ʿAbd al-Raʾūf al-Munāwī, *al-Taysīr: sharḥ al-jāmiʿ al-ṣaghīr* (*lil-Suyūṭī*), ed. Muṣṭafā Muḥammad al-Dhahabī ([Cairo]: Dār al-Ḥadīth, 2000), 1:156, no. 314 (same); Dhahabī, *Siyar*, 8:36-7, note 2 (s.v. Zufar b. Hudhayl) (quoting without citing Suyūṭī [above]; also: editor's note that *akhrajah Ibn ʿAdī fī juzʾ lah ʿan Ibn ʿAbbās marfūʿan biʾl-lafẓ*).

There is some confusion among later scholars about the proper attribution and source of this report. For instance, though Munāwī attributes it to Ibn ʿAdī in his *Taysīr* when commenting on Suyūṭī's *al-Jamīʿ al-ṣaghīr*, he mentions in his *Fayḍ* that ʿAbd al-Razzāq, rather than Ibn ʿAdī, narrates this tradition on the authority of Ibn ʿAbbās. The latter is incorrect if the Ṣanʿānī traditionist ʿAbd al-Razzāq is meant, as no such attribution appears in his *Muṣannaf*. See Muḥammad Ḥasan Ḍayf Allāh, *al-Fayḍ al-qadīr* ([Cairo]: Maktaba

Nuʿmān took his attribution of this version of the *ḥadīth* to the Prophet from an earlier source that had combined the two different sayings, albeit with likely inadvertence.[56] Of equal significance is the fact that, during the same early period surveyed, both parts of this *ḥadīth* were in wide circulation as separate sayings; but the two were quite distinct in attribution, circulation, and application.

A. Attribution and Circulation: Two Different Circles

As for attribution, we know that the *ḥudūd* maxim in all its versions was a non-prophetic saying attributed to Companions or adduced anonymously. Recall that, as a "*ḥadīth*," it had a Kufan pedigree and appeared in the canonical *ḥadīth* collections of Ibn Mājah and Tirmidhī. As a maxim, it circulated widely in juristic circles (including Iraq, the Ḥijāz, and elsewhere) during the first three centuries AH. As detailed above, two principal versions of the maxim circulated alongside each other during that period, though with different versions among the two camps of traditionists and jurists. What about the *aqīlū* saying?

Sunnī and Shīʿī *ḥadīth* literature each present largely uniform views of the source of the *aqīlū* saying, none of which accord easily with their records concerning the provenance of the *ḥudūd* maxim. In early Sunnī *ḥadīth* collections, the *aqīlū* saying originates with the Prophet *via*

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wa-Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī, 1964), 2:142(1). The editor of Ibn Rushd's *Bayān* also indicates that *Musaddid* narrated this "full" version (*tamām al-ḥadīth*) in his *Musnad*, attributing it to Ibn Masʿūd *mawqūfan*. It is not clear that he means this version. In addition, one commentator notes that this version of the tradition is in Ibn ʿAdī's *Kāmil*. See the editor's note in Ibn Rushd al-Jadd, *al-Bayān waʾl-taḥṣīl*, ed. Muḥammad Ḥajjī (Beirut: Dār al-Gharb al-Islamī, 1984), 16:324, note 169. But my examination of *al-Kāmil* revealed no such *ḥadīth* in that book. See Yūsuf al-Biqāʿī, ed., *Muʿjam aḥādīth ḍuʿafāʾ al-rijāl min Kitāb al-Kāmil* (Beirut: Dār al-Fikr, 1988) (s.v. the names of the individual narrators in ʿAynī's chain); see also Fierro, "When Lawful Violence Meets Doubt," 218, note 33 (noting that her search for this *ḥadīth* in *al-Kāmil* was inconclusive). The absence of this version of the *ḥadīth* in *al-Kāmil* is consistent with the fact that no other scholar cites that work for this report and Suyūṭī's explicit reference to Ibn ʿAdī's other work (*juzʾ*). Ibn Rushd's editor seems to be quoting Suyūṭī's reference to Ibn ʿAdī's work mentioned in *al-Jamiʿ al-ṣaghīr* (see above); the editor uses the same language as Suyūṭī except that he interpolates *fī ʾl-Kāmil* in place of the source mentioned by Suyūṭī.

56) See below, notes 70-71 and accompanying text.

ʿĀʾisha—Abū Bakr b. ʿAmr b. Ḥazm or one of his sons.[57] As for Shīʿī sources, Qāḍī Nuʿmān does not record the saying alone, but other Shīʿī *ḥadīth* sources do,[58] attributing it to Jaʿfar al-Ṣādiq rather than to the Prophet.[59] In both contexts, the chains for the *aqīlū* saying are wholly different from those of the *ḥudūd* maxim and from the sparse chains adduced for the combined version at issue.

Circulation and citation of the two statements are quite different as well. Amongst Sunnīs, the *ḥudūd* maxim and the *aqīlū* saying seem to have circulated amongst different groups of *ḥadīth* scholars and appear in completely different sets of canonical *ḥadīth* collections. Whereas the transmitters of the *ḥudūd* maxim indicate a Kufan origin or circulation, the chains of the *aqīlū* saying indicate a circulation in the Ḥijāz (Mecca, Medina, Ṭāʾif), usually alongside other Ḥijāzī sayings calling on Muslims to overlook the faults of fellow Muslims generally.[60]

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57) The most common versions of the *aqīlū* saying (*aqīlū dhawī ʾl-hayaʾāt* …), are recorded with four different endings in Ibn Ḥanbal, Abū Dāwūd, Nasāʾī, Bayhaqī, Ibn Ḥibbān, Ibn Rāhawayh, and Dāraquṭnī. Nasāʾī includes two other versions with the same chain. The less typical version is the one that appears in the second part of this *ḥadīth* (*aqīlū ʾl-kirām ʿatharātihim* …); it appears only in a few collections. The notable point here is that all versions of the *aqīlū ḥadīth* trace back to the Prophet via ʿĀʾisha—…—Abū Bakr b. ʿAmr b. Ḥazm or one of his close descendants (i.e., via ʿĀʾisha—ʿAmra—Muḥammad b. Abī Bakr and/or his father Abū Bakr b. ʿAmr b. Ḥazm, then spreading out from Abū Bakr or his son).

58) *Daʿāʾim* is the most authoritative compendium of law for most Ismāʿīlīs. It is also a source of Imāmī Shīʿī *ḥadīth*, as Qāḍī Nuʿmān recorded traditions attributed to the Imām Jaʿfar al-Ṣādiq and as some Imāmī scholars counted Qāḍī Nuʿmān as one of their own. See Wilferd Madelung, "The Sources of Ismāʿīlī Law," *Journal of Near Eastern Studies* 35 (1976): 29-40, at 29; see also Ṭabarsī, *Mustadrak al-Wasāʾil*, 18:26, no. 21,911 (citing Qāḍī Nuʿmān, *Daʿāʾim*, 2:466, no. 1653).

59) For example, see al-Ḥurr al-ʿĀmilī, *Wasāʾil*, 11:534, no. 3 (*ajīzū* [or *aqīlū*] *li-ahl al-maʿrūf ʿatharātihim wa-ʾghfirū lahum fa-in kaffa ʾllāh ʿazza wa-jalla ʿalayhim hākadhā, wa-awmaʾa bi-yadih kaʾannah bi-hā yaẓull shayʿan*).

60) Especially the "*taʿāfaw* saying," which encourages people to overlook each other's faults so long as offenses have not been brought before the court, in which case adjudication and/or punishment become mandatory. See ʿAbd al-Razzāq, *Muṣannaf* (1972), 10:229, no. 18,937 (Arabic text: *taʿāfaw fī-mā baynakum qabla an taʾtūnī fa-mā balaghanī min ḥadd fa-qad wajaba*); see also Abū Dāwūd Sulaymān b. al-Ashʿath al-Sijistānī, *Sunan*, ed. Muḥammad ʿAbd al-ʿAzīz al-Khālidī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1996), 3:137, no. 4376 (for an English translation, see *Sunan Abu Dawud*, trans. Mohammad Mahdī al-Sharīf (Beirut: Dār al-Kutub al-ʿIlmiyya, 2008), 5:74.); Nasāʾī, *al-Sunan al-kubrā*, ed. Ḥasan ʿAbd al-Munʿim al-Shalabī (Beirut: Muʾassasat al-Risāla, 2001), 7:12, nos. 7331-32; Abū

Whereas the *ḥadīth* versions of the *ḥudūd* maxim appear in Ibn Mājah and Tirmidhī, the *aqīlū* saying appears in Abū Dāwūd and Nasā'ī.[61] Neither appears in Bukhārī or Muslim. The Shī'ī evidence likewise suggests different realms of circulation. Versions of the *ḥudūd* maxim appear in Ibn Bābawayh's collection, which draws on mostly Kufan *ḥadīths* reported on the authority of scholars in Qum.[62] But neither he nor any other collector of canonical Shī'ī *ḥadīth* records the *aqīlū* saying. This suggests that Qummī scholars at that time did not regard it as a *ḥadīth*, or more pointedly, as a valid principle of law.[63] The two maxims appear together during that time in the Shī'ī sources, as noted, only in Qāḍī Nu'mān's *Da'ā'im*, which draws on a collection of reports

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'l-Qāsim al-Ṭabarānī, *al-Mu'jam al-awsaṭ*, ed. Abū Ma'ādh Ṭāriq b. 'Iwaḍ Allāh b. Muḥammad and Abū al-Faḍl 'Abd al-Muḥsin b. Ibrāhīm al-Ḥusaynī (Cairo: Dār al-Ḥaramayn, 1995), 6:210, no. 6212; al-Ḥākim al-Naysābūrī, *al-Mustadrak 'alā 'l-Ṣaḥīḥayn* (Cairo: Dār al-Ḥaramayn lil-Ṭibā'a wa'l-Nashr wa'l-Tawzī', 1997), 4:537, no. 8236; Bayhaqī, *Sunan*, 8:575, no. 17,611.

61) For the two citations in the Sunnī canonical collections, see Abū Dāwūd, 3:137, no. 4375 (English translation in *Sunan Abu Dawud*, 5:74); Nasā'ī, *Sunan*, 6:468-9, nos. 7253-58. For other contemporaneous sources and references through the 5th/11th century, see Isḥāq b. Rāhawayh (d. 238/853), *Musnad,* ed. 'Abd al-Ghafūr b. 'Abd al-Ḥaqq al-Balūshī (Medina: Maktabat al-Īmān, 1412/1990-1), 2:567; Ibn Ḥanbal (d. 241/855), *Musnad*, 6:181; Abū Ya'lā (d. 307/918), *Musnad*, ed. Ḥusayn Salīm Asad (Damascus: Dār al-Ma'mūn lil-Turāth, 1984-94), 8:363-4, no. 4953; Ibn Ḥibbān (d. 354/965), *Ṣaḥīḥ*, ed. Shu'ayb al-Arna'ūṭ and Ḥusayn Asad, arranged by 'Alā' al-Dīn b. Balabān al-Fārisī (Beirut: Mu'assasat al-Risāla, 1407/1987), 1:296; Ṭabarānī (d. 360/970), *al-Mu'jam al-awsaṭ*, 3:277, no. 3139; 6:54, no. 5774, 7:302, no. 7562; Dāraquṭnī (d. 385/995), *Sunan* (Beirut: Mu'assasat al-Risāla, 2004), 3:207; Bayhaqī (d. 458/1066), *Sunan*, 8:579-80, nos. 17,627-79. For later sources, see Badr al-Dīn al-'Aynī (d. 755/1451), *'Umdat al-qārī*, 14:256; al-Muttaqī al-Hindī (d. 975/1567), *Kanz al-'ummāl*, 5:121-24.

62) Ibn Bābawayh, *Kitāb man lā yaḥḍuruhu 'l-faqīh*, ed. 'Alī Akbar al-Ghaffārī (Qum: Jamā'at al-Mudarrisīn fī 'l-Ḥawza al-'Ilmiyya, 1994), 4:53, no. 90. See also Ṭabarsī (d. 1320/1902), *Mustadrak al-Wasā'il*, 18:26, no. 21,912 (listing the *ḥudūd* maxim as it has been popularized, attributed to 'Alī without an *isnād* (from Ibn Bābawayh's *Muqni'*, 147). For inclusion of the saying in later collections, see Ibn Abī Jumhūr al-Aḥsā'ī (d. *ca*. late 9th/15th century), *'Awālī al-la'ālī*, ed. Mujtabā al-Arāqī (Qum: Maṭba'at Sayyid al-Shuhadā', 1983-1985), 1:236; Ḥusayn al-Ṭabāṭabā'ī al-Burūjirdī, *Jāmi' aḥādīth al-Shī'a* (Qum: Maṭba'at al-Mihr, 1992), 23:328 (citing Ibn Bābawayh, *Faqīh*).

63) The *aqīlū* saying appears elsewhere in the Shī'ī *ḥadīth* corpus. For example, al-Ḥurr al-'Āmilī, *Wasā'il al-Shī'a*, 11:534, records a version of the saying (citing *Furū'* [= Kulaynī, *Kāfī*]).

from not only Kufa and sources familiar toTwelver Imāmīs, but also the Ḥijāz and sources circulating amongst Zaydis.[64]

The appearance of the *aqīlū* maxim in the Ḥijāz does nothing to support an idea of early circulation of the double maxim. The *Daʿāʾim* is an abridged law manual rather than a *ḥadīth* work designed to preserve legal rules in the form of authentic prophetic *ḥadīth*s with their chains. For this reason, Qāḍī Nuʿmān often splices together *ḥadīth*s of different provenance or omits chains altogether to support a particular legal proposition.[65] Here, the fact that he draws on early *ḥadīth* collections from Iraq (where the *ḥudūd* maxim was circulating as a *ḥadīth*) and the Ḥijāz (where the *aqīlū* maxim was found), plus the virtual absence of the *ḥadīth* in joint form in the first three centuries of the Islamic period, together indicate that it is quite possible that he or someone from whom he copied his *ḥadīth*s placed these separate sayings together too. In fact, a closer examination of early Shīʿī sources demonstrates that this is indeed most probably what happened.

Without transmission chains in any of his surviving works, we are initially uncertain whether Qāḍī Nuʿmān got the combined version of

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64) Qāḍī Nuʿmān extracted the reports in *Daʿāʾim*, from which he omitted transmission chains, mostly from his massive work of law-related *ḥadīth*, *Kitāb al-Īḍāḥ*, which gathered—among other sayings—*ḥadīth* attributed to the Prophet's family together with their transmission chains. See Qāḍī Nuʿmān, *Kitāb al-Iqtiṣār*, ed. ʿĀrif Tāmir (Beirut: Dār al-Aḍwāʾ, 1996), 9-10 (describing his *Īḍāḥ*); cf. idem, *Īḍāḥ*, ed. Muḥammad Kāẓim Raḥmatī (Beirut: Muʾassasat al-Aʿlamī lil Maṭbūʿāt, 2007) (the surviving fragments of *ḥadīth*s on ritual law). See also Poonawala, "al-Qāḍī al-Nuʿmān," 121, 128 (noting that he added more Zaydī and Mālikī components to the *Daʿāʾim* as well); Madelung, "Sources of Ismāʿīlī Law," 29 (noting the Imāmī and Zaydī components). *Kitāb al-Īḍāḥ* is mostly lost, but from the surviving portion, Madelung reconstructed the sources from which Qāḍī Nuʿmān drew, at least in the extant section on ritual law, and locates them in the late second and early third centuries in sources circulating outside of Qum. The earliest recorded books from which he drew are *Kitāb al-masāʾil* and the *Jāmiʿ* by ʿUbayd Allāh b. Ḥalabī, who transmits directly from Jaʿfar al-Ṣādiq (d. 148/765) and died in his lifetime; the last is the *Kitāb* of Ḥammād b. ʿĪsā (d. 208/823-4 or 209/824-5). Madelung, "Sources of Ismāʿīlī Law," 30. He concludes that the work was a compromise between Imāmī and Zaydī law—materially based on authoritative sources of both but, against the Zaydī tendency, emphasizing the authority of the Imāms, especially that of Jaʿfar al-Ṣādiq, over other ʿAlids. Ibid., 32.

65) Madelung, "Sources of Ismāʿīlī Law," 29 ("He usually quotes only a single tradition on any question in support of actual doctrine, or simply formulates it himself … .").

the maxim from Sunnī or other Shīʿī sources.[66] The sources suggest, at most, that Qāḍī Nuʿmān may have been familiar with the *ḥudūd* maxim through Sunnī[67] or Imāmī[68] circles. Yet a look at the Zaydī sources shows where he got his extended version of it.

The maxim was cited by Zaydism's eponymous school founder, Zayd b. ʿAlī (d. 122/740), according to his grandson. Though it does not appear in the *Musnad* collecting *ḥadīth*s attributed to Zayd, the maxim is in a work collecting his teachings, called the *Amālī*.[69] From that work, we see where Qāḍī Nuʿmān copied his long version of the maxim, inasmuch as we know that he copied from *written* Shīʿī sources for his works on law; in the *Amālī*, it was already a double-maxim, combined and

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66) In addition to the compound version in the *Daʿāʾim*, a simple version of the *ḥudūd* maxim appears in Qāḍī Nuʿmān's *al-Iqtiṣār*, 108, where he simply reports at the end of the chapter on *ḥudūd* that punishments are to be avoided in cases of doubt or ambiguity (*wa-yudraʾ al-ḥadd biʾl-shubha* ...). The standard, if not compound, version thus probably appeared in *al-Īḍāḥ* and his subsequent abridgments of that work (from which all but the ritual law section is lost), though there is no *ḥudūd* maxim in his short didactic poem, *al-Muntakhab*.

67) As for Sunnī sources—specifically the Mālikī and Ḥanafī schools in which Qāḍī Nuʿmān is believed to have started out—we know that they regularly invoked the *ḥudūd* maxim during this time in Ifrīqiya and elsewhere. On Qāḍī Nuʿmān's religious and legal affiliations, and "conversion" from Sunnism to Ismāʿīlī Shīʿism, see Ismail K. Poonawala, "A Reconsideration of al-Qāḍī al-Nuʿmān's 'Madhhab,'" *Bulletin of Oriental and African Studies* 37, 3 (1974): 572-9.

68) The Imāmīs of course have it, as Qāḍī Nuʿmān's contemporary, Ibn Bābawayh (d. 381/991-2), includes it in his *ḥadīth* compilation. (The other compilers of the Imāmī *ḥadīth* canon, Kulaynī (d. 329/941) and Ṭūsī (d. 460/1067), do not.) In principle, Qāḍī Nuʿmān and Ibn Bābawayh could have gotten the *ḥudūd* maxim from a common source available to both of them at the time the former wrote *al-Īḍāḥ* (i.e., between 297/909 and 322/934, during the first Fāṭimid caliph al-Mahdī's reign) and/or *Daʿāʾim* (around 349/960). On the dating of these texts, see Poonawala, "al-Qāḍī al-Nuʿmān," 121, 126. But this was likely not the case, because the sources informing them as well as the versions that they cited differed considerably. Instead, there is a more direct link between Qāḍī Nuʿmān's version of the maxim and a version known in Zaydī circles.

69) See Zayd b. ʿAlī (d. 122/740), *Musnad* (also called *al-Majmūʿ al-fiqhī*), ed. ʿAbd al-ʿAzīz b. Isḥāq al-Baghdādī (Ṣanʿāʾ, Yemen: Maktabat al-Irshād, 1990), 297-304 (*kitāb al-ḥudūd*); Aḥmad b. ʿĪsā b. Zayd (d. 248/869), *Amālī* (also called *Kitāb al-ʿUlūm*), collected and commented upon by Muḥammad b. Manṣūr b. Yazīd al-Murādī al-Kūfī ([Yemen]: Yūsuf b. al-Sayyid Muḥammad al-Muʾayyad al-Ḥusnī?, 1401/1981), 211. See also ʿAlī b. Ismāʿīl al-Ṣanʿānī, *Kitāb Raʾb al-ṣadʾ* (Beirut 1990), 3:1390-1405 (preserving Aḥmad b. ʿĪsā's *Amālī*, with commentary).

attributed to the Prophet: *qāla Rasūl Allāh* [*s.a.w.*] *idraʾū ʾl-ḥudūd biʾl-shubahāt wa-aqīlū ʾl-kirām ʿatharātihim illā min ḥadd*. From the chain, we know that the *ḥadīth* was copied from a book.[70] It seems to have been not uncommon for *ḥadīth*s of similar topics like these to have appeared side by side in early notebooks and for later copyists to divide the run-togther *ḥadīth*s sometimes incorrectly, as here, and attribute them together to the Prophet and as if through an independent chain of transmission, also as here. In other words, Qāḍī Nuʿmān did not do the splicing; he copied from an earlier Zaydī work where the *ḥadīth*s were already conjoined—perhaps inadvertently—and attributed to the Prophet.[71]

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A similar process may have occurred in the Sunnī context, where there is a general lack of overlap between the *ḥudūd* maxim and the *aqīlū*

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70) Aḥmad b. ʿĪsā b. Zayd, *Amālī*, 211 (recording the following chain: Muḥammad—Ḥusayn b. Naṣr—Khālid—Ḥuṣayn [b. Mukhāriq]—Jaʿfar [al-Ṣādiq]—his father [Muḥammad al-Bāqir]). Cf. Hossein Modarressi, *Tradition and Survival: A Bibliographical Survey of Early Shīʿite Literature* (Oxford: Oneworld, 2003), 275-6 (noting that Abū Junāda al-Salūlī [Ḥuṣayn in the above chain], a late 2nd/8th century Kufan transmitter of *ḥadīth* from Jaʿfar al-Ṣādiq [as appears in the above chain] and Mūsā al-Kāẓim with strong Shīʿī leanings, authored a work called *Kitāb Jāmiʿ al-ʿilm*, and that this work appears to have been quoted extensively in Aḥmad b. ʿĪsā's *Amālī*, always through the same chain of transmission; that chain of transmitters [Ḥusayn b. Naṣr b. al-Muzāḥim—Khālid—al-Ḥuṣayn (b. Mukhāriq)], i.e., the same one noted in our copy of Aḥmad b. ʿĪsā's *Amālī*, referred to *ḥadīth*s taken from this work).

71) Furthermore, we know that the simple version of the *ḥudūd* maxim was circulating in the Zaydī community at a point contemporary to Qāḍī Nuʿmān, as the Imām al-Hādī ilā ʾl-Ḥaqq (d. 298/911)—although rejected by later Zaydīs—appealed to it during his lifetime, though without citing it as a *ḥadīth* and not in compound form. See Muḥammad b. Sulaymān al-Kūfī (d. after 399/921), *Muntakhab* (Ṣanʿā': Dār al-Ḥikma al-Yamāniyya, 1993), 413, 416. As a general matter, the maxim was not compound at that time and it did not appear as a Prophetic *ḥadīth* in most Zaydī works until the modern period. Compare Ibn al-Murtaḍā (d. 840/1437), *Kitāb al-Azhār* and *al-Baḥr al-zakhkhār* in addition to al-Nāṭiq biʾl-Ḥaqq's *Kitāb al-Taḥrīr* (no citations to the maxim in any of these works), with Muḥammad b. ʿAlī al-Shawkānī's *Nayl al-awṭār*, eds. Muḥammad Ḥallāq and ʿIzz al-Dīn Khaṭṭāb (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1999), 7:109, and Ṣanʿānī, *Kitāb Raʾb al-ṣadʿ*, 3:1390, 1393, 1405 (citations to the maxim, though not as a *ḥadīth*). On modern Zaydīs, and particularly Shawkānī's appropriation of Sunnī *ḥadīth*s (as he does here with the *ḥudūd* maxim), see Bernard Haykel, *Revival and Reform in Islam: The Legacy of Muḥammad al-Shawkānī* (Cambridge; New York: Cambridge University Press, 2003). (Thanks are due to Najam Haider for directing me to several Zaydī sources.)

saying. As noted above, jurists of the early period regularly cited and applied the *ḥudūd* maxim.[72] But they rarely, if ever, cited or applied the *aqīlū* saying to validate the practice of avoiding criminal sanctions when it came to the elite.[73] This saying is missing in the works of Ibn Abī Shayba, ʿAbd al-Razzāq, Shāfiʿī, Abū Yūsuf, Mālik, and most others who wrote or recorded juristic opinions during that period. One of the few traditionist-jurists of the period to mention the *aqīlū* saying, Ibn Rāhawayh (d. 238/853), records it but not the *ḥudūd* maxim.[74]

Exceptionally, Aḥmad b. Ḥanbal (another traditionist-jurist who postdates the other major Sunnī school-"founding" jurists by some decades) records both maxims, having grappled with but overcome the incompatibility problems between them. He rejects the prophetic attribution of the *ḥudūd*-avoidance *ḥadīth* and is ambivalent about whether *ḥudūd* punishments ever could or should be avoided.[75] But he supports a particular version of the *aqīlū* saying that is at odds with the lenient one cited by Ibn Rāhawayh. As with the *ḥudūd*-avoidance maxim, there

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72) Jurists like Shāfiʿī, Abū Yūsuf and Mālik, in addition to traditionist compilers of law-related *ḥadīth* like ʿAbd al-Razzāq and Ibn Abī Shayba, record and show applications of the *ḥudūd*-avoidance *ḥadīth* but not the *aqīlū* saying. See above section on the early jurists.

73) Abū Bakr b. Muḥammad b. ʿAmr b. Ḥazm, a Medinese judge and *ḥadīth* scholar under ʿUmar II, is said to have promulgated the *ḥadīth* in Medina, but he and other jurists applied it in forms that supported enforcing rather than avoiding *ḥudūd* laws.

74) Ibn Rāhawayh (d. 238/853), *Musnad*, 2:567 (*aqīlū dhawī ʾl-haya'āt zallātihim*, without the *ḥudūd* exception). On Ibn Rāhawayh's jurisprudence, see Susan Spectorsky, "*Ḥadīth* in the Reponses of Isḥāq b. Rāhwayh," *Islamic Law and Society* 8, 3 (2001), 407-31 (noting that, in his responses to specific questions (*masāʾil*), Ibn Rāhawayh relied more on scholarly opinion and Companion sayings and less on prophetic *ḥadīth*s than a Schachtian view of traditionists and of Shāfiʿī's influence initially would lead one to surmise); cf. eadem, trans., *Chapters on Marriage and Divorce: Responses of Ibn Ḥanbal and Ibn Rāhwayh* (Austin: University of Texas Press, 1993), esp. 1-59 (introduction with a detailed biography of Ibn Rāhawayh); ʿAbd al-Ghafūr b. ʿAbd al-Ḥaqq al-Balūshī, *al-Imām Isḥāq b. Rāhawayh wa-kitābuh al-Musnad* (Medina: Maktabat al-Īmān, 1990) (expanded biography of Ibn Rāhawayh).

75) As we saw above, Ibn Ḥanbal acknowledged the report that the Prophet avoided a *ḥadd* punishment in at least one instance, but he rejected the notion that his act had a more general application, as represented in one of the *ḥadīth* formulations of the maxim of which Ibn Ḥanbal was aware. As such, he seemed to have restricted the scope of the practice, or at least some of his later followers understood him to have regarded *ḥadd* avoidance in that case as a one-time exception rather than a prospective rule or general principle of *ḥudūd* laws.

are many versions of the *aqīlū* saying.[76] The relevant difference among them is the occasional inclusion or exclusion of a "*ḥudūd* exception," which stipulates that any lenient stance toward the *minor* faults or misdemeanors of high status members of society is inapt when it comes to *ḥudūd* crimes. For such serious crimes and moral offenses, the *ḥudūd* exception emphasizes that those of high status are subject to punishment like anyone else.

Worth noting is that, while Ibn Rāhawayh does not mention the *ḥudūd* exception, Ibn Ḥanbal includes it, as do Ibn ʿAdī and Qāḍī Nuʿmān and most others who quote the *ḥudūd* maxim in addition to the *aqīlū* saying.[77] As such, these versions *with* the *ḥudūd* exception tend toward *ḥudūd* enforcement rather than *ḥudūd* avoidance. While both the *ḥudūd* maxim and the *aqīlū* saying were known by his time,[78] Ibn Ḥanbal's treatment suggests that the lack of overlap between them amongst the *ḥadīth* collections and juristic works was not fortuitous.

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76) There are three other differences in terminology, as follows: (1) the term used for "overlook" is variously *tajāwazū, aqīlū*, *ajīzū*, or *ihtabalū*; (2) the term used to refer to those of high status is alternatively *al-kirām*, *dhawū ʾl-hayaʾāt* or *hayʾa*, *dhū ʾl-murūʾa/dhawū ʾl-murūʾāt*, *dhawū ʾl-sakhāʾ*, and even *dhawū ʾl-buyūt* (as in Muḥammad Amīn b. Faḍl Allāh al-Muḥibbī, *Khulāṣat al-athar fī aʿyān al-qarn al-hādī ʿashar* (Beirut: Maktabat Khayyāṭ, [1966]), 4:422—though this author or the teacher who related it to him apparently copied or paraphrased the term incorrectly); (3) the terms used for "faults" or "misdemeanors" include *ʿatharātihim, zallātihim*, *dhilla*. For a list of several versions, see al-Muttaqī al-Hindī, *Kanz al-ʿummāl*, nos. 12,975-84, 12,987-88. The second set of terms (*kirām*, *dhawū ʾl-hayaʾāt*, etc., loosely translating as "those of high station") is perhaps most interesting, as it raises questions about just which class of people the maxim is designed to encompass. For an excellent discussion of class distinctions in Islamic history (through the 8th/14th century), see generally Louise Marlow, *Hierarchy and Egalitarianism in Islamic Thought* (Cambridge; NY: Cambridge University Press, 1997).

77) The version with the *ḥudūd* exception appears more widespread. Both versions, with and without the *ḥudūd* exception, appear in Nasāʾī and Ibn Rāhawayh. Abū Dāwūd, Ibn Ḥanbal, Bayhaqī, Dāraquṭnī, Ṭabarānī, and Ibn ʿAdī only have the version with the *ḥudūd* exception. See above, note 61.

78) We have already seen that the *aqīlū* saying was scattered through the *ḥadīth* literature. It also appears regularly in compilations of sayings and proverbs of the time, notably, without the *ḥudūd* exception. See, e.g., Abū ʿUbayd al-Qāsim b. Sallām (d. 224/838), *Kitāb al-Amthāl*, ed. ʿAbd al-Majīd Qaṭāmish (Mecca: Jāmiʿat al-Malik ʿAbd al-ʿAzīz, 1980), 1:52, no. 68. See also Marlow's discussion and the citations therein, indicating circulation of this same saying in the pre-Islamic period. Marlow, *Hierarchy and Egalitarianism*, 27-8, note 78.

As an opponent of gratuitous *ḥudūd* avoidance, he found the *ḥudūd* maxim spurious and the *aqīlū* saying wholly unacceptable without a *ḥudūd* exception. Though other scholars disagreed with him about the *ḥudūd* maxim, most came to signal agreement with his sentiment against the *aqīlū* saying. Accordingly, that saying virtually disappears from subsequent legal literature,[79] while the *ḥudūd* maxim figures prominently.

B. Legal-Theoretical Rejection of Class-Based Distinctions

With this survey, we are now in a better position to revisit theories about the provenance and social context of the *ḥudūd* maxim. In the form of a *ḥadīth*, it was certainly of Kufan stock, though the standard form circulated in centers outside of Abū Ḥanīfa's circle, such as Baghdad, Egypt, and Medina. Questions of dating linked to the socio-legal import of the maxims are more complicated.

Enter the notion of a "touch of class." Recall Fierro's suggestion that the two versions of the *ḥudūd* maxim reflected a historical trend of favoring the social elite in criminal proceedings. To support her point, she provides many examples of how the maxim was indeed used and abused to favor the rich and powerful. The historical point outlining this social context is not to be denied. Yet it is questionable whether this trend can support her associated argument about dating. She argues that, of the two forms she has highlighted, the vague phrase "as much as you can" preceded the more specific phrase "doubts and ambiguities (*shubahāt*)." The latter replaced the former, she argues, in an attempt to curtail and obscure the maxim's arbitrary elite-favoring aspects with objective standards that would avoid the censure of the "pious opposition."[80]

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79) An exception appears, perhaps predictably, in later Ḥanbalī literature, when Ibn Qayyim al-Jawziyya cites the *aqīlū* saying with its *ḥudūd* exception, as had Ibn Ḥanbal. See the collection of his *fiqh* opinions: *Jāmiʿ al-fiqh*, ed. Yusrī al-Sayyid Muḥammad (al-Manṣūra, Egypt: Dār al-Wafāʾ lil-Ṭibāʿa waʾl-Nashr waʾl-Tawzīʿ, 1428/2007), 6:414 (citing and commenting on a citation to the saying as a *ḥadīth* by the 5th/11th century Ḥanbalī luminary, Ibn ʿĀqil: *aqīlū dhawī ʾl-haya'āt ʿatharātihim illā ʾl-ḥudūd*).

80) Fierro is suggesting that *shubahāt* is more of a technical term and thus more limited than *mā ʾstaṭaʿtum*. She posits that the latter preceded the former, which emerged as a response to the "pious opposition," such as Ibn Ḥanbal, Ibn Mājah, and Tirmidhī (and

The distinction made by Fierro is an important one, if not necessarily to support her hypothesis. In noting the differences between the two forms of the maxim, and in calling attention to the legalistic tenor of the *shubahāt* version, her intervention may explain why the standard version becomes central in the later juristic literature. Indeed, both *ḥadīth* scholars and, as we will see, jurists graft a prophetic attribution onto the standard version in the later period, signaling a preference for the more legalistic phrase. But this is not to say that *shubha* was a well-defined technical term during this period (the sources suggest that it was not) or that the standard juristic version itself came later (the sources suggest that it did not).

The sources indicate that the differences in the form of the maxim in the early period were a matter not of sequence, but of genre. Our examination of the first three centuries of *ḥadīth* and legal literature revealed that the *ḥadīth* versions and the standard version of the *ḥudūd* maxim circulated in two completely different arenas, simultaneously. *Ḥadīth* scholars concerned with one set of criteria for recording traditions included in their collections a set of reports different from the maxim used by jurists interested in using another set of criteria for expounding law. Thus, *ḥadīth* scholars cited the various versions of the maxim but never mentioned the standard version, which did not meet their criteria for *ḥadīth* reliability; meanwhile, legal scholars consistently cited the standard version when articulating and applying the law. This practice clarifies an important feature of the early legal system. Both camps knew of both versions. The jurists, however, did not regard their formulation as prophetic in origin; still, they cited and applied the

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later Ibn Ḥazm), who were concerned that the law be applied in an egalitarian way. See Fierro, "When Lawful Violence Meets Doubt," 227, 236 (noting traditions forbidding Muslims from interceding on behalf of one's [high-status] peers). This view of the technical nature of the term *shubahāt* bears out in the later sources, and its more exacting potential may indeed explain why jurists picked up and standardized the *shubahāt* version over the other as, gradually, they elaborated the concept and contours of *shubha*. See below, notes 83, 127. At the same time, arguably (at least for the likes of Ibn Ḥazm), the *shubahāt* version provides a framework no more or less arbitrary than any other version of the maxim during the period in question (the first two to three centuries). More importantly, as I hope to have demonstrated here, both versions are contemporaneous to one another, but circulate in different scholarly circles; and, as I argue elsewhere, the elaboration of *shubha* comes later: jurists who invoke it do not dress it with any marked precision until the 4th and 5th centuries AH.

ḥudūd maxim as a substantive principle of criminal law that drew on earlier precedent. In other words, though the wording was not authoritative, the precedent—as expressed in the maxim—was. In this way, the *ḥudūd* maxim reflected a settled legal principle even as early as the late 1st/7th or 2nd/8th century, when Ibrāhīm al-Nakhaʿī, Shāfiʿī, Mālik, Abū Yūsuf, and others cited it as axiomatic and repeated it in a standard form.

Having established that genre rather than sequence better describes the differences between basic versions of the *ḥudūd* maxim, what of the other versions that combine it with the *aqīlū* saying? The existence of this version in Ibn ʿAdī's work, Fierro suggests, provides corroborating support for the historical trend of favoring the elite in criminal laws. Here is where timing does come into play. While the *aqīlū* saying was as old as the *ḥudūd* maxim, the combined version attributed to Ibn ʿAdī and Qāḍī Nuʿmān was not. It came later through the combination of these two different sayings circulating in two different regions in the earliest period. Additionally, even if the two sayings were known in the same region at some point at least in the mid-3rd/9th century, as indicated by Ibn Ḥanbal's reference to both, was the prescriptive value of the *aqīlū* saying intended to avert *ḥudūd* punishments from those of high social status? Perhaps so without the *ḥudūd* exception, but emphatically not with it. We have seen that Ibn Ḥanbal's version of the *aqīlū* saying co-opts a known saying that reflected societal norms of privileging the elite, but makes clear that their privilege does not exempt them from *ḥudūd* liability. It may be that he and his cohorts emphasized the *ḥudūd* exception precisely to curb elite privilege in applications of *ḥudūd* laws.

In sum, whereas the "arbitrary" and "objective" versions of the *ḥudūd* maxim circulated side-by-side in the early period (through the 3rd/9th century), the widespread *aqīlū* saying was disregarded amongst jurists in the *ḥudūd* context at that time, and it certainly was not appended to the *ḥudūd* maxim as a single saying in the *ḥadīth* context. The *aqīlū* saying was attached to the *ḥudūd* maxim after the principle of mandatory *ḥudūd* enforcement across-the-board had won out; the addition carried a *ḥudūd* exception designed to underscore, not subvert, the principle that the elite were not exempt from criminal liability.

It is doubtful then that elite Ḥanafī jurists whose social peers stood to benefit from relaxed *ḥudūd* laws were responsible for circulating the standard (or combined) version of the *ḥudūd* maxim, at least not pri-

marily in order to favor the upper classes. The stories about Zufar and Abū Yūsuf are unavailing. Remember that in his rebuke of Zufar, ʿAbd al-Wāḥid does not claim that Zufar attributed the maxim to the Prophet. The story about Abū Yūsuf, which does adduce a prophetic attribution, comes from a 4th century source—by which time the maxim had come to be regarded widely as a prophetic *ḥadīth*. Moreover, the several examples from early legal sources applying the maxim to the underprivileged and non-scholarly classes show that this principle was not one meant *just* for the elite.[81]

All of this notwithstanding, it is doubtless true—at least in the literary memory of the Muslim historians—that some jurists used the maxim to benefit the elite, as the many examples Fierro adduces show. She well describes the social context that no doubt rankled jurists like Ibn Ḥanbal and Ibn Ḥazm, who wanted more principled applications of the law based on authentic traditions and who opposed the maxim on grounds of authenticity and coherence. But such preferential treatments likely incensed *ḥudūd* maxim proponents—amongst the Ḥanafīs, Shāfiʿīs, Mālikīs, and Shīʿa—who accepted the authority of the maxim regardless of its status as a prophetic *ḥadīth* and also displayed sensitivities to abuse of the maxim. They labored to curb social and political abuses too by defining the proper contours and scope of the maxim—sometimes with the effect of critiquing the overuse of the maxim, but more often objecting to its underuse.

It is important not to conflate the practice with the theory of the maxim in considering questions of provenance and juristic conceptions of the law. In practice, as Fierro shows, criminal law application was often at odds with theory. The theory was one of consistent *ḥudūd* avoidance following authoritative practices from the earliest period, as enshrined in the *ḥudūd* maxim. In society, hierarchy took hold in criminal and other areas of law early on; but where jurists accommodated it generally, they resisted it in criminal law, and this led to exaggerated attempts to avoid criminal sanctions in the laws on the books through

81) E.g., the cases cited above, notes 38-41 (indicating some instances where the maxim was used to favor the uneducated, non-elite new converts who lacked high social status). To be sure, it is not clear that Fierro is suggesting that the maxims were intended to benefit the elite exclusively; rather, she emphasizes that the maxim likely emerged from and was easily abused by the elite in practice.

a robust "jurisprudence of doubt." Attempts to flatten class distinctions in prosecutions thus later appeared in the form of the modified *aqīlū* saying appended to the original *ḥudūd* maxim. As shown below, subsequently, jurists insisted on the equal-treatment theory of *ḥudūd* avoidance and championed the *ḥudūd* maxim as the central substantive canon of criminal law for all defendants regardless of status or political pull.

V. The *Ḥudūd* Maxim amongst Later Jurists

A. Juristic Proponents

The *ḥudūd* maxim appears in the earliest Islamic legal texts, as jurists cite and apply it in considerations of criminal violations. From the 4th/10th century onward, Ḥanafī, Shāfiʿī, Mālikī, and Imāmī Shīʿī jurists developed the doctrine of doubt and continued to apply the maxim widely, as both a precedential *ḥadīth*-text and a central maxim of Islamic criminal law.[82] By the time of the rise of the collections of legal maxims

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82) The earliest juristic attribution of the maxim to the Prophet that I have been able to find from a source verifiably ascribed to its writer is that of the Ḥanafī jurist Jaṣṣāṣ (d. 370/981), *Aḥkām al-Qurʾān*, 3:330; around the same time, the Qayrawānī biographer Khushanī records an incident where the Cordoban Mālikī jurist ʿAbd al-Mālik b. Ḥabīb (d. 238/853) attributed the maxim to the Prophet as well. See Muḥammad b. al-Ḥārith al-Khushanī (d. 361/971 or 371/981), *Akhbār al-fuqahāʾ waʾl-muḥaddithīn*, ed. Sālim Muṣṭafā al-Badrī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1999), 190. The maxim appears elsewhere in sources that suggest even earlier juristic attributions to the Prophet, but the possibility of interpolation cannot be ruled out, and seems likely, as contemporaneous sources indicate that no other 2nd/8th or 3rd/9th-century figure deemed the maxim prophetic—even though most later sources suggest that they did. For example, there is the citation to Ibn Ḥabīb—both a jurist and a traditionist—who reportedly used the maxim as a prophetic saying to save his brother Hārūn from an accusation of blasphemy. See Khushanī, *Akhbār*, 186-91. Another prominent Mālikī jurist of Cordoba, Muḥammad b. Aḥmad b. ʿAbd al-ʿAzīz al-ʿUtbī (d. 255/869), reported a case in which a man suffering from extreme hunger sold his wife to another man for funds; Mālik's student ʿAbd al-Raḥmān b. al-Qāsim reportedly invoked the maxim as a *ḥadīth* to avoid the punishment. See Ibn Rushd al-Jadd (d. 520/1122), *al-Bayān waʾl-taḥṣīl*, ed. Muḥammad Ḥajjī (Beirut: Dār al-Gharb al-Islamī, 1984), 16:324 (quoting the *ʿUtbiyya*: *qad jāʾa ʾl-ḥadīth idraʾū ʾl-ḥudūd biʾl-shubahāt*). (I owe these references to Maribel Fierro.)

Khushanī's "prophetic" attributions here should be read with caution, as they appear in a source from a period when the maxim has become entrenched as a prophetic *ḥadīth* (4th/10th century); it is not clear whether ʿUtbī's use of *ḥadīth* is to be taken in the developed technical sense of a prophetic statement; and we have indications that at least in one case,

in the 7th/13th through 10th/16th centuries, juristic writings well reflect the entrenchment of that maxim. A brief survey of these school's positions in works of *fiqh* and legal maxims demonstrates the extent to which the *ḥudūd* maxim had become central to criminal law in both citation and application.[83]

In the case of a man forced to rape a woman, the leading Ḥanafī of his time in Baghdad, Aḥmad b. Muḥammad al-Qudūrī (d. 428/1037), defends the unique Ḥanafī position that judges need *not* avoid imposing the *ḥadd* punishment for *zinā* on the perpetrator because of their view that his act could not have been involuntary, as fear—they say—prevents desire and arousal. Though Ḥanafīs do not believe there to be ambiguity in this case, Qudūrī notes that he *would* avoid the punishment if there *were* any ambiguity by operation of the *ḥudūd* maxim announced by the Prophet.[84] He and other Ḥanafīs uniformly apply the maxim in several cases of ambiguity when they do find it.[85] By the

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the earlier jurists ʿUtbī cited in this work either did not know the maxim as prophetic or if they did, they did not append a prophetic attribution to it. That is, Saḥnūn (d. 240/854) relied on Ibn al-Qāsim in compiling the *Mudawwana*; he obtained a notebook recording Mālik's sayings and legal opinions from his student Asad b. al-Furāt (d. 213/828) and verified those answers with Ibn al-Qāsim directly. ʿUtbī, a contemporary of Saḥnūn, similarly relied on Ibn al-Qāsim through copying the latter jurist's notebooks (*juzʾ*, *samāʿ*) amongst those of other students of Mālik in his compilation of Mālikī opinions, *al-ʿUtbiyya*. See ʿUmar b. ʿAbd al-Karīm al-Jīdī, *Mabāḥith fiʾl-madhhab al-Mālikī biʾl-Maghrib* (Rabat: al-Hilāl al-ʿArabiyya lil-Ṭibāʿa waʾl-Nashr, 1993), 70-72. We would expect that if Ibn al-Qāsim in fact quoted the maxim as a prophetic *ḥadīth* in one place, he would have done so when relating (or verifying) Mālik's opinions to Saḥnūn and/or in his notebook from which ʿUtbī copied. But this seems not to have been the case. As recorded in the *Mudawwana*, Ibn al-Qāsim recounted the maxim to Saḥnūn twice, but on specifically anonymous authority both times (*yuqāl* and *qad qīla*). See above, note 43.

83) As a *ḥadīth* and a legal maxim, jurists constantly employed the maxim to resolve the "hard cases"—those that were not rendered clear-cut by existing texts, including early precedents. As they did so, they developed their own conceptions of what constituted the types of ambiguities that would evoke the maxim's application, which were then culled out and applied in works of *fiqh*, *fatwā*s, and—in short form—works of legal maxims.

84) Abū ʾl-Ḥusayn al-Qudūrī (d. 428/1037), *Tajrīd*, ed. Muḥammad Aḥmad al-Sirāj and ʿAlī Jumʿa Muḥammad (Cairo; Alexandria: Dār al-Salām, 2004), 11:5897 (attributing the standard formula to the Prophet: (*idraʾū ʾl-ḥudūd biʾl-shubahāt*); see also Shams al-A'imma al-Sarakhsī (d. 483/1090), *Uṣūl*, ed. Abū ʾl-Wafāʾ al-Afghānī (Beirut: Dār al-Maʿrifa, 1973), 1:147 (attributing the maxim to the Prophet), 167, 290, 2:285.

85) E.g., Sarakhsī (d. 483/1090), *Mabsūṭ*, ed. Abū ʿAbd Allāh Muḥammad Ḥasan Ismāʿīl al-Shāfiʿī (Beirut: Dār al-Kutub al-ʿIlmiyya 2001), 9:61-6; Abū Bakr al-Kāsānī (d.

time of Ibn Nujaym (d. 970/1563), who authored the central work on Ḥanafī legal maxims, the matter had been settled amongst the jurists. He announces the *ḥudūd* maxim as an authentic prophetic *ḥadīth* as agreed-upon and accepted by the entire Muslim community, saying that "jurists of all regions have come to a consensus that [the maxim applies]."[86]

Similarly, in the Shāfiʿī context, Abū Ḥāmid al-Ghazālī (d. 505/1111) adduces the legal maxim as a prophetic *ḥadīth* when he applies it to require avoiding the *ḥadd* punishment for *zinā* in a situation wherein two people had intimate relations in the context of a marriage of disputed legal validity. Examples of these doubtful marriages include temporary marriage (permitted in the Sunnī Meccan school and by the Shīʿa), marriage without a guardian (permitted by Ḥanafīs), and marriage without witnesses (permitted by Mālikīs). The basis for avoiding the *ḥadd* in such cases, Ghazālī explains, is the "[prophetic] *ḥadīth*: … avoid criminal punishments in cases of doubt;" and the juristic dispute suffices to create a *ḥadd*-averting doubt.[87] Other Shāfiʿīs uniformly

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587/1191), *Badāʾiʿ al-ṣanāʾiʿ*, ed. Aḥmad Mukhtār ʿUthmān ([Cairo]: Zakariyyā ʿAlī Yūsuf, 1968), 9:4150-8; Burhān al-Dīn al-Marghīnānī (d. 593/1197), *Hidāya*, in Akmal al-Dīn Muḥammad b. Muḥammad al-Bābartī (d. 786/1384), *al-ʿInāya fī sharḥ al-Hidāya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2007), 4:148-52; ʿAbd Allāh b. Aḥmad al-Nasafī (d. 710/1310), *Kanz al-daqāʾiq*, ed. Abū ʾl-Ḥusayn ʿAbd al-Majīd al-Murādzahī al-Khāshī (Zāhidān, Iran: Muʾassasat Usāma, 2003), 1:563-4; Fakhr al-Dīn al-Zaylaʿī (d. 743/1343), *Tabyīn al-ḥaqāʾiq*, ed. Aḥmad ʿIzzū ʿInāya (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000), 3:566-8; Ibn al-Humām (d. 861/1457), *Fatḥ al-qadīr* (Beirut: Dār Ṣādir, [1972?]), 5:249-52; Ibn Nujaym (d. 970/1563), *al-Baḥr al-rāʾiq sharḥ Kanz al-daqāʾiq* ([Cairo]: n.p., 1893?), 5:5-15.

86) Ibn Nujaym, *Ashbāh*, 142 (citing the maxim—here: *al-ḥudūd tudraʾ biʾl-shubahāt*—as a *ḥadīth* in collections of Ibn ʿAdī, Ibn Mājah, Tirmidhī, and others). But some scholars notice that the *ḥadīth* was problematic and likely inauthentic. For example, the Sunnī *ḥadīth* scholar ʿAbd Allāh b. Yūsuf Zaylaʿī (d. 762/1360-1) says that the *ḥadīth* in its popular form (*idraʾū ʾl-ḥudūd biʾl-shubahāt*) is inauthentic or anomalous (*gharīb*), with many problematic links in the chains in the *ḥadīth* collections. Jamal al-Dīn al-Zaylaʿī, *Naṣb al-rāya: takhrīj aḥādīth al-Hidāya*, ed. Aḥmad Shams al-Dīn (Beirut: Dār al-Kutub al-ʿIlmiyya, 1996), 3:333. For a similar view in the Shīʿī context, see Jawād al-Tabrīzī, *Ṣirāṭ al-najāt* (Qum: Dār al-Ṣadīqa al-Shahīda, 1422/[2001-2]), 1:551.

87) Abū Ḥāmid al-Ghazālī (d. 505/1111), *al-Wasīṭ fī ʾl-madhhab*, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir ([Cairo?]: Dār al-Salām, 1997), 6:443-4 (quoting the standard formula: *idraʾū ʾl-ḥudūd biʾl-shubahāt*); see also idem, *Wajīz*, 2:167;

apply the maxim in like cases involving various types of doubt or ambiguity.[88] By the time of Suyūṭī (d. 911/1505), who authored a core work on Shāfiʿī legal maxims, and even before,[89] the matter had been settled as much for Shāfiʿīs as it had for Ḥanafīs. The Prophet, Suyūṭī explains, had commanded *ḥudūd* avoidance in instances of doubt or ambiguity.[90]

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idem, *al-Mustaṣfā*, 1:382. Cf. Māwardī (d. 450/1058), *al-Aḥkām al-sulṭāniyya*, 254 (attributing it to the Prophet).

88) E.g., Abū Isḥāq al-Shīrāzī (d. 476/1083), *al-Tabṣira fī uṣūl al-fiqh*, ed. Muḥammad Ḥasan Haytū (Beirut: Dār al-Fikr, 1980), 1:485 (indicating that the Prophet said both *idraʾū ʾl-ḥudūd ... biʾl-shubahāt* and ... *mā ʾstaṭaʿtum*); Sayf al-Dīn Abū Bakr al-Qaffāl al-Shāshī (d. 507/1113), *Ḥilyat al-ʿulamāʾ fī maʿrifat madhāhib al-fuqahāʾ*, ed. Yāsīn Aḥmad Ibrāhīm Darādikah (Amman: Maktabat al-Risāla al-Ḥadītha; Mecca: Dār al-Bāz, 1988), 8:7-15; Abū ʾl-Qāsim al-Rāfiʿī (d. 623/1226), *al-ʿAzīz sharḥ al-Wajīz*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwaḍ (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 11:144-50 (citing the *ḥudūd* maxim as a prophetic *ḥadīth*, e.g., on p. 145); Muḥyī ʾl-Din al-Nawawī (d. 676/1277), *Minhāj al-ṭālibīn*, ed. Aḥmad b. ʿAbd al-ʿAzīz al-Ḥaddād (Beirut: Dār al-Bashāʾir, 2000), 3:206; idem, *al-Majmūʿ sharḥ al-Muhadhdhab*, ed. Muḥammad Najīb al-Muṭīʿī ([Cairo]: Maktaba al-ʿAlamiyya biʾl-Fajjāla, 1971), 18:375, 385; idem, *Rawḍat al-ṭālibīn*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwaḍ (Beirut: Dār al-Kutub al-ʿIlmiyya, 1992), 7:306-13; Muḥammad al-Khaṭīb al-Shirbīnī (d. 972/1560), *Mughnī al-muḥtāj ilā maʿrifat maʿānī alfāẓ al-Minhāj*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd and ʿAlī Muḥammad Muʿawwaḍ (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 5:442-5; Ibn Ḥajar al-Haytamī (d. 974/1567), *Tuḥfat al-muḥtāj sharḥ al-Minhāj*, ed. ʿAbd Allāh Maḥmūd Muḥammad ʿUmar (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), 4:118-21 (citing the *ḥudūd* maxim as a prophetic *ḥadīth*, e.g., on p. 118, and as a *khabar ṣaḥīḥ* on pp. 119-20); Ibrāhīm b. Muḥammad al-Bājūrī (d. 1277/1860), *al-Ḥāshiya ʿalā Sharḥ Ibn Qāsim al-Ghazzī* (Beirut: Dār al-Maʿārif, 1974), 2:383-90.

89) He discusses the maxim and its various applications under the title *al-qāʿida fī ʾl-shubahāt al-dāriʾa lil-ḥudūd* ("on the maxim regarding *ḥudūd*-averting doubts or ambiguities"), amongst other principles ranging from the general objectives of the law (*maqāṣid*) and rules of propriety (*adab*) to legal maxims proper. See al-ʿIzz b. ʿAbd al-Salām, *al-Qawāʿid al-kubrā*, ed. Nazīh Kamāl Ḥammād and ʿUthmān Jumuʿa Ḍamīriyya, 2nd ed. (Damascus: Dār al-Qalam, 2007), 2:279-80. He is not, however, concerned with the origins of the maxim, and thus does not present it as a *ḥadīth* or discuss whether he deems it to be one.

90) Suyūṭī, *Ashbāh*, 236-8 (citing the standard formula and listing various applications of the maxim). Suyūṭī's discussion occurs in a chapter entitled *al-ḥudūd tasquṭ* [instead of *tudraʾ*] *biʾl-shubahāt*; for support, he cites the two canonical collections that include this maxim (Ibn Mājah, Tirmidhī), the fragment of the work attributed to Ibn ʿAdī, and other later collections.

The Mālikīs are not much different. Ibn Rushd al-Ḥafīd (d. 595/1198) explains that the Prophet commanded *ḥudūd* avoidance in all cases of doubt or ambiguity.[91] Qarāfī adds that, in applying the maxim, he is following prophetic instructions as well as precedent recorded by Mālik's student Ibn al-Qāsim (d. 191/806) in cases of ignorance. He also purports to be following Ibn Yūnus's practice, which explicitly attributed the maxim to the Prophet.[92] Other Mālikīs followed suit.[93] By Qarāfī's time (d. 684/1285), the maxim was firmly entrenched as a *ḥadīth* and legal principle and accordingly appears in his work of legal maxims, which is central to the Mālikī legal corpus.[94]

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91) Ibn Rushd al-Ḥafīd (d. 595/1198), *Bidāyat al-mujtahid* (Beirut: Dār al-Fikr, n.d.), 2:297 (citing the standard formula); see also ibid., 2:324 (noting that all jurists agree—based on the prophetic *ḥadīth idraʾū ʾl-ḥudūd biʾl-shubahāt*—that an element for the crime of *zinā* is the absence of doubt, even if they disagree as to what constitutes doubts that are *ḥadd*-averting).

92) Shihāb al-Dīn al-Qarāfī (d. 684/1285), *al-Dhakhīra fī furūʿ al-Mālikiyya*, ed. Muḥammad Bū Khubza (Beirut: Dār al-Gharb al-Islāmī, 1994), 12:50-1; cf. ibid., 12:60 (applying it as a *ḥadīth* and maxim to several cases).

93) Mālikīs regularly conceive of the maxim as a prophetic *ḥadīth* and apply it as such in deliberations both about legal issues and in actual cases. For deliberations in *fiqh* works, see, Shams al-Dīn al-Dasūqī (d. 1230/1815), *Ḥāshiyat al-Dasūqī ʿalā ʾl-Sharḥ al-kabīr* (by Dardīr), ed. Muḥammad ʿUlaysh ([Cairo]: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, [198-?]), 4:337 (*wa-qad wurida ʾdraʾū ʾl-ḥudūd biʾl-shubahāt* ...); Ṣāliḥ b. ʿAbd al-Samīʿ al-Ābdī al-Azharī, *al-Thamar al-dānī fī taqrīb al-maʿānī sharḥ Risālat al-Qayrawānī* (Cairo: Dār al-Faḍīla, 2007), 617 (standard version, attributed to the Prophet). For instructions in a manual on judicial administration, see Ibn Farḥūn (d. 799/1396-7), *Tabṣirat al-ḥukkām*, ed. Jamāl Marʿashlī (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), 2:88 (standard version, attributed to the Prophet). For legal opinions arising in actual judicial cases, see, e.g., Aḥmad al-Wansharīsī (d. 914/1508), *al-Miʿyār al-muʿrib waʾl-jāmiʿ al-mughrib ʿan fatāwā ahl Ifrīqiya waʾl-Andalus waʾl-Maghrib*, ed. M. Ḥajjī (Rabat: Wizārat al-Awqāf waʾl-Shuʾūn al-Islāmiyya, 1981), 2:431 (quoting an opinion of a judge attributing the maxim to the Prophet); ibid., 4:493-5 (same).

94) See Shihāb al-Dīn al-Qarāfī (d. 684/1285), *Anwār al-burūq fī anwāʾ al-furūq* (Beirut: Dār al-Maʿrifa, 197-), 4:1307, no. 240 (*al-farq … bayn qāʿidat mā huwa shubha tudraʾ bihā ʾl-ḥudūd waʾl-kaffārāt wa-qāʿidat mā laysa kadhālik*). Here he does not attribute the maxim to the Prophet. But he does make that attribution in his *Dhakhīra*, as noted above. Ibn al-Shaṭṭ, who comments on Qarāfī's *Dhakhīra*, appears to be an exception to the dominant Mālikī trend of attributing the maxim to the Prophet; he explains that even though the maxim is not authentic (*ṣaḥīḥ*), it is nevertheless applicable because there is juristic consensus that imposing *ḥudūd* punishments can occur only where there is no doubt or ambiguity

Shīʿī jurists follow a similar pattern. Al-Shaykh al-Mufīd (d. 413/947) notes that defective contracts give rise to *ḥudūd* avoidance if entered into in the presence of doubt or ambiguity.[95] Ibn Idrīs (d. 598/1202) later spells out that the maxim applies simply because the Prophet commanded it. For example, if a soldier takes a portion of war spoils before they have been divided, he should not be punished for theft because, as a soldier, his entitlement to some portion of the spoils creates ambiguity at the intersection between his ownership interest and the rule requiring him to wait for distribution of the spoils. At base, there can be no punishment then because of "the statement of the Prophet, universally agreed upon, 'avoid *ḥudūd* punishments in cases of doubt or ambiguity.'"[96] And the principle is applied elsewhere.[97] Al-ʿAllāma al-Ḥillī notes several types of *ḥadd*-averting doubt in one of his treatises,[98]

(*shubha*). Ibn al-Shaṭṭ (d. 723/1323), *Idrār al-shurūq ʿalā Anwāʾ al-furūq* (*ʿUmdat al-muḥaqqiqīn*), on the margins of Qarāfī, *Furūq*, 4:316.

95) Mufīd, *Muqniʿa* (Qum: Muʾassasat al-Nashr al-Islāmī, 1410/[1990]), 789 (*al-ʿuqūd al-fāsida tudriʾ al-ḥadd … biʾl-shubahāt*); see also 787 (citing a version of the maxim twice). He applies the rule to women (victims) accused of *zinā* in instances of alleged coercion, as in rape, see ibid., 787, 789, and instances where a defendant repents before a case is brought before the courts, ibid., 787.

96) Ibn Idrīs al-Ḥillī (d. 598/1201-2), *Kitāb al-sarāʾir* (Qum: Muʾassasat al-Nashr al-Islāmī, 1410/[1989-90]), 3:485 (*qawl al-rasūl ʿalayhi al-salām al-mujmaʿ ʿalayhi idraʾū ʾl-ḥudūd biʾl-shubahāt*, adduced to require canceling *ḥadd* liability for alleged cases of theft); cf. ibid. 3:475 (on voiding *ḥadd* liability for alleged cases of drinking: *fa-innahu qāla ʿalayhi ʾl-salām wa-rawathu ʾl-umma wa-ʾjtamaʿat ʿalayhi bi-ghayr khilāf: idraʾū ʾl-ḥudūd biʾl-shubahāt*); ibid., 3:446 (on removing *ḥadd* liability for alleged cases of *zinā*: *al-khabar al-madhkūr al-mujmaʿ ʿalayh …* [*wa-*] *li-qawlih ʿalayhi ʾl-salām idraʾū ʾl-ḥudūd biʾl-shubahāt*).

97) See, e.g., Abū ʾl-Ṣalāḥ al-Ḥalabī (d. 447/1055), *Kāfī*, 406 (recognized twice), 413 (same); Abū Jaʿfar al-Ṭūsī (d. 460/1067), *al-Nihāya fī mujarrad al-fiqh waʾl-fatāwā* ([Tehran]: Chāpkhāna-yi Dānishgāh, 1342/[1963]), 2:708, 711, 716 (three instances); 2:725, 746; Ibn Idrīs, *Sarāʾir*, in addition to citations above, see 3:428, 484 (two instances); 3:432, 446 (two instances); 3:433-4, 445 (two instances), 450, 457 (three instances).

98) Al-ʿAllāma al-Ḥillī (d. 726/1325), *Qawāʿid al-aḥkām* (Qum: Muʾassasat al-Nashr al-Islāmī al-Tābiʿa li-Jamāʿat al-Mudarrisīn bi-Qum, 1413-1419/[1992-1999]), 3:521-3. Despite its title, which in other contexts means "legal maxims," this is not a treatise containing only legal maxims proper; its title more accurately relates a general sense of "principles of Islamic legal rulings," including maxims. Accordingly, while it contains some maxims, most of the work is a concise listing of *fiqh* rulings, with brief explanations. For further detail, see idem, *Irshād al-adhhān ilā aḥkām al-aymān*, ed. Fāris al-Ḥassūn (Qum: Muʾassasat al-Nashr al-Islāmiyya, 1410/[1989-90]), esp. 2:170-92.

and later jurists articulate the range of Shīʿī *shubha* as a part of the *ḥudūd* maxim's central place in Shīʿī criminal law.[99]

B. Juristic Detractors (or Reluctant Adherents)

Ḥanbalī and Ẓāhirī jurists differ greatly from their Sunnī and Shīʿī counterparts by questioning or strongly opposing the *ḥudūd* maxim. Ḥanbalīs are ambivalent. They largely reject the maxim's prophetic provenance and question the scope of its application, but many apply it nonetheless. Ẓāhirīs are adamant in their complete rejection of the maxim, its attribution, and application.

From the beginning, we have noted that, as with the eponyms of the other schools, Aḥmad b. Ḥanbal never considered the standard form of the maxim to be a prophetic *ḥadīth*. To be sure, he mentions another version of the maxim as a prophetic *ḥadīth* in his *Musnad*, but deems it weak, as noted above. Yet, he signals that the *application* of the maxim was sound in cases of coercion and perhaps otherwise. These two features—taken as a reflection of his traditionist jurisprudence—perhaps caused some dissonance in Ḥanbalī law, such that later Ḥanbalīs are of two minds on the matter.

Some apply the maxim, albeit typically without attributing it to the Prophet.[100] For example, Ibn Ḥanbal's student Isḥāq b. Ibrāhīm

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99) Shīʿī *qawāʿid* works tend not to list types of *shubha* that require (or validate) *ḥudūd*-avoidance separately from general discussions about *shubha* in *uṣūl* works or citations of the *ḥudūd* maxim in criminal law chapters in *fiqh* works. Compare al-Waḥīd al-Bihbahānī, *al-Rasāʾil al-uṣūliyya* (Qum: Muʾassasat al-ʿAllāma al-Mujaddid al-Waḥīd al-Bihbahānī, 1416/[1996]), 403-4 (describing categories of *shubha fī nafs al-ḥukm* [i.e., *shubha ḥukmiyya*] and *shubha fī ṭarīq al-ḥukm* [i.e., *shubha mawḍūʿiyya*]), Muḥammad Riḍā al-Muẓaffar, *Uṣūl al-fiqh*, ed. al-Raḥmatī al-Arākī, 2nd ed. (Qum: Muʾassasat al-Nashr al-Islāmī, 1423/[2002?]), 4:314-15 (distinguishing *shubahāt ḥukmiyya* from *mawḍūʿiyya*), with, for example, Muḥammad al-Fāḍil al-Lankarānī, *al-Qawāʿid al-fiqhiyya* (Qum: Mihr, 1416/[1995]), 21 (describing *shubahāt ḥukmiyya*). Muṣṭafā Muḥaqqiq Dāmād, an exception, outlines three categories: the first two as labeled elsewhere—*shubha ḥukmiyya* (in which he includes ignorance of the law [*jahl*]) and *shubha mawḍūʿiyya*—plus a third category (which he culls from the detailed legal rules in *fiqh* manuals): *shubha* that arises from coercion and mistake (*shubha-yi khaṭaʾ* and *shubha-yi ikrāh*). See Muḥaqqiq Dāmād, *Qavāʿid-i Fiqh* (Tehran: Markaz-i Nashr-i ʿUlūm-i Islāmī, 1378), 4:54-61.

100) Exceptionally, the Ḥanbalī scholar is to be found who attributes the *ḥudūd* maxim to the Prophet. See, for example, works by two 5th/10th century scholars, Ibn al-Bannāʾ (d. 471/1078-9), *al-Muqniʿ fī sharḥ Mukhtaṣar al-Khiraqī*, ed. ʿAbd al-ʿAzīz b. Sulaymān b.

disagreed with his teacher's view that drinking intoxicating beverages warranted *ḥadd* punishment even when a person did not get drunk. Isḥāq did agree that the act of drinking was prohibited, based on a prophetic *ḥadīth* that "even small amounts of drinks that are intoxicating in abundance are prohibited (*ḥarām*)." But he was of the opinion that the *ḥadd* punishment did not apply because of the principle requiring "the *ḥadd* sanction to be avoided in cases of doubt."[101]

More tellingly, the erudite scholar Ibn Qudāma (d. 620/1223) in his *Kāfī* announces that one necessary element for finding a person guilty of committing theft is that there be no ambiguity as to ownership of the stolen item, because *"ḥudūd* sanctions are averted in cases of doubt." Thus, the father is not punished for stealing his son's or grandson's property due to ambiguities that arise as to the status of his ownership over that property in light of the prophetic statement addressed to a young man, that "you and your property belong to your father."[102] Compared to the other legal schools' assiduous attribution of the maxim to the Prophet by Ibn Qudāma's time and the provision here of a prophetic *ḥadīth* to prove his point, Ibn Qudāma's invocation of the maxim without a prophetic attribution is striking. He repeats this here and in other works, sometimes referring to the maxim as a "foundational principle" of criminal law,[103] and sometimes citing it to require avoidance of *ḥudūd* punishments in certain cases,[104] but never—so far as I can tell—on the assumption or assertion that it is prophetic.

Ibrāhīm al-Baʿīmī (Riyadh: Maktabat al-Rushd, 1993), 3:1120-1; Maḥfūẓ b. Aḥmad al-Kalwadhānī (d. 510/1116), *al-Intiṣār fī ʾl-masāʾil al-kibār*, ed. Sulaymān b. ʿAbd Allāh al-ʿUmayr (Riyadh: Maktabat al-ʿUbaykān, 1993), 1:313-19.

101) See Isḥāq b. Ibrāhīm al-Naysābūrī (d. 275/888f), *Masāʾil al-Imām Aḥmad b. Ḥanbal*, ed. Abū ʾl-Ḥusayn Khālid b. Maḥmūd al-Ribāṭ et al. (Riyadh: Dār al-Hijra, 2004), 2:265.

102) Ibn Qudāma (d. 620/1223), *al-Kāfī fī fiqh Ibn Ḥanbal*, ed. Zuhayr al-Shāwīsh (Beirut: al-Maktab al-Islāmī, 1979), 4:179.

103) E.g., ibid., 4:550 (explaining that the second-hand testimony admissible in most commercial law matters is inadmissible in *ḥudūd* cases—*li-anna mabnāh ʿalā ʾl-darʾ biʾl-shubahāt*).

104) See Ibn Qudāma, *Mughnī*, 9:116 (noting three other prophetic *ḥadīth*s that create ambiguities as to whether a man has an ownership interest in his children's property sufficient to avoid imposing the *ḥudūd* on him in cases of theft because of the *ḥudūd* maxim (i.e., that *ḥudūd tudraʾ biʾl-shubahāt*); and because the greatest *shubha* is where a man takes property in which the law gives him a property interest [*māl jaʿalahu al-sharʿ lahu*] then

Other Ḥanbalīs follow suit.[105] The illustrious and sharp-tongued Ibn Qayyim al-Jawziyya, student of Ibn Taymiyya,[106] advances pointed remarks in this vein. He acknowledges the maxim in the form that "punishments" (rather than the fixed punishments that form *ḥudūd* laws) "are to be avoided in cases of doubt or ambiguity," perhaps using the non-technical term to underscore the non-prophetic nature of the saying or to indicate that it traverses *ḥudūd*-laws proper (to include discretionary punishments, *taʿzīr*, and retaliation, *qiṣāṣ*).[107] He even applies it to require *ḥudūd*-avoidance in extreme situations, albeit on altogether different jurisprudential grounds. We have already seen one sort of alternative ground when Ibn Qudāma cited other prophetic *ḥadīth*s as grounds for avoiding punishments. Ibn al-Qayyim follows this approach and adds to those textual bases reasons of repentance (*tawba*),[108] necessity (*ḍarūra*),[109] and the public interest (*maṣlaḥa*).[110] In

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advises him to consume it freely). For his frequent citations to the maxim, see ibid., 12:243-4, 275-77, 345-46, 347-48, 350, 354, 359, 363-64, 451, 501.

105) E.g., Muḥammad b. ʿAbd Allāh al-Zarkashī (d. 772/1370), *Sharḥ al-Zarkashī ʿalā Mukhtaṣar al-Khiraqī*, ed. ʿAbd al-Munʿim Khalīl Ibrāhīm (Beirut: Dār al-Kutub al-ʿIlmiyya, 2002), 3:418 (citing the maxim, but not attributing it to the Prophet); Ibn Kathīr (d. 774/1373), *Tafsīr* (n.p.: Dār al-Fikr, 1401), 2:57.

106) Ibn Taymiyya "silently" rejects the *ḥudūd* maxim. That is, he is aware of it—particularly given its prominence in Ibn Qudāma's works—but he omits it in his *ḥudūd* opinions. See Ibn Taymiyya, *Majmūʿ al-Fatāwā*, ed. ʿAbd al-Raḥmān b. Muḥammad b. Qāsim al-ʿĀṣimī al-Najdī (Beirut: Maṭābiʿ Muʾassasat al-Risāla, 1997), 34:177ff (section on *ḥudūd* laws, no mention of the maxim). Curiously though, he cites the maxim approvingly in his interpretation of a Qurʾānic verse governing the authoritativeness of single-sources reports. His citation is somewhat off; it combines the standard version with one usually listed in collections of Tirmidhī and others (see Appendix, version 2), but he attributes it to the *Sunan* of Abū Dāwūd in a version that no traditionist or jurist knew. See ibid., 15:308 (... *kamā fi Sunan Abī Dāwūd: idraʾū ʾl-ḥudūd biʾl-shubahāt fa-innaʾl-imām in yukhṭiʾ fi ʾl-ʿafw khayr min an yukhṭiʾ fi ʾl-ʿuqūba*).

107) Ibn Qayyim al-Jawziyya (d. 751/1350), *Iʿlām al-muwaqqiʿīn*, ed. Ṭāhā ʿAbd al-Raʾūf Saʿd (Beirut: Dār al-Jīl, 1973), 1:104 (*al-ʿuqūbāt tudraʾ biʾl-shubahāt*). The maxim has been labeled the "*ḥudūd*" maxim here for the mention of *ḥudūd* in the standard formula and the centrality of that version in Islamic criminal law jurisprudence, but it is not limited strictly to *ḥudūd* contexts. Jurists often apply it to rules of *qiṣāṣ* (retaliation for murder, personal injury) and *taʿzīr* (discretionary punishments) as well.

108) Ibid., 3:11.

109) Ibid., 3:13-5.

110) Ibid., 3:11.

discussing cases of necessity, for example, he says that criminal liability does not attach to anyone who takes food during a time of famine or to anyone otherwise in need of food.[111] Using the language of ambiguity and doubt, he says that this (need for nourishment) creates a "strong doubt" as to culpability "that [requires] avoidance of the punishment from the one in need"—doubts certainly stronger than many of the so-called ambiguities adduced by several jurists.

Accordingly, Ibn al-Qayyim criticizes the Ḥanafīs and other jurists for applying the rule willy-nilly at the first sign of potential doubt, which no one in their right mind would have believed—absent the overuse of the maxim—was actually a *ḥadd*-averting ambiguity. Rhetorically, he asks how a jurist can consider the legal posture of a case to be ambiguous simply because it involves situations such as the following: taking perishable items or items that were once in the commons and freely available (such as water), destruction rather than outright theft of an item kept in a secure location, repeat thefts, or the incoherent Ḥanafī rule of avoiding the *ḥadd* punishment for a sex crime when a person has incestuous relations under the guise of a marriage contract (even though some Ḥanafīs would apply the *ḥadd* sanction to a man who mistakenly thinks that the woman with whom he had intimate relations was in fact his wife).[112] Even if one accepts that the *ḥudūd* maxim is prophetic and warrants application on that basis, what leads jurists to presume that the existence of a *per se* invalid marriage contract, as between siblings, or a quasi-intentional homicide is the kind of ambiguity to which the maxim refers, to dispense with the *ḥadd* punishment

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111) Ibid., 3:15 (referring to such instances as *maʿa ḍarūrat al-muḥtāj*).

112) Ibid., 1:314-5. In sharp contrast with the majority view, some Ḥanafīs hold that, if a man finds a woman sleeping in his house or bed and has intimate relations with her on the assumption that she is his wife, he is *ḥadd*-eligible if she turns out not to be. See, e.g., Qudūrī (d. 428/1037), *Tajrīd*, 11:5899; Sarakhsī (d. 483/1090), 9:65 (quoting *Hidāya*). However, Abū Ḥanīfa and the handful of Ḥanafī jurists who follow him on this matter (the rest follow Abū Yūsuf and Shaybānī's opinion to the contrary) developed a category of *shubha* that may be called *contractual*, which would exculpate the offender in like cases. Under this category of *shubha*, whenever a legal act is performed on the basis of a contract, even if defective from the onset—such as marrying a sibling, even if knowingly—the existence of the contract creates the *semblance* of legality; that semblance is a *ḥadd*-averting *shubha* under this maxim.

for *zinā* or the retaliation requirement for homicide, respectively?[113] In a play on words, Ibn al-Qayyim attacks his colleagues from other schools, saying that the jurists who find such cases to be confused or ambiguous (i.e., to have *shubha*) are the ones who have confused (*ishtabaha*) cases that incur *ḥadd* liability with ones that do not.[114]

Given the questionable status of the maxim (as applied) in early Ḥanbalī works, by the time of the rise of concentrated scholarship on legal maxims, major Ḥanbalī jurists writing in the field do not mention it. Ibn Rajab, in his *Qawāʿid*, the principal Ḥanbalī text on legal maxims, omits the maxim completely.[115] In certain cases, he avoids *ḥudūd* punishments, such as homicide of a Muslim against a non-Muslim, theft from a non-secure location or by stealth (as in fraud or embezzlement), and theft of food during a time of famine. In these cases, liability for the *ḥudūd* punishments is canceled because of a textual or other legal impediment, as Ibn al-Qayyim had explained in more detail; for Ibn Rajab, liability for the punishment is not completely removed, but the avoided *ḥadd* sanction is to be replaced with a heavy non-*ḥadd* punishment.[116] Ibn al-Laḥḥām, in his work on legal maxims, does cite the *ḥudūd* maxim; for him, it is the expression of the uniform opinion "amongst all jurists" that there is no *ḥadd-* or *qiṣāṣ*-liability for minors "because [of the *ḥudūd* maxim]" and given that minority creates uncertainty (*shubha*) as to moral or legal culpability.[117] But he, like most

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113) Ibn al-Qayyim, *Iʿlām*, 1:241.

114) Ibid., 3:15.

115) See Ibn Rajab (d. 795/1393), *Qawāʿid* (Mecca: Maktabat Nizār Muṣṭafā al-Bāz, 1999). Others writing on legal maxims at times simply are not concerned with *ḥudūd* laws. Ibn Taymiyya's book, *al-Qawāʿid al-fiqhiyya al-nūrāniyya*, ed. Aḥmad b. Muḥammad al-Khalīl (Dammām: Dār Ibn al-Jawzī, 1422/[2001-2]), covers solely legal maxims concerned with commercial law.

116) See ʿAbd al-Karīm b. Muḥammad al-Lāḥim, *Sharḥ Tuḥfat ahl al-ṭalab fī tajrīd uṣūl Qawāʿid Ibn Rajab* (Riyadh: Kunūz Ishbīliyyā lil-Nashr waʾl-Tawzīʿ, 2006), 435-7 (in the chapter called *man suqiṭat ʿanh al-ʿuqūba bi-itlāf nafs aw ṭaraf maʿa qiyām al-muqtaḍī lah li-mānīʿ fa-innahu yataḍaʿafʿalayh al-ghurm*, requiring, for instance, a Muslim to pay blood money equivalent to that of another Muslim for intentional homicide of a non-Muslim).

117) Ibn al-Laḥḥām (d. 803/1401-2), *al-Qawāʿid waʾl-fawāʾid al-uṣūliyya*, ed. Muḥammad Ḥāmid al-Fiqī (Cairo: Maṭbaʿat al-Sunna al-Muḥammadiyya, 1956), 1:29 (citing a version of the standard formula: *al-ḥudūd tudraʾ biʾl-shubahāt*).

Ḥanbalīs, does not attribute the maxim to the Prophet;[118] and the reasons for avoiding the *ḥadd* sanction are really some legal impediment (here: missing element of the crime) rather than a genuine confusion of law or a mistake of fact as discussed by other jurists.

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The Ẓāhirīs are unequivocal in their view: they reject the maxim outright. Ibn Ḥazm lambastes those who deem it permissible to avoid *ḥudūd* sanctions and makes several arguments as to why.[119] For one thing, the maxim has no legal basis in his eyes, because—contrary to the widespread notion amongst later jurists attributing the maxim to the Prophet—it is invalid, inauthentic, and definitely not prophetic.[120] Purported maxims-as-*ḥadīth*s are, for him, merely statements

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118) I have noted a couple of exceptions, noticeably in the 5th/11th century, at which time the other schools have started regularly invoking and emphasizing the maxim as a prophetic *ḥadīth*: the two leading Ḥanbalī scholars Ibn al-Bannāʾ (d. 471/1078-9) and Maḥfūẓ b. Aḥmad al-Kalwadhānī (d. 510/1116) (though the same is not true just a generation before, judging by the works of their more famous, slightly older contemporary, Qāḍī Abū Yaʿlā (d. 458/1066)). See above, note 100. For Abū Yaʿlā's *ḥudūd* jurisprudence, see the collection of his opinions, *al-Jāmiʿ al-ṣaghīr*, ed. Nāṣir b. Saʿūd b. ʿAbd Allāh al-Salāma (Riyadh: Dār Aṭlas), 307ff. But see Abū Yaʿlā, *al-Aḥkām al-sulṭāniyya*, ed. Muḥammad Ḥāmid al-Fiqī (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1966), 263, 265-6 (mentioning *shubha* and *ḥudūd* avoidance, but not as a *ḥadīth* and only in the context of defending Ḥanbalī views on issues that are more polemical than authentically Ḥanbalī in what seems to be a refutation or "Ḥanbalization" of the Shāfiʿī jurist Māwardī's famous tract on political theory of the same name).

119) Ibn Ḥazm (d. 456/1064), *Muḥallā*, 12:57-63 (*masʾalat hal tudraʾ al-ḥudūd biʾl-shubahāt am lā*), esp., 12:61-3, where he specifically criticizes the Ḥanafīs, Mālikīs, and Shāfiʿīs, in the order that he has ranked them according to their support for the maxim.

120) Ibid., 9:428; 8:252 (*mā jāʾa ʿan al-Nabī qaṭṭu*). To be sure, some non-Ẓāhirī jurists realized this as well (e.g., the Mālikī jurist Ibn Shaṭṭ, as described above note 94). But acknowledging that the maxim did not originate with the Prophet formally did not translate into invalidation of the principle. Those scholars, whose jurisprudence was more pragmatic and principle-based than formalistic and strictly text-based, saw substantive canons as precedents emanating from prophetic practice if not prophetic verbal directives. And for them, the attestations of the practice in early Islamic criminal law sufficed to provide a basis for later Islamic criminal law. In other words, the non-prophetic provenance was problematic only for formalist-textualist schools of law that purported to build the law solely on explicit textual directives pronounced by God or the Prophet. Amongst the Sunnīs, this includes some Ḥanbalīs and Ẓāhirīs. Amongst the Shīʿa, Akhbārīs can be added in certain cases. (Though I know of no Akhbārī who has acknowledged that the maxim is not prophetic, Akhbārīs place wide-ranging restrictions on the scope of the maxim in line with

of Companions sometimes attributed to the Prophet, and thus non-normative for law.

For example, a look at the most-quoted form of the maxim, which appears in ʿAbd al-Razzāq's collection on the authority of ʿUmar (as reported by Ibrāhīm al-Nakhaʿī), reveals that it is patently inauthentic. Ibrāhīm al-Nakhaʿī was born *after* ʿUmar died![121] Moreover, even the authentic *ḥadīth*s on which *ḥudūd* maxim-proponents rely to shore up their positions contain no evidence that the presence of *shubha* drove the Prophet's decisions. Thus, a *ḥadīth* about a member of the early Medinan community, Māʿiz, who confessed to committing *zinā*, but whom the Prophet turned away four separate times before finally ruling that the *ḥadd* sanction was due, is unrevealing about how to approach criminal law. Proponents of the *ḥudūd* maxim point to reports of Companions' discussions to the effect that the Prophet's actions had to do with the presence of *shubha*, but Ibn Ḥazm rejects such post-hoc explanation, calling it the mere speculation of the maxim-proponents, not the law. The law says that *ḥudūd* sanctions are mandatory when someone has confessed to a crime.[122]

Second, Ibn Ḥazm says, the maxim itself runs counter to the weight of all recognized Islamic legal authority. The Lawgiver announces certain legal prescriptions and proscriptions, notes that His laws (*ḥudūd*) are not to be transgressed, and imposes certain punishments when they are.[123] Where the foundational sources stipulate certain *ḥudūd* punishments for specified crimes, applying the *ḥudūd* maxim would lead to neglecting the *ḥudūd* laws entirely, for anyone who *could* proffer claims of ambiguity to void the punishment *would* do so by invoking

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certain theological-jurisprudential principles that also arise from their textualist-formalist orientation.)

121) See above, note 82.

122) Ibn Ḥazm, *Muḥallā*, 8:252.

123) Ibid., 9:428 (citing a prophetic *ḥadīth* that life, honor, and other values are sacred, and Qurʾān, 2:229, to the effect that God's laws (*ḥudūd*) are not to be transgressed). This is an equation of *ḥudūd* as moral boundaries to *ḥudūd* in the sense of fixed criminal laws, which was the ordinary sense in which most Muslim jurists came to regard the term—though contemporary scholars have pointed out that the first sense is Qurʾānic while the second is not. See, e.g., Mohammad Hashim Kamali, "Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia," *Arab Law Quarterly*, 13, 3 (1998): 203-34.

the maxim. Canceling *ḥudūd* liability so widely would cut against the consensus of Muslims, the Qur'ān, and the Sunna.[124]

Finally, Ibn Ḥazm finishes, attempts to apply the maxim are incoherent. Ḥanafīs and Mālikīs, whom he deems amongst the staunchest proponents of the maxim, are also amongst the harshest criminal law enforcers. Mālikīs would impose *ḥudūd* punishments for fornication on an unmarried woman with the circumstantial evidence of pregnancy even if she denied having committed a sex crime knowingly or voluntarily; this, despite the existence of all kinds of possible ambiguities, such as the possibility that she was raped, became pregnant during a valid marriage that was not publicized, or was temporarily insane.[125] Ḥanafīs would impose the punishment for theft against accomplices who merely accompany a thief into a house, without ascertaining whether the accomplice was a knowing and willing participant to the crime. If these do not constitute ambiguities and doubts as to the establishment of a crime that, even in the jurisprudence of doubt championed by *ḥudūd* maxim-proponents, should avert the *ḥadd* punishment, then the entire conception and application of the maxim is incoherent. With the maxim, proponents merely complicate matters, transgress the law, and apply rules disparately. In Ibn Ḥazm's view, *shubha* has nothing to do with *enforcing* criminal law. In fact "it is illegal [either] to avoid criminal sanctions in cases of *shubha* or to impose them in cases of *shubha*." For him, the matter is simple: if the crime is established (and the accused found culpable), the *ḥadd* punishment is to be imposed; otherwise, when there is only *shubha*, punishment itself is impermissible.[126]

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124) Ibn Ḥazm, *Muḥallā*, 9:428; see also a similar criticism in Ibn Ḥazm, *Iḥkām*, 7:454-5.

125) Ibid., 8:252.

126) Ibid., 12:57 (*al-ḥudūd lā yaḥull an tudraʾ wa-lā an tuqām bi-shubha wa-innamā huwa ʾl-ḥaqq li-ʾllāh taʿālā wa-lā mazīd, fa-in lam yathbut al-ḥadd lam yaḥull an yuqām bi-shubha* …). Strikingly, even though Ibn Ḥazm rejects the basis and formulation of the *ḥudūd* maxim, this statement virtually aligns his jurisprudence—albeit through other means—with that of *ḥudūd* maxim-proponents.

VI. Conclusion

During the first three centuries after Islam's advent, *ḥadīth* scholars and jurists circulated versions of the *ḥudūd* maxim in two different spheres. Whereas the former group used one type of formulation ("as much as you can," some mention of ambiguity, and usually a rationale) the jurists used another (the standard version, *idraʾū ʾl-ḥudūd biʾl-shubahāt*). So far as we can tell from the sources, both types were in circulation simultaneously at least by the mid-2nd/8th century and probably earlier (within the 1st/7th century). Amongst the jurists, even at that time, the standard version was a substantive canon of settled law that reflected earlier precedents.

The *ḥudūd* maxim was not a prophetic *ḥadīth*. A common link analysis of the *ḥadīth*-as-maxim would trace its prophetic attribution (or origin) to Zuhrī (d. 124/742) and Ibrāhīm al-Nakhaʿī (d. *ca*. 96/717). Yet Schacht concluded that the maxim emerged at the time of Ibrāhīm al-Nakhaʿī's student Ḥammād, in part because he believed Ibrāhīm to be mythical, and in part because he did not have access to the sources showing Zuhrī as a common link. Fierro concluded that the "as much as you can" *ḥadīth* form of the maxim was in fact circulating at the time of Ibrāhīm al-Nakhaʿī. The popularized juristic version must have been a later modification of the *ḥadīth*-versions, she reasons, because there was a need to coat that too-broad version with a legalistic patina by using *shubahāt* as a technical legal term in place of the unwieldy "as much as possible" formulation; it could then be used more legitimately by jurists who tended to privilege (and benefit from) social status in their judgments. Her analysis is a surprising reversal of a Schachtian conclusion (had he distinguished between the two types as she did), which views anonymous sayings like the juristic form of the maxim as older than the *isnād*-clad *ḥadīth* forms. Ultimately, however, these views are not supported by the sources, which reveal the simultaneity of the two versions and a late adoption of a combined version highlighting issues of social class.

Politics and social status played a role in applications of the maxim and other areas of law. In fact, the jurists' increasing insistence on forms of the maxim and sayings that countered hierarchy and emphasized mandatoriness of *ḥudūd* enforcement underscores the extent to which jurists militated against preferential treatment in *ḥudūd* laws. Too,

political authorities exercised extremely wide discretion over criminal matters ostensibly within their enforcement jurisdiction (including *ḥudūd* sanctions, laws of retaliation, and discretionary punishments), to which jurists readily extended the *ḥudūd* maxim. For these reasons, jurists both in favor of and against the maxim attempted to define legally cognizable *ḥadd*-averting doubts and ambiguities or to find other means of curtailing arbitrary enforcement of *ḥudūd* laws. While some dispensed with the maxim altogether, most tried to refine and strengthen it for these purposes.

As the law developed, the maxim took on a standardized form in most juristic works from the 4th/10th century onward. The *ḥudūd* maxim (*idraʾū ʾl-ḥudūd biʾl-shubahāt*) became a prophetic *ḥadīth* for Ḥanafī, Mālikī, Shāfiʿī, and Shīʿī jurists, whose "founders" had cited and employed the maxims themselves (though not with prophetic attributions). The matter grows to be so certain (or necessary) to them that the maxim becomes both a central legal maxim of Islamic criminal law and a prophetic *ḥadīth* to bolster the authenticity and reach of such a seemingly law-flouting maxim used to avoid *ḥudūd* punishments. As a result, the maxim appears not only in these schools' books of law but also in compendia of legal maxims that attempt to extract the essential principles of the law, often right alongside some five "universal maxims." The *ḥudūd* maxim is so securely entrenched that it seems a necessary feature of law, and must therefore be prophetic. It has become super-precedent. This was the ready answer of most later juristic proponents of the *ḥudūd* maxim to the initial question posed: How does a judge really know when to punish the accused and what to do in cases of doubt given the appearance or accusation of criminal misconduct? Only the traditionist-textualist jurists—the Ẓāhirīs and some Ḥanbalīs—were consistently attuned to the non-prophetic pedigree of the maxim. This realization caused many of them to reject the maxim as both *ḥadīth* (in attribution) and substantive canon (in application). Their answer to questions of doubt was otherwise.[127]

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[127] Over time, most jurists elaborated complex and school-specific definitions of doubt and ambiguity (*shubha*) and applied the doctrine of *ḥudūd* avoidance in very different ways when beset with doubt. As part of a study of legal maxims in Islamic law, my PhD dissertation expands on questions of the definition and role of doubt (*shubha*) amongst the

Appendix

Ḥadīth Versions of the *Ḥudūd* Maxim (with *isnād*s/chains of transmission)

Version 1

"Avoid *ḥudūd* punishments wherever you find an opportunity to do so." (*Idfaʿū ʾl-ḥudūd mā wajadtum lah madfaʿan.*)

Ibn Mājah (d. 303/915)[128]	ʿAbd Allāh b. al-Jarrāḥ—Wakīʿ—Ibrāhīm b. [al-] Faḍl—Saʿīd b. Abī Saʿīd—Abū Hurayra—Muḥammad

Version 2

"Avoid *ḥudūd* punishments involving Muslims to the extent possible; if there is an exculpating cause for [the accused], then release him, as it is better that the imām make a mistake in pardoning than in punishing." (*Idraʾū ʾl-ḥudūd ʿan al-muslimīn mā ʾstaṭaʿtum fa-in kāna lah makhrajan fa-khallū sabīlah fa-inna ʾl-imām in yukhṭiʾ fī ʾl-ʿafw khayr min an yukhṭiʾ fī ʾl-ʿuqūba.*)

ʿAbd al-Razzāq (d. 211/826)[129]	(1) Thawrī—Ḥammād—Ibrāhīm [al-Nakhaʿī]—[anonymous]

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various schools of Islamic law in theory and in practice, including juristic views on applying the *ḥudūd* maxim as well as those opposing it in favor of other strategies.

128) Ibn Mājah, *Sunan*, ed. Maḥmūd Muḥammad Maḥmūd Ḥasan Naṣṣār (Beirut: Dār al-Kutub al-ʿIlmiyya, 1998), 4:161, no. 2545 (*bāb satr ʿalā ʾl-muʾmin wa-daf al-ḥudūd biʾl-shubahāt*); Bashshār ʿAwwād Maʿrūf et al., eds., *al-Musnad al-jāmiʿ* (Beirut: Dār al-Jīl; Kuwait: Sharikat al-Muttaḥida, 1993-1996), 17:344, no. 13,743. For an English translation, see Muhammad b. Yazeed et al., ed. and trans., *English Translation of Sunan Ibn Mājah* (Riyadh: Dār al-Salām, 2007). *Ḥadīth* critics concluded that this report was extremely weak, as Ibrāhīm b. Faḍl's narrations were rejected. See, with accompanying footnotes, Abū Yaʿlā, *Musnad*, 11:494, no. 6618; Mizzī, *Tuḥfat al-ashrāf bi-maʿrifat al-aṭrāf* (Beirut: Dār al-Gharb al-Islāmī, 1999), 9:468, no. 12,945; Muḥammad Nāṣir al-Dīn al-Albānī, *Ḍaʿīf Ibn Mājah*, ed. Zuhayr al-Shāwīsh (Beirut: al-Maktab al-Islāmī, 1988), 554; idem, *Irwāʾ al-ghalil fi takhrīj aḥādith Manār al-sabīl* (Beirut: al-Maktab al-Islāmī, 1979), 2:356.

129) ʿAbd al-Razzāq, *Muṣannaf* (1972), 10:166, no. 18,698 (variations in Arabic text: *fa-idhā wajadtum lil-Muslim* instead of *fa-in kāna lah, fa-ʾdraʾ ʿanh* instead of *fa-khallū sabīlah*; *fa-innah in yukhṭiʾ ḥākim min ḥukkām al-muslimīn* instead of *fa-inna ʾl-imām*).

Ibn Abī Shayba (d. 235/849)[130]	(2) Wakīʿ [b. al-Jarrāḥ]—Yazīd b. Ziyād **al-Baṣrī**—Zuhrī—ʿUrwa—ʿĀʾisha
Tirmidhī (d. 279/892)[131]	(3) Abū ʿAmr ʿAbd al-Raḥmān b. al-Aswad al-Baṣrī—Muḥammad [b.] Rabīʿa—Yazīd b. Ziyād **al-Dimashqī**—Zuhrī—ʿUrwa—ʿĀʾisha—Muḥammad (4) Hannād—Wakīʿ—Yazīd b. Ziyād [**al-Kūfī?**]—...—[ʿĀʾisha]
Dāraquṭnī (d. 385/995)[132]	(5) ʿAbd Allāh b. Muḥammad b. ʿAbd al-ʿAzīz—Dāwūd b. Rashīd—Muḥammad b. Rabīʿa—Yazīd b. Ziyād **al-Shāmī**—Zuhrī—ʿUrwa—ʿĀʾisha—Muḥammad (6) Ibrāhīm b. Ḥammād—al-Ḥasan b. ʿArafa—Muḥammad b. Rabīʿa—Yazīd b. Ziyād al-Shāmī—Zuhrī—ʿUrwa—ʿĀʾisha—Muḥammad

130) Ibn Abī Shayba, *Muṣannaf*, ed. Muḥammad b. Ibrāhīm al-Laḥīdān and Ḥamad b. ʿAbd Allāh al-Jumʿa (Riyadh: Maktabat al-Rushd, 2004), 9:360, no. 28,972 (variations in Arabic text: *ʿibād Allāh* instead of *muslimīn*).

131) Tirmidhī, *Sunan* (n.p.: 1965-1969), 5:112-3, no. 1424; *al-Musnad al-jāmiʿ*, 2:41-2, no. 16,799. Tirmidhī points out that the first chain is likely inauthentic because it alone attributes the saying to the Prophet and does so through Yazīd b. Ziyād from Damascus, who was unreliable (*ḍaʿīf al-ḥadīth*). He deems the second chain (which he suggests goes back only to ʿĀʾisha) to be more sound (*aṣaḥḥ*); it was transmitted by the reliable Wakīʿ b. Jarrāḥ, likely by way of Yazīd b. Ziyād the *Kufan*, who is preferred and more reliable (*aqdam wa-athbat*) than the Damascene Yazīd. A Companion-attribution is to be expected, as this was a known saying amongst them. Tirmidhī, *Sunan*, 5:112 (noting attributions also to Abū Hurayra [as in Ibn Mājah] and ʿAbd Allāh b. ʿAmr [b. al-ʿĀṣ], without complete chains). Note that Muḥammad Rabīʿa in this edition should be Muḥammad **b.** Rabīʿa, the Kufan paternal cousin of Wakīʿ (see Mizzī, *Tahdhīb al-kamāl*, 25:196-9, no. 5210), as in *al-Musnad al-jāmiʿ*, 2:41-2, no. 16,799.

132) ʿAlī b. ʿUmar al-Dāraquṭnī, *Sunan* (Beirut: Muʾassasat al-Risāla, 2004), 4:62-3, no. 3097 (variations in Arabic text: transposition of *mā ʾstaṭaʿtum* and *ʿan al-muslimīn*; *fa-in wajadtum lil-muslim makhrajan* instead of *fa-in kāna lah makhrajan*). Note that this edition clarifies that what the 1966 edition presents as a single chain at 3:84 is in fact two chains. Like Tirmidhī, Dāraquṭnī has a problem with Yazīd b. Ziyād al-Dimashqī, whom he deems weak, based on Bukhārī's assessment that this Yazīd's *ḥadīth*s are to be rejected (i.e., that he is *munkar al-ḥadīth*) and Nasāʾī's similar conclusion (i.e., that he is *matrūk* [*al-ḥadīth*]). Dāraquṭnī adds that Wakīʿ related the saying on the authority of Yazīd in a chain that did not trace back to the Prophet (*mawqūf*) and agreed with Tirmidhī that this chain was more reliable.

Bayhaqī (d. 458/1066)[133]	(7) Abū ʾl-Ḥasan ʿAlī Shaqīr b. Yaʿqūb—Abū Jaʿfar Aḥmad b. ʿĪsā b. Hārūn al-ʿIjlī—Muḥammad b. ʿAbd al-ʿAzīz b. Abī Razma—al-Faḍl b. Mūsā and [his father] Mūsā—Yazīd b. Ziyād—Zuhrī—ʿUrwa—ʿĀʾisha—Muḥammad (8) Wakīʿ—Yazīd b. Ziyād—[Zuhrī]—[ʿUrwa]—ʿĀʾisha (9) Rishdīn b. Saʿd—ʿUqayl—Zuhrī—...—[Muḥammad: *marfūʿ*[*an*]] (10) Abū Ḥāzim al-Ḥāfiẓ—Abū ʾl-Faḍl Khamīrwayh—Aḥmad b. Najda—Saʿīd b. Manṣūr—Hushaym—ʿUbayda—Ibrāhīm [al-Nakhaʿī]—[ʿAbd Allāh] Ibn Masʿūd

Version 3

"Avoid *ḥudūd* (punishments) involving believers to the extent possible." (*Idraʾū ʾl-ḥudūdʿan ʿibād Allāh mā ʾstaṭaʿtum*.)

Ibn Abī Shayba (d. 235/849)[134]	Ibn Fuḍayl—al-Aʿmash—Ibrāhīm [al-Nakhaʿī]—[anonymous: *kānū yaqūlūn*]

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[133] Bayhaqī, *Sunan*, 8:413, nos. 17,057-58 (variations in Arabic text for first version (chain #s 7-9): same as Dāraquṭnī's version above, with the addition of *lah* after *fa-inna ʾl-imām in yukhṭiʾ fī ʾl-ʿafw khayr*). Like Tirmidhī and Dāraquṭnī, Bayhaqī found the chain ending in ʿĀʾisha (chain #8), to be inauthentic because of Yazīd b. Ziyād's unreliability (*fīh ḍaʿf*). He also found weak the chain reported by Rishdīn (chain #9), which is also traced back to the Prophet, because of Rishdīn's unreliability (i.e., that he is *ḍaʿīf*). The more sound chain (*aqrab ilā ʾl-ṣawāb*) then is that of Wakīʿ (chain #4), as Tirmidhī and Dāraquṭnī concluded. Ibid. Note that Tirmidhī reports that this chain contains and stops with Yazīd b. Ziyād [al-Kūfī]. Bayhaqī traces that chain back to ʿĀʾisha *via* Yazīd b. Ziyād [al-Shāmī?]—Zuhrī—ʿUrwa. There is some confusion as to whether the Yazīd b. Ziyād in this chain is Kufan or Damascene (Shāmī), as noted more extensively above, note 19. Bayhaqī's editor says that he is Damascene; but Tirmidhī was aware of the difference and said that he was Kufan. Fierro has suggested that this was a deliberate substitution, a matter which requires further study. Finally, see also Bayhaqī, *Sunan*, 8:414, no. 17,062 (variations in Arabic text from the second version [chain #10]: *ʿan al-muslimīn* omitted; *innakum* and appropriate verbs instead of *imām*, *darʾ al-ḥadd* repeated twice, and the first and second parts of the maxim transposed). This version of the report is not attributed to the Prophet, but to the Companion and Kufan jurist Ibn Masʿūd (*mawqūf*[*an*]); Bayhaqī has no comment, apparently accepting the attribution of the saying to Ibn Masʿūd through Ibrāhīm al-Nakhaʿī.

[134] Ibn Abī Shayba, *Muṣannaf*, 9:359, no. 28,966. This version is similar to the one recorded in Ibn Mājah (version 1), using different phrasing (*idraʾū* instead of *idfaʿū* and *idhāʾ staṭaʿtum* instead of *mā wajadtum lah makhrajan*), and similar to the version recorded

Version 4

"If *ḥadd* [liability] is doubtful [to you], then avoid [the punishment]." (*Idhā ʾshtabaha* [*ʿalayk*] *al-ḥadd fa-ʾdraʾah.*)

Ibn Abī Shayba (d. 235/849)[135] (1) ʿAbd al-Salām [b. Ḥarb]—Isḥāq b. Farwa [*sic* = Isḥāq b. ʿAbd Allāh b. Abī Farwa]—ʿAmr b. Shuʿayb —his father [= Shuʿayb b. Muḥammad]—Muʿādh [b. Jabal], [ʿAbd Allāh] Ibn Masʿūd, and ʿUqba b. ʿĀmir

Dāraquṭnī (d. 385/995)[136] (2) Muḥammad b. ʿAbd Allāh b. Ghaylān—Abū Hishām al-Rafāʿī—ʿAbd al-Salām b. Ḥarb—Isḥāq b. ʿAbd Allāh b. Abī Farwa—ʿAmr b. Shuʿayb—his father [= Shuʿayb b. Muḥammad]—Muʿādh b. Jabal, ʿAbd Allāh b. Masʿūd, and ʿUqba b. ʿĀmir al-Jahnī

Bayhaqī (d. 458/1066)[137] (3) Abu Ḥāzim al-Ḥāfiẓ—Abū ʾl-Walīd al-Faqīh—al-Ḥasan b. Sufyān—Abū Bakr b. Abī Shayba—ʿAbd al-Salām b. Ḥarb—Isḥāq b. Abī Farwa [*sic* = Isḥāq b. ʿAbd Allāh b. Abī Farwa]—ʿAmr b. Shuʿayb—his father [= Shuʿayb b. Muḥammad]—Muʿādh [b. Jabal], ʿAbd Allāh b. Masʿūd, and ʿUqba b. ʿĀmir

Version 5

"Avoid [sentences of] death and flogging involving Muslims to the extent possible." (*Idraʾū ʾl-qatl waʾl-jaldʿan al-muslimīn mā ʾstaṭaʿtum.*)

Ibn Abī Shayba (d. 235/849)[138] (1) Wakīʿ—Sufyān—ʿĀṣim—Abū Wāʾil—ʿAbd Allāh [b. Masʿūd]

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in the *Muṣannaf* of ʿAbd al-Razzāg and by Tirmidhī (version 2), except that it excludes the second part of that *ḥadīth*. Ibn Abī Shayba does not comment on the authenticity of the chain, as it is an anonymous saying adopted by Ibrāhīm al-Nakhaʿī.

135) Ibid., 9:359, no. 28,964. He does not comment on the authenticity of the chain.

136) Dāraquṭnī records the same text (with the addition of *mā ʾstaṭaʿt*) and the same chain, as far back as ʿAbd al-Salām b. Ḥarb, who then transmits the statement to Abū Hishām al-Rifāʿī (rather than to Ibn Abī Shayba, as in Bayhaqī's version below). Dāraquṭnī, *Sunan*, 4:63-4, no. 3099 (reporting that this chain is weak because of the presence of Isḥāq b. Farwa, whose *ḥadīth*s are to be rejected (*matrūk qawluh*)).

137) Bayhaqī, *Sunan*, 8:414, no. 17,063 (Arabic text: *idhā ʾshtabaha ʾl-ḥadd fa-ʾdraʾūh*). He does not trace this back to the Prophet and has no comment.

138) Ibn Abī Shayba, *Muṣannaf,* 9:360, no. 28,968. He records this chain, which ends in a Companion, without commenting on its authenticity.

Bayhaqī (d. 458/1066)[139]	(2) Abū ʿAbd Allāh al-Ḥāfiẓ—Abū ʾl-Walīd al-Faqīh—Muḥammad b. Zahīr [or Zuhayr]—ʿAbd Allāh b. Hāshim—Wakīʿ—Sufyān—ʿĀṣim [b. Bahdala]—Abū Wāʾil—ʿAbd Allāh [b. Masʿūd]

Version 6

"Avoid *ḥudūd* [punishments] wherever there is doubt." (*Idfaʿū ʾl-ḥudūd li-kull shubha.*)

Ibn Abī Shayba (d. 235/849)[140]	ʿAbd al-Aʿlā—Burd—Zuhrī

Version 7

"That I suspend *ḥudūd* [punishments] where there is doubt is more preferable to me than imposing them where there is doubt." (*La-an uʿaṭṭil al-ḥudūd biʾl-shubahāt aḥabb ilayya min* [*an*] *uqīmahā fiʾl-shubahāt.*)

Ibn Abī Shayba (d. 235/849)[141]	(1) Hushaym—Manṣūr—al-Ḥārith—Ibrāhīm [al-Nakhaʿī]—[...]—ʿUmar b. al-Khaṭṭāb
Bayhaqī (d. 485/1066)[142]	(2) Abū Ṭāhir al-Faqīh—Abū Bakr al-Qaṭṭān—Ibrāhīm b. al-Ḥārith—Yaḥyā b. Abī Bukayr—al-Ḥasan b. Ṣāliḥ—his father [= Ṣāliḥ b. Ṣāliḥ b. Ḥayy] —[...]—ʿUmar

Version 8

"If 'perhaps' and 'maybe' apply to [determining liability for] the *ḥadd* crime, there is no *ḥadd* liability." (*Idhā balagha fiʾl-ḥudūd laʿalla wa-ʿasā fa-ʾl-ḥadd-muʿaṭṭal.*)

ʿAbd al-Razzāq (d. 211/826)[143]	Ibrāhīm b. Muḥammad—an associate (*ṣāḥib lah*)—al-Ḍaḥḥāk b. Muzāḥim—ʿAlī

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139) Bayhaqī, *Sunan*, 8:414, no. 17,064 (transposing *jald* and *qatl*).

140) Ibn Abī Shayba, *Muṣannaf*, 9:360, no. 28,967 (or ***bi****-kull shubha*, according to the editor's footnote). He does not comment on the authenticity of the report, which is attributed to Zuhrī.

141) Ibid., 9:359, no. 28,963.

142) Bayhaqī has a similar version, also attributed to ʿUmar, but with slightly different language. See Bayhaqī, *Sunan*, 8:414, no. 17,061 (Arabic text: *idhā ḥaḍartumūnā fa-ʾsʾalū fiʾl-ʿahd jahdakum fa-innī in ukhṭiʾ fiʾl-ʿafw aḥabb ilayya min an ukhṭiʾ fiʾl-ʿuqūba*). Bayhaqī has no critical comments, though Ṣāliḥ does not transmit directly from ʿUmar. There is likely a link missing in the chain to ʿUmar, as he was an adult before his son al-Ḥasan (d. 169/785-6) was born in the year 100. See Mizzī, *Tahdhīb al-kamāl*, 13:54-6 (Ṣāliḥ); ibid., 6:177-91 (al-Ḥasan).

143) ʿAbd al-Razzāq, *Muṣannaf* (1972), 7:340-1.

Version 9

"Avoid *ḥudūd* [punishments]." (*Idraʾū ʾl-ḥudūd.*)

Dāraquṭnī (d. 385/995)[144]	(1) Muḥammad b. al-Qāsim al-Zakariyyā—Abū Kurayb—Muʿāwiya b. Hishām—Mukhtār al-Tammār—Abū Maṭar—ʿAlī—Muḥammad
Bayhaqī (d. 458/1066)[145]	(2) Abū Bakr b. al-Ḥārith al-Iṣbahānī—ʿAlī b. ʿUmar —Muḥammad b. al-Qāsim al-Zakariyyā—Abū Kurayb—Muʿāwiya b. Hishām—Mukhtār al-Tammār—Abū Maṭar—ʿAlī—[Muḥammad: *marfūʿ*[*an*]]

Version 10

"Avoid *ḥudūd* [punishments], though it is improper for the imām to neglect them [completely]." (*Idraʾū ʾl-ḥudūd wa-lā yanbaghī lil-imām an yuʿaṭṭil al-ḥudūd.*)

Bayhaqī (d. 458/1066)[146]	Abū Bakr b. al-Ḥārith—Muḥammad b. Ḥayyān—Ibn Abī ʿĀṣim—al-Ḥasan b. ʿAlī—Sahl b.

144) Dāraquṭnī, *Sunan*, 4:63, no. 3098. He notes that the report is not sound because Mukhtār al-Tammār is unreliable. Although this version seems to be a truncated form of previous ones, I have counted it separately because its chain, uniquely among Sunnī collections, attributes it to the Prophet *via* ʿAlī; this formulation is also the beginning of other versions in Shīʿī collections that attribute the standard version of the saying to ʿAlī.

145) Bayhaqī, *Sunan*, 8:414, no. 17,059. The content and the chain are the same as the record above, except that the report comes to Bayhaqī through Muḥammad b. al-Qāsim to ʿAlī b. ʿUmar rather than Dāraquṭnī. Bayhaqī rejects this as well, saying that the chain is not sound.

146) Ibid., no. 17,060. Bayhaqī too considers this report unreliable, because Bukhārī determined that Mukhtār b. Nāfiʿ's narrations are to be rejected (*munkar al-ḥadīth*). Cf. Shawkānī (d. 1839), *Nayl al-awṭār*, eds. Muḥammad Ḥallāq and ʿIzz al-Dīn Khaṭṭāb (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1999), 7:109, who rejects *ḥadīth*s such as this one with Mukhtār b. Nāfiʿ in the chain for the same reason. (Shawkānī gives the standard version, but he must mean version 10, where this Mukhtār appears.) The word I have translated as "neglect completely" (*yuʿaṭṭil*) also means *to void*, *cancel out*, *discontinue*, or (permanently) *suspend*. This version is interesting because it combines *ḥudūd*-avoidance as in version 9 (or all other versions in truncated form) with a principle that seems to conflict with the rationale offered in versions 2 and 7. In those versions, the exponents of the maxim (variously Companions Ibn Masʿūd, ʿĀʾisha, and ʿUmar plus the traditionist Zuhrī and jurist Ibrāhīm al-Nakhaʿī) err on the side of caution, warning that it is better to pardon offenders mistakenly than to punish non-offenders falsely. Versions 7 and 10 (which offers no rationale) uses language that parallels language here (*taʿṭīl al-ḥudūd*, *muʿaṭṭal*); I have translated it differently there ("suspend") to reflect its implicit reference to case-by-case

Ḥammād—al-Mukhtār b. Nāfiʿ—Abū Ḥayyān al-Taymī—his father [Saʿīd b. Ḥayyān]—ʿAlī—Muḥammad

Version 11

"Avoid *ḥudūd* [punishments] where there is doubt, and overlook the faults of the nobles except as regard to *ḥudūd* [crimes]." (*Idraʾū ʾl-ḥudūd biʾl-shubahāt wa-aqīlū ʾl-kirām ʿatharātihim illā fī ḥudūd Allāh.*)

Qāḍī Nuʿmān (d. 363/974)[147]	(1) [no *isnād*]
Ibn ʿAdī (d. 365/976)[148]	(2) Ibn Lahīʿa—Yazīd b. Abī Ḥabīb—ʿIkrima—Ibn ʿAbbās

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individual determinations of *ḥudūd* liability. In this version by contrast, the exponent—said to be the Prophet through ʿAlī—warns against completely neglecting *ḥudūd* laws. The subtext is that *ḥudūd* laws are necessary to give effect to God's prerogative and His will in legislating them in the first place, as Ibn Ḥazm reasons above.

147) Qāḍī Nuʿmān, *Daʿāʾim*, 2:463 (variation in Arabic text: adds *ḥadd min* before *ḥudūd Allāh*) (cited in Ṭabarsī, *Mustadrak al-Wasāʾil*, 18:26, no. 21,911 (in *bāb annahu lā yamīn fiʾl-ḥudūd wa-annaʾl-ḥudūd tudraʾ biʾl-shubahāt*)). Qāḍī Nuʿmān lists another version with wording echoing the *ḥudūd* maxim in his chapter on *ḥudūd*: "avoid [punishing] the believer as much as you can … (*dāriʾ ʿan al-muʾmin mā ʾstaṭaʿt* …)." Ibid., 2:442-3. Interestingly, he also mentions a saying something like this elsewhere, also without explicit reference to *ḥudūd*. See ibid., 1:417 (uniquely mentioning *wa-lā tarkabanna ʾl-shubha* in the letter from ʿAlī to Mālik al-Ashtar, in place of a section including the *ḥudūd* maxim in the version of the letter recorded in Ibn Shuʿba al-Ḥarrānī in *Tuḥaf al-ʿuqūl*, 126-49) (quoted in Muḥammad Bāqir al-Majlisī, *Biḥār al-anwār* (Tehran: al-Maktaba al-Islāmiyya, n.d.), 27:240-66). Neither quote appears in the standard version of the letter in al-Sharīf al-Rāḍī's *Nahj al-balāgha*, 426-45, or any other. For a comparison of the letters, see Muḥammad Bāqir Maḥmūdī, *Nahj al-saʿāda*, ed. ʿAziz Āl Ṭālib (Tehran: Muʾassasat al-Ṭibāʿa waʾl-Nashr, Wizārat al-Thaqāfa waʾl-Irshād al-Islāmī, 1418-1422/[1997-8 to 2001-2]), 5:57-109; Muḥammad al-Rayshahrī, *Mawsūʿat al-Imām ʿAlī b. Abī Ṭālib*, ed. Maḥmūd al-Ṭabāṭabāʾī and Muḥammad Kāẓim al-Ṭabāṭabāʾī (Lebanon: Dār al-Ḥadīth, n.d.), 7:54-76.

148) See Badr al-Dīn al-ʿAynī, *ʿUmdat al-qārī*, 20:259; see also Suyūṭī, *Jāmiʿ*, 1:135, no. 793. For notes on the difficulties involved in tracing this version to Ibn ʿAdī, see above, note 55 and accompanying text. In addition to that explanation, another issue worth mentioning is that this version appears only in the 4th century AH. It may be tempting to think that Ibn ʿAdī or whoever formulated the compound maxim did this through copying it and its attribution to Ibn ʿAbbās from Abū Ḥanīfa's *Musnad* by Ḥārithī (same formula). Indeed, Albānī suggests that such a borrowing is possible, asserting that Ibn ʿAdī's record of the *ḥadīth* matches Ḥārithī's records from Abū Ḥanīfa in both form and *isnād*. See Albānī, *Irwāʾ al-ghalīl*, 7:345. But this is not what occurred. The two are in fact different: Ḥārithī never mentions the *aqīlū* saying; if anything the copyist would have appended that

(3) Ibn ʿAbbās [no *isnād*]

Version 12

"Avoid *ḥudūd* [punishments] in cases of doubt or ambiguity, but there is to be no intercession, nor bail, nor oaths in *ḥadd* [proceedings]." (*Idraʾū ʾl-ḥudūd bi'l-shubahāt wa-lā shafāʿa wa-lā kafāla wa-lā yamīn fi ḥadd*.)

Ibn Bābawayh (d. 381/991-2)[149]	(1) Prophet Muḥammad [no *isnād*]
Al-Ḥurr al-ʿĀmilī (d. 1104/1693)[150]	(2) Muḥammad b. ʿAlī b. al-Ḥusayn—...—Muḥammad

Standard Version

"Avoid *ḥudūd* punishments in cases of doubt or ambiguity." (*Idraʾū ʾl-ḥudūd bi'l-shubahāt*.)

Ḥārithī (d. 340/951-2)[151]	(1) Abū Saʿīd—Yaḥyā b. Farrūkh—Muḥammad b. Bishr—Abū Ḥanīfa—Miqsam—Ibn ʿAbbās
Ibn Bābawayh (d. 381/991-2)[152]	(2) Amīr al-Muʾminīn [= ʿAlī b. Abī Ṭālib] [no *isnād*]

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saying from elsewhere. Albānī may have conflated Abū Ḥanīfa's version with this one, based on attributions of this version to Ibn ʿAbbās (by Ḥārithī in Abū Ḥanīfa's *Musnad* and by Suyūṭī and later scholars) without having compared the *isnād* or the content. Finally, one might also suppose that Ibn ʿAdī and Qāḍī Nuʿmān, who were contemporaries, copied the *ḥadīth* from a source common to both Sunnī and Shīʿī (Ismāʿīlī) traditionists. There were no known interactions between them, and Qāḍī Nuʿmān copied from a limited amount of books available to him—so far as we know from Madelung's list, from no work that would have included Ibn ʿAdī's sources. Instead, we know that Qāḍī Nuʿmān most probably copied his version of the maxim from a late 2nd/8th century source used also by Zaydīs. See above, notes 64-71, and accompanying text.

149) Ibn Bābawayh, *Faqīh*, 4:53.

150) According to al-Ḥurr al-ʿĀmilī, *Wasāʾil al-Shīʿa*, 28:48, no. 34,179. The source of this attribution is unclear, as Ibn Bābawayh attributes the saying directly to the Prophet in his *Faqīh*.

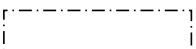
151) ʿAbd Allāh b. Muḥammad al-Ḥārith, *Musnad Abī Ḥanīfa*, ed. Abū Muḥammad al-Asyūṭī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1971), 39, no. 70.

152) Ibn Bābawayh, *Muqniʿ* (Qum: Muʾassasat al-Imām al-Hādī, 1994), 437 (cited in Ṭabarsī, *Mustadrak al-Wasāʾil*, 18:26, no. 21,912 [as p. 147]).

***Note on translations**: I have translated *shubha* (pl. *shubahāt*) as "doubt" or "ambiguity" to cover two senses in which jurists use the term: uncertainties concerning questions of fact ("doubt") as well as law ("ambiguity"). I have rendered the *ḥudūd* maxim as "avoid

Key

The following map includes the chains of transmission of the *ḥadīth* versions of the *ḥudūd* maxim from collections circulating in the first three centuries (as listed above). Fourth/tenth and fifth/eleventh century chains are included only if discussed in the text and otherwise not represented in the previous collections directly.

	Published collection
	Problematic transmitter (see notes in main body)
	Unbroken chain/direct attribution
	Broken chain/indirect attribution
Bold Name	Significant figure (discussed in the text and notes)

ḥudūd punishments in cases of doubt or ambiguity" to reflect this dual usage and the fact that jurists are the ones who typically determine whether *shubha* exists in making decisions about *ḥadd* liability. *Dar'* is given alternately as "aversion" or "avoidance." Aversion is the more literal translation (making *shubha*/*shubahāt* the active agent), but it obscures the fact that the judge or jurist typically acts as agent and addressee of the maxim; he or she is to recognize the legally cognizable types of *shubha* outlined in the legal texts and avoid imposing *ḥudūd* punishments where they are present; in addition, "avoidance" better captures the similar sense of a usage in the familiar corpus of American legal maxims, such as "constitutional avoidance," whereby judges are to avoid the serious consequences of deciding cases on the basis of constitutional doctrines where they can decide them on other grounds. Where relevant legal texts clearly intend to focus on *shubha* as the operative term, I have retained some form of the word "aversion" (e.g., *ḥadd*-averting ambiguity). (Alternative translations that are more literal, but more awkward and less communicative of the sense of the maxim, would be, "avert *ḥudūd* punishments with doubts and ambiguities," or even "use doubts and ambiguities to avert *ḥudūd* punishments.")

Spread of the ***Ḥudūd*** Maxim as a ***Ḥadīth***
(***Isnād*** Map)