

REPENTANCE AS A LEGAL CONCEPT

by

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## ABSTRACT

This thesis assesses the mitigating impact of repentance upon the fixed punishments for brigandage (*hiraba*), theft, and the accusation of fornication (*qadhf*) under Islamic law, focusing on classical sources of Qur’anic exegesis (*tafsir*), law (*fiqh*), and legal theory (*usul al-fiqh*). It examines and compares the opinions of jurists and exegetes who are not affiliated with a school of law as well as jurists who belong to any of the eight legal schools—namely the Hanafis, Malikis, Shafi‘is, Hanbalis, Zahiris, Zaydis, Imamis, and Ibadis. This thesis demonstrates that the mitigating impact of repentance upon the fixed punishments for brigandage, theft, and *qadhf* constitutes a case of casuistry as jurists do not assign legal significance to the concept of repentance in all of these three cases. Furthermore, the legal tradition on the mitigating impact of repentance upon fixed punishments shows a high degree of commonality that transcends school affiliation and theological orientation.

## CHAPTER 1: INTRODUCTION

### 1.1 Context and statement of the problem

The concept of repentance is usually addressed in the field of Sufism rather than law as it basically signifies a matter between a person and his Lord rather than a matter between him and the state. Several scholars have discussed repentance from an ethical perspective in their works that are related to spiritual ethics, such as al-Ghazali (d. 505 /1111)<sup>1</sup> in his *Ihya' 'Ulum al-Din* and Ibn al-Qayyim (d. 751/1349)<sup>2</sup> in his *al-Tawba wa al-Inaba*. As an ethical concept, repentance basically refers to returning to God after committing a wrongdoing through regret, confession, and asking God for forgiveness and mercy—as demonstrated by Adam and Eve when they repented to God of eating from the forbidden tree by saying: “O our Lord! We did an injustice to our own selves. We would definitely be among the losers if You do not forgive us and have mercy on us” (Q. 7:23).<sup>3</sup>

As an ethical concept, repentance may save a person who commits a wrongdoing in this world from receiving God’s punishment in the Hereafter. For instance, upon declaring that those who commit polytheism (*shirk*), murder, or fornication (*zina*) will be tormented on the Day of Resurrection for their vices, God makes an exception for those who repent of their wrongdoings in this world (Q. 25:68-70). He says:

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<sup>1</sup> Al-Ghazali is a Shafi‘i jurist (*faqih*), legal theorist (*usuli*) and a scholar of Sufism, who lived in Khorasan, Nishapur and Baghdad. His name is Muhammad b. Muhammad b. Muhammad b. Ahmad al-Ghazali, his *kunya* is Abu Hamid, and his *laqab* (title) is Hujjat al-Islam. *Kunya* is a form that consists of the word Abu (the father of) or Umm (the mother of) followed by a name.

<sup>2</sup> Ibn al-Qayyim is a Hanbali jurist, who lived in Damascus. His name is Muhammad b. Abi Bakr b. Ayyub b. Sa‘d, his *kunya* is Abu ‘Abd Allah and his *laqab* is Shams al-Din.

<sup>3</sup> Throughout the thesis, the English translation of the Qur’an is an amalgam of seven translations by Yusuf Ali, Ghali, Pickthal, Sahih International, Abdel Haleem, Shakir and Muhsin Khan. These translations, with the exception of Abdel Haleem’s, are available at <http://Quran.com/>. Sometimes I refer to Arberry’s translation at <http://tanzil.net/>.



And [the servants of the All-Merciful are]<sup>4</sup> those who do not invoke another god along with God, nor kill the self that God has [made its killing] prohibited except in the pursuit of justice nor commit fornication. Whoever does these [violations] will meet the penalty for vice: doubled will be the torment for him on the Day of Resurrection, and he will eternally abide therein degraded—except for those who repent, believe and do righteous deeds. For these [people], God will turn their odious deeds into fair deeds. God is Ever-Forgiving, Ever-Merciful.

Upon prescribing the worldly fixed punishments for brigandage (*hiraba*) and the accusation of fornication (*qadhf*), God makes an exception for those who repent of their wrongdoings. In the case of brigandage, God says:

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ (33) إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْرُبُوا عَلَيْهِمْ فَأَعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَحِيمٌ (34) {سورة المائدة 33-34}

Surely, the penalty for those who wage war against God and His Messenger and endeavor to do corruption in the land is that they should be massacred or crucified, or that their hands and legs should be cut asunder alternately or that they should be exiled from the land. That is a disgrace for them in this world, and in the Hereafter they will have a tremendous torment—except for those who repent before you gain control over them. Know that God is Ever-Forgiving, Ever-Merciful. (Q. 5:33-34)

In the case of *qadhf*, God says:

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ (4) إِلَّا الَّذِينَ تَابُوا مِنْ بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ (5) {سورة النور 4-5}

[As for] those who hurl [insults at] chaste women, then they do not come up with four witnesses, flog them eighty times and do not accept any testimony of theirs ever, and those are the ones who are immoral (*fasiq*)—except for those who repent after that and act righteously. Surely God is Ever-Forgiving, Ever-Merciful. (Q. 24:4-5)

Similarly, God makes an exception for thieves who repent of their wrongdoing; however, the syntactic structure of exception is a conditional sentence rather than an exceptive clause. In the case of theft, God says:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ (38) فَمَنْ تَابَ مِنْ بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ (39) {سورة المائدة 38-39}

[As for] the male thief and the female thief: cut off the hands of both, as a punishment for what they committed (earned), as a torture from God. God is Ever-Mighty, Ever-Wise. If one repents

<sup>4</sup> This is understood from Q. 25:63. The verse cluster Q. 25:63-73 describes the characteristics of those who believe in and worship God; the servants of the All-Merciful (*ibad al-rahman*).

after his injustice and acts righteously, surely God will accept his repentance. Surely God is Ever-Forgiving, Ever-Merciful. (Q. 5:38-39)

Exception in these three cases signifies that repentance is a legal concept and a matter between a person and the state as it saves a convict of brigandage, theft, and *qadhf* from receiving the fixed punishments (*hudud*)<sup>5</sup> for these crimes in this world. Furthermore, this exception paves the way for generalizing the mitigating impact of repentance upon all fixed punishments in general. Hence, the problems which this thesis addresses are:

- 1- Does repentance cancel the fixed punishment for brigandage?
- 2- Does repentance cancel the fixed punishment for theft?
- 3- Does repentance cancel the fixed punishment for the accusation of fornication?
- 4- Does repentance cancel all fixed punishments in general?
- 5- Do scholarly contentions on the mitigating impact of repentance generally reveal a case of virtual convergence or divergence of opinion?

## 1.2 Objectives and scope of the study

This thesis aims to answer the above questions, and is primarily concerned with analyzing the mitigating impact of repentance upon the fixed punishments for brigandage (*hiraba*), theft, and the accusation of fornication (*qadhf*) under Islamic law through the examination of classical sources of Qur'anic exegesis and Islamic law. The study does not examine the mitigating impact of repentance upon other fixed punishments, such as

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<sup>5</sup> Plural of *hadd*; a *hadd* penalty is a punishment whose amount is fixed by God in the Qur'an or by the Prophet in *hadith* (Prophetic saying). Overall, it is enforced by the state when the crime is established before the court through either confession or evidence (witnesses).

fornication (*zina*), consumption of intoxicants (*shurb al-khamr*), apostasy (*ridda*), abandoning prayers (*tark al-salat*), and sorcery (*sihr*).<sup>6</sup> Moreover, the fixed laws of retaliation (*qisas*) in the cases of murder, injuries, and limb-cutting are beyond the scope of this research. Furthermore, the mitigating impact of repentance upon non-fixed punishments (*ta'zir*)<sup>7</sup> is not addressed in this thesis. Notwithstanding its limitations, this study offers some insight into the cancellation of fixed punishments in general by reason of repentance.

The three particular cases of the fixed punishments for brigandage, theft, and *qadhf* are selected for analysis because the relevant Qur'anic verses mention an exception for repentant offenders immediately after describing the worldly fixed punishment.<sup>8</sup> Moreover, these cases are representative examples in Islamic criminal law as they fit the two categories of the theory of rights: God's rights (*haqq Allah*) and individuals' rights (*haqq al-'ibad*).<sup>9</sup> This dichotomous theory is mainly based upon the principle that punishments that are construed as individuals' rights are the only penalties that can be cancelled after the crimes are established before the court. The cancellation takes place

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<sup>6</sup> Jurists are not unanimous in considering all of these examples as fixed punishments.

<sup>7</sup> *Ta'zir* is a disciplinary punishment whose amount is prescribed at the discretion of the judge or ruler (*imam*) for a violation of God's law that does not have a fixed punishment in the Quran or *hadith*. In general, *ta'zir* may have different forms: beating, flogging, imprisonment, banishment, etc. Throughout this text, the phrase "be disciplined" would mean "to receive *ta'zir* disciplinary punishment."

<sup>8</sup> Almost all the Qur'anic verses that follow the pattern of post-punishment exception for repentant wrongdoers discuss the mitigating impact of repentance upon punishments in the Hereafter rather than upon worldly punishments—as demonstrated in Q. 2:159-160, Q. 3:86-89, Q. 4:145-146, Q. 19:59-60, and Q. 25:68-70.

<sup>9</sup> *Haqq al-'ibad* literally means the right of the servants (i.e. God's servants). In his *Crime and Punishment in Islamic Law*, Rudolph Peters translates *haqq al-'ibad* into "a claim of men" and *haqq Allah* into "a claim of God." He states that claims of God represent the public interest; Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (United Kingdom: Cambridge University Press, 2005) 192.

when the plaintiff pardons the defendant. In Islamic criminal law, God's rights usually refer to the fixed punishments for brigandage, theft, fornication, and consumption of intoxicants, whereas individuals' rights usually refer to the fixed punishment for *qadhf*, retaliation (*qisas*), and the financial liability for stolen property (*daman*).<sup>10</sup>

Unlike the majority of scholars, Abu Hanifa (d. 150/767)<sup>11</sup> postulates that all fixed punishments are God's rights and that individuals' rights are only represented by retaliation. Moreover, he opines that hand-cutting is the only punishment for theft and that a thief would not be liable for stolen property if his hand is cut off.<sup>12</sup> Like Abu Hanifa, the majority of scholars perceives retaliation as an individual's right, but they also consider flogging in the fixed punishment for the accusation of fornication (*qadhf*) and the financial liability for stolen property in the fixed punishment for theft as examples of individuals' rights. All scholars perceive hand-cutting in the fixed punishment for theft, the fixed punishment for fornication<sup>13</sup> and flogging in the fixed punishment for consumption of intoxicants as examples of God's rights. For the sake of

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<sup>10</sup> Due to space limitation for a master's thesis, I have not discussed the mitigating impact of repentance upon other fixed punishments—such as the punishments for fornication, consumption of intoxicants, and apostasy. This would be a good topic for future research.

<sup>11</sup> Abu Hanifa is an independent jurist, who lived in Kufa, and he is the eponym of the Hanafi school. His name is al-Nu'man b. Thabit.

<sup>12</sup> According to Abu Hanifa, a thief has to return the stolen property if his hand is not cut off; al-Jassas, *Ahkam al-Qur'an*, ed. Muhammad Qamhawi, vol. 4 (Beirut: Dar Ihya' al-Turath al-'Arabi; Beirut: Mu'assasat al-Tarikh al-'Arabi, 1992) 83-84.

<sup>13</sup> In general, the fixed punishment for fornication is publicly flogging the non-*muhsan* convict one hundred times and banishing him for one year. If the convict is *muhsan*, the punishment is stoning to death. By and large, the word *muhsan* refers to a sane pubescent person who has consummated a valid marriage during his or her lifetime.

simplicity, the thesis follows the majority's perception of the theory of rights, as demonstrated in table 1.1 below.

Table 1.1: Islamic Theory of Rights

Punishment		God's Right	Individual's Right
Fixed Punishment for Brigandage ( <i>hiraba</i> )		Yes	No
Fixed Punishment for Theft	Hand-cutting	Yes	No
	Liability	No	Yes
Fixed Punishment for Accusation of Fornication ( <i>qadhf</i> )		No	Yes
Fixed Punishment for Fornication		Yes	No
Fixed Punishment for Consumption of Intoxicants		Yes	No
Retaliation ( <i>qisas</i> )		No	Yes

### 1.3 Review of Literature

The primary goal of this thesis is to analyze in depth the mitigating impact of repentance upon the fixed punishments for brigandage, theft, and *qadhf* under Islamic law. This goal can be achieved through answering three main questions. First, is the fixed punishment cancelled by reason of repentance? Second, would the repentant convict have any liability whatsoever? Third, is repentance subject to certain conditions that render it valid from a legal perspective? Notwithstanding my careful search, I have found that the literature on this topic written in English is very scarce. I have not encountered a single

source in English that provide a detailed analysis of the legal significance of repentance in the field of Islamic criminal law. Therefore, this thesis may be considered the first of its kind in laying the groundwork for future studies in English on repentance as a legal concept under Islamic law. This section reviews and compares the literature that has been published about the mitigating impact of repentance upon fixed punishments in general and upon the fixed punishments for brigandage, theft, and *qadhf* in particular. The English sources will be discussed first followed by the Arabic sources.

### 1.3.1 Repentance and brigandage

Nik Wajis briefly discusses the mitigating impact of repentance upon the fixed punishment for brigandage in his PhD dissertation on brigandage under Islamic law.<sup>14</sup> He presents two juristic opinions on the liability of pre-arrest repentant brigands and gives justified preference to the view that pre-arrest repentance cancels the four fixed penalties for brigandage: execution, cutting off the right hand and left foot, crucifixion, and exile. Nevertheless, the convict would be liable for individuals' rights and therefore he would be obliged to return the stolen property to the rightful owner and to face the laws of retaliation that allow the family of a murdered person to kill or pardon the murderer or obtain blood money from him.<sup>15</sup> The other scholarly contention is that pre-arrest repentance cancels the four penalties for brigandage as well as the liability for

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<sup>14</sup> Nik Wajis, "The Crime of Hiraba in Islamic Law," diss., U Caledonian, 1996.

<sup>15</sup> Wajis, 93-95.

individuals' rights with the exception of returning the existing, not the perished, stolen item to the rightful owner.<sup>16</sup>

Wajis provides some names of scholars who espouse the first opinion, yet he does not cite any of the proponents who support the second opinion. Although Wajis substantiates his preference, he does not mention the evidence that jurists of the second opinion use to support their argument. Moreover, he does not mention the third opinion concerning this issue in which some exegetes and jurists postulate that pre-arrest repentance altogether cancels the liability of pre-arrest repentant brigands for individuals' rights. Like Wajis, Rudolph Peters remarks that pre-capture repentance cancels the fixed punishment for brigandage but "does not affect the liability for homicide, bodily harm or theft since these are claims of men."<sup>17</sup>

Both Wajis and Peters explain the conditions for the validity of repentance in the case of the fixed punishment for brigandage. Wajis stipulates that a brigand's repentance represented in stopping the act of brigandage must take place before capture.<sup>18</sup> Along the same line, Peters adds that some schools "specify a term during which the defendant must give evidence of the seriousness of his intentions" and that the Malikis further require that the repentant convict turn himself to the authorities.<sup>19</sup> Neither Wajis nor Peters provide the other conditions specified by jurists for the validity of repentance in the case of the fixed punishment for brigandage—such as fleeing to a non-Muslim land, securing

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<sup>16</sup> Wajis, 94.

<sup>17</sup> Peters, 27.

<sup>18</sup> Wajis, 96-97.

<sup>19</sup> Peters, 27.

a pledge of safety from the ruler, and the ability to protect oneself from capture either independently or through a powerful group.

### 1.3.2 Repentance and theft

With regard to the issue of repentance in the context of the fixed punishment for theft, Peters does not examine the mitigating impact of repentance (in its basic form) upon the punishment of hand-cutting. Nonetheless, he observes that returning the stolen goods to the rightful owner before the passing of a judgment saves the thief from the punishment of hand-cutting.<sup>20</sup> If we consider returning the stolen item as an act of repentance (which is not the way the jurists construe this act), then Peters discusses only one facet of the mitigating impact of repentance upon the fixed punishment for theft. Nevertheless, Peters provides neither the advocates of this opinion nor the names of jurists who hold opposing views.

However, Peters cites the opinions of the Hanafis, Malikis, and Shafi'is concerning the liability of thieves.<sup>21</sup> He shows that the Hanafis maintain that a thief would not be liable if his hand is cut off, whereas the Shafi'is postulate that he is liable whether or not his hand is cut off. In contrast, the Malikis state that a thief would be liable for perished items if he is "rich."<sup>22</sup> The liability that Peters presents applies to thieves in general; he does not specifically refer to the opinions of jurists who cancel the hand-cutting by mere repentance, such as the Shafi'is (in one trend in the school), the

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<sup>20</sup> Wajis, 57.

<sup>21</sup> Peters, 57.

<sup>22</sup> Peters, 57.



Hanbalis, and the Imamis. The contention of the Hanafis that denies the liability of thieves whose hands were cut off suggests that there is a lack of scholarly consensus over the liability of thieves. However, Scott Lucas notes that Ibn al-Mundhir (d. ca. 318/930)<sup>23</sup> believes in such a consensus.<sup>24</sup> The Hanafis' opinion undermines Ibn al-Mundhir's claim of scholarly consensus that a thief whose hand is cut off has to return the stolen item to the rightful owner.

### 1.3.3 Repentance and *qadhf*

Peters touches upon the mitigating impact of repentance upon the fixed punishment for the accusation of fornication (*qadhf*). He states that the testimony of a convict of *qadhf* is rejected unless he repents, and adds that the Hanafis consider this testimony invalid forever.<sup>25</sup> Nonetheless, Peters does not analyze in depth the arguments of the two opposing scholarly camps regarding the validity of the testimony of a repentant convict of *qadhf*. Furthermore, he does not provide the jurists' opinions concerning the scope of validity of such testimony. More importantly, he makes no mention for the conditions that are required for the validity of repentance in the case of the fixed punishment for *qadhf*.

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<sup>23</sup> Ibn al-Mundhir is a Shafi'i jurist and a scholar of *hadith*, who lived in Nishapur, Egypt, and Mecca. His name is Muhammad b. Ibrahim b. al-Mundhir, and his *kunya* is Abu Bakr. According to Wael Hallaq, Ibn al-Mundhir was the eponym of an extinct legal school; Wael Hallaq, *The Origins and Evolution of Islamic Law* (UK: Cambridge University Press, 2005) 168.

<sup>24</sup> Scott Lucas, "Abu Bakr Ibn al-Mundhir, Amputation, and the Art of Ijtihad," *International Journal of Middle Eastern Studies* 39 (2007): 357.

<sup>25</sup> Peters, 63.

### 1.3.4 Repentance Paradigms

Eloquently and succinctly, Rudolph Peters reveals two main paradigms that govern the mitigating impact of repentance upon fixed punishments in general.<sup>26</sup> All Sunni schools, as stated by Peters, hold the view that repentance cancels the fixed punishments for apostasy and brigandage. Shi'i schools and a trend in the Shafi'i and Hanbali schools add that repentance that takes place "before the crime has been proven in court" cancels all fixed punishments except *qadhf*. Peters says that the exemption from punishment offered by repentance is not in harmony with Western theories of criminal law; however, he justifies the position of Islamic law by affirming that "one of the objectives of the punishment is the rehabilitation of the offender." "By showing his repentance," Peters explains, "the offender actually proves that he has already been reformed and does not need to be punished anymore."<sup>27</sup> Table 1.2 summarizes Peters' wonderful presentation.

Table 1.2: Repentance Paradigms in Islamic Criminal Law

	Repentance Paradigms
First Paradigm	Repentance cancels all fixed punishments, save <i>qadhf</i> (Repentance has to take place before the crime is proven in court)
Second Paradigm	Repentance cancels the fixed punishments for apostasy and brigandage

<sup>26</sup> Peters, 27-28.

<sup>27</sup> Peters, 27.

Through examining the exegetical and legal works that discuss the mitigating impact of repentance upon the fixed punishments for brigandage, theft, and *qadhf*, I have reached the conclusion that there are three scholarly trends in the legal discourse concerning the legal significance of repentance in terms of its mitigating impact upon fixed punishments in general.<sup>28</sup> Jurists of the first trend argue that punishments that are considered as God's rights are cancelled by repentance, whereas punishments that are perceived as individuals' rights are not cancelled by repentance. These scholars tend to regard the mitigating impact of repentance upon the fixed punishment for brigandage (*hiraba*) as the mother case that governs the mitigating impact of repentance upon all fixed punishments that are construed as God's right. The extensive use of analogy characterizes this legal approach. The Shafi'is (in one trend in the school), Hanbalis, and Imamis are the main proponents of this first major trend.

In blatant contradiction to the first trend, jurists of the second approach assert that repentance does not cancel fixed punishments that are perceived as individuals' rights and does not cancel punishments that are considered as God's rights, save the fixed punishment for brigandage. These scholars tend to refrain from applying the model of repentance in the fixed punishment for brigandage to other fixed punishments. They, however, cite the fixed punishments for apostasy and abandoning prayers as two

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<sup>28</sup> For example, see al-Mawardi, *Kitab al-Hudud min al-Hawi al-Kabir*, ed. Ibrahim Sanduqji, vol. 2 (1995) 817-824; Ibn Hajar, *Tuhfat al-Minhaj bi-Sharh al-Minhaj*, 4:153; Ibn Hubayra, *al-Fiqh 'ala Madhahib al-A'imma al-Arba'a*, ed. Ibrahim al-Qadi, al-Sayyid al-Mursi, and Muhammad al-Manqush, 2 vols. (Cairo: Dar al-Haramayn, 2000) 2:314; Ibn Hazm, *al-Muhalla bi-al-Athar*, ed. 'Abd al-Ghaffar al-Bindari, vol. 12 (Beirut: Dar al-Fikr) 22; Yusuf al-Thula'i, *Tafsir al-Thamarat al-Yani'a wa al-Ahkam al-Wadiha al-Qati'a*, vol. 3 (Yemen: Maktabat al-Turath al-Islami, 2002) 109-110; Miqdad al-Suyuri, *Kanz al-'Irfan fi Fiqh al-Qur'an* (al-Najaf: Dar al-Adwa', 1964) part 4, 43-44.

exceptions to their general rule. The Hanafis, Malikis, Shafi'is (in one trend in the school), Zahiris, Zaydis and Ibadis are the main advocates of this second major trend.

Breaking a scholarly consensus, a few Shafi'i jurists postulate that repentance cancels all fixed punishments even the fixed penalty for *qadhf*. According to this trend, punishments that are regarded as individuals' rights as well as punishments that are perceived as God's right are both cancelled by reason of repentance. These opinions—though weakened by the overwhelming majority of jurists—could constitute a minor trend in Islamic law regarding the mitigating impact of repentance upon fixed punishments. Thus, jurists have formulated three paradigms that govern the legal significance of repentance in terms of its mitigating impact upon fixed punishments.

Table 1.3: Repentance Paradigms in Islamic Criminal Law

	Major Trend	Repentance Cancels All Fixed Punishments	Exceptions
First Paradigm	Yes	Yes	-Fixed punishment for the accusation of fornication ( <i>qadhf</i> ) -Fixed laws of retaliation ( <i>qisas</i> )
Second Paradigm	Yes	No	-Fixed punishment for brigandage -Fixed punishment for apostasy -Fixed punishment for abandoning prayers
Third Paradigm	No	Yes	Almost None

Figure 1.1: Repentance Paradigms in Islamic Criminal Law

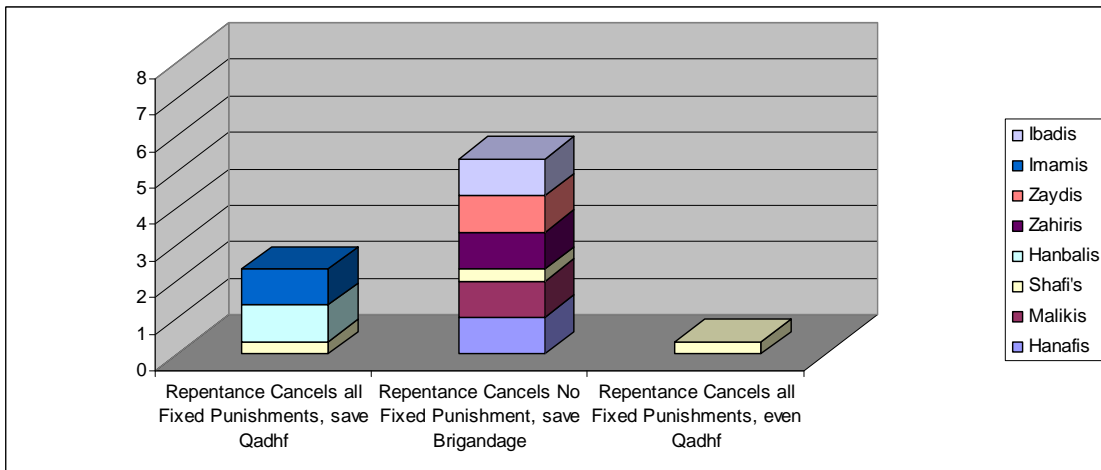
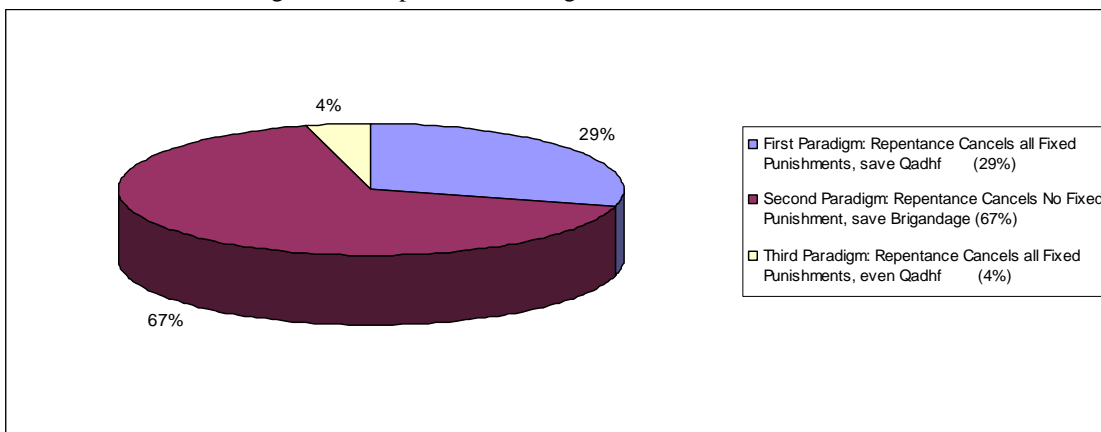


Figure 1.2: Repentance Paradigms in Islamic Criminal Law



### 1.3.5 Legal tradition on repentance

The legal discourse on the mitigating impact of repentance upon the fixed punishments for brigandage, theft, and the accusation of fornication reveals that there is a shared legal tradition in spite of school affiliation and theological orientation across the eight legal schools of the Hanafis, Malikis, Shafi‘is, Hanbalis, Zahiris, Zaydis, Imamis, and Ibadis. This commonality can be seen in the juristic opinions, reasoning, and

evidence expressed across these eight schools. On the whole, jurists—whether independent or affiliated to a legal school—recognize the mitigating impact of repentance upon the fixed punishment for brigandage rather than the fixed punishments for theft and *qadhf* (see Table 1.4 and Figure 1.3 below). The scholarly contentions on the mitigating impact of repentance generally reveal a case of virtual convergence rather than divergence of opinion. Surprisingly, the Hanbalis and Imamis express virtually identical views on the mitigating impact of repentance in the three cases analyzed in this thesis (see Table 1.4 below).

Moreover, these various schools overall advance similar arguments and use the same *hadith*<sup>29</sup> and *athar*<sup>30</sup> reports as evidence in their discourse on the mitigating impact of repentance in the three cases of brigandage, theft, and the accusation of fornication. Unexpectedly, the Imamis cite an *athar* report on the authority of ‘Umar b. al-Khattab while discussing the mitigating impact of repentance upon cancelling a component of the fixed punishment for *qadhf*, namely the eternal rejection of the convict’s testimony. This report is cited by each and every school as well as by independent jurists. By virtue of this report, the Imamis as well as the majority of jurists rule that this punishment is cancelled by reason of repentance and that the convict should declare that he was lying in his accusation so that his testimony could be accepted in the future. The Imamis base their arguments on the judgment of ‘Umar b. al-Khattab in a *qadhf* case documented in

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<sup>29</sup> *Hadith* (Prophetic saying) refers to what the Prophet said or did or tacitly approved.

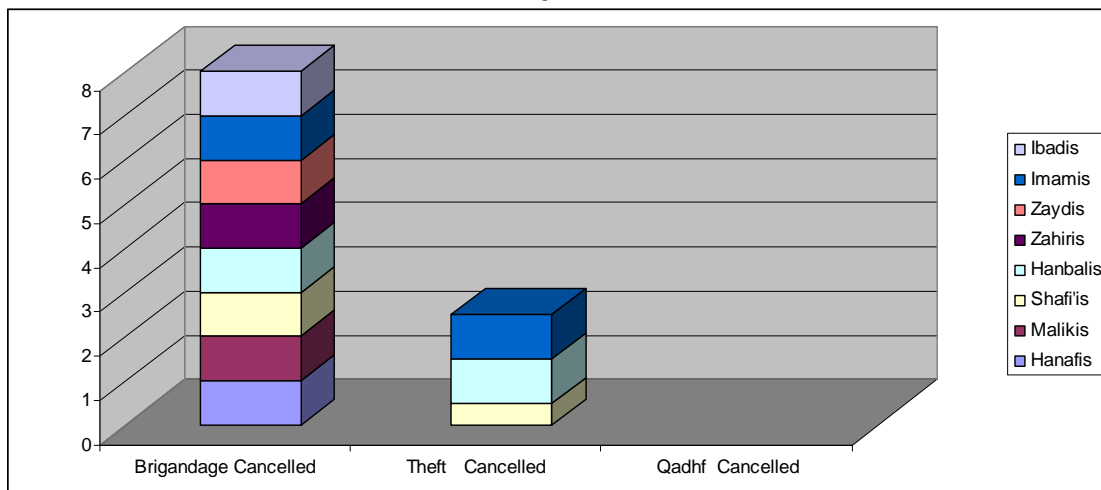
<sup>30</sup> *Athar* (post-Prophetic saying) refers to what a *sahabi* or *tabi’i* said or did or tacitly approved. A *sahabi* (companion) refers to a Muslim person who saw the Prophet and died as a Muslim; singular of *sahaba*. A *tabi’i* (follower) refers to a Muslim person who saw a *sahabi* and died as a Muslim; singular of *tabi’un*. Loosely speaking, *sahaba* and *tabi’un* refer to the first and second Muslim generations.

that *athar* report. The legal conclusion of the Imamis on this issue is shared by the Malikis, Shafi'is, Hanbalis, Zahiris, Zaydis, Imamis, and Ibadis.

Table 1.4: Mitigating Impact of Repentance upon the Fixed Punishments for Brigandage, Theft, and Qadhf

	Fixed Punishment for Brigandage Cancelled	Fixed Punishment for Theft Cancelled		Fixed Punishment for Accusation of Fornication Cancelled
Hanafis	Yes	No		No
Malikis	Yes	No		No
Shafi'is	Yes	No	Yes	No
Hanbalis	Yes	Yes		No
Zahiris	Yes	No		No
Zaydis	Yes	No		No
Imamis	Yes	Yes		No
Ibadis	Yes	No		No

Figure 1.3: Mitigating Impact of Repentance upon the Fixed Punishments for Brigandage, Theft, and Qadhf



Besides the works of Peters, Wajis, and Lucas, I have surveyed a large number of literary works in English about Islamic criminal law in the hope that I would find a detailed discussion of repentance as a legal concept. For instance, I considered El-Awa's *Punishment in Islamic Law*;<sup>31</sup> Abou El Fadl's *Rebellion and Violence in Islamic Law*;<sup>32</sup> *Criminal Justice in Islam* by Abdel Haleem *et al.*;<sup>33</sup> and Tahir-ul-Qadri's *Islamic Penal System & Philosophy*.<sup>34</sup> I have come to the conclusion that these sources and several others do not provide more information about the topic of my thesis and are not directly related to my research. I have encountered some titles that seemingly fit my topic; however, I have later realized that they discuss the concept of repentance from a non-

<sup>31</sup> Mohamed El-Awa, *Punishment in Islamic Law: A Comparative Study* (Plainfield: American Trust Publications, 2000).

<sup>32</sup> Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (United Kingdom: Cambridge University Press, 2001).

<sup>33</sup> Muhammad Abdel Haleem, Adel Sherif, and Kate Daniels, *Criminal Justice in Islam: Judicial Procedure in the Shari'a* (New York: I. B. Tauris, 2003).

<sup>34</sup> Muhammad Tahir-ul-Qadri, *Islamic Penal System & Philosophy* (Pakistan: Minhaj-ul-Qur'an, 1995).



legal perspective. For example, Husain's "Effect of Tauba (Repentance) on Penalty in Islam" discusses the concept of repentance from an ethical perspective,<sup>35</sup> whereas "Punishment and Repentance" by John Tasioulas offers valuable information about repentance from a philosophical perspective.<sup>36</sup>

I have also experienced difficulty in locating secondary sources in Arabic analyzing in depth the mitigating impact of repentance upon fixed punishments in general and upon the fixed penalties for brigandage, theft, and *qadhf* in particular. Despite my thorough search, I was successful in identifying only six secondary sources in Arabic. Three of these books have similar titles that basically mean *The Impact of Repentance on Cancelling Punishments under Islamic law*. These works are authored by 'Ali Jaffal,<sup>37</sup> 'Abd Allah al-Juburi,<sup>38</sup> and 'Ali Khalaf.<sup>39</sup> The fourth book discusses the impact of change in circumstances upon the enforcement of punishments under Islamic law.<sup>40</sup> Al-Nur considers the offender's repentance as one of these circumstances. The English

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<sup>35</sup> Husain argues that repentance prevents one from committing crimes and thus it has an impact on penalty; Syed Mu'azzam Husain, "Effect of Tauba (Repentance) on Penalty in Islam," *Islamic Studies* 8 (1969): 198-198.

<sup>36</sup> Tasioulas argues that mercy on the grounds of repentance is an ethical consideration intimately related to retributive desert (justice) within the framework of the communicative theory that regards the communication of justified censure to the offender as the primary aim of the punishment; John Tasioulas, "Punishment and Repentance," *Philosophy* 81 (2006): 279-322.

<sup>37</sup> 'Ali Jaffal, *al-Tawba wa Atharuha fi Isqat al-Hudud fi al-Fiqh al-Islami* (Beirut: Dar al-Nahda al-Arabiyya, 1989).

<sup>38</sup> 'Abd Allah al-Juburi, *Athar al-Tawba fi Suqut al-'Uquba fi al-Fiqh al-Islami* (Dubai: Dar al-Qalam, 2006).

<sup>39</sup> 'Ali Khalaf, *al-Tawba wa Atharuha fi Isqat al-'Uquba fi al-Fiqh al-Islami* (Al-Qunaytira: Ambirmanur, 1998).

<sup>40</sup> Muhammad al-Nur, *Taghayyur al-Hal wa Atharuh 'ala al-'Uquba fi al-Fiqh al-Islami: Dirasa 'an Taghayyur Hal al-Jani wa al-Majni 'alayh* (Beirut: Dar al-Basha'ir al-Islamiyya, 2008).

equivalent of the fifth work's title is *Punishment Cancellation under Islamic Law*.<sup>41</sup> In this study, al-Fudaylat examines the factors that exempt convicts from receiving punishments, and cites repentance as one of these factors.

These five sources present a relatively detailed discussion about repentance as a legal concept, providing more evidence and opinions across the Islamic legal schools. Nevertheless, these sources in the main do not cite the opinions of the Zaydis, Imamis, and Ibadis.<sup>42</sup> Moreover, they do not utilize many books that belong to the genre of law-centered exegesis (*tafsir ayat al-ahkam*)—such as the works of Abu al-Hawari (d. ca. 3<sup>rd</sup>/9<sup>th</sup> century),<sup>43</sup> al-Qassab (d. ca. 360/970),<sup>44</sup> al-Jassas (d. 370/980),<sup>45</sup> Ilkiya al-Harrasi (d. 405/1014),<sup>46</sup> Ibn al-'Arabi (d. 543/1148),<sup>47</sup> Sa'id al-Rawandi (573/1177),<sup>48</sup> Ibn al-

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<sup>41</sup> Jabr al-Fudaylat, *Suqut al-'Uquba fi al-Fiqh al-Islami*, 2 vols. (Jordan: Dar 'Ammar, 1987).

<sup>42</sup> Although al-Fudaylat cites the opinions of the Zaydis and Imamis, the intra-debates within each of these schools are not provided. Moreover, the opinions of the Ibadis are not mentioned.

<sup>43</sup> Abu al-Hawari, *al-Diraya wa Kanz al-Ghinaya fi Muntaha al-Ghaya wa Bulugh al-Kifaya fi Tafsir Khamsumi'at Aya min al-Qur'an al-Karim*, ed. Walid 'Awjan (Jordan: Manshurat Jami'at Mu'ta, 1994); Abu al-Hawari is an Ibadī jurist, who lived in Oman. His name is Muhammad b. al-Hawari, and his *kunya* is Abu al-Hawari.

<sup>44</sup> Al-Qassab, *Nukat al-Qur'an al-Dalla 'ala al-Bayan fi Anwa' al-'Ulum wa al-Ahkam wa al-Munbiya 'an Ikhtilaf al-Anam*, ed. 'Ali al-Tuwaijiri, Ibrahim al-Junaydil, and Shayi' al-Asmari, 3 vols. (al-Dammam: Dar Ibn al-Qayyim; Cairo: Dar Ibn 'Affan, 2003); al-Qassab is an independent jurist and scholar of *hadith*, who lived in Karj (a city in Iran). His name is Muhammad b. 'Ali b. Muhammad al-Qassab, and his *kunya* is Abu Ahmad. He is commonly known as "al-Qassab."

<sup>45</sup> Al-Jassas is a Hanafi jurist and legal theorist, who lived in Baghdad and Nishapur. His name is Ahmad b. 'Ali al-Razi, and his *kunya* is Abu Bakr. He is commonly known as "al-Jassas."

<sup>46</sup> Ilkiya al-Harrasi, *Ahkam al-Qur'an*, 2 vols. (Beirut: al-Maktaba al-'Ilmiyya, 1983); Ilkiya al-Harrasi is a Shafi'i jurist and exegete, who lived in Khurasan, Nishapur, and Baghdad. His name is 'Ali b. Muhammad b. 'Ali al-Tabari, and his *kunya* is Abu al-Hasan. He is commonly known as "Ilkiya al-Harrasi."

<sup>47</sup> Ibn al-'Arabi, *Ahkam al-Qur'an*, ed. Muhammad 'Ata, 4 vols. (Beirut: Dar al-Kutub al-'Ilmiyya, 2003); Ibn al-'Arabi is a Maliki jurist and exegete, who lived in al-Andalus, Egypt, Sham (now Syria, Lebanon and Palestine), Baghdad, and Mecca. His name is Muhammad b. 'Abd Allah b. Muhammad b. 'Abd Allah b. Ahmad, and his *kunya* is Abu Bakr.

Faras (d. 597/1200),<sup>49</sup> al-Qurtubi (d. 671/1272),<sup>50</sup> Ibn Mutawwaj al-Bahrani (d. 820/1417),<sup>51</sup> Muhammad al-Muzi'i (d. 825/1422),<sup>52</sup> Miqdad al-Suyuri (d. 826/1422),<sup>53</sup> Yusuf al-Thula'i (d. 832/1429),<sup>54</sup> Fakhr al-Din al-Najri (d. 877/1472),<sup>55</sup> al-Suyuti (d. 911/1505),<sup>56</sup> Muhammad b. al-Qasim (d. 1067/1656),<sup>57</sup> Ahmad al-Jaza'iri (1150/1737),<sup>58</sup> Siddiq al-Qannuji (d. 1307/1890),<sup>59</sup> and al-Dah al-Shinqiti (d. 1403/1982).<sup>60</sup>

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<sup>48</sup> Sa'id al-Rawandi, *Fiqh al-Qur'an*, ed. al-Sayyid al-Husayni, 2 vols. (1977; Qom: al-Matba'a al-'Ilmiyya; Qom: Matba'at al-Khayyam, 1978); Sa'id al-Rawandi is an Imami jurist, exegete and a scholar of *hadith*, who lived in Rawand (a town near Kashan in Iran). His name is Sa'id b. 'Abd Allah b. al-Husayn b. Hibat Allah b. al-Hasan al-Rawandi, his *kunya* is Abu al-Husayn, and his *laqab* is Qutb al-Din.

<sup>49</sup> Ibn al-Faras, *Ahkam al-Qur'an*, ed. Taha Busrih, Munjiya al-Sawayhi, and Salah al-Din Bu'afif, 3 vols. (Beirut: Dar Ibn Hazm, 2006); Ibn al-Faras is a Maliki jurist, who lived in al-Andalus. His name is 'Abd al-Mun'im b. Muhammad b. 'Abd al-Rahim b. Muhammad, and his *kunya* is Abu Muhammad. He is commonly known as "Ibn al-Faras."

<sup>50</sup> Al-Qurtubi, *al-Jami' li-Ahkam al-Qur'an wa al-Mubayyin li ma Tadammanah min al-Sunna wa al-Furqan*, ed. 'Abd Allah al-Turki, Muhammad 'Irsusi, Mahir Habbush, Kamil al-Kharrat, Ghiyath Ahmad, Muhammad Barakat, Muhammad Karim al-Din, Muhammad al-Khinn, and Khalid al-'Awwad, 24 vols. (Beirut: Mua'ssasat al-Risala, 2006); al-Qurtubi is a Maliki jurist and exegete, who lived in al-Andalus and Egypt. His name is Muhammad b. Ahmad b. Abi Bakr b. Farh, and his *kunya* is Abu 'Abd Allah.

<sup>51</sup> Ibn Mutawwaj al-Bahrani, *Minhaj al-Hidaya fi Bayan Khamsumi'at al-Aya*, ed. Muhammad Barik Bin (Qazwin: Qism al-Abhath wa al-Dirasat fi al-Hawza al-'Ilmiyya, 2008); Ibn Mutawwaj al-Bahrani is an Imami jurist and exegete, who lived in Bahrain. His name is Ahmad b. 'Abd Allah b. Muhammad b. 'Ali b. Hasan b. Mutawwaj al-Bahrani, and his *laqab* is Jamal al-Din.

<sup>52</sup> Muhammad al-Muzi'i, *Taysir al-Bayan li-Ahkam al-Qur'an*, ed. Ahmad al-Muqri, 2 vols. (Makkah: Rabitat al-'Alam al-Islami, 1996); Muhammad al-Muzi'i is a Shafi'i jurist and exegete, who lived in Yemen. His name is Muhammad b. 'Ali b. Ibrahim al-Muzi'i, and his *kunya* is Jamal al-Din. He is commonly known as Ibn Nur al-Din al-Muzi'i.

<sup>53</sup> Miqdad al-Suyuri is an Imami jurist and theologian, who lived in Hillah (a city in Iraq). His name is Miqdad b. 'Abd Allah b. Muhammad b. al-Husayn b. Muhammad al-Suyuri, his *kunya* is Abu 'Abd Allah, and his *laqab* is Sharaf al-Din.

<sup>54</sup> Yusuf al-Thula'i is a Zaydi jurist and exegete, who lived in Yemen. His name is Yusuf b. Ahmad b. Muhammad b. Ahmad b. 'Uthman b. 'Ali b. 'Uthman al-Thula'i.

<sup>55</sup> Fakhr al-Din al-Najri, *Shafi al-'Alil Sharh al-Khamsumi'at Aya min al-Tanzil*, ed. Muhammad al-'Utayq, 2 vols. diss., U of Umm al-Qura, 1985; Fakhr al-Din al-Najri is a Zaydi jurist, who lived in Yemen. His name is 'Abd Allah b. Muhammad b. al-Qasim al-Najri, and his *laqab* is Fakhr al-Din.

<sup>56</sup> Al-Suyuti, *al-Iklil fi Istinbat al-Tanzil*, ed. 'Amir al-'Urabi, 3 vols. (Jeddah: Dar al-Andalus al-Khadra', 2002); al-Suyuti is a Shafi'i jurist, exegete, linguist and a scholar of *hadith*, who lived in Egypt and Yemen.

The sixth secondary source in Arabic—as understood from its title—compares the mitigating impact of repentance between the Islamic law and other laws. This book is authored by Jawda Jihad under the title of *al-Tawba bayn al-Shari‘a al-Islamiyya wa al-Qawanin al-Wad‘iyya*.<sup>61</sup> I was not able to have access to this interesting book via the library of the University of Arizona. In my thesis, I depend largely on classical primary sources in Arabic that belong to the two genres of Quranic exegesis (*tafsir*) and law (*fiqh*). I rely more on exegetical works because there is a small number of legal books that examine the mitigating impact of repentance upon all of the three punishments under review. This very fact gives weight to the present work as it fills a gap in the literature in this field.

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His name is ‘Abd al-Rahman b. al-Kamal b. Muhammad al-Suyuti, his *kunya* is Abu Bakr, and his *laqab* is Jalal al-Din.

<sup>57</sup> Muhammad b. al-Qasim, *Muntaha al-Maram fi Sharh Ayat al-Ahkam*, 2<sup>nd</sup> ed., 2 vols. (Yemen: al-Dar al-Yamaniyya; Beirut: Dar al-Manahil, 1986); Muhammad b. al-Qasim is a Zaydi jurist and scholar of *hadith*, who lived in Yemen. His name is Muhammad b. al-Husayn b. al-Qasim b. Muhammad.

<sup>58</sup> Ahmad al-Jaza’iri, *Qala’id al-Durar fi Bayan Ayat al-Ahkam bi-al-Athar*, 3 vols. (al-Najaf: Maktabat al-Najah, 1962); Ahmad al-Jaza’iri is an Imami jurist, exegete, and a scholar of *hadith*, who lived in Iraq. His name is Ahmad b. Isma’il b. ‘Abd al-Nabi b. Sa’d al-Jaza’iri.

<sup>59</sup> Siddiq Hasan al-Qannuji, *Nayl al-Maram fi Tafsir Ayat al-Ahkam*, ed. Ibrahim al-Qadi, al-Sayyid al-Mursi, and Muhammad al-Manqush, 2 vols. (Cairo: Dar al-Haramayn, 1998); Siddiq al-Qannuji is an exegete and scholar of *hadith*, who lived in India. His name is Siddiq Hasan Khan al-Qannuji. The word “Qannuji” is a reference to the Indian city “Kannauj.” Al-Qannuji does not seem to follow a certain legal school although he studied at al-Azhar. He wrote multiple works in several Islamic disciplines—such as *hadith*, legal theory, and Qur’anic exegesis—in Hindi, Persian, and Arabic. Al-Qannuji was among the Ahl-i Hadith in South Asia; Muhammad Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (New Jersey: Princeton University Press, 2002) 40-41.

<sup>60</sup> Al-Dah al-Shinqiti, *al-Ayat al-Muhkamat fi al-Tawhid wa al-‘Ibadat wa al-Mu‘amalat*, ed. ‘Abd Allah al-Siddiq (Cairo: Maktabat al-Qahira, 1964); al-Dah al-Shinqiti is a Maliki jurist and exegete, who lived in Mauritania and the Sudan. His name is Muhammad b. Ahmad al-Dah al-Shinqiti. The word “Dah” means “smart.” He wrote on Islamic law, theology, *hadith* and Qur’anic exegesis. The information about al-Dah al-Shinqiti is extracted from <http://www.azahera.net/showthread.php?t=4936> as the available edition of *al-Ayat al-Muhkamat* does not include sufficient information about the author.

<sup>61</sup> Jawda Jihad, *al-Tawba bayn al-Shari‘a al-Islamiyya wa al-Qawanin al-Wad‘iyya* (Cairo: 1991).

#### 1.4 Methodology

This thesis consists of three chapters—apart from an introduction and a conclusion—each of which analyzes in depth the mitigating impact of repentance upon the fixed punishments for brigandage, theft, and *qadhf* respectively. Each chapter presents a brief description of the fixed punishment under discussion and determines its position in the dichotomous theory of rights. The chapter then examines the scholarly debate over the mitigating impact of repentance upon the fixed punishment, which involves answering three broad questions. First, does repentance cancel the fixed punishment? Second, if so, what would be the scope of the mitigating impact of repentance and what liability would be in store for repentant offenders? Third, would mere unconditional repentance be sufficient to effect a mitigating impact, or is it mandatory that repentance meets certain requirements in order to have such an impact? Chapter 2 concludes with a discussion of applying the laws of repentance in the case of the fixed punishment for brigandage to other cases in Islamic criminal law.

This thesis focuses on classical sources of Qur’anic exegesis and Islamic law, yet it occasionally cites sources from other periods.<sup>62</sup> In this study, I cite the opinions of the following eight schools of Islamic law: the Hanafis, Malikis, Shafi’is, Hanbalis, Zahiris, Zaydis, Imamis, and Ibadis. Moreover, I provide the opinions of jurists and exegetes who are not affiliated to a certain legal school and the opinions of jurists and exegetes who predated the doctrinal era of legal schools. Whenever there is a scholarly debate over an issue, I present the arguments and counterarguments of both sides based on the available

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<sup>62</sup> By classical I mean late 3<sup>rd</sup>/9<sup>th</sup> century to early 10<sup>th</sup>/16<sup>th</sup> century.

sources. From a historical perspective, the legal opinions quoted in this research go back as early as the 1<sup>st</sup>/7<sup>th</sup> century and would move forward until they reach the 14<sup>th</sup>/20<sup>th</sup> century. The earliest legal authority identified in this research is Abu Bakr al-Siddiq (d. 13/634), whereas the latest scholar is al-Dah al-Shinqiti. In spite of the lengthy historical period the research covers, the classical period receives the utmost attention in this study.

In order for the results of this research to be accurate, it is necessary to isolate the factor of repentance from other factors that may have a mitigating impact upon fixed punishments. Therefore, this thesis is based on four assumptions, the most important of which is that repentance refers to the feeling of remorse (*nadam*) experienced by the offender after committing his crime rather than to his voluntary confession of the crime before the authorities. Second, the religion of the offender at the time of committing the crime is Islam. In other words, the offender is not a non-Muslim who commits any of the three crimes then embraces Islam. Third, the victim of brigandage, theft, and *qadhf* demands justice and does not grant a legal pardon to the offender. Fourth, the scene of the crime falls under the jurisdiction of a Muslim ruler.

## 1.5 Conclusion

The primary goal of this thesis is to assess the legal significance of repentance in terms of its mitigating impact upon the three fixed punishments for brigandage, theft, and the accusation of fornication (*qadhf*) under Islamic law. Through my close analysis of Arabic classical sources of exegesis and law, I have observed that jurists and exegetes in general recognize the mitigating impact of repentance upon the fixed punishment for

brigandage rather than the fixed punishments for theft and *qadhf*. Assigning legal significance to the concept of repentance in the case of brigandage rather than the case of *qadhf* means that the mitigating impact of repentance upon fixed punishments constitutes a case of casuistry.<sup>63</sup> The general convergence of opinion on the mitigating impact of repentance transcends the boundaries of school affiliation and theological orientation. The research shows a high degree of commonality between the schools and even between independent jurists in their reasoning and in the evidence they use—especially the *hadith* and *athar* reports cited in their discourses. I argue that the legal significance of repentance in terms of its mitigating impact upon the three fixed punishments for brigandage, theft, and the accusation of fornication constitutes a case of casuistry under Islamic law and reveals a shared legal tradition that transcends both school affiliation and theological orientation.

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<sup>63</sup> Casuistry signifies that the validity of legal concepts is confined to certain boundaries; Baber Johansen, “Between Legal Concept and Social Praxis,” *Islamic Law and Society* 2.2 (1995): 135-156.

## CHAPTER 2: REPENTANCE AND BRIGANDAGE (HIRABA)

This chapter assesses the legal significance of repentance in terms of its mitigating impact upon the fixed punishment for brigandage under Islamic law. It attempts to answer three main questions. First, is the fixed punishment for brigandage cancelled by reason of repentance? Second, would repentant brigands be liable for the blood they shed and the property they stole? Third, is brigands' repentance subject to certain conditions that render it valid from a legal perspective? The chapter concludes with a discussion of the possibility of extending the legal force of repentance in the case of brigandage to other cases in Islamic criminal law, such as fornication and consumption of intoxicants. The discussion in this chapter is based on the assumption that the fixed punishment for brigandage mentioned in Q. 5:33 applies to Muslim brigands and "repentance" in Q. 5:34 means "repentance of brigandage"—as understood by the majority of jurists and exegetes.<sup>64</sup>

The analysis reveals that the majority of jurists maintains that pre-arrest repentance cancels the fixed punishment for brigandage, but does not absolve repentant brigands from liability for the blood they shed and the property they stole in case any of the victims demands justice (see Table 2.1 below). Moreover, these jurists stipulate that repentance becomes valid only when it takes place before capture and that the mitigating impact of pre-arrest repentance is peculiar to the case of brigandage and cannot be extended to other cases.

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<sup>64</sup> Al-Harrasi, 2:64-65; al-Jassas, *Ahkam al-Quran*, 4:52-54; al-Qurtubi, 7:431-435.



Table 2.1: Mitigating Impact of Pre-arrest Repentance upon the Fixed Penalties for Brigandage

Crime During Brigandage	Fixed Penalty for this Crime	Penalty Cancelled by Pre-arrest Repentance	Liability
Murder	Execution	Yes	Facing the laws of retaliation upon request from the victim's family, which means three possibilities: Execution, Blood Money, or Pardon
Robbery	Cutting off the right hand and left foot	Yes	Returning the stolen property to the rightful owner
Murder and Robbery	Execution then putting onto a cross	Yes	- Facing the laws of retaliation upon request from the victim's family - Returning the stolen property to the rightful owner
Frightening People	Exile	Yes	-

## 2.1 Definition of brigandage

Under Islamic law, brigandage (*hiraba*) refers to committing armed robbery and murder openly (*mujahara*), especially in areas where help is difficult to be sought.<sup>65</sup> The archetypal example of brigandage cited by jurists is highway robbery (*qat' al-tariq*).<sup>66</sup> As remarked by Wajis, the Malikis emphasize the element of terror in their definition of brigandage as “the act of terrorizing people for the purpose of robbery or other

<sup>65</sup> There is a considerable debate among jurists over the definition of brigandage. Extensive citation of these definitions is beyond the scope of this research. The definition I cited is a hybrid of several juristic definitions and is by no means comprehensive. Each jurist defines brigandage according to the custom (*urf*) of his time—as inferred from the exposition of al-Muzi'i; al-Muzi'i, 2:746. In *Mu'jam Lughat al-Fuqaha'*, brigandage (*hiraba*) is defined as fighting people with weapons; Muhammad Qal'aji, Hamid Qunaybi, and Qutb Sanu, *Mu'jam Lughat al-Fuqaha'* (Beirut: Dar al-Nafa'is, 1996) 156.

<sup>66</sup> Al-Muzi'i, 2:746.

purposes.”<sup>67</sup> Other examples of brigandage signify crimes where the element of force is evident, such as rape.<sup>68</sup> Abou El Fadl notes that “terrorism” may serve as a contemporary example of brigandage. In the same vein, Wajis finds that the Malikis’ definition of brigandage can be extended to cover terrorism.<sup>69</sup>

Brigandage is seen by jurists as a blatant challenge to the ruler’s authority and this is why almost all jurists perceive the fixed punishment for brigandage as God’s right despite the flagrant violations that brigands commit against people’s life and property. Nevertheless, brigandage is different from rebellion (*baghy*) as the latter refers to organized armed rebellion against the state in order to overthrow the ruling system.<sup>70</sup> These rebels believe that they have a justification to enter into this armed conflict.<sup>71</sup> Nonetheless, brigandage is an act committed by an armed group against unarmed civilians, especially in areas where it is difficult for the ruler to extend his authority (*sultan*). In general, the crime of brigandage is not perpetrated for political reasons.

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<sup>67</sup> Wajis, 63.

<sup>68</sup> Abou El Fadl, 251, 277; the Maliki jurist and judge Ibn Rushd (d. 520/1122) considers rape as a case of brigandage. Like Ibn Rushd, the Hanbali jurist Ibn Taymiyya (d. 728/1328) contends that rape constitutes brigandage. Azman Noor cites three scholarly trends towards the classification of rape: (1) a crime that deserves the enforcement of the fixed punishment for fornication; (2) a crime that entails the infliction of a discretionary punishment (*ta’zir*); and (3) a crime that requires the infliction of the fixed punishment for brigandage; Azman Noor, “Rape: A Problem of Crime Classification in Islamic Law,” *Arab Law Quarterly* 24 (2010): 417-438.

<sup>69</sup> Wajis, 164-166; Wajis also asserts that smuggling and drug trafficking can be perceived as brigandage; Wajis, 217.

<sup>70</sup> Abou El Fadl, 237-238; jurists also construe the term *baghy* as a reference to inter-Muslim clashes and they cite Q. 49:9 as evidence: “If two sections of the believers fight, reconcile them. If one of them transgresses against the other, fight the one that transgresses until it returns to God’s Command. If it returns, reconcile them with justice, and act equitably. Surely God loves those who act equitably.”

<sup>71</sup> Ibn Rushd believes that rebels who base their action on a plausible interpretation (*ta’wil sa’igh*) should not be regarded as brigands; Abou El Fadl, 254-255; Ibn al-‘Arabi, 4:153.

Another difference between brigandage and other crimes is that a brigand (*muharib*) is beyond the ruler's control, whereas other offenders are in almost all cases under the ruler's control. This is why an assailant (*sa'il*), for instance, is different from a brigand despite the similarity in the offences that both wrongdoers commit.<sup>72</sup>

## 2.2 Fixed punishment for brigandage

In Q. 5:33, God prescribes the fixed punishment for brigandage to be “execution, crucifixion,<sup>73</sup> cutting hands<sup>74</sup> and legs<sup>75</sup> alternately, or exile from the land.” The coordinating conjunction “or” is understood by some exegetes and jurists as giving the option to the ruler to enforce whichever punishment he deems proper to the situation. However, other jurists contend that the function of “or” (*aw*) is categorization (*taqsim*), which means that each punishment is prescribed for a specific violation. For instance, al-Shafi'i (d. 204/820)<sup>76</sup> stipulates that a brigand would be executed if he commits murder; would have his right hand and left foot cut off if he commits robbery; and would be

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<sup>72</sup> An assailant refers to the one who makes an attempt on somebody's life, property, or honor; Qal'aji et al., 240. Each of the similar crimes of brigandage (*hiraba*) and assault (*siyal*) has different legal consequences.

<sup>73</sup> As noted by Abou El Fadl, crucifixion (*salb*) does not mean nailing someone to a cross; Abou El Fadl, 74.

<sup>74</sup> Some scholars, such as the Imamis, state that only the fingers would be cut; Ibn al-Faras, 2:398.

<sup>75</sup> The majority of jurists believes that the Arabic word *arjul* (legs) in the verse refers to feet. However, some scholars, such as the Imamis, contend that half the feet should be cut and the heels should be spared; Ibn al-Faras, 2:398-399.

<sup>76</sup> Al-Shafi'i is an independent jurist, who lived in Mecca, Medina, Yemen, Baghdad and Egypt, and he is the eponym of the Shafi'i school. His name is Muhammad b. Idris b. al-'Abbas b. 'Uthman b. Shafi', and his *kunya* is Abu 'Abd Allah.

executed then put onto the cross<sup>77</sup> if he commits both murder and robbery. If a brigand does not commit murder or robbery, but helps his fellow brigands in their crimes, or frightens people, or just attends the crime scene, he would be disciplined and imprisoned.<sup>78</sup> Table 2.2 illustrates the fixed punishments for brigandage as described by al-Shafi‘i.<sup>79</sup>

Table 2.2: Fixed Penalties for Brigandage, according to al-Shafi‘i

Fixed Penalties for Brigandage	
Penalty	Offence during Brigandage
Execution	Murder
Cutting off the right hand and left foot	Robbery
Execution then putting onto a cross	Murder and robbery
Exile	Frightening people or Mere presence in the crime scene

“Exile from the land” in Q. 5:34 is construed in various ways by jurists and exegetes. I will focus on the juristic opinions that assign legal significance to repentance.<sup>80</sup> Al-Tabari (d. 310/923)<sup>81</sup> perceives “exile” as banishing the brigand from

<sup>77</sup> After the brigand is killed, he is put onto the cross for no more than three days, according to al-Shafi‘i. If a change happened to his body before the elapse of this period, he would be removed from the cross immediately; al-Mawardi, *al-Hawi*, 2:770-73.

<sup>78</sup> Al-Mawardi, *al-Hawi*, 2:751-759, 770, 773-4, 780, 787, 792.

<sup>79</sup> There is a considerable debate among jurists over the categorization of the prescribed penalties for brigandage. Extensive citation of these opinions is beyond the scope of this research.

<sup>80</sup> It should be noted that the scholarly opinions on this point are based on the assumption that a convict of brigandage was captured before declaring repentance. In other words, these contentions discuss the

his city to another one and imprisoning him there until his repentance becomes manifest.<sup>82</sup> Al-Fayruzabadi (d. 817/1414)<sup>83</sup> understands “exile” as the imprisonment of brigands “until their righteousness and repentance become manifest and apparent.”<sup>84</sup> Similarly, al-Tabarani (d. 360/970)<sup>85</sup> believes that the ruler has to put brigands in prison “until they repent or die.”<sup>86</sup> To the same effect, the Shafi‘is (in one opinion in the school) contend that there is no specific time for imprisonment and that a brigand is imprisoned until his repentance becomes manifest (*zuhur al-tawba*).<sup>87</sup> Jurists who understand “exile” as imprisonment usually cite the opinion of ‘Umar b. al-Khattab (d. 23/644): “I imprison him until I know that he repented and I do not banish him from a city to another city lest he should harm them.”<sup>88</sup> Nonetheless, Ibn Hazm (d. 456/1064)<sup>89</sup> and the Imamis<sup>90</sup>

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mitigating impact of post-arrest repentance upon the punishment of exile, which is an integral component of the fixed punishment for brigandage.

<sup>81</sup> Al-Tabari is an independent jurist, exegete, historian and scholar of *hadith*, who lived in Tabaristan, Basra, Kufa, Baghdad, Sham and Egypt. His name is Muhammad b. Jarir b. Yazid b. Kathir b. Ghalib, and his *kunya* is Abu Ja‘far. According to Wael Hallaq, al-Tabari was the eponym of an extinct legal school; Hallaq, 168, 215.

<sup>82</sup> Al-Tabari, *Jami‘ al-Bayan ‘an Ta‘wil Ay al-Qur’an*, <<http://www.altafsir.com/>>.

<sup>83</sup> Al-Fayruzabadi is a Shafi‘i linguist and exegete, who lived in Shiraz, Baghdad, Damascus, Jursalem, Cairo, India, and Yemen. His name is Muhammad b. Ya‘qub b. Muhammad b. Ibrahim al-Fayruzabadi, and his *laqab* is Majd al-Din. He is the author of *al-Qamus al-Muhit*.

<sup>84</sup> Al-Fayruzabadi, *Tafsir al-Qur’an*, <<http://www.altafsir.com/>>.

<sup>85</sup> Al-Tabarani is a scholar of *hadith*, who lived in Sham, Egypt, Yemen, Hejaz, Baghdad, Kufa, Basra, and Asbahan (Isfahan). His name is Sulayman b. Ahmad b. Ayyub b. Mutayr al-Tabarani, and his *kunya* is Abu al-Qasim. He is famous for his three *hadith* works whose title start with the word “*al-Mu‘jam*.”

<sup>86</sup> Al-Tabarani, *al-Tafsir al-Kabir*, <<http://www.altafsir.com/>>.

<sup>87</sup> Al-Mawardi, *al-Hawi*, 2:781-82.

<sup>88</sup> Exegetes report this *athar* on the authority of Makhul (d. 113/731); al-Qurtubi, 7:439.

<sup>89</sup> Ibn Hazm is a Zahiri jurist and legal theorist, who lived in al-Andalus. His name is ‘Ali b. Ahmad b. Sa‘id b. Hazm, and his *kunya* is Abu Muhammad.

postulate that “exile from the land” stands for banishing a brigand from a city to another one and so forth “until he repents.”<sup>91</sup>

These scholarly opinions that show that repentance brings the punishment of exile to an end prove that repentance has a mitigating impact upon the fixed punishment for brigandage. As can be seen from these contentions, several jurists and exegetes stress that the manifestation of a brigand’s repentance marks the end of his imprisonment. This condition demonstrates the fact that jurists want to check the sincerity of the brigand’s repentance. It logically follows that the brigand’s behavior would be monitored and evaluated during his stay in prison until it becomes evident that the brigand is sincere in his repentance. What attests to this logical conclusion is the opinion of Ibrahim al-Nakha’i (d. 96/715),<sup>92</sup> who argues that a brigand is imprisoned “until he behaves well” (*hatta yuhdith khayra*).<sup>93</sup> Likewise, Ibn ‘Atiyya (d. 546/1151)<sup>94</sup> states that an imprisoned brigand would be set free “if he repents and his condition is understood” (*idha tab wa fuhim haluh*).<sup>95</sup>

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<sup>90</sup> Al-Tabarsi clearly states in his *Majma’ al-Bayan* that the Imami jurists hold this opinion; al-Tabarsi, *Majma’ al-Bayan fi Tafsir al-Qur’an*, <<http://www.altafsir.com/>>; al-Tabarsi is an Imami exegete and jurist, who lived in Mashhad, Tabaristan, and Bayhaq (Iran). His name is al-Fadl b. al-Hasan b. al-Fadl al-Tabarsi, and his *kunya* is Abu ‘Ali. He died in 548/1154.

<sup>91</sup> Ibn Hazm, *al-Muhalla*, 12:99-100; al-Tabarsi, *Majma’ al-Bayan*.

<sup>92</sup> Ibrahim al-Nakha’i is an independent jurist, who lived in Kufa. His name is Ibrahim b. Yazid b. Qays b. al-Aswad, and his *kunya* is Abu ‘Imran.

<sup>93</sup> Al-Jassas, *Ahkam al-Qur’an*, 4:54.

<sup>94</sup> Ibn ‘Atiyya is a Maliki jurist and exegete, who lived in al-Andalus. His name is ‘Abd al-Haqq b. Ghalib b. ‘Abd al-Rahman b. Tammam b. ‘Atiyya, and his *kunya* is Abu Muhammad.

<sup>95</sup> Ibn ‘Atiyya, *al-Muharrar al-Wajiz fi Tafsir al-Kitab al-‘Aziz*, <<http://www.altafsir.com/>>.

### 2.3 Mitigating impact of repentance

This section attempts to answer a crucial question as to whether pre-arrest repentance cancels the fixed punishment for brigandage. Moreover, it analyzes the reasons and evidence cited by jurists and exegetes that justify the mitigating impact of pre-arrest repentance upon the fixed punishment for brigandage. The analysis shows that almost all jurists state that the fixed punishment for brigandage is cancelled by reason of pre-arrest repentance mainly because of the apparent meaning of Q. 5:33-34. It also demonstrates that some scholars draw an analogy between the fixed punishment for brigandage and that for theft, which has triggered a scholarly debate over the cancellation of the punishment of hand-cutting by reason of repentance in the case of brigandage. Furthermore, it explains why the mitigating impact of post-arrest repentance upon the punishment of exile does not lie in contradiction with the condition stipulated by almost all jurists that only pre-arrest repentance has a mitigating impact upon the punishments comprising the fixed penalty for brigandage.

After mentioning the fixed punishment for brigandage in Q. 5:33, God states an exception for brigands who repent before they are captured: “Except for those who repent before you gain control over them. Know that God is Ever-Forgiving, Ever-Merciful” (Q. 5:34). Acting upon the apparent meaning of the verse, almost all jurists and exegetes affirm that pre-arrest repentance cancels the fixed punishment for brigandage. This convergence of opinion transcends school affiliation across the eight legal schools of the

Hanafis, Malikis, Shafi'is, Hanbalis, Zahiris, Zaydis, Imamis, and Ibadis.<sup>96</sup> Therefore, a pre-arrest repentant brigand would not receive any of the four punishments that comprise the fixed penalty for brigandage: execution, cutting the right hand and left foot, putting onto a cross after execution, and exile.<sup>97</sup>

The classification of the penalty of hand-cutting in the fixed penalty for brigandage as a replication of the fixed punishment for theft rather than as peculiar to the fixed punishment for brigandage has caused a split within the Shafi'i school. Drawing analogy between the two cases of the fixed punishment for brigandage and that for theft has led Shafi'i jurists to advance opposing views concerning the mitigating impact of repentance upon the punishment of hand-cutting in the fixed penalty for brigandage. As there are Shafi'i jurists who believe that repentance does not cancel the punishment of hand-cutting in the fixed penalty for theft, drawing this analogy would mean that repentance does not cancel the punishment of hand-cutting in the fixed penalty for brigandage. The available sources do not refer to this debate in other schools of law.

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<sup>96</sup> Al-Jassas, *Ahkam al-Qur'an*, 4:59; Ibn al-Faras, 2:401, 403; al-Muzi'i, 2:750; Ibn al-Jawzi, *Zad al-Masir fi 'Ilm al-Tafsir*, <<http://www.altafsir.com/>>; Ibn Hubayra, 2:313; Ibn Hazm, *al-Muhalla*, 12:22; al-Thula'i, 3:108-109; al-Jaza'iri, 3:392; Atfiyyash, *Hamayan al-Zad ila Dar al-Ma'ad*, <<http://www.altafsir.com/>>; Ibn al-Qayyim, *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin*, ed. Mashhur Al Salman, vol. 3 (Saudi Arabia: Dar Ibn al-Jawzi, 2002) 308; Ibn Hubayra is a Hanbali jurist, who lived in Baghdad. His name is Yahya b. Muhammad b. Hubayra b. Sa'd, his *kunya* is Abu al-Muzaffar, and his *laqab* is 'Awn al-Din. He died in 560/1164; Atfiyyash is an Ibadi jurist and exegete, who lived in Algeria. His name is Amuhammad b. Yusuf b. 'Isa b. Salih b. 'Abd al-Rahman b. 'Isa b. Isma'il b. Muhammad b. 'Abd al-'Aziz b. Bakir. He is commonly known as "Atfiyyash," which figuratively denotes his family's generosity. He wrote several works on Islamic law, such as *Sharh Kitab al-Nayl wa al-Shifa'*. He died in 1332/1913; Muhammad Baba'ammī, Ibrahim Bakir, Mustafa Baju, and Mustafa Sharifi, *Mu'jam A'lam al-Ibadiyya*, 2<sup>nd</sup> ed., vol. 2 (Beirut: Dar al-Gharb al-Islami, 2000) 399-406.

<sup>97</sup> Al-Mawardi, *al-Hawi*, 2: 822; Ibn al-Jawzi, *Zad al-Masir*; Atfiyyash, *Hamayan al-Zad*; Ibn al-Jawzi is a Hanbali jurist, exegete and scholar of *hadith*, who lived in Baghdad. His name is 'Abd al-Rahman b. 'Ali b. Muhammad b. 'Ali, his *kunya* is Abu al-Faraj, and his *laqab* is Jamal al-Din. He died in 597/1200.



In his *Tafsir al-Qur'an al-'Azim*, Ibn Kathir (d. 774/1373)<sup>98</sup> says that there are two scholarly opinions on the cancellation of hand-cutting in the fixed punishment for brigandage by reason of pre-arrest repentance and suggests that the hand of repentant brigands should not be cut off.<sup>99</sup> He bases his opinion on the apparent meaning of the verse and on the practice of *sahaba* (the Prophet's Companions). He cites three historical incidents during the time of *sahaba* in which repentant brigands were granted full legal pardon by the authorities.<sup>100</sup> Similarly, Nizam al-Din al-Naysaburi (d. 728/1327)<sup>101</sup> adopts the same opinion, but bases his opinion on logic. He says that hand-cutting is an integral component of the fixed punishment for brigandage; thus, if the whole fixed punishment is not enforced, neither of its components would be enforced.<sup>102</sup>

The presentation of this intra-Shafi'i debate by al-Mawardi (d. 450/1058)<sup>103</sup> revolves around the question whether the punishment of hand-cutting is peculiar to brigandage.<sup>104</sup> He mentions two scholarly opinions within the Shafi'i school on this issue. First, hand-cutting is not peculiar to brigandage because it is the same punishment for

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<sup>98</sup> Ibn Kathir is a Shafi'i exegete and scholar of *hadith*, who lived in Damascus. His name is Isma'il b. 'Umar b. Kathir, his *kunya* is Abu al-Fida', and his *laqab* is 'Imad al-Din.

<sup>99</sup> Fakhr al-Din al-Razi supports this opinion; Fakhr al-Din al-Razi, *al-Tafsir al-Kabir*, <<http://www.altafsir.com/>>. Ibn Hubayra also mentions this intra-Shafi'i debate, 2:313.

<sup>100</sup> These incidents will be mentioned in full under 2.4.

<sup>101</sup> Nizam al-Din al-Naysaburi is a Shafi'i exegete and linguist, who lived in Nishapur and Qom. His name is al-Hasan b. Muhammad b. Husayn al-Naysaburi, and his *laqab* is Nizam al-Din.

<sup>102</sup> Al-Naysaburi, *Ghara'ib al-Qur'an wa Ragha'ib al-Furqan*, <<http://www.altafsir.com/>>.

<sup>103</sup> Al-Mawardi is a Shafi'i jurist, who lived in Basra and Baghdad. His name is 'Ali b. Muhammad b. Habib al-Mawardi, and his *kunya* is Abu al-Hasan. He is famous for his *al-Hawi al-Kabir*, a multi-volume book on Shafi'i law.

<sup>104</sup> Al-Mawardi, *al-Hawi*, 2:822-23.

theft, which entails the enforcement of repentance laws in the fixed punishment for theft that—in one trend in the school—does not recognize the mitigating impact of repentance. Second, hand-cutting is peculiar to brigandage because it is legislated as a punishment for stealing property openly, whereas the hand is cut in a non-brigandage situation because of stealing property covertly. This contention entails the enforcement of repentance laws in the fixed punishment for brigandage that recognizes the mitigating impact of repentance. Abu Ishaq al-Marwazi (d. 340/951)<sup>105</sup> espouses the first opinion, whereas Abu ‘Ali b. Abi Hurayra (d. 345/956)<sup>106</sup> adopts the second.

Table 2.3: Mitigating Impact of Pre-arrest Repentance upon the Penalty of Alternate Cutting of Hands and Feet in the Fixed Punishment for Brigandage

Fixed Penalty for Brigandage	Cancelled by Pre-arrest Repentance	Consensus
Cutting off the Hand	Yes	No
Cutting off the Foot	Yes	Yes

Under section 2.2 above, I have discussed the meaning of exile and demonstrated that post-arrest repentance terminates the punishment of exile. This post-arrest cancellation of punishment might seem inconsistent with the jurists’ virtual unanimity that post-arrest repentance does not have a mitigating impact upon the fixed punishment for brigandage.<sup>107</sup> Nevertheless, there is no inconsistency because most of the jurists

<sup>105</sup> Abu Ishaq al-Marwazi is a Shafi‘i jurist, who lived in Baghdad and Egypt. His name is Ibrahim b. Ahmad, and his *kunya* is Abu Ishaq; al-Mawardi, *al-Hawi*, 1:308.

<sup>106</sup> Abu ‘Ali b. Abi Hurayra is a Shafi‘i jurist, who lived in Baghdad. His name is al-Hasan b. al-Husayn, and his *kunya* is Abu ‘Ali; al-Mawardi, *al-Hawi*, 1:120.

perceive the punishment of exile as a form of non-fixed disciplinary punishment (*ta'zir*) rather than a fixed penalty (*hadd*).<sup>108</sup> This is why most scholars do not fix a period of time for imprisonment and make righteousness and the manifestation of repentance a marker for the elapse of imprisonment. Jurists who perceive exile as a fixed punishment assign a period of time for imprisonment that cannot be terminated by repentance. For instance, Abu 'Abd Allah al-Zubayri (d. 317/929)<sup>109</sup> maintains that imprisonment should last for six months, whereas Abu al-'Abbas Ibn Surayj (d. 306/918)<sup>110</sup> estimates this period to be one year.<sup>111</sup> The Zaydi jurist al-Nasir al-Utrush al-Hasan b. 'Ali (d. 304/917)<sup>112</sup> maintains that the ruler has the choice to either banish or imprison the brigand for one year.<sup>113</sup>

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<sup>107</sup> It should be noted that there is a minor trend within the Shafi'is and Imamis that cancels the fixed penalty for brigandage by reason of post-arrest repentance. The Imami jurist Ahmad al-Jaza'iri states the possibility that the ruler in this case would have the option to either punish or pardon the repentant brigand. He draws an analogy between this situation and the impact of repentance upon hand-cutting in the case of theft when the convict repents after the crime is established before the judge. In this case, the ruler has the choice to either punish or pardon the repentant thief; al-Jaza'iri, 3:384-385, 392; Muhammad b. al-Qasim, 253.

<sup>108</sup> Al-Mawardi, *al-Hawi*, 2:780-782.

<sup>109</sup> Abu 'Abd Allah al-Zubayri is a Shafi'i jurist, who lived in Basra. His name is al-Zubayr b. Ahmad b. Sulayman.

<sup>110</sup> Abu al-'Abbas Ibn Surayj is a Shafi'i jurist, who lived in Baghdad. His name is Ahmad b. 'Umar b. Surayj; al-Mawardi, *al-Hawi*, 1:120-121.

<sup>111</sup> Al-Mawardi, *al-Hawi*, 2:782.

<sup>112</sup> Al-Nasir al-Utrush al-Hasan b. 'Ali is a Zaydi jurist; "Zaydiyya," *Encyclopaedia of Islam*, CD-ROM (Leiden: Brill).

<sup>113</sup> Al-Najri, 1:243.

Table 2.4: Mitigating Impact of Repentance upon the Fixed Penalties for Brigandage

Pre-arrest Repentance			Post-arrest Repentance		
Brigandage Penalty	Cancelled by Pre-arrest Repentance	Consensus	Brigandage Penalty	Cancelled by Post-arrest Repentance	Consensus
Execution	Yes	Yes	Execution	No	Yes
Cutting	the right hand	Yes	Cutting the right hand and left foot	No	Yes
	and left foot	Yes			
Crucifixion	Yes	Yes	Crucifixion	No	Yes
Exile	Yes	Yes	Exile	Yes	No

Figure 2.1: Mitigating Impact of Pre-arrest Repentance upon the Fixed Penalties for Brigandage

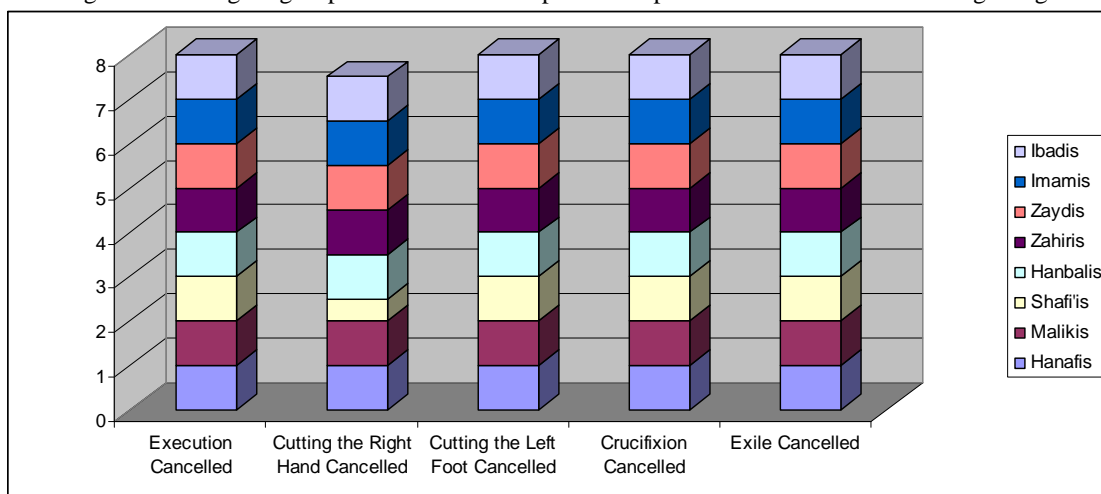


Table 2.5: Mitigating Impact of Pre-arrest Repentance upon the Fixed Penalties for Brigandage

	Execution Cancelled	Cutting off		Crucifixion Cancelled	Exile Cancelled
		the Right Hand Cancelled	and Left Foot Cancelled		
Hanafis	Yes	Yes	Yes	Yes	Yes
Malikis	Yes	Yes	Yes	Yes	Yes
Shafi'is	Yes	Yes	No	Yes	Yes
Hanbalis	Yes	Yes	Yes	Yes	Yes
Zahiris	Yes	Yes	Yes	Yes	Yes
Zaydis	Yes	Yes	Yes	Yes	Yes
Imamis	Yes	Yes	Yes	Yes	Yes
Ibadis	Yes	Yes	Yes	Yes	Yes

### 2.3.1 Evidence

It is worth noting that the reasons and evidence that jurists and exegetes cite to justify the cancellation of the fixed punishment for brigandage due to pre-arrest repentance are almost identical across the eight legal schools. These reasons focus primarily on the syntactic structure of exception in Q. 5:34 and the potential sincerity of pre-arrest repentance by brigands. The lexical aspect of Q. 5:34—though cited by some scholars—does not enjoy the same prominence that the former two reasons have. The analysis shows that the lexical aspect of Q. 5:34 represented in God's statement "Before

you gain control over them” is the underlying factor that has led jurists and exegetes to achieve unanimity on the mitigating impact of pre-arrest repentance upon the fixed punishment for brigandage.<sup>114</sup>

In Q. 5:33-34, God says: “That is a disgrace for them in this world, and in the Hereafter they will have a tremendous torment—except for those who repent before you gain control over them.” Almost all jurists and exegetes deduce from Q. 5:34 that a brigand would not face the fixed punishment for brigandage if he repents before arrest.<sup>115</sup> By contrast, he would be punished if he repents after arrest. Jurists, exegetes and grammarians perceive this contrastive implication because Q. 5:34 is based on the syntactic structure of exception (*istithna*). The function of this structure in the Arabic language is to single out an item from a larger entity, giving it a ruling that is opposite to that of the larger entity. Therefore, if the larger entity (*mustathna minhu*) is in the affirmative, the singled out item (*mustathna*) would be in the negative, and vice versa.<sup>116</sup> The contrastive function of exception is effected by the use of the particle *illa* (except) and similar particles, such as *siwa* (apart from).

Q. 5:33-34 partly reads: “That is a disgrace for them in this world, and in the Hereafter they will have a tremendous torment—except for those who repent before you

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<sup>114</sup> I have assigned more space for the discussion of the significance of the structure of exception in Q. 5:34 as this theme is recurrent in the three cases analyzed by this thesis—namely the fixed punishments for brigandage, theft, and the accusation of fornication.

<sup>115</sup> Almost all scholars use the Qur’anic phraseology “before control is gained over him” (*min qabl al-qudra ‘alayh*). For the sake of brevity, I use the phrase “before arrest” to convey this meaning.

<sup>116</sup> Abu Hanifa, unlike al-Shafi’i, does not rule that exception from an entity in the negative would render the singled out item in the affirmative; Abu al-Thana’ al-Asbahani, *Bayan al-Mukhtasar*, ed. ‘Ali Jum’a, vol. 2 (Cairo: Dar al-Salam, 2004) 560. Abu al-Thana’ al-Asbahani is a Shafi’i jurist, who lived in Asbahan (Iran), Damascus, and Egypt. His name is Mahmud b. ‘Abd al-Rahman b. Ahmad b. Muhammad al-Asbahani, and his *kunya* is Abu al-Thana’. He died in 749/1348.

gain control over them.” The exceptive clause “except for those who repent” is preceded by two sentences coordinated by “and” (*wa*). In the first sentence “That is a disgrace for them in this world,” this disgrace refers to the fixed penalty for brigandage in this world. In the second sentence “In the Hereafter they will have a tremendous torment,” this torment refers to the punishment for brigandage in the Hereafter. If the exceptive clause refers to the immediate preceding sentence, it would follow that pre-arrest repentant brigands would not face the punishment for brigandage in the Hereafter, but would face the fixed punishment for brigandage in this world. However, if the exceptive clause refers to both sentences, it would follow that pre-arrest repentant brigands would face neither the punishment in the Hereafter nor the fixed penalty in this world.

Scholars of Arabic syntax and legal theory (*usul al-fiqh*) debate the anaphoric reference of an exceptive clause when preceded by a sequence of coordinated sentences. They express three main opinions: first, the exceptive clause would refer to all of the preceding coordinated sentences; second, it would refer to the immediate preceding sentence only; and third, the reference would be established on a case-by-case basis.<sup>117</sup> According to the third opinion, if there is a contextual indication (*qarina*) that shows that the last sentence is not related to the other preceding sentences, the exceptive clause would refer anaphorically to the last sentence only. However, if there is a contextual

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<sup>117</sup> The first opinion is mainly represented by the Shafi‘is, whereas the second opinion is mainly represented by the Hanafis. Abu al-Thana’ al-Asbahani and al-Qurtubi espouse the third; Abu al-Thana’ al-Asbahani, 2:554-555, 564-565; al-Qurtubi, 15:136; al-Zarkashi, *al-Bahr al-Muhit*, 8 vols. (Dar al-Kutbi, 1994), <<http://www.islamweb.net/newlibrary/>>; al-Zarkashi is a Shafi‘i jurist and legal theorist, who lived in Egypt, Aleppo and Damascus. His name is Muhammad b. Bahadir b. ‘Abd Allah al-Zarkashi, his *kunya* is Abu ‘Abd Allah, and his *laqab* is Badr al-Din. He died in 794/1391.

indication that shows that the last sentence is related to the other preceding sentences, the exceptive clause would refer to all of the sentences.

Al-Jassas supports the Hanafi position that the exceptive clause would refer only to the immediate preceding sentence in a sequence of coordinated sentences. Nevertheless, he mentions that a lexical indication (*dalala fi al-lafz*) makes him rule otherwise in this particular verse.<sup>118</sup> This indication is God's statement "before you gain control over them." The mitigating impact of repentance upon the punishment in the Hereafter is not subject to the condition that repentance takes place before arrest. Therefore, this conditional repentance, al-Jassas argues, is meant to cancel the fixed punishment of brigandage in this world. Were it not for this lexical indication, al-Jassas asserts, the exceptive clause would refer only to the preceding sentence and thus would not rid pre-arrest repentant brigands from facing the fixed punishment for brigandage.<sup>119</sup>

Although Ibn 'Ashur (d. 1393/1972)<sup>120</sup> identifies the same lexical indication, he puts more emphasis on the syntactic structure of exception as contrasted with other syntactic structures. Ibn 'Ashur argues that it is the exceptive particle that signifies the cancellation of the fixed punishment for brigandage in case the offender repents before arrest.<sup>121</sup> Were it not for the structure of exception, he asserts, the verse would not signify

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<sup>118</sup> Al-Jassas, *al-Fusul fi Usul al-Fiqh*, 2<sup>nd</sup> ed., ed. 'Ujayl al-Nashami, vol. 1 (Kuwait: Wazarat al-Awqaf, 1994) 270-71.

<sup>119</sup> This strong emphasis that al-Jassas puts on the lexical aspect of Q. 5:34 is lacking in his exposition on the same verse in his *Ahkam al-Quran*. In the latter book, he lays particular emphasis on the significance of the syntactic structure of exception in Q. 5:34 and considers it the reason why the fixed punishment for brigandage is cancelled by reason of pre-arrest repentance; al-Jassas, *al-Fusul*, 1:270-71.

<sup>120</sup> Ibn 'Ashur is a Maliki jurist and exegete, who lived in Tunisia. His name is Muhammad al-Tahir b. 'Ashur.



the cancellation of the fixed penalty. He believes that if Q. 5:34 hypothetically read “if they repent” instead of “except for those who repent,” the verse would only signify the cancellation of the punishment for brigandage in the Hereafter.<sup>122</sup> The author implies that other syntactic structures, including the structure of a conditional sentence, does not have the function of the structure of exception, which is excluding an item from a larger entity. God’s statement “Except for those who repent” in Q. 5:34 excludes repentant brigands from the larger entity of brigands who deserve the fixed punishment for brigandage. However, the hypothetical “if they repent” does not exclude repentant brigands from those deserving the fixed punishment for brigandage; it merely states that God would forgive repentant brigands, which does not necessarily mean that repentant brigands would not be punished in this world.

In contrast to Ibn ‘Ashur’s contention, it seems that God’s statement “before you gain control over them” has led exegetes and jurists to unanimously agree that pre-arrest repentance has a mitigating impact upon the fixed punishment for brigandage. If the structure of exception is the underlying factor behind this unanimity, it would have led jurists to achieve the same unanimity in the case of the mitigating impact of repentance upon the fixed punishment for *qadhf* where Q. 24:5 is phrased as a structure of exception. Notwithstanding the virtually identical syntactic structure between Q. 5:34 and Q. 24:5, scholars have not declared that flogging in the case of *qadhf* is cancelled by reason of repentance.<sup>123</sup> The main difference between the two verses is God’s statement “before

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<sup>121</sup> Ibn ‘Ashur, *al-Tahrir wa al-Tanwir*, <<http://www.altafsir.com/>>.

<sup>122</sup> Ibn ‘Ashur, *al-Tahrir*.

you gain control over them.” Owing to the lack of such a statement in Q. 24:5, jurists and exegetes do not assign legal significance to the concept of repentance in terms of its mitigating impact on the punishment of flogging in the fixed penalty for *qadhf*.

This is why I argue that the scholarly consensus over the legal significance of repentance in the case of the fixed punishment for brigandage would not exist if Q. 5:34 hypothetically read, “Except for those who repent. Know that God is Ever-Forgiving, Ever-Merciful” instead of “Except for those who repent before you gain control over them. Know that God is Ever-Forgiving, Ever-Merciful.” God’s statement “before you gain control over them” has prompted jurists to appreciate the legal significance of repentance in the case of the fixed punishment for brigandage and to perceive repentance as a matter between a person and the state rather than as a matter between a person and his Lord. Moreover, I argue that there would be a scholarly consensus over the mitigating impact of pre-arrest repentance in the case of the fixed punishment for brigandage even if Q. 5:34 assumes the structure of a conditional sentence and hypothetically read, “If they repent before you gain control over them, know that God is Ever-Forgiving, Ever-Merciful.”

God Almighty forgives sins when the offender repents to Him, regardless of whether he repents before the authorities arrest him and regardless of whether this sin deserves a fixed punishment in this world. The impact of this forgiveness is typically perceived in terms of being relieved from punishment in the Hereafter, unless there is evidence that signifies relieving from punishment in this world. The condition “before

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<sup>123</sup> See section 4.3.

you gain control over them” signifies that this conditional repentance cancels the worldly punishment, regardless of whether Q. 5:34 is phrased as an exceptive clause or as a conditional sentence. It is true that the structure of exception is stronger than the structure of a conditional sentence in terms of exclusion and contrastive implication, yet the function of exclusion in the structure of exception is not the underlying factor that prompts exegetes to recognize the mitigating impact of pre-arrest repentance upon the fixed punishment for brigandage. It is the lexical aspect of the verse of brigandage that leads jurists to reach such conclusions.

The second major reason for the eight schools’ support of the view that pre-arrest repentance cancels the fixed punishment for brigandage is the potential sincerity of pre-arrest repentance by brigands. Jurists use contrast—as explained by al-Qurtubi (d. 671/1272)—to highlight the importance of this reason.<sup>124</sup> If a brigand declares his repentance after his capture, it might be suspected that he declared his repentance in order to avoid the punishment.<sup>125</sup> Al-Qurtubi likens the brigands’ post-arrest repentance to the invalid repentance by previous communities who declared repentance after “they experienced God’s punishment”<sup>126</sup> and to the invalid repentance that one declares “when

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<sup>124</sup> Al-Qurtubi, 7:447.

<sup>125</sup> Ibn Hajar al-Haytami and Ahmad al-Jaza’iri also have the same opinion; Ibn Hajar al-Haytami, *Tuhfat al-Minhaj bi-Sharh al-Minhaj*, vol. 4 (Beirut: Dar al-Kutub al-‘Ilmiyya, 2001) 153; al-Jaza’iri, 3:392. Ibn Hajar is a Shafi’i jurist, who lived in Egypt and Mecca. His name is Ahmad b. Muhammad b. Muhammad b. ‘Ali b. Hajar al-Haytami, and his *kunya* is Abu al-‘Abbas. He died in 973/1565.

<sup>126</sup> Describing the situation of previous communities who did not believe in God and mocked their prophets, God says: “When they saw Our punishment, they said: ‘We believe in God alone, and we disbelieve in whatever we used to be associating with Him.’ Yet, their belief did not benefit them once they saw Our punishment” (Q. 40:84-5).

his soul is about to leave his body” (*hal al-gharghara*).<sup>127</sup> Conversely, he likens the brigands’ pre-arrest repentance to the valid repentance by the people of Prophet Jonah (Yunus) who repented before seeing the sign of God’s punishment.<sup>128</sup>

#### 2.4 Liability of repentant convicts

This section answers a crucial question as to whether pre-arrest repentant convicts of brigandage would be liable for the blood they shed and the property they stole during brigandage. Moreover, it analyzes the reasons and evidence cited by jurists and exegetes that justify the liability of repentant brigands. It also provides the counterarguments by other scholars who believe that pre-arrest repentance totally absolves a brigand from any liability whatsoever. Notwithstanding their virtual unanimity on the mitigating impact of pre-arrest repentance upon the fixed punishment for brigandage, scholars are divided concerning the liability of pre-arrest repentant brigands. The analysis shows that the majority of jurists maintains that pre-arrest repentant brigands would not face the fixed punishment for brigandage, but they would be liable for the blood they shed and the money they stole in case the victim or his family demands justice.

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<sup>127</sup> According to al-Muzi‘i, in this state the pharaoh during the time of Prophet Moses declared his belief in God. This is why “his belief did not benefit him”; al-Muzi‘i, 1:580.

<sup>128</sup> When Jonah found no response from his people, he warned them that they would receive God’s punishment in three days, and he left the town. When his people did not find him the next day, they repented before seeing the sign of God’s punishment. According to al-Qurtubi, God’s statement “We relieved them of the punishment of disgrace” in Q. 10:98 refers to the punishment that Jonah warned his people about. Q. 10:98 reads, “If only a single town had believed and benefited from its belief! Only Jonah’s people did so, and when they believed, We relieved them of the punishment of disgrace in the life of this world”; al-Qurtubi, 11:55-56. The translation of Q. 10:98 is the rendition of Abdel Haleem; M. Abdel Haleem, *The Quran*, (New York: Oxford University Press, 2005) 135.

Table 2.6: Liability of Pre-arrest Repentant Brigands for Murder and Robbery

Crime During Brigandage	Fixed Penalty for this Crime	Penalty Cancelled by Pre-arrest Repentance	Liability
Murder	Execution	Yes	Facing the laws of retaliation upon request from the victim's family, which means three possibilities: Execution, Blood Money, or Pardon
Robbery	Cutting off the right hand and left foot	Yes	Returning the stolen property to the rightful owner
Murder and Robbery	Execution then putting onto cross	Yes	-Facing the laws of retaliation upon request from the victim's family -Returning the stolen property to the rightful owner

Jurists and exegetes express two main opinions concerning the liability of pre-arrest repentant brigands for the blood they shed and the property they stole during brigandage. The proponents of the first opinion admit such liability and thus the family of the murdered person (*wali al-damm*) would be given the right to exercise one of the three options in the laws of retaliation (*qisas*)—namely executing or pardoning the murderer or obtaining blood money (*diya*) from him. If the family requests that the murderer be executed, he would be executed. If they request blood money, he would have to pay it to them. If they declare that they pardon the brigand for free, he would have no liability for his crime of murder that he committed during brigandage.<sup>129</sup> As for the stolen property,

<sup>129</sup> The phrase “during brigandage” is reiterated because of its significance in this discourse. If a person had committed murder or robbery before committing brigandage, and then he repented of brigandage before capture, his pre-arrest repentance would cancel the fixed punishment for brigandage, but would not cancel the crimes that took place before brigandage. To this effect, Rabi’a (d. 136/754) formulates his opinion on the mitigating impact of repentance upon the fixed punishment for brigandage; al-Tabari, *Jami’ al-Bayan*.

the victim of robbery would have the right to reclaim his stolen item. Upon his request, the brigands would have to return the stolen item to him and they would have to return its equivalent if the item no longer remains in their possession.

The advocates of the second opinion deny the liability of pre-arrest repentant brigands for the blood they shed and the property they stole during brigandage. Therefore, repentant brigands in this case would not face the laws of retaliation and they would not be obliged by law to return the stolen property to its rightful owner. As far as the eight schools are concerned, the second opinion is primarily espoused by the Ibadis, whereas the first opinion is mainly adopted by the Hanafis, Shafi'is, Hanbalis, and Imamis. Within the literature of the Malikis and Zaydis, the two opinions are advocated. I could not identify the opinion of the Zahiris because Ibn Hazm does not specifically discuss this issue.<sup>130</sup> The opinions of the seven schools are illustrated in Table 2.7 and Figure 2.2 below.

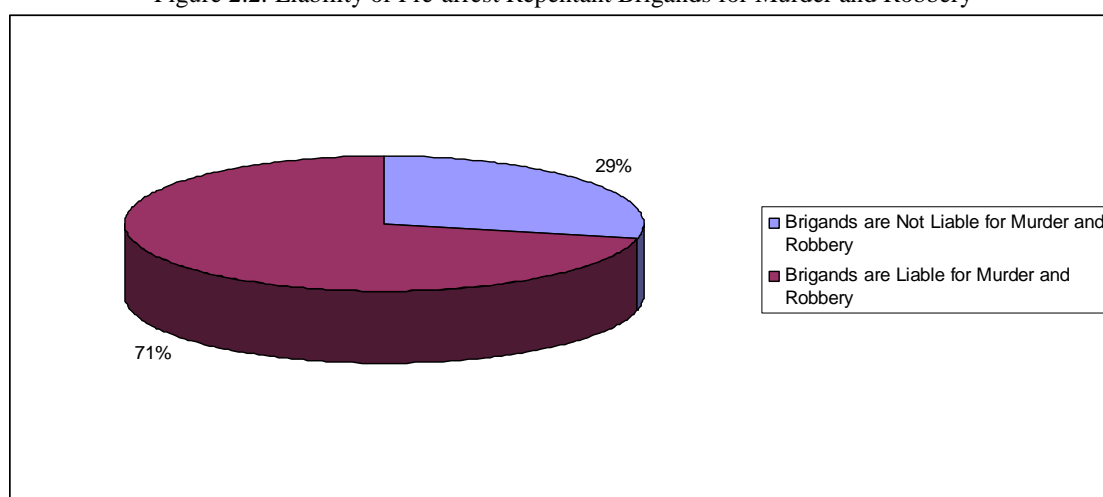
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<sup>130</sup> Ibn Hazm just observes that pre-arrest repentance cancels the fixed punishment for brigandage. His main argument is that repentance does not cancel any fixed punishment with the exception of the fixed punishment for brigandage; Ibn Hazm, *al-Muhalla*, 12:22, 97-100, 272-299.

Table 2.7: Liability of Pre-arrest Repentant Brigands for Murder and Robbery

	Repentant Brigands have Liability for Murder and Robbery	
Hanafis	Yes	
Malikis	Yes (in one opinion)	No (in one opinion)
Shafi'is	Yes	
Hanbalis	Yes	
Zahiris	?	
Zaydis	Yes (in one opinion)	No (in one opinion)
Imamis	Yes	
Ibadis	No	

Figure 2.2: Liability of Pre-arrest Repentant Brigands for Murder and Robbery



At the individual level, scholars who support the first opinion (Group A) as well as those who adopt the second opinion (Group B) are mentioned in Table 2.8 and arranged in chronological order.

Table 2.8: Liability of Pre-arrest Repentant Brigands for Murder and Robbery

Group A (Repentant Brigands are Liable)		Group B (Repentant Brigands are Not Liable)	
Scholar	Death Date	Scholar	Death Date
Zayd b. 'Ali	122/740	Al-Suddi	127/744
Abu Hanifa	150/767	Al-Awza'i	157/773
Al-Shafi'i	204/820	Al-Layth b. Sa'd	175/791
Ahmad b. Hanbal	241/855	'Amrus	283/896
Abu Thawr	246/860	Al-Hadi Yahya b. al-Husayn	298/911
Al-Nasir al-Utrush al-Hasan b. 'Ali	304/917	Al-Samin al-Halabi	756/1355
Al-Jassas	370/980	Muhammad b. al-Qasim	1067/1656
Ilkiya al-Harrasi	405/1014	Al-Shawkani	1250/1834
Al-Mu'ayyad al-Kabir Ahmad b. al-Husayn	412/1021	Siddiq al-Qannuji	1307/1890
Al-Tusi	460/1067		
Al-Zamakhshari	538/1143		
Ibn 'Atiyya	546/1151		
Sa'id al-Rawandi	573/1177		
Fakhr al-Din al-Razi	606/1209		
Al-Qurtubi	671/1272		
Nizam al-Din al-Naysaburi	728/1327		
Muhammad al-Muzi'i	825/1422		
Miqdad al-Suyuri	826/1422		
'Abd al-Rahman al-Tha'alibi	875/1470		
Ibn 'Adil	880/1475		
Al-Biq'a'i	885/1480		
Al-Suyuti	911/1505		
Al-'Ulaymi	928/1521		
Al-Khatib al-Shirbini	977/1569		
Abu al-Su'ud	982/1574		
Isma'il Haqqi	1127/1715		
Ahmad al-Jaza'iri	1150 /1737		
Al-Alusi	1270/1854		
Ibn 'Ashur	1393/1972		
Al-Amin al-Shinqiti	1393/1973		

The scholarly opinions over the liability of pre-arrest repentant brigands for murder and robbery that they committed during brigandage are mentioned here again on



the levels of both schools and individual jurists in order to demonstrate the sources that cite these scholars. The first opinion that recognizes the liability of repentant brigands is espoused by Abu Hanifa,<sup>131</sup> al-Shafi'i,<sup>132</sup> Ahmad b. Hanbal;<sup>133</sup> al-Jassas,<sup>134</sup> al-Zamakhshari,<sup>135</sup> Abu al-Su'ud,<sup>136</sup> Isma'il Haqqi,<sup>137</sup> al-Alusi,<sup>138</sup> 'Abd al-Rahman al-

<sup>131</sup> Ibn 'Atiyya, *al-Muharrar*; Abu Hayyan, *al-Bahr al-Muhit*, <<http://www.altafsir.com/>>; al-Mawardi, *al-Hawi*, 2:817; Ibn Hubayra, 2: 313; al-Najri, 1:243; Abu Hayyan is a jurist and exegete, who lived in al-Andalus and Egypt. In al-Andalus, he was affiliated to the Malikis and Zahirs, but he followed the Shafi'i school when he came to Egypt. His name is Muhammad b. Yusuf b. 'Ali b. Yusuf b. Hayyan, and his *kunya* is Abu Hayyan. He died in 745/1344.

<sup>132</sup> Al-Mawardi, *al-Hawi*, 2:817; al-Baghawi, *Ma'alim al-Tanzil*, <<http://www.altafsir.com/>>; Abu Hayyan, *al-Bahr*; al-Tabari, *Jami' al-Bayan*; Ibn 'Atiyya, *al-Muharrar*; al-Mahalli and al-Suyuti, *Tafsir al-Jalalayn*, <<http://www.altafsir.com/>>; Ibn al-Jawzi, *Zad al-Masir*; Ibn al-'Arabi, 2:101; Abu Ishaq al-Tha'labi, *al-Kashf wa al-Bayan*, <<http://www.altafsir.com/>>; Ibn Hubayra, 2: 313; al-Tusi, *al-Tibyan al-Jami' li-'Ulum al-Qur'an*, <<http://www.altafsir.com/>>; Atfiyyash, *Hamayan al-Zad*; al-Najri, 1:244; al-Jaza'iri, 3:392; al-Baghawi is a Shafi'i jurist and scholar of *hadith*, who lived in Khorasan. His name is al-Husayn b. Mas'ud b. Muhammad al-Baghawi, and his *kunya* is Abu Muhammad. He died in 516/1122. Al-Mahalli is a Shafi'i jurist and exegete, who lived in Egypt. His name is Muhammad b. Ahmad b. Muhammad b. Ibrahim al-Mahalli, his *kunya* is Abu 'Abd Allah, and his *laqab* is Jalal al-Din. He died in 864/1459. Al-Tha'labi is a Shafi'i exegete and linguist, who lived in Nishapur. His name is Ahmad b. Muhammad b. Ibrahim al-Tha'labi and his *kunya* is Abu Ishaq. He died in 427/1035. Al-Tusi is an Imami jurist, legal theorist and scholar of *hadith*, who lived in Khorasan and Baghdad. His name is Muhammad b. al-Hasan b. 'Ali al-Tusi, and his *kunya* is Abu Ja'far. He is referred to as the head of the Imamis (*shaykh al-Imamiyya*). He died in 460/1067; al-Hasan b. al-Mutahhar, *Khulasat al-Aqwal fi Ma'rifat al-Rijal*, ed. Jawad al-Qayyumi (Qom: Mu'assasat Nashr al-Faqaha, 1996) 249-250.

<sup>133</sup> Ahmad b. Hanbal is an independent jurist and scholar of *hadith*, who lived in Baghdad, and he is the eponym of the Hanbali school. He died in 241/855; al-Muzi'i, 2:750-751; Ibn Hubayra, 2: 313.

<sup>134</sup> Al-Jassas, *Ahkam al-Qur'an*, 4:60.

<sup>135</sup> Al-Zamakhshari is a linguist and exegete affiliated with the Mu'tazili theological school and the Hanafi legal school. He lived in Khwarizm, Bukhara and Khorasan. His name is Mahmud b. 'Umar al-Zamakhshari, his *kunya* is Abu al-Qasim, and his *laqab* is Jar Allah. He died in 538/1143; al-Zamakhshari, *al-Kashshaf 'an Haqa'iq Ghawamid al-Tanzil wa 'Uyun al-Aqawil fi Wujuh al-Ta'wil*, <<http://www.altafsir.com/>>.

<sup>136</sup> Abu al-Su'ud is a Hanafi exegete and linguist, who lived in Constantinople. His name is Muhammad b. Mustafa al-'Imadi, and his *kunya* is Abu al-Su'ud. He died in 982/1574; Abu al-Su'ud, *Irshad al-'Aql al-Salim ila Mazaya al-Kitab al-Karim*, <<http://www.altafsir.com/>>.

<sup>137</sup> Isma'il Haqqi is a Hanafi exegete, who lived in Istanbul, Bursa, and Constantinople. His name is Isma'il Haqqi b. Mustafa, and his *kunya* is Abu al-Fida'. He died in 1127/1715; Isma'il Haqqi, *Ruh al-Bayan fi Tafsir al-Qur'an*, <<http://www.altafsir.com/>>.

Tha'alibi,<sup>139</sup> Ibn 'Atiyya,<sup>140</sup> al-Qurtubi,<sup>141</sup> Ibn 'Ashur,<sup>142</sup> al-Amin al-Shinqiti,<sup>143</sup> Abu Thawr,<sup>144</sup> Ilkiya al-Harrasi,<sup>145</sup> Fakhr al-Din al-Razi,<sup>146</sup> Nizam al-Din al-Naysaburi,<sup>147</sup> Muhammad al-Muzi'i,<sup>148</sup> al-Biqa'i,<sup>149</sup> al-Suyuti,<sup>150</sup> al-Khatib al-Shirbini;<sup>151</sup> Ibn 'Adil,<sup>152</sup>

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<sup>138</sup> Al-Alusi is a Hanafi jurist and exegete, who lived in Baghdad. His name is Mahmud b. 'Abd Allah al-Husayni al-Alusi, his *kunya* is Abu al-Thana', and his *laqab* is Shihab al-Din. My reading of his commentary on the Qur'an suggests that he follows the Hanafi school. Al-Alusi died in 1270/1854; al-Alusi, *Ruh al-Ma'ani fi Tafsir al-Qur'an al-'Azim wa al-Sab' al-Mathani*, <<http://www.altafsir.com/>>.

<sup>139</sup> Al-Tha'alibi is a Maliki jurist, exegete and scholar of *hadith*, who lived in Algeria, Tunisia and Egypt. His name is 'Abd al-Rahman b. Muhammad b. Makhlu'f al-Tha'alibi, and his *kunya* is Abu Zayd. He died in 875/1470; 'Abd al-Rahman al-Tha'alibi, *al-Jawahir al-Hisan fi Tafsir al-Qur'an*, <<http://www.altafsir.com/>>.

<sup>140</sup> Ibn 'Atiyya, *al-Muharrar*.

<sup>141</sup> Al-Qurtubi, 7:446.

<sup>142</sup> Ibn 'Ashur, *al-Tahrir*.

<sup>143</sup> Al-Amin al-Shinqiti is a Maliki jurist and exegete, who lived in Mauritania and Medina. His name is Muhammad al-Amin b. Muhammad al-Mukhtar b. 'Abd al-Qadir b. Muhammad b. Ahmad Nuh. He died in 1393/1973; al-Amin al-Shinqiti, *Adwa' al-Bayan fi Idah al-Qur'an bi-al-Qur'an*, <<http://www.altafsir.com/>>.

<sup>144</sup> Abu Thawr is a Shafi'i jurist, who lived in Baghdad. His name is Ibrahim b. Khalid b. Abi al-Yaman. He died in 246/860; al-Muzi'i, 2:750-751; al-Qurtubi, 7:443. According to Hallaq, Abu Thawr was the eponym of an extinct legal school; Hallaq, 168, 211.

<sup>145</sup> Al-Harrasi, 2:70.

<sup>146</sup> Fakhr al-Din al-Razi is a Shafi'i jurist, exegete, legal theorist and theologian, who lived in Rey and Khorasan. His name is Muhammad b. 'Umar b. al-Hasan b. al-Husayn b. 'Ali al-Razi, and his *laqab* is Fakhr al-Din. He died in 606/1209; al-Razi, *al-Tafsir al-Kabir*.

<sup>147</sup> Al-Naysaburi, *Ghara'ib al-Qur'an*.

<sup>148</sup> Al-Muzi'i, 2:750-751.

<sup>149</sup> Al-Biqa'i is a Shafi'i exegete, who lived in Damascus and Cairo. His name is Ibrahim b. 'Umar b. Hasan b. 'Ali al-Biqa'i, and his *laqab* is Burhan al-Din. He died in 885/1480; al-Biqa'i, *Nazm al-Durar fi Tanasub al-Ayat wa al-Suwar*, <<http://www.altafsir.com/>>.

<sup>150</sup> Al-Suyuti, *al-Iklil*, 2:632.

<sup>151</sup> Al-Khatib al-Shirbini is a Shafi'i jurist and exegete, who lived in Egypt. His name is Muhammad b. Ahmad al-Shirbini, and his *laqab* is Shams al-Din. He is known as "al-Khatib al-Shirbini." He died in 977/1569; al-Khatib al-Shirbini, *al-Siraj al-Munir fi al-i'ana 'ala Ma'rifat ba'd Ma'ani Kalam Rabbina al-Hakim al-Khabir*, ed. Ibrahim Shams al-Din, vol. 1 (Beirut: Dar al-Kutub al-'Ilmiyya, 2004) 432.

al-‘Ulaymi;<sup>153</sup> the Hanafis,<sup>154</sup> the Malikis<sup>155</sup> (in one opinion in the school), the Shafi‘is,<sup>156</sup> the Hanbalis;<sup>157</sup> Zayd b. ‘Ali,<sup>158</sup> al-Nasir al-Utrush al-Hasan b. ‘Ali,<sup>159</sup> al-Mu‘ayyad al-Kabir Ahmad b. al-Husayn,<sup>160</sup> al-Tusi,<sup>161</sup> Sa‘id al-Rawandi,<sup>162</sup> Miqdad al-Suyuri,<sup>163</sup> Ahmad al-Jaza’iri,<sup>164</sup> and the Imamis.<sup>165</sup>

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<sup>152</sup> Ibn ‘Adil is a Hanbali exegete and linguist, who lived in Damascus and al-Nu‘maniyya (a city in Iraq). His name is ‘Umar b. ‘Ali b. ‘Adil, his *kunya* is Abu Hafs, and his *laqab* is Siraj al-Din. He died in ca. 880/1475; Ibn ‘Adil, *al-Lubab fi ‘Ulum al-Kitab*, <<http://www.altafsir.com/>>.

<sup>153</sup> Al-‘Ulaymi is a Hanbali exegete, jurist and historian, who lived in Jerusalem and Cairo. His name is ‘Abd al-Rahman b. Muhammad b. ‘Abd al-Rahman b. Yusuf al-‘Ulaymi. He died in 928/1521; al-‘Ulaymi, *Fath al-Rahman fi Tafsir al-Qur’an*, ed. Nur al-Din Talib, 2<sup>nd</sup> ed., vol. 2 (Syria: Dar al-Nawadir, 2011) 291.

<sup>154</sup> Ibn ‘Atiyya, *al-Muharrar*; Abu Hayyan, *al-Bahr*; al-Dah al-Shinqiti, 74-75.

<sup>155</sup> The opinion of Malik is different; al-Dah al-Shinqiti, 74-75.

<sup>156</sup> Al-Dah al-Shinqiti attributes this opinion to the Shafi‘is; al-Dah al-Shinqiti, 74-75.

<sup>157</sup> Both Ibn al-Jawzi and al-Dah al-Shinqiti attribute this opinion to the Hanbalis; Ibn al-Jawzi, *Zad al-Masir*; al-Dah al-Shinqiti, 74-75.

<sup>158</sup> Zayd b. ‘Ali is an independent jurist, who lived in Medina, and he is the eponym of the Zaydi school. His name is Zayd b. ‘Ali b. al-Husayn b. ‘Ali b. Abi Talib. He died in 122/740; al-Najri, 1:244; Muhammad b. al-Qasim, 252-253.

<sup>159</sup> Al-Najri, 1:244; Muhammad b. al-Qasim, 252-253.

<sup>160</sup> Al-Mu‘ayyad al-Kabir Ahmad b. al-Husayn is a Zaydi jurist. He died in 412/1021; al-Najri, 1:244; Muhammad b. al-Qasim, 252-253.

<sup>161</sup> Al-Tusi, *al-Tibyan*.

<sup>162</sup> Both al-Rawandi and al-Tusi clearly state that they support the opinion of al-Shafi‘i. They use the same phraseology to express their support. After mentioning the opinion of al-Shafi‘i, both al-Tusi and al-Rawandi say: “And this is our opinion (*wa huwa madhhabuna*)”; al-Rawandi, 1:368.

<sup>163</sup> Al-Suyuri, part 4, 46.

<sup>164</sup> Al-Jaza’iri, 3:392.

<sup>165</sup> Ahmad al-Jaza’iri attributes this opinion to the Imamis; al-Jaza’iri, 3:392.

The second opinion that denies the liability of pre-arrest repentant brigands for murder and robbery that they committed during brigandage is adopted by al-Suddi,<sup>166</sup> al-Awza'i,<sup>167</sup> al-Layth b. Sa'd,<sup>168</sup> al-Samin al-Halabi,<sup>169</sup> al-Shawkani,<sup>170</sup> Siddiq al-Qannuji,<sup>171</sup> al-Hadi Yahya b. al-Husayn,<sup>172</sup> Muhammad b. al-Qasim,<sup>173</sup> and 'Amrus.<sup>174</sup>

Furthermore, three jurists advance an opinion that is similar to the scholarly contention that denies the liability of pre-arrest repentant brigands. For instance, Malik (d. 179/796)<sup>175</sup> maintains that pre-arrest repentant brigands are liable for the blood they shed but they are not liable for the property they stole except for the stolen property that

<sup>166</sup> Al-Suddi is an independent exegete, who lived in Kufa. His name is Isma'il b. 'Abd al-Rahman, and his *kunya* is Abu Muhammad. He died in 127/744; al-Tha'labi, *al-Kashf*; al-Tabari, *Jami' al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>167</sup> Al-Awza'i is an independent jurist, who lived in Sham. His name is 'Abd al-Rahman b. 'Amr b. Yahmid al-Awza'i, and his *kunya* is Abu 'Amr. He died in 157/773; al-Tha'labi, *al-Kashf*; al-Tabari, *Jami' al-Bayan*. According to Hallaq, al-Awza'i was the eponym of an extinct legal school; Hallaq, 170-171, 211.

<sup>168</sup> Al-Layth b. Sa'd is an independent jurist, who lived in Egypt. His name is al-Layth b. Sa'd b. 'Abd al-Rahman, and his *kunya* is Abu al-Harith. He died in 175/791; al-Tha'labi, *al-Kashf*; al-Tabari, *Jami' al-Bayan*; Ibn al-'Arabi, 2:101; al-Muzi'i, 2:750-751; al-Tusi, *al-Tibyan*.

<sup>169</sup> Al-Samin al-Halabi is a Shafi'i exegete and linguist, who lived in Aleppo and Cairo. His name is Ahmad b. Yusuf b. Muhammad b. Mas'ud, and his *kunya* is Abu al-'Abbas. He died in 756/1355; al-Samin al-Halabi, *al-Durr al-Masun fi 'Ulum al-Kitab al-Maknun*, <<http://www.altafsir.com/>>.

<sup>170</sup> Al-Shawkani is an independent jurist, exegete and a scholar of *hadith*, who lived in Yemen. He used to follow the Zaydi school in the early stages of his scholarship. His name is Muhammad b. 'Ali b. Muhammad b. 'Abd Allah al-Shawkani. He died in 1250/1834; al-Shawkani, *Fath al-Qadir al-Jami' bayn Fannay al-Riwaya wa al-Diraya min 'Ilm al-Tafsir*, <<http://www.altafsir.com/>>.

<sup>171</sup> Siddiq al-Qannuji, 2:53.

<sup>172</sup> Al-Hadi Yahya b. al-Husayn is a Zaydi jurist. He died in 298/911; al-Najri, 1:244; Muhammad b. al-Qasim, 252-253; al-Thula'i, 3:108.

<sup>173</sup> Muhammad b. al-Qasim, 252-253.

<sup>174</sup> 'Amrus is an Ibadi jurist, who lived in Nafousa Mountains (mostly in Libya). His name is 'Amrus b. Fath al-Masakini al-Nafusi, and his *kunya* is Abu Hafs. He died in 283/896; Muhammad Baba'ammi et al., 2:321-22; Atfiyyash, *Hamayan al-Zad*.

<sup>175</sup> Malik b. Anas is an independent jurist and a scholar of *hadith*, who lived in Medina, and he is the eponym of the Maliki school. His name is Malik b. Anas b. Malik, and his *kunya* is Abu 'Abd Allah.

still remains in their possession.<sup>176</sup> Virtually absolving repentant brigands of liability, al-Tabari and Ibn al-Faras (d. 597/1200) state that pre-arrest repentant brigands are neither liable for the blood they shed nor the property they stole except for the stolen property that still remains in their possession.<sup>177</sup>

Before discussing the reasons why jurists are divided concerning the liability of repentant brigands, it should be noted that jurists are unanimous in cancelling the fixed punishment for brigandage by reason of pre-arrest repentance. This unanimity is achieved across the eight schools as well as independent jurists who are not affiliated with any legal school. Jurists do not debate whether pre-arrest repentant brigands would be executed, crucified, exiled, or have their right hands and left feet cut off. What they debate, however, is the liability of pre-arrest repentant brigands for the blood they shed and the property they stole during brigandage. In other words, jurists debate whether these brigands would face the laws of retaliation and whether they would be required by law to return the stolen property to the rightful owner.

#### 2.4.1 Evidence

This section analyzes the reasons and evidence cited by jurists and exegetes concerning the liability of pre-arrest repentant brigands for the blood they shed and the property they stole during brigandage. It presents the arguments of scholars who

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<sup>176</sup> Al-Tha'labi, *al-Kashf*; al-Tabari, *Jami' al-Bayan*; Ibn al-Faras, 2:403-404; Ibn al-'Arabi, 2:101; al-Muzi'i, 2:750-751; al-Tusi, *al-Tibyan*; Ibn Hubayra contends that there is a consensus among Abu Hanifa, Malik, al-Shafi'i, and Ahmad b. Hanbal that repentant brigands are liable for murder and robbery; Ibn Hubayra, 2:313.

<sup>177</sup> Al-Tabari, *Jami' al-Bayan*.

recognize such liability (Group A) as well as the counterarguments of those who deny it (Group B). The analysis shows that both scholarly camps use the text of 5:44 as a support of their arguments. In addition to the Qur'an, Group B provides three *athar* reports in which pre-arrest repentant brigands were absolved from liability by Muslim *sahabi* rulers. However, Group A responds by presenting Qur'anic verses and *hadith* reports revealing the liability of offenders in general for murder and robbery outside the context of brigandage.

God's statement "God is Ever-Forgiving" in Q. 5:34 is understood in two different ways by exegetes and jurists. Upon describing the fixed punishment for brigandage in Q. 5:33, God excludes pre-arrest repentant brigands from receiving the punishment and declares that He forgives them (Q. 5:34). Group A (the majority) perceives this declaration of forgiveness as a cancellation of the fixed punishment for brigandage, which constitutes a God's right, rather than absolving repentant brigands from liability for murder and robbery, which represents an individual's right.<sup>178</sup> Al-Suyuti (d. 911/1505) remarks that God says that He is "Ever-Forgiving, Ever-Merciful" instead of saying "Do not inflict the fixed punishment on them" to imply that repentance to Him cancels His rights rather than individuals' rights.<sup>179</sup>

In a similar vein, the Shafi'i jurist Muhammad al-Muzi'i (d. 825/1422) notes that repentant brigands are liable for individuals' rights because these rights are not discussed in Q. 5:33. This verse explains the punishment for violating God's rights and then

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<sup>178</sup> Al-Qurtubi, 7:446; al-'Ulaymi, 2:289; Ibn al-'Arabi, 2:102; al-Suyuti, *al-Iklil*, 2:632; al-Muzi'i, 2:750-751.

<sup>179</sup> Al-Mahalli and al-Suyuti, *Tafsir al-Jalalayn*.

excludes repentant offenders from facing the penalty.<sup>180</sup> Nevertheless, Group B construes God's statement "God is Ever-Forgiving" as an implication for cancelling the punishment for brigandage as well as the liability for murder and robbery. Since the declaration of forgiveness in Q. 5:34 is general, it would encompass the cancellation of both God's rights and individuals' rights as the verse does not specify any of these two categories. This argument is deployed by the Maliki jurist Ibn al-Faras, and two Zaydi jurists: al-Hadi Yahya b. al-Husayn and Muhammad b. al-Qasim.<sup>181</sup>

Nonetheless, the Zaydi jurist Fakhr al-Din al-Najri (d. 877/1472) affirms that repentant brigands are liable owing to the general laws of retaliation and liability.<sup>182</sup> The texts that shed light on these laws are presented by the Zaydi jurist Yusuf al-Thula'i (d. 832/1429).<sup>183</sup> In the case of retaliation, God says: "O you who believe! Prescribed for you is retaliation concerning (the ones) killed...Yet whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct" (Q. 2:178). This verse shows that it is the victim's family who can decide the fate of the murderer. Concerning the financial liability, the Prophet says: "One is liable for what he took until he returns it [to the rightful owner]."<sup>184</sup> This *hadith* report demonstrates that a person would be liable for any damages that might happen to the item

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<sup>180</sup> Al-Muzi'i, 2:750-751; Ibn Juzayy, *al-Tashil li-'Ulum al-Tanzil*, <<http://www.altafsir.com/>>.

<sup>181</sup> Ibn al-Faras, 2:403-404; al-Najri, 1:244; Muhammad b. al-Qasim, 252-253; Ibn Juzayy, *al-Tashil*; Ibn Juzayy is a Maliki jurist and legal theorist, who lived in al-Andalus. His name is Muhammad b. Ahmad b. Muhammad b. 'Abd Allah b. Juzayy, and his *kunya* is Abu al-Qasim. He died in 741/1340.

<sup>182</sup> Al-Najri, 1:244.

<sup>183</sup> Al-Thula'i, 3:109.

<sup>184</sup> Literally, the *hadith* reads: "The hand is liable for what it took until it returns it."

he takes from its owner—whether he takes it by means of borrowing or stealing. It also demonstrates that a thief has to return the stolen property to its rightful owner.

Furthermore, Group B that denies liability on the part of pre-arrest repentant brigands cite three *athar* reports in which three brigands were granted full legal pardon due to their pre-arrest repentance.<sup>185</sup> These historical precedents took place during the caliphate of ‘Uthman b. ‘Affan (d. 35/656), ‘Ali b. Abi Talib (d. 40/661) and Mu‘awiya b. Abi Sufyan (d. 60/679) respectively. During the caliphate of ‘Uthman, a person who committed brigandage came before arrest to Abu Musa al-Ash‘ari (d. 42/662), who was the governor of Kufa during that time, declaring repentance and asking for Abu Musa’s protection.<sup>186</sup> Abu Musa announced the offender’s repentance and ordered people not to harm him.<sup>187</sup> The announcement of Abu Musa apparently reveals that the pre-arrest repentant brigand was absolved from liability for the crimes he committed.

In the second precedent, a brigand named Haritha b. Badr<sup>188</sup> decided to cease committing crimes of brigandage and to declare his repentance before the authorities could arrest him.<sup>189</sup> Haritha, who committed murder and robbery during brigandage,

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<sup>185</sup> The available sources do not include a *hadith* or an *athar* report that proves that a brigand declared his pre-arrest repentance during the lifetime of the Prophet.

<sup>186</sup> Al-Khazin, *Lubab al-Ta‘wil fi Ma‘ani al-Tanzil*, <<http://www.altafsir.com/>>; al-Suyuti, *al-Durr al-Manthur fi al-Tafsir bi-al-Ma‘thur*, <<http://www.altafsir.com/>>; al-Khazin is a Shafi‘i jurist and exegete, who lived in Baghdad and Damascus. His name is ‘Ali b. Muhammad b. Ibrahim b. ‘Umar, his *kunya* is Abu al-Hasan, and his *laqab* is ‘Ala’ al-Din. He died in 725/1324.

<sup>187</sup> Exegetes report this *athar* on the authority of al-Sha‘bi (d. ca. 100/718); al-Khazin, *Lubab al-Ta‘wil*; al-Tabari, *Jami‘ al-Bayan*; al-Tha‘labi, *al-Kashf*.

<sup>188</sup> There are variants for the name of this person in the books of exegesis, but they all refer to the same person. Muhammad b. al-Qasim says that the name of this person as mentioned in al-Zamakhshari’s *Kashshaf* is al-Harith b. Badr. Ibn al-Qasim says that this might be a misspelling (*tahrif*) on the part of scribes; Muhammad b. al-Qasim, 252.



asked Sa‘id b. Qays to seek a pledge of safety (*aman*) on his behalf from ‘Ali b. Abi Talib, who was the caliph during that time. When Sa‘id informed ‘Ali that Haritha repented before arrest, ‘Ali granted a pledge of safety to Haritha.<sup>190</sup> This pledge means that the repentant brigand was absolved of liability for the blood he shed and the money he stole. Unexpectedly, the Imamīs do not act upon this *athar* report—although they do cite it in their books—and follow the opinion of the majority of scholars (Group A) that asserts that pre-arrest repentant brigands are liable for the murder and robbery they commit during brigandage.<sup>191</sup>

The third *athar* report relates the repentance of ‘Ali al-Asady, who committed murder and robbery during brigandage. ‘Ali went to Abu Hurayra (d. 57/676) in Medina and declared his repentance before a congregation in the Prophet’s mosque. Abu Hurayra took ‘Ali al-Asadi to Marwan b. al-Hakam (d. 65/685), the governor of Medina during the caliphate of Mu‘awiya, and said to him: “This is ‘Ali; he came repentant and you should do him neither harm nor execution.” The narrator of this report said that the repentant brigand was absolved of liability.<sup>192</sup>

Notwithstanding their citation in the literature of all the eight schools, particularly the schools of Group A that hold pre-arrest repentant brigands liable for their crimes, these three *athar* reports that seemingly deny the liability of repentant brigands received

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<sup>189</sup> Al-Tabari, *Jami‘ al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>190</sup> Exegetes report this *athar* on the authority of al-Sha‘bi; Ibn ‘Atiyya, *al-Muharrar*; Ibn ‘Adil, *al-Lubab*; al-Tha‘labi, *al-Kashf*; al-Suyuti, *al-Durr*; al-Mawardi, *al-Hawi*, 2:816.

<sup>191</sup> Al-Tusi, *al-Tibyan*; al-Suyuti, part 4, 46; al-Jaza‘iri, 3:392.

<sup>192</sup> Al-Tabari cites this report with an *isnad* up to al-Layth b. Sa‘d and Musa b. Ishaq; al-Tabari, *Jami‘ al-Bayan*; al-Tusi, *al-Tibyan*.

little response on the part of Group A. The most important report in this set is the one in which ‘Ali b. Abi Talib granted full legal pardon to a repentant brigand, absolving him of liability. Even the Imamis who are expected not only to comment on but also to adhere to this report do not reconcile it with their stance that recognizes liability. A reconciliatory attempt is made by the Zaydi jurist Yusuf al-Thula’i, who argues that the pledge of safety that ‘Ali gave means that the fixed punishments for brigandage would not be inflicted on the repentant brigand. He supports his contention by citing an *athar* report in which ‘Ali said that a pre-arrest repentant brigand is liable for the property he stole and that the laws of retaliation would be inflicted upon him.<sup>193</sup>

The arguments of both Group A and Group B seem to have equal weight. Q. 5:34 and the *athar* reports can be construed as either denying or recognizing the liability of pre-arrest repentant brigands for the blood they shed and the money they stole. Excluding brigands from punishment in Q. 5:34 may suggest that they have no liability for their crimes. However, understanding Q. 5:34 in the context of other verses and *hadith* reports may lead to the belief that the liability is not cancelled despite the cancellation of the punishment for brigandage as the former is individuals’ rights while the latter is God’s right. The cancellation of liability can also be understood from the *athar* reports cited by Group B, yet there is a possibility that these reports demonstrate the cancellation of the fixed punishment for brigandage but not necessarily the liability on the part of repentant brigands. The citation of two seemingly contradictory *athar* reports on the authority of

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<sup>193</sup> Zayd b. ‘Ali narrates this *athar* with his *isnad* (a chain of narrators) up to ‘Ali b. Abi Talib. The book that contains this *athar* is entitled *Sharh al-Ibana*; al-Thula’i, 3:109. This *athar* is not mentioned in any of the literature of the eight schools except the Zaydis.

‘Ali b. Abi Talib lends support to the argument of the Zaydi jurist Muhammad b. al-Qasim, namely that the issue of the liability of pre-arrest repentant brigands is open for *ijtihad*.<sup>194</sup>

## 2.5 Conditions for the validity of convicts’ repentance

This section answers a crucial question as to whether repentance in the case of the fixed punishment for brigandage is subject to certain conditions that render it valid from a legal perspective. The analysis shows that the majority of jurists adheres to the apparent meaning of Q. 5:34 and rules that the only precondition for the validity of repentance in the case of brigandage is that it takes place before the brigand is captured—as God says “Except for those who repent before you gain control over them.” Failing to observe this condition means that repentance loses its legal force. Nevertheless, other scholars stipulate various conditions along with the main condition that stresses the time factor. Among these conditions are securing a pledge of safety from the ruler, fleeing to a non-Muslim land, ability to protect oneself from capture either independently or through a powerful group, and righteous conduct. This section analyzes these conditions and presents the arguments and counterarguments of both sides.

Almost all jurists are unanimous that repentance would not have a mitigating impact upon the fixed punishment for brigandage unless the brigand repents before he is captured—as understood from Q. 5:34.<sup>195</sup> The Maliki jurist Ibn al-Qasim (d. 191/806)<sup>196</sup>

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<sup>194</sup> In other words, a judge can choose the opinion that he deems proper in a given context; Muhammad b. al-Qasim, 253.

<sup>195</sup> Ibn Hajar, 4:153; al-Jaza’iri, 3:392.

adds that the brigand has to go to the ruler and declare his repentance.<sup>197</sup> In blatant contradiction of Ibn al-Qasim's opinion, the Maliki jurist Ibn al-Majishun (d. ca. 213/828)<sup>198</sup> observes that the brigand must not go to the ruler and that his repentance should take the form of stopping the acts of aggression and staying wherever he is until his repentance "becomes manifest to his neighbors."<sup>199</sup> Nevertheless, Ibn al-Faras argues that a brigand would not face the fixed punishment for brigandage in both cases whether or not he declares his repentance before the ruler as long as he repents before arrest.<sup>200</sup> To support his argument, Ibn al-Faras asserts that God's statement "Except for those who repent" in Q. 5:34 does not refer to a specific way of repentance.<sup>201</sup>

Al-Suddi insists that a brigand would receive the fixed punishment for brigandage unless he secures a pledge of safety from the ruler.<sup>202</sup> He affirms that the ruler has to accept his repentance and grant him this pledge because the brigand would cause more corruption and commit more murders and robberies if his pre-arrest repentance is not legally accepted by the state.<sup>203</sup> When the brigand is granted the pledge, al-Suddi

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<sup>196</sup> Ibn al-Qasim is a Maliki jurist, who lived in Egypt. His name is 'Abd al-Rahman b. al-Qasim b. Khalid b. Junada, and his *kunya* is Abu 'Abd Allah.

<sup>197</sup> Ibn al-Faras, 2:401-403.

<sup>198</sup> Ibn al-Majishun is a Maliki jurist, who lived in Medina. His name is 'Abd al-Malik b. 'Abd al-'Aziz b. 'Abd Allah al-Majishun, and his *kunya* is Abu Marwan.

<sup>199</sup> Ibn al-Faras, 2:401-403.

<sup>200</sup> Al-Dah al-Shinqiti, 74.

<sup>201</sup> Ibn al-Faras, 2:401-403.

<sup>202</sup> Al-Tabari, *Jami' al-Bayan*.

<sup>203</sup> Al-Tabari, *Jami' al-Bayan*.

continues, he has to come to the ruler “until he puts his hand into his hand” [as a gesture of surrender and obedience].

‘Urwa b. al-Zubayr (d. 94/713)<sup>204</sup> has laid down the condition that a brigand has to flee to a non-Muslim land then come back repentant before arrest so that his repentance could be legally accepted.<sup>205</sup> Although al-Tabari cites another report on the authority of ‘Urwa in which he says that a brigand would be punished for the crimes he committed even if he flees to a non-Muslim land, ‘Urwa is usually cited by exegetes and jurists as the proponent of the opinion that fleeing to a non-Muslim land then coming to a Muslim land after declaring repentance before arrest cancels the fixed punishment for brigandage.

Al-Tabari stipulates that a brigand must have the ability to protect himself from capture either independently or through a powerful group (*fi’a*).<sup>206</sup> In a similar vein, the condition of having a powerful group that protects one from capture is recognized by ‘Abd Allah b. ‘Umar (d. 73/693), Rabi‘a (d. 136/754),<sup>207</sup> and al-Hakam b. ‘Utayba (d. ca. 115/733).<sup>208</sup> Along the same line, al-Awza‘i (d. 157/774) and al-Layth b. Sa‘d stipulate three conditions, any of which is sufficient to signify that the brigand is outside the

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<sup>204</sup> ‘Urwa b. al-Zubayr b. al-‘Awwam is an independent jurist, who lived in Medina. His *kunya* is Abu ‘Abd Allah.

<sup>205</sup> Al-Tabari, *Jami‘ al-Bayan*.

<sup>206</sup> Al-Tabari, *Jami‘ al-Bayan*.

<sup>207</sup> Rabi‘a b. Abi ‘Abd al-Rahman is an independent jurist, who lived in Medina. He is commonly known as “Rabi‘a al-Ra’y.”

<sup>208</sup> Al-Hakam b. ‘Utayba al-Kandi is an independent jurist, who lived in Kufa. His *kunya* is Abu ‘Abd Allah; al-Mawardi, *al-Hawi*, 2:814-15; Abu Ishaq al-Shirazi, *Tabaqat al-Fuqaha*, ed. Ihsan ‘Abbas (Beirut: Dar al-Ra’id al-‘Arabi, 1970) 82-83.

ruler's control and thus renders the brigand's pre-arrest repentance valid.<sup>209</sup> First, the brigand must be able to protect himself from being captured by the ruler. Second, the brigand must have a powerful group that protects him from capture (*fi'a yamtani'u biha*). Third, the brigand has to leave the Muslim land to a non-Muslim land<sup>210</sup> then come back repentant before arrest. If none of these three conditions is satisfied, the brigand's pre-arrest repentance would be legally invalid and therefore it would not cancel the fixed punishment for brigandage.

Al-Awza'i said that if "a thief or a group of thieves" commit murder and highway robbery but they cannot protect themselves from being captured or "do not have a powerful group" that offers them protection, and "they do not feel safe unless they join the masses of their community," if they repent before the ruler gains control over them, their repentance would not be accepted and they would receive the fixed punishment. As can be seen, Al-Awza'i does not consider a person as a brigand if he is not powerful or has a powerful group that can protect him from being captured by the ruler. Furthermore, al-Awza'i's statement suggests that brigands are a distinct heterogeneous entity separate from the society. It gives one the sense that these extremely powerful gangs of brigands live in fortresses and citadels and have their own territories.

In contrast, Ibn al-Faras and other jurists are of the opinion that a brigand's pre-arrest repentance is legally accepted under all circumstances whether or not he has a powerful group that protects him from capture and whether or not the brigand flees to a

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<sup>209</sup> Al-Tabari, *Jami' al-Bayan*.

<sup>210</sup> The term provided in the narration is *dar al-harb*.

non-Muslim land.<sup>211</sup> Ibn al-Faras supports his argument through the general style of Q. 5:34 in which God excludes pre-arrest repentant brigands from receiving the fixed punishment for brigandage. God's statement "Except for those who repent" in Q. 5:34 refers to repentant brigands in general; it does not refer to a specific group of brigands with certain qualifications.

In his *Ghara'ib al-Qur'an wa Ragha'ib al-Furqan*, the Shafi'i exegete Nizam al-Din al-Naysaburi argues that a brigand's repentance has to be accompanied by righteous conduct. To support his argument, al-Naysaburi cites two Qur'anic verses in which righteous conduct is mentioned after repentance. After mentioning the punishment for fornication,<sup>212</sup> God says: "Yet, in case they (both) repent and act righteously, then leave them alone" (Q. 4:16). After mentioning the punishment for theft, God says: "If one repents after his injustice and acts righteously" (Q. 5:39). Al-Naysaburi observes that the implication of this condition would probably be that a seemingly repentant brigand would receive the punishment for brigandage "if something that contradicts repentance becomes apparent" (*in zahar ma yukhalif al-tawba*). The condition stipulated by al-Naysaburi would necessitate that the authorities monitor the behavior of the repentant brigand until they establish the sincerity of his repentance. Performing righteous acts would be an explicit marker that signifies a positive change in the brigand's conduct.

Nevertheless, the Shafi'i jurists al-Mawardi and Muhammad al-Muzi'i note that the verse that discusses the fixed punishment for brigandage (Q. 5:33-34) should not be

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<sup>211</sup> Ibn al-Faras, 2:401-403.

<sup>212</sup> The majority of scholars believe that the punishment for fornication in Q. 4:16 is abrogated by Q. 24:2.

understood in the context of other verses that explain the fixed punishment for non-brigandage crimes.<sup>213</sup> Their argument is based on the principle that there is a difference between the crime of brigandage and other non-brigandage crimes, which can be seen in three factors. First, God does not mention righteous conduct after repentance in Q. 5:33-34 and therefore repentance would be legally valid even if the repentant brigand does not perform righteous acts after his repentance.<sup>214</sup> Nevertheless, God mentions righteous conduct in a non-brigandage context, such as theft (Q. 5:38-39).

The second factor that distinguishes brigandage from other crimes is that the brigand commits his violation openly and is not under the ruler's control. Therefore, his pre-arrest repentance would apparently be sincere and would not be driven by dissimulation (*taqiyya*). Nevertheless, a non-brigand commits his violation covertly and he is under the ruler's control. Consequently, there might be suspicion (*tuhma*) that he declares his repentance for fear of punishment. This suspicion will be dispelled if his repentance is accompanied by righteous conduct.

Muhammad al-Muzi'i discerns the third factor that renders brigandage unique to other crimes. Accepting the pre-arrest repentance of a brigand, according to Muhammad al-Muzi'i, would save the state from further aggression and bloodshed.<sup>215</sup> This is not the case with non-brigandage crimes. The thief, for instance, can be easily caught and punished and the damage he does is not as serious as that of a brigand. However, the ruler

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<sup>213</sup> Al-Mawardi, *al-Hawi* 2:819-820; al-Muzi'i, 2:751.

<sup>214</sup> Ibn Hajar cites this reason; Ibn Hajar 4:153.

<sup>215</sup> The Arabic term used by al-Muzi'i is *fitna*, which would mean in this context "further violations against people's life and property"; al-Muzi'i, 2:751.



must employ massive armed efforts in order to capture the brigand as the damage he causes is extremely enormous.<sup>216</sup>

To recapitulate, jurists have laid down certain conditions and made them mandatory for the validity of a brigand's repentance. Without the fulfillment of these conditions, repentance would lose its legal force and thus the repentant brigand would face the fixed punishment for brigandage. Scholars are unanimous in stipulating that a brigand must declare his repentance before arrest, but they differ on recognizing other conditions—such as going to the ruler, securing a pledge of safety from the ruler, fleeing to a non-Muslim land, the ability to protect oneself from capture either independently or through a powerful group, and righteous conduct. The majority's opinion of recognizing the first condition while disregarding other stipulations seems to be valid as Q. 5:34 does not discuss any condition other than pre-arrest repentance.

## 2.6 Repentance and other crimes

This section examines the possibility of extending the laws of pre-arrest repentance in the case of the fixed punishment for brigandage to the fixed punishments for theft, fornication, and consumption of intoxicants given that all of these penalties are examples of God's right. Almost all the exegetical works under review discuss this possibility in their interpretation of Q. 5:33-34. The analysis shows that the majority of jurists (Group A) confines the scope of the mitigating impact of repentance to the fixed punishment for brigandage, whereas some jurists (Group B) extend the legal force of

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<sup>216</sup> Ibn al-'Arabi says that the ruler needs an army in order to capture the brigands, who usually live in protected places in the desert; Ibn al-'Arabi, 2:102.

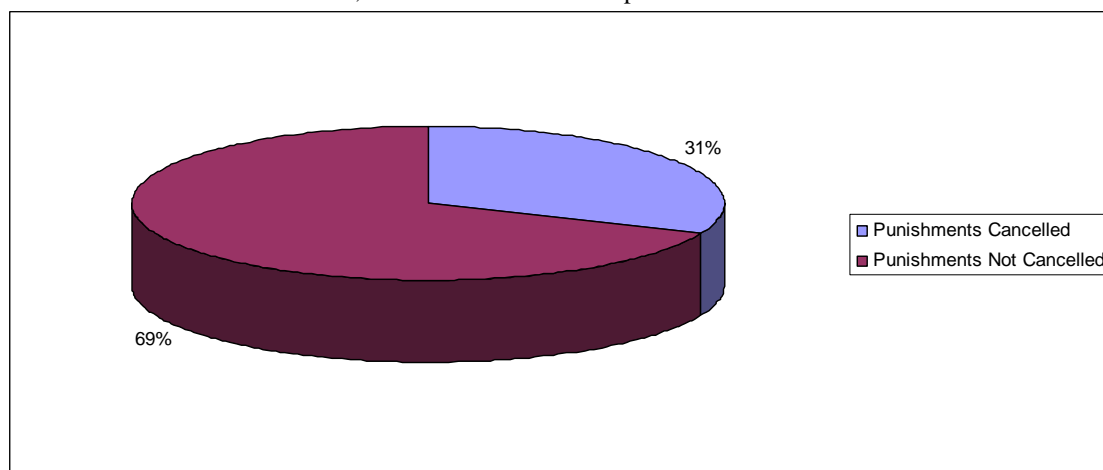
repentance in the case of brigandage to the cases of theft, fornication, and consumption of intoxicants. Group A is represented by the Hanafis, Malikis, Shafi'is (in one opinion), Zahiris, Zaydis, and Ibadis, whereas Group B is represented by the Shafi'is (in one opinion), Hanbalis, and Imamis.<sup>217</sup>

Table 2.9: Mitigating Impact of Repentance upon the Fixed Punishments for Theft, Fornication and Consumption of Intoxicants

	Pre-arrest Repentance Cancels the Fixed Punishments for Theft, Fornication and Consumption of Intoxicants	
Hanafis	No	
Malikis	No	
Shafi'is	Yes	No
Hanbalis	Yes	
Zahiris	No	
Zaydis	No	
Imamis	Yes	
Ibadis	No	

<sup>217</sup> Al-Mawardi, *al-Hawi*, 2:817-824; Ibn Hajar, 4:153; Ibn Hazm, *al-Muhalla*, 12:22; al-Thula'i, 3:109-110; al-Suyuri, part 4, 43-44.

Figure 2.3: Mitigating Impact of Repentance upon the Fixed Punishments for Theft, Fornication and Consumption of Intoxicants



Group B draws an analogy between the offences of brigandage, theft, fornication, and consumption of intoxicants, whereas Group A deems this analogy invalid. In order to support their stance, jurists from Group B advance three main arguments. First, there is similarity between brigandage, theft, and fornication since God excludes repentant offenders in these cases from receiving the fixed punishment.<sup>218</sup> In the case of brigandage, God says: “Except for those who repent before you gain control over them” (Q. 5:34). After mentioning the punishment for theft, God says: “If one repents after his injustice and acts righteously, surely God will accept his repentance” (Q. 5:39). Moreover, the right hand is cut off for stealing property in the cases of brigandage and theft. Similarly, repentance terminates the punishment for fornication as God says: “Yet, in case they [both] repent and act righteously, then leave them alone” (Q. 4:16). Likewise, the Prophet told the *sahaba* that they should have stopped inflicting the

<sup>218</sup> Al-Mawardi, *al-Hawi*, 2:817-819.

punishment for fornication on a convict who retracted his confession.<sup>219</sup> Group B generalizes the mitigating impact of repentance upon any fixed punishment considered to be God's right.<sup>220</sup>

Pursuing an *a fortiori* argument, Group B maintains that all fixed punishments that are construed as God's right should be cancelled by reason of pre-arrest repentance because the fixed penalty for brigandage is cancelled owing to pre-arrest repentance.<sup>221</sup> Since the fixed penalty for brigandage is the severest punishment in the category of God's right, other punishments that are less severe should also be cancelled. Moreover, the crime of brigandage is the most serious offence in that category; therefore, other less serious crimes should be cancelled.<sup>222</sup> The third argument that Group B cites is that God does not punish repentant offenders since they are no longer sinners.<sup>223</sup> The Prophet says, "The one who repents of a sin is like a sinless person."<sup>224</sup> Furthermore, the Prophet did not enforce a fixed punishment upon a person who confessed of a crime that deserves a fixed punishment. After praying with the Prophet, the man renewed his request that the punishment be inflicted on him, but the Prophet told the man that God has forgiven his sin.<sup>225</sup>

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<sup>219</sup> Al-Razi, *al-Tafsir al-Kabir*.

<sup>220</sup> Peters, 27-28; Jaffal, 193-194.

<sup>221</sup> Al-Mawardi, *al-Hawi*, 2:817-819; Ibn al-Qayyim, 3:308.

<sup>222</sup> Ibn al-Qayyim, 3:308.

<sup>223</sup> Al-Mawardi, *al-Hawi*, 2:817-819; Ibn al-Qayyim, 3:308-310.

<sup>224</sup> This *hadith* is narrated by Ibn Maja and al-Tabarani; <<http://dorar.net/enc/hadith>>.

<sup>225</sup> This *hadith* is narrated by al-Bukhari in his *Sahih*; Ibn al-Qayyim, 3:310; <<http://dorar.net/enc/hadith>>.

Nevertheless, Group A states that drawing an analogy between the case of brigandage and other cases in the category of God's right is invalid owing to the unique particularities surrounding the case of brigandage. The most important feature that distinguishes a brigand from other offenders is that he is outside the ruler's control and that the state needs to amass significant troops in order to capture a gang of brigands. This very fact leads jurists to appreciate the sincerity of the pre-arrest repentance by a brigand and to doubt the authenticity of the pre-arrest repentance by a non-brigand. Group A observes that God does not mention righteous conduct after repentance in Q. 5:34 but mentions it in Q. 5:39 and Q. 4:16 to signify that a brigand would be sincere in his repentance. Moreover, stipulating that repentance has to take place before capture is declared by Q. 5:34 rather than Q. 5:39 and Q. 4:16, which attests to the uniqueness of brigandage. Furthermore, a thief's hand is cut off because he steals property in a covert and clandestine way, whereas a brigand's hand is cut off because he steals property openly. Therefore, the fixed punishments for brigandage and theft are legislated for two different reasons.<sup>226</sup>

Group A generalizes their contention and postulates that repentance does not cancel any fixed punishment perceived as God's right, save brigandage.<sup>227</sup> However, this scholarly group cites the fixed punishments for apostasy and abandoning prayer as exceptions to this general rule.<sup>228</sup> These exceptions prove that the mitigating impact of repentance upon fixed punishments represents a case of casuistry. Concerning the textual

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<sup>226</sup> Al-Mawardi, *al-Hawi*, 2:817-819; Ibn Hajar, 4:153.

<sup>227</sup> Ibn al-Faras, 2:423-424.

<sup>228</sup> Ibn Hajar, 4:153; al-Thula'i, 3:109-110.

evidence cited by Group B, it should be noted that repentance may cancel the punishment in the Hereafter, but this does not necessarily mean that it would cancel the fixed punishment in this world. God may forgive the offender's sin and save him from punishment in the Hereafter, but He may hold him responsible for his crime in this world. The ethical and legal implications of repentance are separate and should not be conflated.

In addition, it was the convict's retraction of his confession to fornication rather than his repentance that prompted the Prophet to declare that the *sahaba* should have stopped stoning him. Were the crime established through witnesses, the Prophet would not have advised that the punishment be terminated. Furthermore, the Prophet ordered that the punishment for fornication be inflicted upon the woman who confessed of her crime. This woman is perceived by jurists as repentant because she came voluntarily to the Prophet, confessed of her offence, and requested that the fixed penalty for fornication be inflicted upon her. Despite her repentance, she received the punishment.<sup>229</sup> As for the man who came voluntarily to the Prophet and requested that he receives a fixed punishment, the Prophet did not inflict a fixed punishment upon him because he did not specify which crime he committed. Were his offence clearly stated, he would have received the fixed penalty. The arguments of Group A seem to outweigh those of Group B.

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<sup>229</sup> Ibn al-Qayyim, 3:311.

## 2.7 Conclusion

Brigandage is basically defined as committing murder and robbery openly and is punished by execution, cutting off the right hand and left foot, putting onto a cross after execution, or exile. If a brigand repents prior to arrest, he would not receive any of the four punishments, but he would be liable for the blood he shed and the property he stole during brigandage in case the victim or his family demands justice. In other words, a pre-arrest repentant brigand would be subject to the laws of retaliation that grant the family of a murdered person three options: to kill the murderer, to obtain blood money from him, or to pardon him. Moreover, a pre-arrest repentant brigand has to return the stolen property to its rightful owner upon the victim's request.

Across the eight schools, jurists and exegetes are virtually unanimous that pre-arrest repentance totally cancels the fixed punishment for brigandage. Nevertheless, scholars express various opinions concerning the liability of pre-arrest repentant brigands for their crimes during brigandage. Although Q. 5:34 makes it clear that pre-arrest repentance cancels the fixed punishment for brigandage, jurists differ as to whether it also indicates the cancellation of liability. The *athar* reports cited by those who deny the liability are undermined by virtue of another report in which a *sahabi* is said to have recognized the liability of pre-arrest repentant brigands. This is why the issue of liability can be open to *ijtihad* and assigned different rulings by different judges.

In order to be valid and have a mitigating impact, repentance in the case of the fixed punishment for brigandage has to take place before arrest, or else the brigand would receive the punishment. The only exception to this rule is the termination of exile by

reason of post-arrest repentance given that this punishment is mainly perceived by jurists as a non-fixed disciplinary punishment. Jurists and exegetes are unanimous in stipulating that a brigand must declare his repentance before arrest, but they differ on recognizing other conditions—such as going to the ruler and securing a pledge of safety from him, fleeing to a non-Muslim land, the ability to protect oneself from capture either independently or through a powerful group, and righteous conduct.

Owing to the peculiarities surrounding the fixed punishment for brigandage, the majority of jurists asserts that the laws of pre-arrest repentance cannot be extended by analogy to other fixed punishments that are construed as God's right—such as the fixed penalties for theft, fornication, and consumption of intoxicants. Unlike other offenders, brigands are beyond the ruler's control and this is why their pre-arrest repentance is potentially sincere. Nonetheless, some jurists perceive similarities between brigandage and other cases and apply the laws of pre-arrest repentance to all fixed punishments that are construed as God's right. In most of these cases, God excludes the repentant offender from receiving the fixed punishment. These two opposing scholarly attitudes prove that the mitigating impact of repentance upon fixed punishments constitutes a case of casuistry.

The analysis of the mitigating impact of repentance upon the fixed punishment for brigandage reveals the centrality of the Qur'an and *hadith* in the legal discourse across the eight schools as well as among jurists and exegetes who do not belong to a certain legal school. The verse cluster that discusses the fixed punishment for brigandage and the exemption from punishment in the case of pre-arrest repentance (Q. 5:33-34) is used as



evidence by all jurists and exegetes in their discourse on the mitigating impact of repentance upon the fixed punishment for brigandage, the liability of repentant brigands, and the conditions for the validity of brigands' repentance. The linguistic analysis of this verse cluster in terms of its syntax and lexis is a significant tool that all jurists have deployed in deducing the pertinent legal rulings. Additional five Qur'anic verses and five *hadith* reports are cited by scholars in their debate, especially concerning the application of repentance laws in the case of brigandage to the fixed punishments for theft, fornication, and consumption of intoxicants. These additional texts prove that jurists work within a complex network of evidence in order to draw legal conclusions.

This intricate network of evidence is also composed of *athar* reports on the authority of *sahaba* and *tabi'un*. In their assessment of the legal significance of repentance in the case of the fixed punishment for brigandage, jurists and exegetes have provided numerous *athar* reports on the authority of *tabi'un*. Of more importance in the legal discourse are the *athar* reports on the authority of *sahaba*. Scholars have presented five *athar* reports on the authority of four *sahaba*: 'Umar b. al-Khattab, 'Ali b. Abi Talib, Abu Musa al-Ash'ari, and Abu Hurayra. The first *athar* demonstrates the mitigating impact of post-arrest repentance upon terminating the punishment of exile, whereas the rest of the reports address the issue of liability on the part of pre-arrest repentant brigands. The binding nature of *athar* reports on the authority of *sahaba* has always been a subject of scholarly debate in the field of Islamic legal theory.<sup>230</sup>

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<sup>230</sup> See Sha'ban Isma'il, *Usul al-Fiqh al-Muyassar*, vol. 1 (Beirut: Dar Ibn Hazm, 2008) 584-597.

Another integral part of the elaborate network of evidence is analogy. Jurists have used analogical reasoning several times in their debate on the mitigating impact of repentance upon the fixed punishment for brigandage as well as in their examination of the possibility of enforcing the laws of pre-arrest repentance upon all fixed punishments, save *qadhf*. For instance, drawing an analogy between the cases of brigandage and theft has led some jurists to enforce the punishment of hand-cutting despite brigands' pre-arrest repentance as these scholars do not recognize the mitigating impact of repentance upon the fixed punishment for theft. Ironically, this very analogy has prompted other scholars to rule that pre-arrest repentance cancels all fixed punishments that are construed as God's right. Besides, the *a fortiori* arguments remarkably appeared in the juristic discourse on the mitigating impact of repentance in the case of brigandage. For example, some jurists argue that the right hand of repentant brigands would not be cut off because the whole fixed punishment for brigandage is cancelled because of repentance.

The analysis of the mitigating impact of repentance upon the fixed punishment for brigandage shows that almost all jurists across the eight schools have utilized the complex network of evidence and have advanced similar arguments, virtually following the same line of reasoning. In the case of a scholarly debate, each scholarly camp that typically consists of several schools shares the same evidence and arguments notwithstanding school affiliation and theological orientation. This shared legal tradition unanimously appreciates the legal significance of repentance in terms of its mitigating impact upon the fixed punishment for brigandage. The overwhelming majority of jurists postulates that repentant brigands have to return the stolen property and have to be

subject to the laws of retaliation although they are exempted from receiving the four punishments that comprise the fixed punishment for brigandage. Moreover, these jurists stress that repentance has to take place before arrest, or else brigands would receive the punishment. The formulation of two opposing paradigms that govern the mitigating impact of repentance proves that the legal significance of repentance constitutes a case of casuistry.

The highly sophisticated legal discourse on the mitigating impact of repentance upon the fixed punishment for brigandage demonstrates that jurists exercise the highest degree of caution before they assign legal significance to the ethical concept of repentance. Guided by a complex network of evidence and an elaborated discipline of legal theory, jurists debate whether repentance could acquire legal force and cancel the fixed punishment for brigandage. They also debate whether repentance could cancel each and every component of this fixed penalty. After discussing the liability of repentant brigands to the state, jurists debate whether repentant brigands would be liable to the victims and their families. Furthermore, their careful attention to the sincerity of repentance on the part of brigands leads them to discuss the required conditions for the validity of repentance.

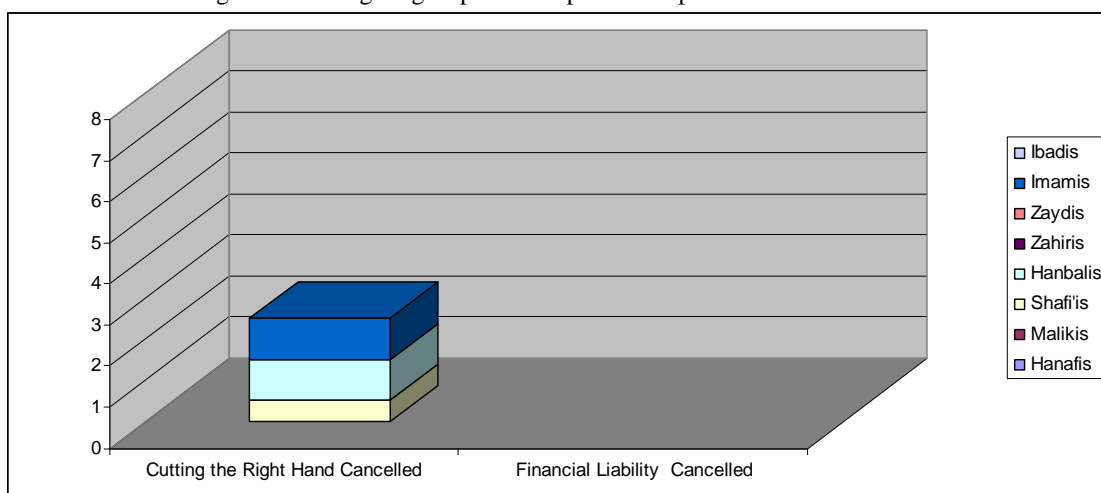
### CHAPTER 3: REPENTANCE AND THEFT

This chapter assesses the legal significance of repentance in terms of its mitigating impact upon the fixed punishment for theft under Islamic law. It attempts to answer three main questions. First, is the fixed punishment for theft cancelled by reason of repentance? Second, would a repentant thief be liable for the property he stole? Third, is a thief's repentance subject to certain conditions that render it valid from a legal perspective? The analysis reveals that the majority of jurists maintains that repentance does not cancel the fixed punishment for theft. However, some jurists opine that a repentant thief would not have his right hand cut off, but he has to return the stolen property to its rightful owner (see Table 3.1 below). These scholars stipulate that a thief's repentance becomes valid only when it takes place before arrest or before the crime is established before the judge.

Table 3.1: Mitigating Impact of Repentance upon the Fixed Penalties for Theft

	Cutting off the Right Hand Cancelled by Repentance		Liability Cancelled by Repentance
Hanafis	No		-
Malikis	No		-
Shafi'is	No	Yes	No
Hanbalis	Yes		No
Zahiris	No		-
Zaydis	No		-
Imamis	Yes		No
Ibadis	No		-

Figure 3.1: Mitigating Impact of Repentance upon the Fixed Penalties for Theft



### 3.1 Definition of theft

Under Islamic law, theft refers to stealing somebody's property in a way that is surreptitious and non-violent without the use of arms.<sup>231</sup> If theft is perpetrated openly or violently with the use of arms, it becomes an act of brigandage.<sup>232</sup> If the element of oppression is present, the crime becomes usurpation (*ghasb*) as the victim is made to give up his property in a way that indicates that he seemingly does so voluntarily.<sup>233</sup> Jurists have laid down various conditions in their definitions of theft, chief among which are the amount of stolen property and where the stolen item is originally kept.<sup>234</sup> Extensive citation of these definitions is beyond the scope of this research.

### 3.2 Fixed punishment for theft

In Q. 5:38, God says: “[As for] the male thief and the female thief: cut off the hands of both.” The majority of jurists understands from this verse that the fixed punishment for theft is cutting off the right hand.<sup>235</sup> These jurists also believe that the liability for stolen property is an integral part of the penalty. Nonetheless, Abu Hanifa opines that hand-cutting is the only punishment for theft and that a thief would not be

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<sup>231</sup> In *Mu'jam Lughat al-Fuqaha*, theft (*sariqa*) is defined as taking somebody's property in a clandestine way; Qal'aji et al., 217.

<sup>232</sup> Al-Rawandi, 2:388.

<sup>233</sup> Qal'aji et al., 300-301; each of the similar crimes of usurpation, theft, and brigandage has different legal consequences.

<sup>234</sup> Peters, 56.

<sup>235</sup> The Imamis contend that only the fingers of the right hand—excluding the thumb—should be cut. There are other opinions whose discussion is beyond the scope of this research; al-Suyuri, part 4, 42.

liable for the stolen property if his hand is cut off.<sup>236</sup> Overall, jurists construe hand-cutting as a right of God, but they perceive the liability for stolen property as an individual's right.<sup>237</sup>

A large number of scholars postulate that a thief whose hand was cut off is punished by imprisonment if he repeats his crime and that his repentance terminates the punishment of imprisonment. For instance, 'Ata' (d. ca. 114/732)<sup>238</sup> applies this punishment in the second instance of theft, whereas Abu Hanifa, Ahmad b. Hanbal, and Abu al-Hawari (d. ca. 3<sup>rd</sup>/9<sup>th</sup> century) enforce it in the third instance.<sup>239</sup> Imprisonment is imposed when a thief commits his crime for the fifth time—as stated by Abu Bakr al-Siddiq (in one narration), Qatada (d. 118/736),<sup>240</sup> Malik and al-Shafi'i.<sup>241</sup> All these scholars clearly state that a thief is released upon his repentance. The fact that a thief's repentance terminates his imprisonment proves that repentance has a mitigating impact upon the procedure of the fixed punishment for theft. This pattern of imprisonment terminated by repentance is almost identical in the two cases of theft and brigandage.<sup>242</sup>

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<sup>236</sup> The contention of Abu Hanifa and the Hanafis casts doubt on Ibn al-Mundhir's claim that there is a scholarly consensus that a thief has to return the stolen property to the rightful owner even if his hand is cut off; Lucas, 357.

<sup>237</sup> Al-Mawardi, *al-Hawi*, 1:430.

<sup>238</sup> 'Ata' is an independent jurist, who lived in Mecca. His name is 'Ata' b. Abi Rabah b. Safwan, and his *kunya* is Abu Muhammad.

<sup>239</sup> Al-Dah al-Shinqiti attributes this opinion to the Hanafis and Hanbalis; al-Dah al-Shinqiti, 72-73; al-Baghawi, *Ma'alim al-Tanzil*; Ibn 'Atiyya, *al-Muharrar*; al-'Ulaymi, 2:293; Abu al-Hawari, 171.

<sup>240</sup> Qatada is an independent jurist and exegete, who lived in Basra. His name is Qatada b. Di'ama b. 'Aziz, and his *kunya* is Abu al-Khattab.

<sup>241</sup> Al-Baghawi, *Ma'alim al-Tanzil*; al-Jassas, *Ahkam al-Qur'an*, 4:71; al-'Ulaymi, 2:293.

<sup>242</sup> See the discussion about exile under section 2.2.

### 3.3 Mitigating impact of repentance

This section attempts to answer a crucial question as to whether repentance cancels the fixed punishment for theft. Moreover, it analyzes the reasons and evidence cited by jurists and exegetes that justify the mitigating impact of repentance upon the fixed punishment for theft. It also provides the counterarguments by other scholars who believe that repentance does not cancel the fixed punishment for theft. The analysis shows that the majority of jurists states that the fixed punishment for theft is not cancelled by reason of repentance. It also demonstrates that the opposing scholarly camp draws an analogy between the fixed punishment for theft and that for brigandage.

Before discussing the mitigating impact of repentance upon the fixed punishment for theft, it should be noted that repentance in this context refers to feelings of remorse rather than returning the stolen item to its rightful owner. The majority of jurists postulates that a thief's hand would be cut off even if he returns the stolen property to the rightful owner because fulfillment of individuals' rights does not cancel God's rights.<sup>243</sup> Moreover, taking an item out of its guarded custody (*hirz*) is the reason why a thief's hand is cut off. Therefore, returning the stolen item to its guarded custody would not cancel the punishment of hand-cutting.<sup>244</sup> Nevertheless, Abu Hanifa, Sufyan al-Thawri (d. ca. 161/777),<sup>245</sup> and the Hanafis contend that returning the stolen item cancels the

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<sup>243</sup> Al-Baghawi, *Ma'alim al-Tanzil*.

<sup>244</sup> Al-Mawardi, *al-Hawi*, 1:538-539; Ibn 'Atiyya, *al-Muharrar*.

<sup>245</sup> Sufyan al-Thawri is an independent jurist, who lived in Kufa. His name is Sufyan b. Sa'id b. Masruq b. Habib, and his *kunya* is Abu 'Abd Allah.



punishment of hand-cutting.<sup>246</sup> Given that Abu Hanifa asserts that repentance does not cancel the punishment for theft, it would follow that he perceives repentance in the context of theft as feelings of remorse rather than returning the stolen property to the rightful owner.

The majority of exegetes and jurists is of the opinion that repentance does not cancel the fixed punishment for theft.<sup>247</sup> Nonetheless, some jurists appreciate the legal significance of repentance in the case of theft and argue that the right hand of a repentant thief would not be cut off. As far as the eight schools are concerned, the second opinion is primarily espoused by the Hanbalis and the Imamis, whereas the first opinion is mainly adopted by the Hanafis, Malikis, Zahiris, Zaydis, and Ibadis. Within the literature of the Shafi'is, both opinions are advocated. The opinions of the eight schools are illustrated in Table 3.2 and Figure 3.2 below.

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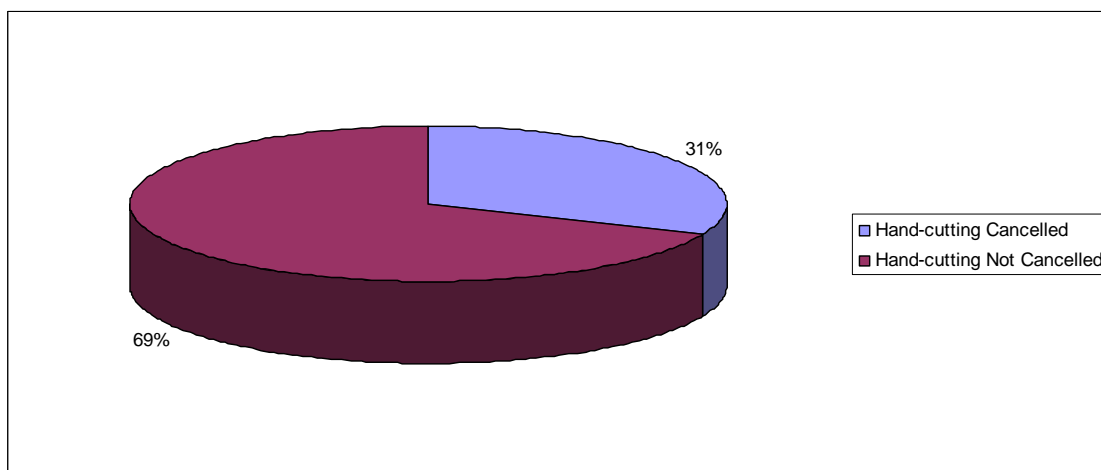
<sup>246</sup> Al-Shirbini, 1:433; al-Mawardi, *al-Hawi*, 1:538-539.

<sup>247</sup> Al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Abu Hayyan, *al-Bahr*; al-Naysaburi, *Ghara'ib al-Qur'an*; al-Tha'alibi, *al-Jawahir*; Ibn 'Adil, *al-Lubab*; al-Razi, *al-Tafsir al-Kabir*; al-Baydawi, *Anwar al-Tanzil wa Asrar al-Ta'wil*, <<http://www.altafsir.com/>>; Ibn 'Ashur, *al-Tahrir*; al-Shirbini, 1:433; al-Muzi'i, 2:759; al-Baydawi is a Shafi'i jurist, exegete and judge, who lived in Shiraz and Tabriz. His name is 'Abd Allah b. 'Umar b. Muhammad b. 'Ali al-Baydawi. He died in 685/1286.

Table 3.2: Mitigating Impact of Repentance upon Hand-cutting in the Fixed Punishment for Theft

	Cutting off the Right Hand Cancelled by Repentance	
Hanafis	No	
Malikis	No	
Shafi'is	Yes	No
Hanbalis	Yes	
Zahiris	No	
Zaydis	No	
Imamis	Yes	
Ibadis	No	

Figure 3.2: Mitigating Impact of Repentance upon Hand-cutting in the Fixed Punishment for Theft



At the individual level, scholars who support the first opinion (Group A) as well as those who adopt the second opinion (Group B) are mentioned in Table 3.3 below and arranged in chronological order.

Table 3.3: Mitigating Impact of Repentance upon Hand-cutting in the Fixed Punishment for Theft

Group A (Hand-Cutting is not Cancelled by repentance)		Group B (Hand-Cutting is Cancelled by repentance)	
Scholar	Death Date	Scholar	Death Date
Abu Hanifa	150/767	Al-Sha'bi	ca. 100/718
Malik	179/796	'Ata'	ca. 114/732
Al-Shafi'i	204/820	Al-Shafi'i	204/820
Al-Jassas	370/980	Ahmad b. Hanbal	241/855
Abu Ishaq al-Tha'labi	427/1035	Al-Samarqandi	375/985
Makki b. Abi Talib	437/1045	Al-Tusi	460/1067
Ibn Hazm	456/1064	Sa'id al-Rawandi	573/1177
Ibn al-'Arabi	543/1148	Al-Haddadi	ca. 800/1398
Ibn 'Atiyya	546/1151	Ibn Mutawwaj al-Bahrani	820/1417
Ibn al-Faras	597/1200	Muhammad al-Muzi'i	825/1422
Al-Qurtubi	671/1272	Al-Kashani	1090/1679
Fakhr al-Din al-Najri	877/1472	Ahmad al-Jaza'iri	1150 /1737
Al-Biq'a'i	885/1480	Al-Janabidhi	14 <sup>th</sup> /19 <sup>th</sup> cent.
Al-Suyuti	911/1505		
Abu al-Su'ud	982/1574		
Isma'il Haqqi	1127/1715		
Al-Shawkani	1250/1834		
Al-Alusi	1270/1854		
Atfiyyash	1332/1913		
Ibn 'Ashur	1393/1972		

The scholarly opinions over the mitigating impact of repentance upon the fixed punishment for theft are mentioned here again at the levels of both schools and individual jurists in order to demonstrate the sources that cite these scholars. The first opinion that does not recognize the mitigating impact of repentance is espoused by Abu Hanifa,<sup>248</sup>

<sup>248</sup> Al-Zamakhshari, *al-Kashshaf*; al-A'qam, *Tafsir al-A'qam*, <<http://www.altafsir.com/>>; Atfiyyash, *Hamayan al-Zad*; al-'Ulaymi, 2:293-295; al-Suyuri, part 4, 43; al-Thula'i, 3:121; al-Jaza'iri, 3:383-84; al-

Malik,<sup>249</sup> al-Shafi'i (in one opinion),<sup>250</sup> Ibn Hazm,<sup>251</sup> al-Jassas,<sup>252</sup> Abu al-Su'ud,<sup>253</sup> Isma'il Haqqi,<sup>254</sup> al-Alusi,<sup>255</sup> Makki b. Abi Talib,<sup>256</sup> Ibn al-'Arabi,<sup>257</sup> Ibn 'Atiyya,<sup>258</sup> Ibn al-Faras,<sup>259</sup> al-Qurtubi,<sup>260</sup> Ibn 'Ashur,<sup>261</sup> al-Biqa'i,<sup>262</sup> Abu Ishaq al-Tha'labi,<sup>263</sup> al-Suyuti,<sup>264</sup> al-Shawkani,<sup>265</sup> the Hanafis;<sup>266</sup> Fakhr al-Din al-Najri;<sup>267</sup> and Atfiyyash.<sup>268</sup>

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A'qam is a Zaydi jurist and exegete, who lived in Yemen. His name is Ahmad b. 'Ali b. Muhammad b. 'Ali al-A'qam. He died in the 9<sup>th</sup>/15<sup>th</sup> century; 'Abd al-Salam al-Wajih, *A'lam al-Mu'allifin al-Zaydiyya*, <[http://www.dawacenter.net/index.php?sub=detail\\_books&RecordID=39](http://www.dawacenter.net/index.php?sub=detail_books&RecordID=39)>.

<sup>249</sup> Ibn Juzayy, *al-Tashil*; Ibn 'Ajiba, *al-Bahr al-Madid fi Tafsir al-Qur'an al-Majid*, <<http://www.altafsir.com/>>; al-'Ulaymi, 2:293-295; Ibn 'Ajiba is a Maliki exegete, who lived in Morocco. His name is Ahmad b. Muhammad b. al-Mahdi b. 'Ajiba, and his *kunya* is Abu al-'Abbas. He died in 1224/1809.

<sup>250</sup> Ibn 'Ajiba, *al-Bahr*; al-'Ulaymi, 2:293-295; al-Muzi'i, 2:759; al-Suyuri, part 4, 43; al-Jaza'iri, 3:383-84.

<sup>251</sup> Ibn Hazm, *al-Muhalla*, 12:22.

<sup>252</sup> Al-Jassas, *al-Fusul*, 1:270-71.

<sup>253</sup> Abu al-Su'ud, *Irshad al-'Aql*.

<sup>254</sup> Isma'il Haqqi, *Ruh al-Bayan*.

<sup>255</sup> Al-Alusi, *Ruh al-Ma'ani*.

<sup>256</sup> Makki b. Abi Talib is a Maliki exegete, linguist and jurist, who lived in al-Qayrawan (Tunisia), Egypt, Mecca and al-Andalus. His name is Hammush b. Muhammad b. Mukhtar. He died in 437/1045; Makki b. Abi Talib, *al-Hidaya ila Bulugh al-Nihaya*, <<http://www.altafsir.com/>>.

<sup>257</sup> Ibn al-'Arabi, 2:115.

<sup>258</sup> Ibn 'Atiyya, *al-Muharrar*.

<sup>259</sup> Al-Suyuti, *al-Iklil*, 2:634.

<sup>260</sup> Al-Qurtubi, 7:472-473.

<sup>261</sup> Ibn 'Ashur, *al-Tahrir*.

<sup>262</sup> Al-Biqa'i, *Nazm al-Durar*.

<sup>263</sup> Al-Tha'labi, *al-Kashf*.

<sup>264</sup> Al-Mahalli and al-Suyuti, *Tafsir al-Jalalayn*; al-Suyuti, *al-Iklil*, 2:634.

<sup>265</sup> Al-Shawkani, *Fath al-Qadir*.

The second opinion that recognizes the mitigating impact of repentance is adopted by al-Sha‘bi,<sup>269</sup> ‘Ata’,<sup>270</sup> al-Shafi‘i (in one opinion),<sup>271</sup> Ahmad b. Hanbal;<sup>272</sup> al-Samarqandi,<sup>273</sup> al-Haddadi;<sup>274</sup> Muhammad al-Muzi‘i,<sup>275</sup> the Shafi‘is (in one opinion of the school);<sup>276</sup> al-Tusi,<sup>277</sup> Sa‘id al-Rawandi,<sup>278</sup> Ibn Mutawwaj al-Bahrani,<sup>279</sup> al-Kashani,<sup>280</sup> Ahmad al-Jaza‘iri,<sup>281</sup> al-Janabidhi,<sup>282</sup> and the Imamis.<sup>283</sup> To recapitulate,

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<sup>266</sup> Al-Zamakhshari, *al-Kashshaf*.

<sup>267</sup> Al-Najri, 1:248.

<sup>268</sup> Atfiyyash, *Hamayan al-Zad*.

<sup>269</sup> Al-Sha‘bi is an independent jurist, who lived in Kufa. His name is ‘Amir b. Sharahil b. ‘Abd b. Dhi Kibar, and his *kunya* is Abu ‘Amr. He died in ca. 100/718; al-Tha‘labi, *al-Kashf*.

<sup>270</sup> Abu Hayyan, *al-Bahr*; al-Tha‘labi, *al-Kashf*; Ibn ‘Ashur, *al-Tahrir*; al-Qurtubi, 7:472-473.

<sup>271</sup> Abu Hayyan, *al-Bahr*; al-Tha‘alibi, *al-Jawahir*; Abu al-Su‘ud, *Irshad al-‘Aql*; Ibn Juzayy, *al-Tashil*; al-Zamakhshari, *al-Kashshaf*; Ibn ‘Ajiba, *al-Bahr*; al-A‘qam, *Tafsir al-A‘qam*; Atfiyyash, *Hamayan al-Zad*; Ibn ‘Ashur, *al-Tahrir*; al-Alusi, *Ruh al-Ma‘ani*; al-Qurtubi, 7:472-473; al-Najri, 1:247; Ibn al-‘Arabi, 2:115; al-Thula‘i, 3:121.

<sup>272</sup> Al-‘Ulaymi, 2:293-295.

<sup>273</sup> Al-Samarqandi is a Hanafi jurist and exegete, who lived in Samarqand (now a city in Uzbekistan). His name is Nasr b. Muhammad b. Ibrahim al-Samarqandi, and his *kunya* is Abu al-Layth. He died in ca. 375/985; al-Samarqandi, *Bahr al-‘Ulum*, <<http://www.altafsir.com/>>.

<sup>274</sup> Isma‘il Haqqi, *Ruh al-Bayan*.

<sup>275</sup> Al-Muzi‘i, 2:759.

<sup>276</sup> Al-Qurtubi, 7:472-473; Ibn al-‘Arabi, 2:115.

<sup>277</sup> Al-Tusi, *al-Tibyan*.

<sup>278</sup> Al-Rawandi, 2:385.

<sup>279</sup> Al-Bahrani, 375.

<sup>280</sup> Al-Kashani is an Imami jurist and exegete, who lived in Qom, Kashan and Shiraz. His name is Muhammad Muhsin b. Murtada b. Mahmud, and he is commonly known as “al-Fayd al-Kashani.” He died in 1090/1679; al-Kashani, *al-Safi fi Tafsir Kalam Allah al-Wafi*, <<http://www.altafsir.com/>>.

<sup>281</sup> Al-Jaza‘iri, 3:383-384.

Group B that supports the second opinion is mainly represented by the Shafi‘is (in one opinion within the school), Hanbalis and Imamis, whereas Group A that advocates the first opinion is primarily represented by the Hanafis, Malikis, Shafi‘is (in one opinion within the school), Zahiris, Zaydis, and Ibadis.

### 3.3.1 Evidence

This section analyzes the reasons and evidence cited by jurists and exegetes concerning the mitigating impact of repentance upon the fixed punishment for theft. It presents the arguments of scholars who recognize this impact (Group B) as well as the counterarguments of those who deny it (Group A). The analysis shows that both scholarly camps use the text of Q. 5:39 as a support of their arguments. In addition to the Qur’an, Group B draws an analogy between the cases of brigandage and theft and provides an *athar* report in which a thief was exempted from punishment upon his confession. However, Group A responds by presenting three *hadith* reports revealing the necessity to enforce the fixed punishment for theft once the crime is established before the authorities.

Group B understands God’s declaration of forgiveness in Q. 5:39 as a cancellation of the fixed punishment for theft.<sup>284</sup> Upon describing the fixed punishment for theft in Q. 5:38, God says: “If one repents after his injustice and acts righteously, surely God will

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<sup>282</sup> Al-Janabidhi is an Imami exegete, who lived in Khorasan and Najaf. His name is Muhammad b. Haydar b. Muhammad al-Janabidhi. He died in the 14<sup>th</sup>/19<sup>th</sup> century; al-Janabidhi, *Bayan al-Sa‘ada fi Maqamat al-Ibada*, <<http://www.altafsir.com/>>.

<sup>283</sup> Ahmad al-Jaza’iri affirms that there is a consensus of opinion among Imami jurists over this point; al-Jaza’iri, 3:383-84; al-Suyuri, part 4, 43.

<sup>284</sup> Al-Razi, *al-Tafsir al-Kabir*; al-Najri, 1:247-248; al-Bahrani, 376; this argument is advanced by the majority of jurists when they discuss the liability of pre-arrest repentant brigands; see section 2.4.1.

accept his repentance. Surely God is Ever-Forgiving, Ever-Merciful” (Q. 5:39). Moreover, Group B postulates that Q. 5:39 should be understood in the context of Q. 5:34 which excludes pre-arrest repentant brigands from facing the fixed punishment for brigandage. This understanding has led al-Shafi‘i (in one opinion), for instance, to rule that pre-arrest repentance cancels the fixed punishment for theft in analogy to the pre-arrest repentance that cancels the fixed punishment for brigandage.<sup>285</sup> Similarly, al-Sha‘bi and ‘Ata’ declare that if a thief returns the stolen property before arrest, he would not receive the fixed punishment for theft because God says, “Except for those who repent before you gain control over them.”<sup>286</sup> Citing the verse that discusses brigandage while answering a question on theft clearly reveals the centrality of Q. 5:34 in the legal discourse of Group B concerning the mitigating impact of repentance upon the fixed punishment for theft.

In addition to the Qur’an, the Imamis cite an *athar* report in which ‘Ali b. Abi Talib exempted a thief who confessed of his crime from receiving the fixed punishment for theft.<sup>287</sup> In this report, ‘Ali asked the thief whether he had memorized any part of the Qur’an, and the man said that he had memorized the second chapter (*surat al-Baqara*). ‘Ali then said: “I give [up cutting] your hand for [memorizing] the chapter of al-Baqara (*wahabt yadak li-surat al-Baqara*).” Al-Ash‘ath (d. ca. 40/660)<sup>288</sup> was present and he asked ‘Ali whether he refuses to enforce a punishment fixed by God. However, ‘Ali

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<sup>285</sup> Ibn ‘Atiyya, *al-Muharrar*; Ibn al-Faras, 2:423; al-Najri, 1:247-248.

<sup>286</sup> Al-Tha‘labi, *al-Kashf*; al-A‘qam, *Tafsir al-A‘qam*.

<sup>287</sup> Al-Bahrani, 375; al-Suyuri, part 4, 43; al-Jaza‘iri, 3:384-85.

<sup>288</sup> Al-Ash‘ath is a *sahabi*. His name is al-Ash‘ath b. Qays b. Ma‘d Yakrub al-Kandi.

explained to him that a ruler cannot pardon a thief if his crime is established through evidence (*bayyina*), but in case theft is established through confession (*iqrar*), the ruler would have the choice to either pardon or punish the thief.<sup>289</sup> This report has led the Imamis (in one opinion in the school) to conclude that repentance cancels the fixed punishment for theft before the evidence is established against the thief.<sup>290</sup>

Nevertheless, Group A does not perceive Q. 5:39 as a cancellation of the fixed punishment for theft mainly because it lacks the syntactic structure of an exceptive clause as opposed to Q. 5:34.<sup>291</sup> For instance, al-Jassas and al-Shawkani believe that the conditional sentence in Q. 5:39 means that God accepts the repentance of thieves, but it does not imply the cancellation of the punishment of hand-cutting.<sup>292</sup> Al-Jassas observes that the structure of a conditional sentence is not as conclusive as the structure of an exceptive clause in signifying contrastive implication. Moreover, he states that the independence of the conditional structure does not make it mandatory to understand Q. 5:39 in the context of the preceding verse. This structure is independent because it can produce a proper meaning if it stands alone by itself.<sup>293</sup> By contrast, the structure of an exceptive clause in Q. 5:34 needs to be incorporated within the context of the preceding

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<sup>289</sup> ‘Ali said: “If evidence is established, the *imam* (ruler) is not entitled to pardon [the thief]. If the man [the thief] confesses, it would be up to the ruler to either pardon [the thief] or cut [the thief’s hand].” The term “evidence” refers to witnesses; al-Jaza’iri, 3:384-85.

<sup>290</sup> Al-Bahrani, 375; al-Suyuri, part 4, 43; al-Jaza’iri, 3:384-85; al-Tusi, *al-Tibyan*; al-Rawandi, 1:368.

<sup>291</sup> Al-Jassas, *Ahkam al-Qur’an*, 4:59-60; al-Harrasi, 2:69-70; Ibn al-Faras, 2:423; al-Shawkani, *Fath al-Qadir*; Atfiyyash, *Hamayan al-Zad*.

<sup>292</sup> Al-Jassas, *Ahkam al-Qur’an*, 4:60; al-Shawkani, *Fath al-Qadir*.

<sup>293</sup> Al-Harrasi, 2:69-70.



verse as it cannot stand alone by itself.<sup>294</sup> This is why the structure of an exceptive clause in Q. 5:34 exempts repentant brigands from facing the punishment, whereas the structure of a conditional sentence does not necessarily exempt repentant thieves from having their hands cut off.

Furthermore, Group A asserts the invalidity of drawing an analogy between the cases of theft and brigandage owing to the peculiarities surrounding each case. For example, Ibn al-‘Arabi notes that a thief is under the ruler’s control, whereas a brigand is beyond the ruler’s control.<sup>295</sup> He adds that the ruler exerts massive armed efforts in order to capture the offender in the case of brigandage rather than theft. Similarly, Ibn ‘Ashur opines that the mitigating impact of repentance in the case of brigandage cannot be extended to the case of theft because the two respective verses address two different issues.<sup>296</sup> Owing to this difference, Q. 5:39 should not be understood in the context of Q. 5:34. Along the same line, the Maliki jurist Ibn al-Faras postulates that Q. 5:34 demonstrates that repentance cancels the fixed punishments for crimes that are committed in an open way, such as brigandage, rather than offences that are perpetrated in a covert and clandestine way, such as theft.<sup>297</sup>

In addition to their linguistic and legal analyses that highlights the difference between the two cases of theft and brigandage represented by Q. 5:38-39 and Q. 5:33-34, jurists and exegetes from Group A cite three *hadith* reports that demonstrate that a

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<sup>294</sup> Al-Jassas, *Ahkam al-Qur’an*, 4:60.

<sup>295</sup> Ibn al-‘Arabi, 2:115.

<sup>296</sup> Ibn ‘Ashur, *al-Tahrir*.

<sup>297</sup> Ibn al-Faras, 423-424.

convict would receive the fixed punishment if his case is reported to the authorities. In the first report, a thief was brought to the Prophet. Although the thief confessed to his crime, the Prophet said to him: “I don’t think you committed theft.” However, the man stated that he did perpetrate theft. Thereupon, the Prophet ordered that the thief’s hand be cut off.<sup>298</sup> In the second report, a Makhzumi woman had her hand cut off because she committed theft.<sup>299</sup> Commenting on this *hadith*, Ibn ‘Ashur remarks that the woman received the punishment despite her repentance.<sup>300</sup>

In the third *hadith*, the Prophet advised people not to expose themselves if they committed a crime that deserves a fixed punishment. The Prophet said that he would enforce the punishment if an offender reports his case to him.<sup>301</sup> The Prophet made this statement in the context of the fixed punishment for fornication. The Ibadi jurist Atfiyyash suggests that this *hadith* eliminates the role of repentance as a mitigating factor in the case of theft.<sup>302</sup> Similar to this *hadith* is the *athar* report on the authority of ‘Amr b. Shu‘ayb (d. 118/736) in which he describes a case of theft that was established before the

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<sup>298</sup> This *hadith* is mentioned in *Sunan Abi Dawud* and *Sunan al-Nasa’i*; al-Khazin, *Lubab al-Ta’wil*; Hud al-Hawwari, *Tafsir Kitab Allah al-‘Aziz*, <<http://www.altafsir.com/>>; <<http://dorar.net/enc/hadith>>; Hud al-Hawwari is an Ibadi exegete, who lived in Algeria. His name is Hud b. Muhakkam al-Hawwari, and his famous work is *Tafsir Kitab Allah al-‘Aziz*; Muhammad Baba‘ammi et al., 2:443

<sup>299</sup> This *hadith* is mentioned in *Sahih Muslim*, *Sunan Abi Dawud* and *Sunan al-Nasa’i*; <<http://dorar.net/enc/hadith>>.

<sup>300</sup> Ibn ‘Ashur, *al-Tahrir*.

<sup>301</sup> This *hadith* is mentioned in *Sunan al-Bayhaqi* and Ibn ‘Abd al-Barr’s *al-Istidhkar*; <<http://dorar.net/enc/hadith>>. In this *hadith*, Zayd b. Aslam (d. 136/753) is quoting the Prophet. Therefore, this *hadith* is *mursal* (i.e. the link between a *tabi’i* and the Prophet is missing).

<sup>302</sup> Atfiyyash, *Hamayan al-Zad*.

Prophet through witnesses.<sup>303</sup> When the plaintiff asked the Prophet to exempt the thief from punishment, the Prophet told him that the ruler cannot refrain from enforcing the punishment if the crime was established before him. He also informed the plaintiff that he could have relinquished his right before bringing the defendant to him.<sup>304</sup>

Each of Group A and Group B cites Q. 5:39 to prove or refute the role of repentance as a mitigating factor in the case of the fixed punishment for theft. Group B construes the conditional sentence in Q. 5:39 as stating an exception for repentant thieves from facing the punishment. However, Group A refutes this argument by comparing this verse to Q. 5:34 and stressing that Q. 5:39 does not exclude repentant thieves from punishment because it lacks the syntactic structure of an exceptive clause that Q. 5:34 has. Moreover, Group B uses analogy and extends the mitigating impact of repentance upon the fixed punishment for brigandage to the case of theft. Nevertheless, Group A asserts that it is invalid to draw such an analogy owing to the peculiarities of each case.

Furthermore, the Imami scholars from Group B cite an *athar* report in which ‘Ali b. Ali Talib exempted a thief from receiving the punishment of hand-cutting. Nevertheless, Group A provides three *hadith* reports which reveal that the fixed punishment should be enforced once the crime is established. Two of these reports show that the fixed punishment for theft was inflicted upon the offender when the crime was

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<sup>303</sup> According to al-Suyuti, this *hadith* is mentioned in ‘Abd al-Razzaq’s *Musannaf*; al-Suyuti, *al-Durr*.

<sup>304</sup> This remark is highlighted in a similar *hadith* in which the Prophet said: “You should exempt one another from the fixed punishments, since whatever crime deserving a fixed penalty comes to my attention, [its penalty] must be executed.” This *hadith* is mentioned in *Sunan Abi Dawud* and *Sunan al-Nasa’i*; <<http://dorar.net/enc/hadith>>. The rendition of this *hadith* is provided by Scott Lucas in his “Abu Bakr ibn al-Mundhir, Amputation, and the Art of Ijtihad,” 355. Few minor changes have been introduced in order to maintain consistency throughout the research.

established through confession in the first case and through evidence in the second. Moreover, Group A provides an *athar* report in which the Prophet was reported to have declared that the ruler cannot refrain from enforcing the fixed punishment once the crime is established. The arguments of Group A seem to be stronger than those of Group B due to the *hadith* reports they cite and to their refutation of the possibility of drawing an analogy between the cases of theft and brigandage.

Although I have not found the *athar* report that the Imamis cite in the available sources of the seven schools, I have encountered a juristic opinion by a Hanbali jurist that espouses the same idea presented in the *athar* report. Explaining his paradigm that governs the mitigating impact of repentance upon fixed punishments, Ibn al-Qayyim concludes that the ruler would have the option to either pardon or punish a repentant convict when the crime is established through confession.<sup>305</sup> Ibn al-Qayyim's contention is almost identical with what the Imamis believe concerning the mitigating impact of repentance upon the fixed punishment for theft. The Imamis (in one trend in the school) affirm that the ruler can pardon or punish a repentant convict of theft if the crime is established through confession. They add that the ruler would not have this option if the crime was established through evidence.

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<sup>305</sup> Ibn al-Qayyim, 3:311-312; the evidence advanced by Ibn al-Qayyim is discussed under 2.6.

### 3.4 Liability of repentant convicts

All jurists and exegetes from Group B that recognize the mitigating impact of repentance upon the fixed punishment of hand-cutting in the fixed punishment for theft hold repentant thieves liable for the property they steal. For instance, al-Shafi‘i declares that a thief is liable for what he steals whether or not his hand is cut off and whether or not the stolen item exists.<sup>306</sup> Similarly, the Imami jurist Miqdad al-Suyuri says: “As for the right of the owner, it is never cancelled by reason of repentance.”<sup>307</sup> Likewise, the Imami jurist al-Tusi maintains that a repentant thief would be requested to return the stolen item.<sup>308</sup> Along the same line, the Imami jurist Sa‘id al-Rawandi stresses that a repentant thief has to return the stolen property to its rightful owner.<sup>309</sup>

### 3.5 Conditions for the validity of convicts’ repentance

This section answers a crucial question as to whether repentance in the case of the fixed punishment for theft is subject to certain conditions that render it valid from a legal perspective. The analysis shows that almost all jurists from Group B that recognizes the mitigating impact of repentance upon the fixed punishment for theft stipulate that repentance has to take place before arrest—with reference to Q. 5:34. The Imamis phrase their stipulation in a slightly different way and maintain that repentance has to occur

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<sup>306</sup> Al-Mawardi, *al-Hawi*, 2:707.

<sup>307</sup> Al-Suyuri, part 4, 43.

<sup>308</sup> Al-Tusi, *al-Tibyan*.

<sup>309</sup> Al-Rawandi, 2:385.

before theft is established before the court. Some Shafi'i and Imami jurists add that pre-arrest repentance has to be accompanied by righteous conduct.

Jurists from Group B that espouse the cancellation of hand-cutting by reason of repentance specify a time frame during which repentance in the case of the fixed punishment for theft can be legally valid. For example, al-Shafi'i (in one opinion) and the Imami jurist al-Kashani postulate that repentance in the case of the fixed punishment for theft has to take place before arrest, or else the thief's hand would be cut off.<sup>310</sup> Shifting the focus of the time frame, Ahmad b. Hanbal and the Imamis (in one opinion) require that repentance should occur before the crime of theft is established before the judge, either through confession or evidence.<sup>311</sup> Furthermore, the Imamis (in another opinion) state that repentance has to take place before the evidence is established against the thief.<sup>312</sup> Emphasizing the reason why the Imamis stipulate this condition, Ahmad al-Jaza'iri argues that a thief's repentance might not be genuine if he declares it after the evidence is established against him.<sup>313</sup>

Acting upon the apparent meaning of Q. 5:39, some Shafi'i and Imami jurists contend that righteous conduct is a condition for the validity of repentance. For instance, the Shafi'i jurist al-Mawardi opines that repentance would not be accepted until it becomes manifest through performing righteous acts during a period of time in which it is

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<sup>310</sup> Al-Mawardi, *al-Hawi*, 2:818-19; al-Kashani, *al-Safi*; Abu Hayyan, *al-Bahr*.

<sup>311</sup> Al-'Ulaymi, 2:293-95; al-Jaza'iri, 3:383-84.

<sup>312</sup> If theft is established through confession, the judge would have the option to either pardon or punish the offender; al-Suyuri, part 4, 43; al-Bahrani, 375; al-Rawandi, 2:385.

<sup>313</sup> Al-Jaza'iri, 3:383-84.

possible to establish the sincerity of a thief's righteousness.<sup>314</sup> The Imami jurist Ahmad al-Jaza'ri cites an opinion in the Imami school which states that this period should be around five months.<sup>315</sup> If a thief does something good during this period, he would not receive the fixed punishment for theft. Fixing a period of time to test a thief's righteousness clearly demonstrates the juristic concern for establishing the sincerity of a thief's repentance.

### 3.6 Conclusion

Unlike brigandage, theft lacks the elements of violence and terror. Nevertheless, some jurists draw an analogy between the two crimes concerning the mitigating impact of repentance. The Shafi'is (in one opinion), Hanbalis, and Imamis contend that a repentant thief would not have his right hand cut off, but he would have to return the stolen property to the rightful owner. The Shafi'is qualify this exemption by stipulating that repentance has to take place before arrest, whereas the Hanbalis and the Imamis (in one opinion) state that repentance has to occur before theft is established before the judge—whether the crime is established through confession or evidence. Moreover, the Imamis (in another opinion) postulate that repentance should take place before the evidence is established against the thief. They add that the ruler would have the option to either pardon or punish the repentant thief if theft is established through confession.

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<sup>314</sup> Al-Mawardi, *al-Hawi*, 1:819; al-Muzi'i, 1:579.

<sup>315</sup> Al-Jaza'iri, 3:383-84.

Nonetheless, the Hanafis, Malikis, Shafi‘is (in one opinion), Zahiris, Zaydis, and Ibadis declare that a thief would have his right hand cut off even if he repents.

The analysis of the mitigating impact of repentance upon the fixed punishment for theft reveals the centrality of the Qur’an in the legal discourse across the eight schools as well as among jurists and exegetes who do not belong to a certain legal school. The two opposing scholarly camps cite Q. 5:39 as a support of their argument. Moreover, jurists who espouse the cancellation of the punishment cite Q. 5:34 and draw an analogy between the two cases of theft and brigandage. However, it is not clear why these jurists do not adhere to the several *hadith* reports that the majority of scholars provides to demonstrate that repentance does not cancel the fixed punishment for theft. These reports show that the fixed punishment for theft was enforced once the crime was established before the Prophet—regardless of whether the crime was established through confession or evidence.

The majority of scholars believes that the convicts in these reports were repentant because they wanted to be purified from their sin through receiving the punishment. Furthermore, these scholars stress that in one incident a thief came to the Prophet and confessed of his crime. Confession, according to these jurists, serves as a marker for repentance. Jurists who believe in the mitigating impact of repentance upon the fixed punishment for theft may construe these *hadith* reports as evidence for enforcing the punishment upon the establishment of crime. They may not perceive any relationship between repentance and these reports as these historical precedents do not mention that a thief declared his repentance then was arrested after the crime was established before the



judge. The influence of Q. 5:34 upon the discourse of these scholars may support my hypothesis.

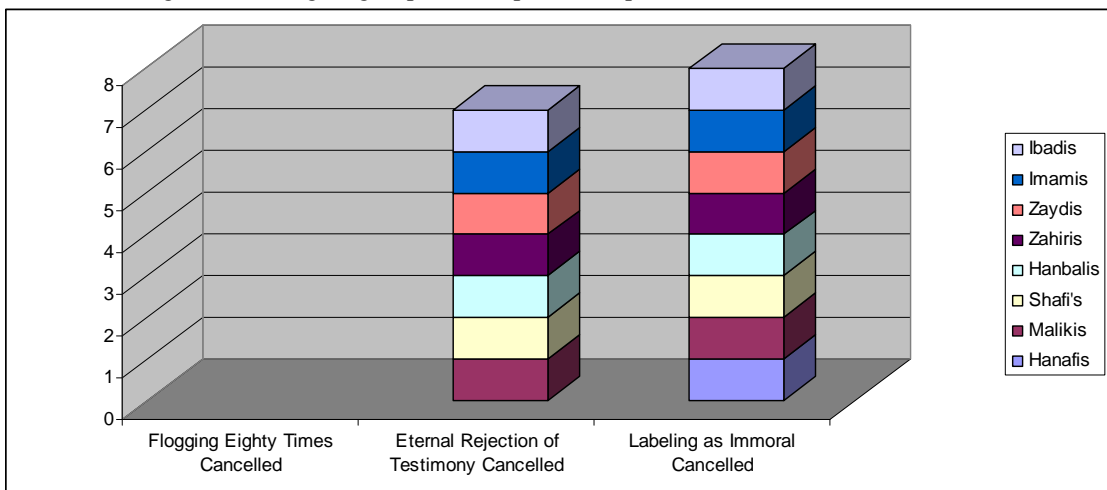
#### CHAPTER 4: REPENTANCE AND ACCUSATION OF FORNICATION (QADHF)

This chapter assesses the legal significance of repentance in terms of its mitigating impact upon the fixed punishment for the accusation of fornication (*qadhf*) under Islamic law. It attempts to answer two main questions. First, is the fixed punishment for *qadhf* cancelled by reason of repentance? Second, is repentance in this case subject to certain conditions that render it valid from a legal perspective? The discussion in this chapter is based on the assumption that the plaintiff does not confess to committing fornication and the defendant is unable to support his accusation with four witnesses. The analysis reveals that the majority of jurists maintains that repentance does not cancel the punishment of flogging, but cancels the rejection of testimony and the label of being “immoral.” Moreover, most of these jurists stipulate that repentance becomes valid only when the convict declares that he was lying in his accusation.

Table 4.1: Mitigating Impact of Repentance upon the Fixed Penalties for Qadhf

	Flogging Eighty Times Cancelled	Eternal Rejection of Testimony Cancelled	Labeling as Immoral Cancelled
Hanafis	No	No	Yes
Malikis	No	Yes	Yes
Shafi'is	No	Yes	Yes
Hanbalis	No	Yes	Yes
Zahiris	No	Yes	Yes
Zaydis	No	Yes	Yes
Imamis	No	Yes	Yes
Ibadis	No	Yes	Yes

Figure 4.1: Mitigating Impact of Repentance upon the Fixed Penalties for Qadhf



#### 4.1 Definition of *qadhf*

Lexically, *qadhf* means “to hurl, to allege, or to insult.”<sup>316</sup> Under Islamic law, *qadhf* refers to an allegation in the form of an insult against somebody’s chastity in order to bring shame on the insulted person (*‘ala sabil al-ta‘yir*).<sup>317</sup> More specifically, it refers to accusing a person of committing fornication (*zina*).<sup>318</sup> Some jurists extend the definition of *qadhf* to cover accusations of any sexual activity outside the context of a valid marriage—such as homosexuality, lesbianism, bestiality, anal intercourse between a man and a woman, and prostitution. Moreover, the offence of *qadhf* refers to denying a person’s paternity and to accusing a person’s parent of committing fornication,<sup>319</sup> as stated by several jurists.<sup>320</sup> *Qadhf* is not necessarily a false accusation because it can be true and can be supported with evidence. Only when the defendant is unable to produce four witnesses to prove his claim can his accusation be considered as false.<sup>321</sup>

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<sup>316</sup> Arabic Language Academy, *al-Mu‘jam al-Wasit*, 4<sup>th</sup> ed. (Cairo: Maktabat al-Shuruq al-Dawliyya, 2004) 721; al-Fayruzabadi, *Basa‘ir Dhawi al-Tamyiz fi Lata‘if al-Kitab al-‘Aziz*, ed. Muhammad al-Najjar, vol. 4 (Beirut: al-Maktaba al-‘Ilmiyya) 250.

<sup>317</sup> Ibn Hazm, *al-Muhalla*, 12:261; this chapter does not discuss the legal consequences for accusing one’s wife of adultery. This topic is separately addressed by jurists and exegetes under the category of *li‘an* (reciprocal cursing). See Q. 24:6-9.

<sup>318</sup> Qal‘aji et al., 327; Basically, Abu Hanifa defines fornication as unlawful vaginal intercourse between a man and a woman who is not his wife. However, the majority of jurists contend that fornication refers to unlawful intercourse—vaginal or anal—between a man and a woman who is not his wife, and to anal intercourse between two men.

<sup>319</sup> Under Islamic law, a valid marriage establishes paternity. Therefore, if a child is born out of wedlock, he would not be considered as the son of the biological father. Insulting a person by telling him that his father commits fornication might imply that the insulted person was born out of wedlock and thus is not a son of his father. Insulting a person by telling him that his mother commits fornication could imply that the insulted person was born as a consequence of adultery and thus he would not be a son of his father whose name he bears. This is why accusing a person’s parent of committing fornication could make a case for *qadhf*—from the perspective of jurists who consider denying a person’s sonhood to his father as *qadhf*.

<sup>320</sup> Ibn Hazm, *al-Muhalla*, 12:220-223.

## 4.2 Fixed punishment for *qadhf*

When the victim of *qadhf* brings the case to the court's attention, the defendant would receive the fixed punishment for *qadhf* if he is unable to prove his accusation through four upright witnesses. If the defendant substantiates his accusation with such evidence,<sup>322</sup> he would not receive the fixed punishment for *qadhf*. This stipulation of four witnesses is stated very clearly in Q. 24:4 in which God says: “[As for] those who hurl [insults at]<sup>323</sup> chaste women, then they do not come up with four witnesses, flog them eighty times and do not accept any testimony of theirs ever, and those are the ones who are immoral (*fasiqs*).” This chapter is based on the assumption that the defendant is unable to support his accusation with four witnesses and that the victim of *qadhf* brings the case to the court and demands the enforcement of the fixed punishment for *qadhf*.

The fixed punishment for *qadhf*, as stated in Q. 24:4, consists of three components: flogging the convict eighty times; rejecting his testimony forever; and describing him as a *fasiq* (immoral person). To be a *fasiq* signifies that a person commits

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<sup>321</sup> In Q. 24:13, God says: “If they had come up with four witnesses against it—yet as they did not come up with the witnesses, then those, in the Reckoning of God, are the liars.” The translation of this verse is mainly the rendition of Ghali, <<http://Quran.com/>>.

<sup>322</sup> These four witnesses have to clearly state that at one incident each and every one of them did see the plaintiff's penis into the vagina of a woman and that this woman is not the plaintiff's wife. Since this very detailed description is highly unlikely to be advanced by four men at the same time, the defendant is highly likely to receive the fixed punishment for *qadhf*. Ibn 'Atiyya remarks that God stipulates the condition of four witnesses in order not to expose His slaves and to have mercy on them; Ibn 'Atiyya, *al-Muharrar*.

<sup>323</sup> “Those who hurl” is the English equivalent for the Arabic phrase “*al-ladhin yarmun*” in the Qur'anic text of Q. 24:4. A large number of exegetes in the available sources interpret “*al-ladhin yarmun*” as “those who insult” (*al-ladhin yasubbun*). For example, see al-Qurtubi, 122. To retain the euphemistic figurative Qur'anic style of “*al-ladhin yarmun*,” the English word “hurl” is used as an equivalent. To give a hint of what type of hurling is meant by the verse, the phrase “insults at” is put in parenthesis after the word “hurl.” These insults implicitly refer to the accusation of fornication.

major sins, persists in committing minor sins, or has an immoral character.<sup>324</sup> In general, the legal significance of the label “*fasiq*” is that a person who fits this description cannot have his testimony accepted before the court owing to the lack of moral integrity; moreover, such a person is denied access to key positions in the state and he cannot serve as a legal guardian (*wali*). Furthermore, most jurists do not recognize a *fasiq*’s validation of the marriage contract of his daughter.<sup>325</sup> In other words, an immoral person is not given authority over people, whether through his testimony, guardianship, or being in power.

By and large, most jurists consider the fixed punishment for *qadhaf* as an individual’s right, which would imply that the fixed punishment would be cancelled if the victim grants a legal pardon to the offender.<sup>326</sup> However, Abu Hanifa perceives the fixed punishment for *qadhaf* as God’s right, which would imply that the fixed punishment would be enforced even if the victim legally pardons the offender.<sup>327</sup> Moreover, Malik (in one opinion) regards the fixed punishment for *qadhaf* as a right for God and people and contends that it could not be cancelled if the victim pardons the offender after the case is

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<sup>324</sup> Qal’aji et al., 307.

<sup>325</sup> The majority of jurists perceive the guardian’s consent as a condition for the validity of the marriage contract of his daughter. If a guardian does not approve of the marriage, the contract would be null and void from its inception. A woman, as stated by the majority of jurists, has to seek her guardian’s approval of marriage, regardless of her age and regardless whether she consummated a previous marriage.

<sup>326</sup> Al-Muzi’i, 2:984-85; Ibn al-Jawzi, *Zad al-Masir*.

<sup>327</sup> Al-Jassas, *Ahkam al-Qur’an*, 5:114.

reported to the ruler.<sup>328</sup> Throughout this research, the offence of *qadhf* is considered as an individual's right.

#### 4.3 Mitigating impact of repentance

This section attempts to answer a crucial question as to whether repentance cancels the three penalties comprising the fixed punishment for *qadhf*. Moreover, it analyzes the reasons and evidence cited by jurists and exegetes that justify or deny the mitigating impact of repentance upon the three components of the fixed punishment for the accusation of fornication. The analysis shows that almost all jurists state that repentance does not cancel the punishment of flogging, but it cancels the punishment of labeling the convict of *qadhf* as immoral. Moreover, the majority of scholars believes that repentance cancels the punishment of eternal rejection of testimony. The linguistic rule governing the anaphoric reference of an exceptive clause when preceded by a sequence of coordinated sentences is a main reason why jurists express opposing views on accepting the testimony of a repentant convict of *qadhf*.

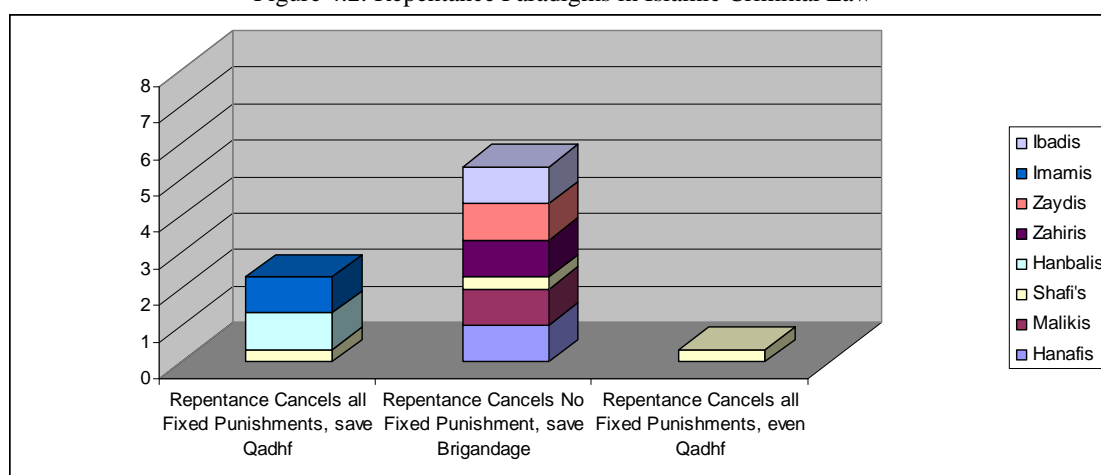
Upon describing the fixed punishment for *qadhf* in Q. 24:4, God states an exception for those who repent of their crime in Q. 24:5: "Except for those who repent after that and act righteously. Surely God is Ever-Forgiving, Ever-Merciful." The apparent meaning of the verse suggests that repentant convicts would neither be flogged, have their testimony rejected, nor be described as immoral. Nevertheless, there is virtual unanimity of opinion among jurists and exegetes that a repentant convict of *qadhf* would

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<sup>328</sup> Ibn al-Faras, 3:340.

be flogged despite his repentance.<sup>329</sup> This unanimity is achieved across the eight schools as well as independent jurists who are not affiliated with a certain legal school. Nonetheless, al-Sha‘bi, al-Janabidhi, and a few Shafi‘i jurists contend that a repentant convict of *qadhf* would not be flogged.<sup>330</sup> These contentions—though weakened by the overwhelming majority of jurists—could constitute a minor trend in Islamic law that suggests that all fixed punishments are cancelled by reason of repentance.

Figure 4.2: Repentance Paradigms in Islamic Criminal Law

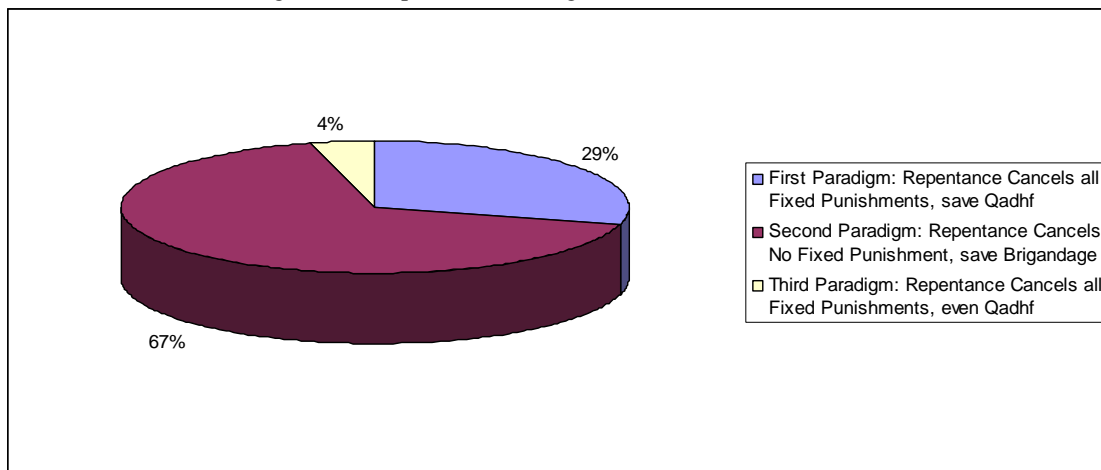


<sup>329</sup> Al-Jassas, *Ahkam al-Qur'an*, 5:115; Ibn al-Faras, 3:342-343; al-Muzi'i, 2:983; al-Tabarani, *al-Tafsir al-Kabir*; al-Suyuti, *al-Iklil*, 3:1008; Ibn Hazm, *al-Muhalla*, 12:22; al-Thula'i, 4:384-385; al-Rawandi, 2:389, 1:428; al-Suyuri, part 4, 38; Atfiyyash, *Hamayan al-Zad*.

<sup>330</sup> Al-Qurtubi, 15:133-134; al-Baghawi, *Ma'alim al-Tanzil*; al-Shirbini, 2:665; al-Janabidhi, *Bayan al-Sa'ada*; al-Mawardi, *al-Hawi*, 2:823-824; al-Mawardi did not mention the names of the Shafi'i jurists who espouse the cancellation of flogging because of repentance.



Figure 4.3: Repentance Paradigms in Islamic Criminal Law



The position of the fixed punishment for *qadhf* in the dichotomous theory of rights leads almost all jurists and exegetes to deny the mitigating impact of repentance upon flogging. Scholars argue that flogging in the fixed punishment for *qadhf* is an individual's right and therefore it cannot be cancelled by reason of repentance in the same way retaliation is not cancelled by the convict's repentance.<sup>331</sup> Furthermore, Ibn Hazm suggests that the lexis of the exceptive clause in Q. 24:5 precludes the possibility that flogging would be cancelled because of the convict's repentance. He argues that if absolute repentance cancels flogging, the exceptive clause would hypothetically read "except for those who repent" instead of "except for those who repent after that."<sup>332</sup> Ibn Hazm asserts that the prepositional phrase "after that" means "after the convict is flogged eighty times, after his testimony is rejected, and after he is labeled as immoral."

<sup>331</sup> Al-Biqa'i, *Nazm al-Durar*; al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; al-Tabari, *Jami' al-Bayan*; al-Muzi'i, 2:983; al-Alusi, *Ruh al-Ma'ani*; al-Najri, 2:428; Muhammad b. al-Qasim, 403; al-Thula'i, 4:384-385; al-Tusi, *al-Tibyan*.

<sup>332</sup> Ibn Hazm, *al-Muhalla*, 12:22.

Therefore, repentance has a mitigating impact in the case of *qadhf* after—not before—the enforcement of flogging.

Jurists unanimously agree that a repentant convict of *qadhf* would no longer be described as immoral and that he would become an upright (*‘adl*) person.<sup>333</sup> Nevertheless, scholars express two main opinions concerning the cancellation of the eternal rejection of the convict’s testimony by reason of repentance, which are in fact just the opposite of one another. First, repentance renders the testimony of the convict of *qadhf* valid. Second, repentance does not render the testimony of the convict of *qadhf* valid. As far as the eight schools are concerned, the second opinion is primarily espoused by the Hanafis, whereas the first opinion is mainly adopted by the Malikis, Shafi‘is, Hanbalis, Zahiris, Zaydis, Imamis, and Ibadis. The opinions of the eight schools are illustrated in Table 4.2 and Figure 4.4 below.

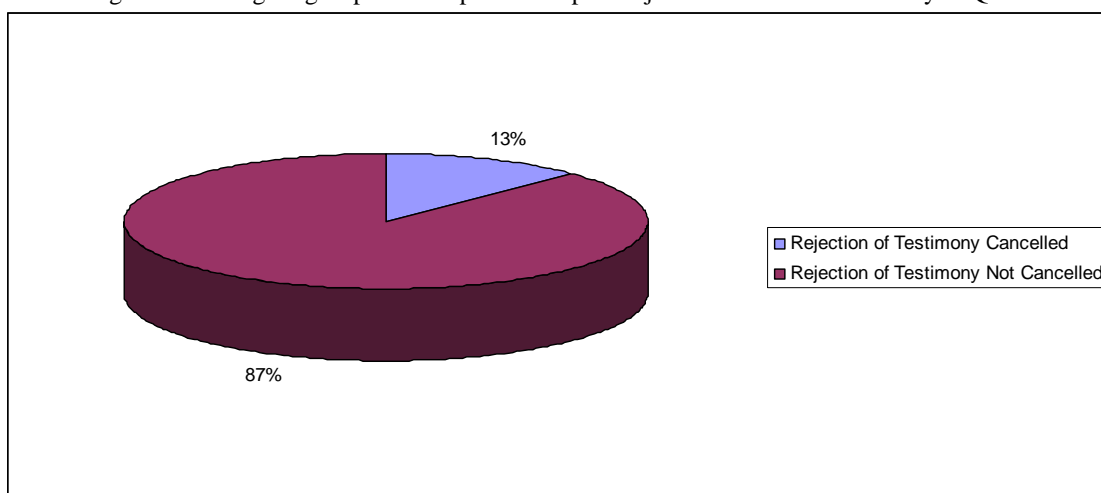
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<sup>333</sup> Al-Suyuti, *al-Iklil*, 3:1008; al-Muzi‘i, 2:983; al-Qurtubi, 15:133; Ibn Juzayy, *al-Tashil*; Ibn Hazm, *al-Muhalla*, 12: 22; al-Thula‘i, 4:384-385; Muhammad b. al-Qasim, 403.

Table 4.2: Mitigating Impact of Repentance upon Rejection of Future Testimony in Qadhf

	Eternal Rejection of Convict's Testimony Cancelled
Hanafis	No
Malikis	Yes
Shafi'is	Yes
Hanbalis	Yes
Zahiris	Yes
Zaydis	Yes
Imamis	Yes
Ibadis	Yes

Figure 4.4: Mitigating Impact of Repentance upon Rejection of Future Testimony in Qadhf



At the individual level, scholars who support the first opinion (Group A) as well as those who adopt the second opinion (Group B) are mentioned in Table 4.3 and arranged in chronological order. Given that some authorities are reported to have declared both opinions, the names of these scholars are highlighted.

Table 4.3: Mitigating Impact of Repentance upon Rejection of Future Testimony in Qadhf

Group A (Rejection of Testimony is Cancelled by Repentance)		Group B (Rejection of Testimony is not Cancelled by Repentance)	
Scholar	Death Date	Scholar	Death Date
'Umar b. al-Khattab	23/644	Ibn 'Abbas	68/687
'Ali b. Abi Talib	40/661	Shurayh	78/697
Masruq	ca. 62/681	Sa'id b. al-Musayyib	93/711
Ibn 'Abbas	68/687	Sa'id b. Jubayr	94/712
Ibn 'Umar	73/692	Ibrahim al-Nakha'i	96/715
'Abd Allah b. 'Utba	74/693	Al-Sha'bi	100/718
Shurayh	78/697	Mujahid	ca. 104/722
Sa'id b. al-Musayyib	93/711	'Ikrima	105/723
Sa'id b. Jubayr	94/712	Muhammad b. Sirin	110/728
Al-Sha'bi	100/718	Al-Hasan al-Basri	110/728
'Umar b. 'Abd al-'Aziz	101/719	Makhul	ca. 112/730
Al-Dahhak	ca. 102/720	Qatada	118/736
Mujahid	ca. 104/722	Zayd b. 'Ali	122/739
Al-Qasim b. Muhammad	ca. 105/723	Abu Hanifa	150/767
'Ikrima	105/723	Ibn Jurayj	ca. 150/767
Salim	106/724	'Abd al-Rahman b. Zayd b. Jabir	?
Tawus	106/724	Zufar	158/774
Sulayman b. Yasar	ca. 107/725	Sufyan al-Thawri	ca. 161/777
Mu'awiya b. Qarra	113/731	Al-Hasan b. Salih	ca. 167/783
Muhammad al-Baqir	114/732	Abu Yusuf	182/798
'Ata'	ca. 114/732	Al-Farra'	207/822
Muharib	116/734	Al-Samarqandi	375/985
Al-Zuhri	124/741	Abu Hayyan	745/1344
Abu al-Zinad	130/747	Ibn 'Ajiba	1224/1809
Ibn Abi Najih	131/748		
'Uthman al-Batti	143/760		
Ja'far al-Sadiq	148/765		
Al-Layth b. Sa'd	175/791		
Malik	179/796		
Al-Shafi'i	204/820		
Abu 'Ubayda	209/824		
Abu 'Ubayd	224/838		
Ishaq b. Rahawayh	238/853		

Ahmad b. Hanbal	241/855
Abu Thawr	246/860
Abu al-Hawari	ca. 3 <sup>rd</sup> /9 <sup>th</sup> cent.
Al-Tabari	310/923
Al-Zajjaj	ca. 311/923
Al-Qassab	ca. 360/970
Ilkiya al-Harrasi	405/1014
Abu Talib	424/1032
Makki b. Abi Talib	437/1045
Ibn Hazm	456/1064
Al-Tusi	460/1067
Sa'id al-Rawandi	573/1177
al-Mansur bi-Allah	614/1217
Al-Qurtubi	671/1272
Ibn Mutawwaj al-Bahrani	820/1417
Miqdad al-Suyuri	826/1422
Fakhr al-Din al-Najri	877/1472
Al-Khatib Al-Shirbini	977/1569
Al-Shawkani	1250/1834
Atfiyyash	1332/1913
Al-Tabataba'i	1402/1982

The scholarly opinions over the mitigating impact of repentance upon the eternal rejection of convict's testimony in the fixed punishment for *qadhf* are mentioned here again on the levels of both schools and individual jurists in order to demonstrate the sources that cite these scholars. The first opinion that recognizes this mitigating impact is advocated by 'Umar b. al-Khattab,<sup>334</sup> 'Ali b. Abi Talib,<sup>335</sup> Masruq,<sup>336</sup> Ibn 'Abbas (in one opinion),<sup>337</sup> Ibn 'Umar,<sup>338</sup> 'Abd Allah b. 'Utba,<sup>339</sup> Shurayh (in one opinion),<sup>340</sup> Sa'id b.

<sup>334</sup> Al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Ibn 'Adil, *al-Lubab*; al-Suyuti, *al-Durr*; Makki b. Abi Talib, *al-Hidaya*; al-Tabari, *Jami' al-Bayan*; Ibn al-'Arabi, 3:345; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>335</sup> Atfiyyash, *Hamayan al-Zad*.

<sup>336</sup> Masruq is an independent jurist, who lived in Kufa. His name is Masruq b. al-Ajda' b. Malik b. Umayya b. 'Abd Allah. He died in ca. 62/681; al-Suyuti, *al-Durr*; al-Tha'labi, *al-Kashf*; Ibn 'Ajiba, *al-Bahr*; al-Tabari, *Jami' al-Bayan*; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>337</sup> Al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Ibn 'Adil, *al-Lubab*; al-Suyuti, *al-Durr*; Makki b. Abi Talib, *al-Hidaya*; al-Tabari, *Jami' al-Bayan*; al-Shirbini, 2:665; al-Muzi'i, 2:984; al-Tabarsi, *Majma' al-Bayan*; Hud al-Hawwari, *Tafsir Kitab Allah*; Atfiyyash, *Hamayan al-Zad*.

al-Musayyib (in one opinion),<sup>341</sup> Sa'id b. Jubayr (in one opinion),<sup>342</sup> al-Sha'bi (in one opinion),<sup>343</sup> 'Umar b. 'Abd al-'Aziz,<sup>344</sup> al-Dahhak,<sup>345</sup> Mujahid (in one opinion),<sup>346</sup> al-Qasim b. Muhammad,<sup>347</sup> 'Ikrima (in one opinion),<sup>348</sup> Salim,<sup>349</sup> Tawus,<sup>350</sup> Sulayman b.

<sup>338</sup> Al-Shirbini, 2:665.

<sup>339</sup> 'Abd Allah b. 'Utba is an independent jurist, who lived in Kufa. His name is 'Abd Allah b. 'Utba b. Mas'ud b. Ghafil b. Habib, and his *kunya* is Abu 'Abd al-Rahman. He died in 74/693; Ibn Sa'd, *al-Tabaqat al-Kubra*, 5:58-59, <<http://shiaonlinelibrary.com/>>; al-Shirazi, 60; al-Tha'labi, *al-Kashf*; Makki b. Abi Talib, *al-Hidaya*; al-Tabari, *Jami' al-Bayan*.

<sup>340</sup> Shurayh is an independent jurist, who lived in Kufa. His name is Shurayh b. al-Harith b. Qays al-Kandi. He died in 78/697; al-Samarqandi, *Bahr al-'Ulum*; al-Alusi, *Ruh al-Ma'ani*.

<sup>341</sup> Sa'id b. al-Musayyib is an independent jurist, who lived in Medina. His name is Sa'id b. al-Musayyib b. Abi Wahb b. 'Amr b. 'A'idh b. 'Imran. He died in 93/711; al-Samarqandi, *Bahr al-'Ulum*; al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Ibn 'Adil, *al-Lubab*; al-Tha'labi, *al-Kashf*; Makki b. Abi Talib, *al-Hidaya*; al-Tabari, *Jami' al-Bayan*; Ibn Kathir, *Tafsir al-Qur'an al-'Azim*, <<http://www.altafsir.com/>>; al-Tusi, *al-Tibyan*.

<sup>342</sup> Sa'id b. Jubayr is an independent jurist, who lived in Kufa. His name is Sa'id b. Jubayr b. Hisham. He died in 94/712; al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Ibn 'Adil, *al-Lubab*; al-Tha'labi, *al-Kashf*; al-Tabari, *Jami' al-Bayan*; al-Thula'i, 4:385; al-Alusi, *Ruh al-Ma'ani*; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*; Atfiyyash, *Hamayan al-Zad*.

<sup>343</sup> Al-Samarqandi, *Bahr al-'Ulum*; al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Abu Hayyan, *al-Bahr*; Ibn 'Adil, *al-Lubab*; al-Suyuti, *al-Durr*; al-Tha'labi, *al-Kashf*; Ibn 'Ajiba, *al-Bahr*; Makki b. Abi Talib, *al-Hidaya*; al-Tabari, *Jami' al-Bayan*; Ibn Kathir, *Tafsir al-Qur'an*; al-Shawkani, *Fath al-Qadir*; al-Jassas, *Ahkam al-Qur'an*, 5:118; al-Muzi'i, 2:984; al-Thula'i, 4:385; al-Alusi, *Ruh al-Ma'ani*; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*; al-Amin al-Shinqiti, *Adwa' al-Bayan*.

<sup>344</sup> 'Umar b. 'Abd al-'Aziz is an independent jurist, who lived in Medina. His name is 'Umar b. 'Abd al-'Aziz b. Marwan b. al-Hakam b. Abi al-'As b. Umayya. He died in 101/719; al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Ibn 'Adil, *al-Lubab*; Makki b. Abi Talib, *al-Hidaya*; al-Tabari, *Jami' al-Bayan*; al-Alusi, *Ruh al-Ma'ani*; al-Tusi, *al-Tibyan*.

<sup>345</sup> Al-Dahhak is an independent jurist and exegete, who lived in Khorasan. His name is al-Dahhak b. Muzahim al-Hilali. He died in ca. 102/720; al-Tha'labi, *al-Kashf*; al-Tabari, *Jami' al-Bayan*; Ibn Kathir, *Tafsir al-Qur'an*; al-Shawkani, *Fath al-Qadir*; al-Thula'i, 4:385; al-Tusi, *al-Tibyan*; al-Amin al-Shinqiti, *Adwa' al-Bayan*.

<sup>346</sup> Mujahid is an independent jurist and exegete, who lived in Mecca. His name is Mujahid b. Jabr. He died in ca. 104/722; al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Abu Hayyan, *al-Bahr*; Ibn 'Adil, *al-Lubab*; al-Tha'labi, *al-Kashf*; Makki b. Abi Talib, *al-Hidaya*; al-Jassas, *Ahkam al-Qur'an*, 5:118; al-Muzi'i, 2:984; al-Alusi, *Ruh al-Ma'ani*; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*; Atfiyyash, *Hamayan al-Zad*.

Yasar,<sup>351</sup> Mu‘awiya b. Qarra,<sup>352</sup> Muhammad al-Baqir,<sup>353</sup> ‘Ata’,<sup>354</sup> Muharib,<sup>355</sup> al-Zuhri,<sup>356</sup>  
 Abu al-Zinad,<sup>357</sup> Ibn Abi Najih,<sup>358</sup> ‘Uthman al-Batti,<sup>359</sup> Ja‘far al-Sadiq,<sup>360</sup> al-Layth b.

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<sup>347</sup> I think that al-Qasim b. Muhammad is a reference for al-Qasim b. Muhammad b. Abi Bakr al-Siddiq. He is an independent jurist, who lived in Medina. He died in ca. 105/723; Abu Hayyan, *al-Bahr*; al-Jassas, *Ahkam al-Qur’an*, 5:118.

<sup>348</sup> ‘Ikrima is an independent jurist and exegete, who lived in Mecca. His name is ‘Ikrima b. ‘Abd Allah, and his *kunya* is Abu ‘Abd Allah. He died in 105/723; al-Baghawi, *Ma‘alim al-Tanzil*; al-Khazin, *Lubab al-Ta‘wil*; Ibn ‘Adil, *al-Lubab*; al-Alusi, *Ruh al-Ma‘ani*.

<sup>349</sup> I think that “Salim” is a reference to Salim b. ‘Abd Allah b. ‘Umar b. al-Khattab. He is an independent jurist, who lived in Medina. He died in 106/724; Abu Hayyan, *al-Bahr*; al-Jassas, *Ahkam al-Qur’an*, 5:118.

<sup>350</sup> Tawus is an independent jurist, who lived in Yemen. His name is Tawus b. Kaysan. He died in 106/724; al-Samarqandi, *Bahr al-Ulum*; al-Baghawi, *Ma‘alim al-Tanzil*; al-Khazin, *Lubab al-Ta‘wil*; Abu Hayyan, *al-Bahr*; Ibn ‘Adil, *al-Lubab*; al-Suyuti, *al-Durr*; al-Tha‘labi, *al-Kashf*; Makki b. Abi Talib, *al-Hidaya*; al-Jassas, *Ahkam al-Qur’an*, 5:118; al-Muzi‘i, 2:984; al-Thula‘i, 4:385; al-Alusi, *Ruh al-Ma‘ani*; al-Tabarsi, *Majma‘ al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>351</sup> Sulayman b. Yasar is an independent jurist, who lived in Medina. He died in ca. 107/725; al-Baghawi, *Ma‘alim al-Tanzil*; al-Khazin, *Lubab al-Ta‘wil*; Ibn ‘Adil, *al-Lubab*; al-Tha‘labi, *al-Kashf*; Ibn ‘Ajiba, *al-Bahr*; al-Tabari, *Jami‘ al-Bayan*.

<sup>352</sup> Mu‘awiya b. Qarra is an independent jurist, who lived in Basra. His name is Mu‘awiya b. Qarra b. Iyas b. Hilal b. Ri‘ab. He died in 113/731; al-Alusi, *Ruh al-Ma‘ani*.

<sup>353</sup> Muhammad al-Baqir is an independent jurist, who lived in Medina. He is a member of the Prophet’s family. His name is Muhammad b. ‘Ali Zayn al-‘Abidin b. al-Husayn b. ‘Ali b. Abi Talib, his *kunya* is Abu Ja‘far, and his *laqab* is al-Baqir. He died in 114/732; al-Tabarsi, *Majma‘ al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>354</sup> Al-Samarqandi, *Bahr al-Ulum*; al-Baghawi, *Ma‘alim al-Tanzil*; al-Khazin, *Lubab al-Ta‘wil*; Abu Hayyan, *al-Bahr*; Ibn ‘Adil, *al-Lubab*; al-Suyuti, *al-Durr*; al-Tha‘labi, *al-Kashf*; Ibn ‘Ajiba, *al-Bahr*; Makki b. Abi Talib, *al-Hidaya*; al-Jassas, *Ahkam al-Qur’an*, 5:118; al-Suyuti, *al-Iklil*, 3:1009; al-Muzi‘i, 2:984; al-Thula‘i, 4:385; al-Tabarsi, *Majma‘ al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>355</sup> Muharib is an independent jurist, who lived in Kufa. His name is Muharib b. Dithar b. Kardus b. Qarwash. He died in 116/734; al-Alusi, *Ruh al-Ma‘ani*.

<sup>356</sup> Al-Zuhri is an independent jurist, who lived in Medina. His name is Muhammad b. Muslim b. ‘Ubayd Allah b. Shihab al-Zuhri. He died in 124/741; al-Baghawi, *Ma‘alim al-Tanzil*; al-Khazin, *Lubab al-Ta‘wil*; Abu Hayyan, *al-Bahr*; Ibn ‘Adil, *al-Lubab*; al-Suyuti, *al-Durr*; Makki b. Abi Talib, *al-Hidaya*; al-Tabari, *Jami‘ al-Bayan*; al-Jassas, *Ahkam al-Qur’an*, 5:118; al-Thula‘i, 4:385; al-Alusi, *Ruh al-Ma‘ani*; al-Tabarsi, *Majma‘ al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>357</sup> Abu al-Zinad is an independent jurist, who lived in Medina. His name is ‘Abd Allah b. Dhakwan. He died in 130/747; Makki b. Abi Talib, *al-Hidaya*.

Sa'd,<sup>361</sup> Malik,<sup>362</sup> al-Shafi'i,<sup>363</sup> Ahmad b. Hanbal,<sup>364</sup> Makki b. Abi Talib,<sup>365</sup> al-Qurtubi,<sup>366</sup>  
 Abu Thawr,<sup>367</sup> Ilkiya al-Harrasi,<sup>368</sup> al-Khatib Al-Shirbini,<sup>369</sup> Ishaq b. Rahawayh,<sup>370</sup> the

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<sup>358</sup> Ibn Abi Najih is an independent jurist and exegete, who lived in Mecca. His name is 'Abd Allah b. Yasar, and his *kunya* is Abu Yasar. He is commonly known as Ibn Abi Najih. He died in 131/748; al-Tabari, *Jami' al-Bayan*.

<sup>359</sup> 'Uthman al-Batti is an independent jurist, who lived in Basra and Kufa. His name is 'Uthman b. Sulayman al-Batti, and his *kunya* is Abu 'Amr. He died in 143/760; al-Dhahabi, *Siyar A'lam al-Nubala'*, <<http://www.islamweb.net/newlibrary/>>; al-Shirazi, *Tabaqat*; al-Jassas, *Ahkam al-Qur'an*, 5:118.

<sup>360</sup> Ja'far al-Sadiq is an independent jurist, who lived in Medina. He is a member of the Prophet's family. His name is Ja'far b. Muhammad al-Baqir b. 'Ali Zayn al-'Abidin b. al-Husayn b. 'Ali b. Abi Talib, his *kunya* is Abu 'Abd Allah, and his *laqab* is al-Sadiq. He died in 148/765; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>361</sup> Al-Jassas, *Ahkam al-Qur'an*, 5:118.

<sup>362</sup> Al-Mawardi, *al-Nukat wa al-'Uyun*, <<http://www.altafsir.com/>>; al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Abu Hayyan, *al-Bahr*; Ibn 'Adil, *al-Lubab*; Ibn Juzayy, *al-Tashil*; Makki b. Abi Talib, *al-Hidaya*; Ibn Kathir, *Tafsir al-Qur'an*; al-Jassas, *Ahkam al-Qur'an*, 5:118; Ibn al-'Arabi, 3:345; al-Shirbini, 2:665; al-'Ulaymi, 2:287; al-Muzi'i, 2:983; al-Thula'i, 4:385; al-Alusi, *Ruh al-Ma'ani*; al-Amin al-Shinqiti, *Adwa' al-Bayan*.

<sup>363</sup> Al-Mawardi, *al-Nukat*; al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; al-Naysaburi, *Ghara'ib al-Qur'an*; Ibn 'Adil, *al-Lubab*; al-Tha'labi, *al-Kashf*; al-Samin al-Halabi, *al-Durr*; Ibn 'Ajiba, *al-Bahr*; Makki b. Abi Talib, *al-Hidaya*; al-Zamakhshari, *al-Kashshaf*; al-Razi, *al-Tafsir al-Kabir*; Ibn Kathir, *Tafsir al-Qur'an*; al-Jassas, *Ahkam al-Qur'an*, 5:118; Ibn al-'Arabi, 3:345; al-Shirbini, 2:665; al-'Ulaymi, 2:287; al-Suyuti, *al-Iklil*, 3:1009; al-Muzi'i, 2:983; al-Thula'i, 4:385; al-Rawandi, 1:429; al-Suyuti, part 4, 37; al-Jaza'iri, 3:374; al-Alusi, *Ruh al-Ma'ani*; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*; Atfiyyash, *Hamayan al-Zad*; al-Amin al-Shinqiti, *Adwa' al-Bayan*.

<sup>364</sup> Makki b. Abi Talib, *al-Hidaya*; Ibn Kathir, *Tafsir al-Qur'an*; al-'Ulaymi, 2:287; al-Alusi, *Ruh al-Ma'ani*; al-Amin al-Shinqiti, *Adwa' al-Bayan*.

<sup>365</sup> Makki b. Abi Talib, *al-Hidaya*.

<sup>366</sup> Al-Qurtubi, 15:137.

<sup>367</sup> Makki b. Abi Talib, *al-Hidaya*.

<sup>368</sup> Al-Harrasi, 2:300.

<sup>369</sup> Al-Shirbini, 2:665.

<sup>370</sup> Ishaq b. Rahawayh is a scholar of *hadith*, who lived in Khorasan, Nishapur, Iraq, Hejaz, Sham, and Yemen. His name is Ishaq b. Ibrahim b. Makhliid b. Ibrahim, and his *kunya* is Abu Ya'qub. He died in 238/853; Makki b. Abi Talib, *al-Hidaya*.



Shafi'is,<sup>371</sup> Abu 'Ubayda,<sup>372</sup> Abu 'Ubayd,<sup>373</sup> al-Tabari,<sup>374</sup> al-Zajjaj,<sup>375</sup> al-Qassab,<sup>376</sup> al-Shawkani,<sup>377</sup> Ibn Hazm,<sup>378</sup> Fakhr al-Din al-Najri,<sup>379</sup> Abu Talib,<sup>380</sup> al-Mansur bi-Allah,<sup>381</sup> the Zaydis,<sup>382</sup> al-Tusi,<sup>383</sup> Sa'id al-Rawandi,<sup>384</sup> Ibn Mutawwaj al-Bahrani,<sup>385</sup> Miqdad al-Suyuri,<sup>386</sup> al-Tabataba'i,<sup>387</sup> the Imamis,<sup>388</sup> Abu al-Hawari,<sup>389</sup> Atfiyyash,<sup>390</sup> and the Ibadis.<sup>391</sup>

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<sup>371</sup> Ibn 'Ajiba, *al-Bahr*; Muhammad b. al-Qasim, 404; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*.

<sup>372</sup> Abu 'Ubayda is a scholar of syntax, who lived in Basra. His name is Ma'mar b. al-Muthanna al-Taymi. He died in 209/824; al-Shawkani, *Fath al-Qadir*; Hud al-Hawwari, *Tafsir Kitab Allah*.

<sup>373</sup> Abu 'Ubayd is a linguist and jurist, who lived in Heart (Afghanistan), Kufa, Baghdad, Tartus (Syria), and Khorasan. His name is al-Qasim b. Sallam b. 'Abd Allah. He died in 224/838; Makki b. Abi Talib, *al-Hidaya*.

<sup>374</sup> Al-Tabari, *Jami' al-Bayan*.

<sup>375</sup> Al-Zajjaj is a Hanbali linguist, who lived in Baghdad. His name is Ibrahim b. al-Sari b. Sahl al-Zajjaj, and his *kunya* is Abu Ishaq. He died in ca. 311/923; al-Zajjaj, *Ma'ani al-Qur'an wa I'rabuh*, ed. 'Abd al-Jalil Shalabi, vol. 4 (Beirut: 'Alam al-Kutub, 1988) 31-32; al-Shawkani, *Fath al-Qadir*.

<sup>376</sup> Al-Qassab, 2:415-421.

<sup>377</sup> Al-Shawkani, *Fath al-Qadir*.

<sup>378</sup> Ibn Hazm, *al-Muhalla*, 12:22.

<sup>379</sup> Al-Najri, 2:428.

<sup>380</sup> Abu Talib is a Zaydi jurist, who lived in Amol (Iran). His name is Yahya b. al-Husayn al-Haruni. He died in 424/1033; Muhammad b. al-Qasim, 404; <<http://www.hukam.net/family.php?fam=2>>.

<sup>381</sup> Al-Mansur bi-Allah is a Zaydi jurist, who lived in Yemen. His name is 'Abd Allah b. Hamza. He died in 614/1217; Muhammad b. al-Qasim, 404; <<http://www.hukam.net/family.php?fam=2>>.

<sup>382</sup> Muhammad b. al-Qasim, 404; al-Thula'i, 4:385.

<sup>383</sup> Al-Tusi, *al-Tibyan*.

<sup>384</sup> Al-Rawandi, 1:429.

<sup>385</sup> Al-Bahrani, 362, 371.

<sup>386</sup> Al-Suyuri, part 4, 37.

The second opinion that denies the mitigating impact of repentance upon the eternal rejection of convicts' testimony in the fixed punishment for *qadhf* is supported by Ibn 'Abbas (in one opinion),<sup>392</sup> Shurayh (in one opinion),<sup>393</sup> Sa'id b. al-Musayyib (in one opinion),<sup>394</sup> Sa'id b. Jubayr (in one opinion),<sup>395</sup> Ibrahim al-Nakha'i,<sup>396</sup> al-Sha'bi (in one opinion),<sup>397</sup> Mujahid (in one opinion),<sup>398</sup> 'Ikrima (in one opinion),<sup>399</sup> Muhammad b.

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<sup>387</sup> Al-Tabataba'i is an Imami exegete and philosopher, who lived in Tabriz, Najaf, and Qom. His name is al-Sayyid Muhammad Husayn al-Tabataba'i. He died in 1402/1981; al-Tabataba'i, *al-Mizan fi Tafsir al-Qur'an*, <<http://www.altafsir.com/>>; Hamid Algar, "Allama Sayyid Muhammad Husayn Tabataba'i: Philosopher, Exegete, and Gnostic," *Journal of Islamic Studies* 17.3 (2006): 326-351.

<sup>388</sup> Al-Jaza'iri, 3:374.

<sup>389</sup> Abu al-Hawari, 160.

<sup>390</sup> Atfiyyash, *Hamayan al-Zad*.

<sup>391</sup> Hud Al-Hawwari, *Tafsir Kitab Allah*.

<sup>392</sup> Al-Samarqandi, *Bahr al-'Ulum*; al-Suyuti, *al-Durr*; al-Tha'labi, *al-Kashf*; al-Tabarani, *al-Tafsir al-Kabir*; Ibn 'Ajiba, *al-Bahr*; Makki b. Abi Talib, *al-Hidaya*; al-Jassas, *Ahkam al-Qur'an*, 5:118.

<sup>393</sup> Al-Baghawi, *Ma'alim al-Tanzil*; Ibn 'Atiyya, *al-Muharrar*; al-Khazin, *Lubab al-Ta'wil*; Abu Hayyan, *al-Bahr*; Ibn 'Adil, *al-Lubab*; al-Tha'labi, *al-Kashf*; al-Tabarani, *al-Tafsir al-Kabir*; Ibn 'Ajiba, *al-Bahr*; Makki b. Abi Talib, *al-Hidaya*; al-Tabari, *Jami' al-Bayan*; al-Qurtubi, 15:133; Ibn Kathir, *Tafsir al-Qur'an*; al-Shawkani, *Fath al-Qadir*; al-Jassas, *Ahkam al-Qur'an*, 5:118; Ibn al-'Arabi, 3:345; al-Shirbini, 2:665; al-Thula'i, 4:385; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*; al-Amin al-Shinqiti, *Adwa' al-Bayan*.

<sup>394</sup> Abu Hayyan, *al-Bahr*; al-Suyuti, *al-Durr*; al-Tabari, *Jami' al-Bayan*; al-Jassas, *Ahkam al-Qur'an*, 5:118; al-Thula'i, 4:385; al-Suyuti, part 4, 37; al-Jaza'iri, 3:374; al-Alusi, *Ruh al-Ma'ani*; al-Tusi, *al-Tibyan*; Hud al-Hawwari, *Tafsir Kitab Allah*.

<sup>395</sup> Al-Samarqandi, *Bahr al-'Ulum*; Abu Hayyan, *al-Bahr*; al-Suyuti, *al-Durr*; Ibn 'Ajiba, *al-Bahr*; Makki b. Abi Talib, *al-Hidaya*; Ibn Kathir, *Tafsir al-Qur'an*; al-Shawkani, *Fath al-Qadir*; al-Jassas, *Ahkam al-Qur'an*, 5:118; al-Alusi, *Ruh al-Ma'ani*; al-Amin al-Shinqiti, *Adwa' al-Bayan*.

<sup>396</sup> Al-Samarqandi, *Bahr al-'Ulum*; al-Mawardi, *al-Nukat*; al-Baghawi, *Ma'alim al-Tanzil*; Ibn 'Atiyya, *al-Muharrar*; al-Khazin, *Lubab al-Ta'wil*; Abu Hayyan, *al-Bahr*; Ibn 'Adil, *al-Lubab*; al-Suyuti, *al-Durr*; al-Tha'labi, *al-Kashf*; al-Tabarani, *al-Tafsir al-Kabir*; Ibn 'Ajiba, *al-Bahr*; Makki b. Abi Talib, *al-Hidaya*; al-Tabari, *Jami' al-Bayan*; al-Razi, *al-Tafsir al-Kabir*; Ibn Kathir, *Tafsir al-Qur'an*; al-Shawkani, *Fath al-Qadir*; al-Jassas, *Ahkam al-Qur'an*, 5:118; al-Shirbini, 2:665; al-Suyuti, *al-Iklil*, 3:1009; al-Thula'i, 4:385; al-Tabarsi, *Majma' al-Bayan*; al-Tusi, *al-Tibyan*; Atfiyyash, *Hamayan al-Zad*; al-Amin al-Shinqiti, *Adwa' al-Bayan*.

<sup>397</sup> Al-Mawardi, *al-Nukat*; Atfiyyash, *Hamayan al-Zad*.

Sirin,<sup>400</sup> al-Hasan al-Basri,<sup>401</sup> Makhul,<sup>402</sup> Qatada,<sup>403</sup> Zayd b. ‘Ali,<sup>404</sup> Abu Hanifa,<sup>405</sup> Ibn Jurayj,<sup>406</sup> ‘Abd al-Rahman b. Zayd b. Jabir,<sup>407</sup> Zufar,<sup>408</sup> Sufyan al-Thawri,<sup>409</sup> al-Hasan b. Salih,<sup>410</sup> Abu Yusuf,<sup>411</sup> al-Farra’,<sup>412</sup> al-Samarqandi,<sup>413</sup> the Hanafis,<sup>414</sup> Ibn ‘Ajiba,<sup>415</sup> and

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<sup>398</sup> Al-Samarqandi, *Bahr al-‘Ulum*.

<sup>399</sup> Al-Suyuti, *al-Durr*.

<sup>400</sup> Muhammad b. Sirin is an independent jurist, who lived in Basra. He died in 110/728. His *kunya* is Abu Bakr; al-Suyuti, *al-Durr*; al-Alusi, *Ruh al-Ma‘ani*.

<sup>401</sup> Al-Hasan al-Basri is an independent jurist, who lived in Basra. His name is al-Hasan b. Yasar, and his *kunya* is Abu Sa‘id. He died in 110/728; Ibn ‘Atiyya, *al-Muharrar*; Abu Hayyan, *al-Bahr*; al-Suyuti, *al-Durr*; al-Tabarani, *al-Tafsir al-Kabir*; al-Tabari, *Jami‘ al-Bayan*; al-Razi, *al-Tafsir al-Kabir*; al-Shawkani, *Fath al-Qadir*; al-Jassas, *Ahkam al-Qur’an*, 5:118; al-Thula‘i, 4:385; al-Rawandi, 1:429; al-Suyuri, part 4, 37; al-Jaza‘iri, 3:374; al-Tabarsi, *Majma‘ al-Bayan*; al-Alusi, *Ruh al-Ma‘ani*; al-Tusi, *al-Tibyan*; Hud al-Hawwari, *Tafsir Kitab Allah*.

<sup>402</sup> Makhul is an independent jurist, who lived in Sham. His name is Makhul b. ‘Abd Allah, and his *kunya* is Abu ‘Abd Allah. He died in ca. 112/730; al-Suyuti, *al-Durr*; Ibn Kathir, *Tafsir al-Qur’an*; al-Shawkani, *Fath al-Qadir*; al-Amin al-Shinqiti, *Adwa‘ al-Bayan*.

<sup>403</sup> Al-Tabarsi, *Majma‘ al-Bayan*.

<sup>404</sup> Al-Thula‘i, 4:385.

<sup>405</sup> Al-Mawardi, *al-Nukat*; Ibn ‘Atiyya, *al-Muharrar*; Abu Hayyan, *al-Bahr*; al-Naysaburi, *Ghara‘ib al-Qur’an*; Ibn ‘Adil, *al-Lubab*; al-Tha‘labi, *al-Kashf*; al-Samin al-Halabi, *al-Durr*; al-Tabarani, *al-Tafsir al-Kabir*; Ibn ‘Ajiba, *al-Bahr*; al-Zamakhshari, *al-Kashshaf*; al-Razi, *al-Tafsir al-Kabir*; Ibn Kathir, *Tafsir al-Qur’an*; al-Shawkani, *Fath al-Qadir*; al-Harrasi, 2:300; al-Jassas, *Ahkam al-Qur’an*, 5:118; Ibn al-‘Arabi, 3:345; al-‘Ulaymi, 2:287; al-Suyuti, *al-Iklil*, 3:1009; Ibn al-Faras, 3:343; al-Muzi‘i, 2:983; al-Najri, 2:428; al-Thula‘i, 4:385; al-Suyuri, part 4, 37; al-Jaza‘iri, 3:374; al-Tabarsi, *Majma‘ al-Bayan*; al-A‘qam, *Tafsir al-A‘qam*; Atfiyyash, *Hamayan al-Zad*; al-Amin al-Shinqiti, *Adwa‘ al-Bayan*.

<sup>406</sup> Ibn Jurayj is an independent jurist, who lived in Mecca. His name is ‘Abd al-Malik b. ‘Abd al-‘Aziz b. Jurayj. He died in ca. 150/767; al-Suyuti, *al-Durr*.

<sup>407</sup> I have not found biographical information on ‘Abd al-Rahman b. Zayd b. Jabir, but I found some information on ‘Abd al-Rahman b. Yazid b. Jabir, who is an independent jurist in Damascus (d. ca. 153/770); Ibn Kathir, *Tafsir al-Qur’an*; al-Shawkani, *Fath al-Qadir*; al-Amin al-Shinqiti, *Adwa‘ al-Bayan*.

<sup>408</sup> Zufar is a Hanafi jurist, who lived in Kufa, Asbahan and Basra. His name is Zufar b. al-Hudhayl b. Qays, and his *kunya* is Abu al-Hudhayl. He died in 158/774; al-Jassas, *Ahkam al-Qur’an*, 5:118.

<sup>409</sup> Ibn ‘Atiyya, *al-Muharrar*; Abu Hayyan, *al-Bahr*; Ibn ‘Adil, *al-Lubab*; Makki b. Abi Talib, *al-Hidaya*; al-Razi, *al-Tafsir al-Kabir*; al-Shawkani, *Fath al-Qadir*; al-Jassas, *Ahkam al-Qur’an*, 5:118.

<sup>410</sup> Al-Hasan b. Salih is an independent jurist, who lived in Kufa. His name is al-Hasan b. Salih b. Hayy b. Muslim b. Hayyan, and his *kunya* is Abu ‘Abd Allah. He died in ca. 167/783; Abu Hayyan, *al-Bahr*; Ibn

Abu Hayyan.<sup>416</sup> To recapitulate, Group B that supports the second opinion is mainly represented by the Hanafis, whereas Group A that advocates the first opinion is primarily represented by the Malikis, Shafi'is, Hanbalis, Zahiris, Zaydis, Imamis, and Ibadis.

#### 4.3.1 Evidence

This section analyzes the reasons and evidence cited by jurists and exegetes concerning the mitigating impact of repentance upon the eternal rejection of testimony in the fixed punishment for the accusation of fornication. It presents the arguments of scholars who recognize this impact (Group A) as well as the counterarguments of those who deny it (Group B). The analysis shows that both scholarly camps use the text of Q. 24:4-5 as a support of their arguments. The implications of the lexis and syntactic structure of Q. 24:4-5 have been the subject of considerable debate among scholars. In addition to the Qur'an, Group A cites an *athar* report in which the testimony of two

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<sup>410</sup> 'Adil, *al-Lubab*; al-Razi, *al-Tafsir al-Kabir*; al-Jassas, *Ahkam al-Qur'an*, 5:118; Atfiyyash, *Hamayan al-Zad*.

<sup>411</sup> Abu Yusuf is a Hanafi jurist, who lived in Kufa. His name is Ya'qub b. Ibrahim b. Habib b. Sa'd. He died in 182/798; al-Jassas, *Ahkam al-Qur'an*, 5:118.

<sup>412</sup> Al-Farra' is a linguist, who lived in Kufa and Baghdad. His name is Yahya b. Ziyad b. 'Abd Allah b. Manzur, and his *kunya* is Abu Zakariyya. He died in 207/822; al-Farra', *Ma'ani al-Qur'an*, 3<sup>rd</sup> ed., vol. 2 (Beirut: 'Alam al-Kutub, 1983) 245-246.

<sup>413</sup> Al-Samarqandi, *Bahr al-'Ulum*.

<sup>414</sup> Al-Baghawi, *Ma'alim al-Tanzil*; al-Khazin, *Lubab al-Ta'wil*; Abu Hayyan, *al-Bahr*; Ibn 'Adil, *al-Lubab*; al-Tha'labi, *al-Kashf*; al-Tabarani, *al-Tafsir al-Kabir*; Ibn 'Ajiba, *al-Bahr*; Makki b. Abi Talib, *al-Hidaya*; al-Razi, *al-Tafsir al-Kabir*; al-Shirbini, 2:665; al-Tabarsi, *Majma' al-Bayan*; al-Alusi, *Ruh al-Ma'ani*.

<sup>415</sup> Ibn 'Ajiba, *al-Bahr*.

<sup>416</sup> Abu Hayyan, *al-Bahr*.

repentant convicts of *qadhf* was accepted after receiving the punishment of flogging. However, Group B responds by presenting two *hadith* reports that demonstrate that the testimony of a person who received a fixed punishment is invalid.

Group B contends that repentance is not considered as a mitigating factor concerning the eternal rejection of the testimony of a convict of *qadhf* because the exceptive clause in Q. 24:5 does not refer to the rejection of the convict's testimony in Q. 24:4. Jurists of Group B maintain that if an exceptive clause is preceded by a sequence of coordinated sentences, it would refer only to the immediate preceding sentence unless there is a contextual clue that necessitates that the exceptive clause should refer to the whole sequence.<sup>417</sup> In Q. 24:4, there are three coordinated sentences: “flog them eighty times,” “reject their testimony forever,” and “they are immoral.” These sentences are coordinated with the conjunction “and” (*wa-*) that appears in the Arabic text before each of the second and third sentences. These three sentences, according to Group B, cannot be treated as one entity and thus the exceptive clause would not refer to the whole sequence. Rather, the exceptive clause would only refer to the immediate preceding sentence.

Group B asserts that the linguistic function of the *wa-* connector before the third sentence in Q. 24:4 is to start off a new sentence (*ibtida'*) rather than to coordinate between the second and third sentences (*'atf*).<sup>418</sup> Consequently, Q. 24:4-5 would read “flog them eighty times and reject their testimony forever. They are immoral unless they

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<sup>417</sup> Al-Naysaburi, *Ghara'ib al-Qur'an*; al-Razi, *al-Tafsir al-Kabir*; Abu al-Thana' al-Asbahani, 2:554-559; al-Qurtubi, 15:135; al-Thula'i, 4:386; Muhammad b. al-Qasim, 404.

<sup>418</sup> Al-Jassas, *Ahkam al-Qur'an*, 5:121-122.

repent.” Moreover, this sequence of three sentences cannot be treated as one entity because the third sentence is declarative and describes the moral character of the convict, whereas the other two sentences are imperative and discuss the fixed penalty that he should incur. Therefore, the exceptive clause in Q. 24:5 would not refer to the whole sequence and thus the immediate preceding sentence would be the only antecedent of the exceptive clause. As a consequence, a repentant convict of *qadhf* would not be considered as immoral, but he would have his testimony rejected.<sup>419</sup>

To support their position, scholars from Group B cite similar verses from the Qur’an in which an exceptive clause refers to the immediate preceding sentence in a sequence of coordinated sentences. For example, there is virtual unanimity of opinion among jurists and exegetes over the anaphoric reference of the exceptive clause in Q. 4:92 in which God describes the punishment for unintentional killing: “If one killed a believer by mistake, then [it is incumbent upon him to] free a slave believer and to hand blood money to his family—except when they give [up their right as] charity.”<sup>420</sup> Accordingly, the killer would still be required to free a slave even if the family of the deceased absolves him from paying the blood money. By analogy, the anaphoric reference of the exceptive clause in Q. 24:5 would entail that a repentant convict of *qadhf* would have his testimony rejected even if he is no longer considered as immoral.

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<sup>419</sup> Al-Jassas, *Ahkam al-Qur’an*, 5:122-123; al-Baghawi, *Ma’alim al-Tanzil*; Ibn ‘Atiyya, *al-Muharrar*; Ibn ‘Adil, *al-Lubab*; Ibn Kathir, *Tafsir al-Qur’an*; al-Shawkani, *Fath al-Qadir*; al-Tha’labi, *al-Kashf*; Ibn al-Faras, 3:343; al-Jaza’iri, 3:374; al-Zamakhshari, *al-Kashshaf*; al-Thula’i, 4:384-385; Muhammad b. al-Qasim, 404.

<sup>420</sup> Al-Qurtubi, 15:136.

Furthermore, Group B perceives flogging as the reason why the testimony of a convict of *qadhf* becomes invalid. Jurists of Group B construe the pronoun “that” in the exceptive clause as a reference to “flogging.” Therefore, Q. 24:5 would mean “except for those who repent after having been flogged eighty times.” Consequently, a convict’s testimony would become unacceptable as soon as the flogging comes to an end.<sup>421</sup> Moreover, Group B maintains that the adverb “forever” in “reject their testimony forever” means “as long as they are alive.” Consequently, the testimony of a convict of *qadhf* who was flogged eighty times would be rejected for the remainder of his life whether or not he repents.<sup>422</sup>

In order to substantiate their argument, jurists of Group B cite *hadith* reports in which the Prophet is quoted to have declared the invalidity of a person’s testimony as a consequence of receiving the punishment of flogging in a fixed punishment. For instance, the Hanafi jurist al-Jassas provides a *hadith* report in which the Prophet says: “Muslims are upright except for a person who received the fixed punishment for *qadhf* [i.e. flogged].”<sup>423</sup> Al-Jassas notes that the Prophet does not make an exception for repentant convicts in his statement and therefore a repentant offender in the case of *qadhf* would have his testimony rejected if he was punished by flogging. Moreover, al-Jassas cites a

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<sup>421</sup> Al-Zamakhshari, *al-Kashshaf*.

<sup>422</sup> Al-Zamakhshari, *al-Kashshaf*; al-Naysaburi, *Ghara’ib al-Qur’an*; al-Muzi’i, 2:983; al-Thula’i, 4:384-385; Muhammad b. al-Qasim, 404.

<sup>423</sup> The chain of narrators for this *hadith*, as stated by al-Jassas, is al-Hajjaj b. Arta’a ← ‘Amr b. Shu‘ayb ← his father ← his grandfather ← the Prophet; al-Jassas, *Ahkam al-Qur’an*, 5:126; al-Naysaburi, *Ghara’ib al-Qur’an*. Al-Qassab believes that this *hadith* does not indicate the invalidity of the testimony of repentant convicts of *qadhf* as the text of this report does not mention the issue of repentance. Besides, both al-Qassab and Ibn Hazm do not consider this *hadith* as sound; al-Qassab, 2:420-421; <http://dorar.net/enc/hadith>.

similar *hadith* in which the Prophet clearly states that the testimony of a person who was previously flogged in a fixed punishment should be rejected.<sup>424</sup>

Nevertheless, Group A affirms that repentance is considered as a mitigating factor concerning the eternal rejection of the testimony of a convict of *qadhf* because the exceptive clause in Q. 24:5 refers to the rejection of the convict's testimony in Q. 24:4. Jurists of Group A maintain that if an exceptive clause is preceded by a sequence of coordinated sentences, it would refer to the whole sequence unless there is a contextual clue that necessitates that the exceptive clause should only refer to the immediate preceding sentence.<sup>425</sup> In Q. 24:4, there are three coordinated sentences: “flog them eighty times,” “reject their testimony forever,” and “they are immoral.” These sentences are coordinated with the conjunction “and” (*wa-*) that appears in the Arabic text before each of the second and third sentences. These three sentences, according to Group A, can be treated as one entity and thus the exceptive clause would refer to the whole sequence.

Group A asserts that the linguistic function of the *wa-* connector between each of the three sentences in Q. 24:4 is coordination (*'atf*). Consequently, each of these three sentences would be eligible to be a recipient of the ruling of exception. However, the exceptive clause would not refer to the first sentence because flogging is perceived as an

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<sup>424</sup> The chain of narrators for of this *hadith*, as stated by al-Jassas, is al-Jassas ← ‘Abd al-Baqi b. Qani’ ← Hamid b. Muhammad ← Shurayh ← Marwan ← Yazid b. Abi Khalid ← al-Zuhri ← ‘Urwa ← ‘A’isha ← the Prophet; al-Jassas, *Ahkam al-Qur’an*, 5:126-127. Al-Qassab does not grade this *hadith* as sound. The text of this report reads: “It is not permissible [to accept] the testimony of a dishonest male person or female person, [the testimony of] a person who received a fixed punishment, nor [the testimony of] a person who has a grudge against his brother.” Al-Muzi‘i observes that this *hadith*—if sound—would mean that the testimony of these people would be invalid unless they repent. He provides this *hadith* report with the following chain: ‘Amr b. Shu‘ayb ← his father ← his grandfather ← The Prophet. Moreover, he does not consider this *hadith* as sound; al-Muzi‘i, 2:983-984; al-Qassab, 2:420-421.

<sup>425</sup> Al-Naysaburi, *Ghara’ib al-Qur’an*; al-Razi, *al-Tafsir al-Kabir*; Abu al-Thana’ al-Asbahani, 2:554-559; al-Qurtubi, 15:135; al-Biq’a’i, *Nazm al-Durar*; al-Thula’i, 4:386; Muhammad b. al-Qasim, 404.



individual's right. Therefore, Q. 24:4-5 would read "flog them eighty times, reject their testimony forever (unless they repent), and they are immoral unless they repent." Moreover, this sequence of three sentences can be treated as one entity because they have one purpose, which is vengeance on and humiliation of the offender who accuses others of committing fornication.<sup>426</sup> Hence, the exceptive clause in Q. 24:5 would refer to the whole sequence and thus a repentant convict of *qadhf* would not be considered as immoral and would not have his testimony rejected.<sup>427</sup> The two scholarly approaches of Group A and Group B towards the textual analysis of Q. 24:4-5 are demonstrated in Table 4.4 below.

Table 4.4: Textual Analysis of Q. 24:4-5

Sentences 1-2 & Sentence 3	Interrelated	Function of <i>wa</i> -inter-connector	One entity	Anaphoric Reference of Exceptive Clause
Group A	Yes	Coordination	Yes	Sentences 2 & 3
Group B	No	Starting a new sentence	No	Sentence 3

To support their position, scholars of Group A cite similar verses from the Qur'an in which an exceptive clause refers to the whole sequence of the preceding coordinated sentences. For example, there is virtual unanimity of opinion among jurists and exegetes

<sup>426</sup> Al-Qarafi, *al-Istighna' fi al-Istithna'*, ed. Muhammad 'Ata (Beirut: Dar al-Kutub al-'Ilmiyya, 1986) 560-575; Ibn Hazm, *al-Ihkam fi Usul al-Ahkam*, ed. Muhammad 'Abd al-'Aziz, vol. 1 (Cairo: Maktabat 'Atif, 1978) 523-529; al-Qarafi is a Maliki jurist and legal theorist, who lived in Egypt. His name is Ahmad b. Idris b. 'Abd al-Rahman al-Qarafi, his *kunya* is Abu al-'Abbas, and his *laqab* is Shihab al-Din. He died in 684/1285.

<sup>427</sup> Al-Baghawi, *Ma'alim al-Tanzil*; Ibn 'Atiyya, *al-Muharrar*; al-Zamakhshari, *al-Kashshaf*; Ibn 'Adil, *al-Lubab*; Ibn Kathir, *Tafsir al-Qur'an*; al-Shawkani, *Fath al-Qadir*; al-Tabarani, *al-Tafsir al-Kabir*; al-Tha'labi, *al-Kashf*; Ibn al-Faras, 3:343; al-Suyuti, *al-Iklil*, 3:1008; al-Thula'i, 4:384-385; al-Suyuri, part 4, 37; al-Jaza'iri, 3:374.

over the anaphoric reference of the exceptive clause in Q. 5:33-34 in which God describes the punishment for brigandage:

Surely, the penalty for those who wage war against God and His Messenger and endeavor to do corruption in the land is that they should be massacred or crucified, or that their hands and legs should be cut asunder alternately or that they should be exiled from the land. That is a disgrace for them in this world, and in the Hereafter they will have a tremendous torment—except for those who repent before you gain control over them.

Accordingly, a pre-arrest repentant brigand would not be executed, crucified, punished by alternate cutting of hands and feet, exiled, nor tormented in the Hereafter. Group A observes that the exceptive clause in Q. 5:34 refers to the whole sequence of the preceding sentences in Q. 5:33 although it consists of imperative and declarative sentences. Therefore, the different types of sentences do not have an impact on whether a sequence of sentences can be treated as one entity—as opposed to what Group B stipulates.<sup>428</sup> By analogy, the anaphoric reference of the exceptive clause in Q. 24:5 would entail that a repentant convict of *qadhf* would not have his testimony rejected nor be considered as immoral.<sup>429</sup>

Furthermore, Group A declares that being an immoral person (*fasiq*) is the rationale for the invalidity of the testimony of convicts of *qadhf*.<sup>430</sup> Jurists of Group A construe the pronoun “that” in the exceptive clause as a reference to “the act of committing *qadhf*.” Therefore, Q. 24:5 would mean “except for those who repent after

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<sup>428</sup> Al-Jassas from Group B responds by saying that God’s statement in Q. 24:4 “Surely, the penalty for those who wage war against God and His Messenger” is an order in the shape of a declarative sentence. Because the imperative sentences in this verse have the shape of declarative sentences, al-Jassas postulates that the exceptive clause in Q. 24:5 refers to all of the preceding sentences; al-Jassas, *Ahkam al-Qur’an*, 5: 122.

<sup>429</sup> Al-Qurtubi, 15:136; al-Razi, *al-Tafsir al-Kabir*.

<sup>430</sup> Al-Razi, *al-Tafsir al-Kabir*; al-Qurtubi, 15:137; al-Shawkani, *Fath al-Qadir*; al-Thula’i, 4:387.

committing *qadhf*.” Consequently, a convict’s testimony would become unacceptable as soon as he commits *qadhf*. Moreover, Group A maintains that the adverb “forever” in “reject their testimony forever” means “as long as they do not repent.”<sup>431</sup> Consequently, the testimony of a convict of *qadhf* would be accepted as soon as he repents. The two lines of reasoning adopted by Group A and Group B concerning the rationale behind rejecting the testimony of a convict of *qadhf* and its impact on the validity of testimony are illustrated in Table 4.5 below.

Table 4.5: Textual Analysis of Q. 24:4-5

	Why Testimony Becomes Invalid	When Testimony Becomes Invalid	Meaning of “That” in Q. 24:5	Meaning of “Forever” in Q. 24:4	When Testimony Becomes Valid
Group A	Committing <i>qadhf</i>	Once a person commits <i>qadhf</i>	Committing <i>qadhf</i>	As long as the convict does not repent	Once the convict repents
Group B	Flogging	After the end of flogging	Having been flogged	As long as the person is alive	Never

In order to substantiate their argument, jurists of Group A cite an *athar* report in which two repentant convicts of *qadhf* had their testimony accepted after they were flogged. In this historical precedent, ‘Umar b. al-Khattab—the caliph during that time—flogged three out of four witnesses who came to him and reported a case of fornication.<sup>432</sup> He flogged them because he detected a lack of exact details in the testimony of the fourth witness. Upon flogging the witnesses, ‘Umar asked them to repent so that their testimony

<sup>431</sup> Al-Baghawi, *Ma‘alim al-Tanzil*; al-Zamakhshari, *al-Kashshaf*; Ibn ‘Adil, *al-Lubab*; al-Tabarani, *al-Tafsir al-Kabir*; Abu al-Su‘ud, *Irshad al-‘Aql*; Muhammad b. al-Qasim, 404.

<sup>432</sup> Al-Razi, *al-Tafsir al-Kabir*.

would be accepted in the future.<sup>433</sup> Two of the three repented and therefore their testimony was accepted afterward.<sup>434</sup> However, the third witness—Abu Bakra (d. ca. 51/671)<sup>435</sup>—refused to repent and consequently his testimony was not accepted thereafter.<sup>436</sup> The eight legal schools—including the Imamis—cite this *athar* report in support for the opinion that the testimony of a convict of *qadhf* becomes valid once he repents.<sup>437</sup>

The Shafi'i jurist Fakhr al-Din al-Razi states that no *sahabi* disapproved of 'Umar's judgment, indicating that there is a consensus among *sahaba* (the Prophet's companions) over 'Umar's opinion. In the same vein, the Maliki jurist al-Qurtubi asserts that this incident was widely known throughout Muslim territories and argues that the *sahaba* would have objected to 'Umar's judgment if Q. 24:4 meant that the testimony of repentant convicts of *qadhf* is rejected for the remainder of their lives.<sup>438</sup> It should be noted that Abu Bakra and the other witnesses were reporting what they had seen to the

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<sup>433</sup> Al-Jassas does not consider this *athar* report as sound and postulates that 'Umar may have made this request before flogging took place. He also observes that Sa'id b. al-Musayyib appears in the chain of narrators for this *athar*, which means that Sa'id advocates the opinion of 'Umar and Group A in general. Given that Sa'id is reported to have said that the testimony of a repentant convict of *qadhf* is not accepted, al-Jassas asserts that Sa'id may have changed his opinion owing to stronger evidence; al-Jassas, *Ahkam al-Qur'an*, 5:118-119.

<sup>434</sup> Al-Naysaburi, *Ghara'ib al-Qur'an*; Ibn al-Faras, 3:343; al-Muzi'i, 2:983; al-Thula'i, 4:384-385.

<sup>435</sup> Abu Bakra is a *sahabi*, who lived in Basra. His name is Nufay' b. al-Harith al-Thaqafi.

<sup>436</sup> Al-Tha'labi, *al-Kashf*; Ibn al-Faras, 3:343; al-Muzi'i, 2:983.

<sup>437</sup> Al-Suyuri, part 4, 37.

<sup>438</sup> Al-Qurtubi, 15:137.

authorities. They did not commit *qadhif* in the literal sense of the word as they did not insult the person whom they believed that he was committing fornication.<sup>439</sup>

In addition to the *athar* report, al-Suyuti cites a *hadith* in which the Prophet is quoted to have said: “God and His Messenger decreed that neither the testimony of three [people] nor two [people] nor one [person] concerning fornication could be accepted. They should be flogged eighty times each. Their testimony should never be accepted until their sincere repentance and righteous conduct becomes evident to Muslims.”<sup>440</sup> This report demonstrates that the testimony of a convict of *qadhif* cannot be accepted unless the offender repents of his crime. Overall, all jurists and exegetes in the available sources cite the *athar* report in their discussion of the impact of repentance upon the validity of testimony. However, they do not provide the *hadith* report cited by al-Suyuti.<sup>441</sup>

Jurists and exegetes express opposing opinions on the validity of the testimony of a repentant convict of *qadhif*. Both scholarly camps engage in a detailed linguistic analysis of Q. 24:4-5 in order to assess the mitigating impact of repentance upon the punishment of eternal rejection of testimony in the fixed punishment for the accusation of fornication. Whereas Group B asserts that the exceptive clause in Q. 24:5 does not refer to the sentence about testimony in Q. 24:4, Group A establishes this anaphoric reference and thus declares the testimony as valid upon repentance. Both groups cite Qur’anic

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<sup>439</sup> Al-Dhahabi, *Siyar*.

<sup>440</sup> The chain of narrators for this *hadith*, as explained by al-Suyuti, is ‘Abd al-Razzaq ← ‘Amr b. Shu‘ayb ← the Prophet; al-Suyuti, *al-Durr*. Ibn Hazm considers this *hadith* as *munqati‘* (i.e. there is a missing link in the chain); <http://dorar.net/enc/hadith>.

<sup>441</sup> Al-Razi also cites another *hadith* report in this vein, “The one who repents of a sin is like a sinless person.” He affirms that a sinless person would definitely has his testimony accepted; al-Razi, *al-Tafsir al-Kabir*.

verses that have the same syntactic structure of Q. 24:4-5. Surprisingly, the examples they provide prove their respective arguments and receive unanimous support from both groups. Nevertheless, each group infers from Q. 24:4-5 a different reason behind the invalidity of testimony in the case of *qadhf*. This inference has resulted in various interpretations of this verse with different legal conclusions.

In addition to their rigorous analysis of the text of Q. 24:4-5, both of Group A and Group B cite *hadith* and *athar* reports in order to substantiate their arguments. Group B cites two *hadith* reports in which the Prophet invalidates the testimony of a person who was flogged in a *qadhf* case and also invalidates the testimony of anyone who received any fixed punishment. However, these reports do not discuss the impact of repentance upon the validity of testimony. Furthermore, Group A provides an *athar* report that explicates the impact of repentance upon the validity of testimony. In this historical precedent, two convicts of *qadhf* had their testimony accepted after their repentance. Nonetheless, the testimony of the third witness was rejected because he refused to declare his repentance. He believed that he was saying the truth when he reported what he had seen to the authorities.

The linguistic analysis of Q. 24:4-5 on the levels of syntax and semantics that both Group A and Group B performed yields two opposing results. Linguistically speaking, both results can be valid because the text of the verse allows the inference of these two possibilities. Moreover, the Qur'anic verses that are structurally similar to Q. 24:4-5 substantiate the arguments of both groups. The decisive factor in this case is based on the *athar* report in which 'Umar validated the testimony of repentant convicts of

*qadhf*. The seemingly opposing *hadith* reports that Group B provides discuss the invalidity of testimony in general without referring to the issue of repentance. This is why some jurists of Group A argue that the content of these reports is applicable in case the convict does not repent of his crime. Hence, the arguments of Group A seem to be stronger than those of Group B.

#### 4.4 Scope of validity of repentant convicts' testimony

The majority of jurists within Group A does not restrict the scope of validity of the testimony of repentant convicts of *qadhf* to specific court cases. These jurists hold this opinion because the text of Q. 24:4-5 does not specify certain domains where the testimony of previous convicts would be considered as valid.<sup>442</sup> However, some Maliki jurists within this scholarly camp restrict the scope of validity of such testimony.<sup>443</sup> For instance, Ibn al-Majishun (d. 213/828), Mutarrif (d. 220/835),<sup>444</sup> Asbagh (d. 225/839)<sup>445</sup> and Sahnun (d. 240/854)<sup>446</sup> stipulate that the testimony of a repentant convict of *qadhf* would not be valid if he gives it in a case of *qadhf*.<sup>447</sup> Likewise, a person who was flogged because of committing fornication cannot give testimony in the future in a

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<sup>442</sup> Ibn 'Atiyya, *al-Muharrar*.

<sup>443</sup> Al-Qurtubi, 15:134-135.

<sup>444</sup> Mutarrif is a Maliki jurist, who lived in Medina. His name is Mutarrif b. 'Abd Allah b. Mutarrif b. Sulayman b. Yasar, and his *kunya* is Abu Mus'ab.

<sup>445</sup> Asbagh is a Maliki jurist, who lived in Egypt. His name is Asbagh b. al-Faraj b. Sa'id b. Nafi', and his *kunya* is Abu 'Abd Allah.

<sup>446</sup> Sahnun is a Maliki jurist and a scholar of *hadith*, who lived in al-Qayrawan and Medina. His name is 'Abd al-Salam b. Sa'id b. Habib al-Tanukhi, his *kunya* is Abu Sa'id and his *laqab* is Sahnun.

<sup>447</sup> Ibn al-Faras, 3:343; Ibn 'Atiyya, *al-Muharrar*; al-Qurtubi, 15:135.

similar court case in the future in which another person is accused of committing the same crime. These jurists have laid down a principle that a person who receives a fixed punishment for a certain offence cannot give testimony in the future regarding the same offence for which he was punished.

Unexpectedly, some Hanafi jurists within Group B specify some exceptions where the testimony of a repentant convict of *qadhf* can be accepted. They maintain that the testimony can be valid in matters related to the acts of worship.<sup>448</sup> For instance, a repentant convict of *qadhf* would have his testimony accepted if he testifies before the court that he saw the crescent of the month of Ramadan. Based on his testimony, the month would officially start and people would start fasting. Nevertheless, the famous opinion within the Hanafi school is that the testimony of a repentant convict of *qadhf* is invalid in all legal cases, including the acts of worship.

The rejection of testimony in the fixed punishment for *qadhf* does not have an impact upon the authenticity of *hadith* reports that a convict of *qadhf* narrates.<sup>449</sup> Almost all scholars of *hadith* and legal theory state that if a person received the fixed punishment for *qadhf*, the *hadith* reports that he narrates would still be accepted.<sup>450</sup> The rationale behind this scholarly contention is that the act of giving testimony is different from the

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<sup>448</sup> Al-Alusi, *Ruh al-Ma'ani*.

<sup>449</sup> Al-Amin al-Shinqiti, *Tafsir Surat al-Nur* (Jadda: Dar al-Mujtama', 1990) 50-51.

<sup>450</sup> Ibn Qudama, *Rawdat al-Nazir wa Jannat al-Munazir fi Usul al-Fiqh*, ed. 'Abd al-Karim al-Namla, 2<sup>nd</sup> ed., vol. 2 (Riyadh: Maktbat al-Rushd, 1993) 405; Ibn Qudama is a Hanbali jurist and legal theorist, who lived in Juraselem, Damascus and Baghdad. His name is 'Abd Allah b. Ahmad b. Muhammad b. Qudama, his *kunya* is Abu Muhammad, and his *laqab* is Muwaffaq al-Din. He died in 620/1223.



act of narrating a *hadith* report.<sup>451</sup> Because the legal consequences of *qadhf* do not apply to the narration of *hadith*, scholars of *hadith*—such as al-Bukhari and Muslim—narrate *hadith* reports on the authority of Abu Bakra, who was once flogged in a *qadhf* case.<sup>452</sup> It should be noted that this scholarly unanimity applies whether or not a convict of *qadhf* repents. The jurists who stipulate that repentance is a precondition for the acceptance of *hadith* reports by a convict of *qadhf* restrict this rule to offenders who committed *qadhf* in the literal sense of the word. In other words, this condition applies only when the offender insults a person concerning his chastity. However, it does not apply to witnesses who report a case of fornication then receive the fixed punishment for *qadhf*.<sup>453</sup>

#### 4.5 Conditions for the validity of convicts' repentance

This section answers a crucial question as to whether repentance in the case of the fixed punishment for the accusation of fornication is subject to certain conditions that render it valid from a legal perspective. The analysis shows that a large number of jurists act upon the *athar* report on the authority of 'Umar and stipulate that repentance should

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<sup>451</sup> Abu al-Ma'ali al-Juwayni, *Kitab al-Talkhis fi Usul al-Fiqh*, ed. 'Abd Allah al-Nibaly and Shubbayr al-'Umari, vol. 2 (Beirut: Dar al-Basha'ir; Mecca: Maktabat Dar al-Baz, 1996) 381; Ibn Rashiq, *Lubab al-Mahsul fi 'Ilm al-Usul*, ed. Muhammad Jabi, vol. 1 (UAE: Dar al-Buhuth, 2001) 355; al-Juwayni is a Shafi'i jurist and legal theorist, who lived in Nishapur, Baghdad and Mecca. His name is 'Abd al-Malik b. 'Abd Allah b. Yusuf b. Muhammad al-Juwayni, and his *kunya* is Abu al-Ma'ali. He died in 478/1085. Ibn Rashiq is a Maliki jurist and legal theorist, who lived in Egypt. His name is al-Husayn b. 'Atiq b. al-Husayn b. 'Atiq b. Rashiq, and his *kunya* is Abu 'Ali. He died in 632/1234.

<sup>452</sup> Ibn Qudama, 2:405; Fatima Mernissi rejects a *hadith* report narrated by Abu Bakra and recorded by al-Bukhari in which the Prophet indicated that people would not prosper if they appointed a woman as their leader. Breaking a scholarly consensus, Mernissi argues that the *hadith* reports of Abu Bakra should be rejected because he received the fixed punishment for *qadhf*; Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Canada: Addison-Wesley Publishing Company, 1991) 59-61.

<sup>453</sup> Ibn Qudama, 2:405.

take the form of declaring oneself as a liar. However, other scholars act upon the apparent meaning of 24:5 and maintain that repentance should be perceived in its basic form, namely the feeling of regret. Furthermore, a few jurists note that repentance should be accompanied by righteous conduct.

Influenced by the judgment of ‘Umar b. al-Khattab in a *qadhf* case, a large number of jurists and exegetes—such as al-Sha‘bi, Tawus, al-Zuhri, al-Shafi‘i, and al-Qurtubi—require that a convict of *qadhf* should declare that he was lying in his accusation.<sup>454</sup> Al-Sha‘bi clearly states that the convict’s testimony would not be accepted if he does not declare himself a liar because God says: “If they had come up with four witnesses against it—yet as they did not come up with the witnesses, then those, in the Reckoning of God, are the liars” (Q. 24:13). Moreover, al-Dahhak remarks that the convict has to make this confession when he is flogged.<sup>455</sup> In a similar vein, the Imami jurist al-Kashani and the Ibadi jurist al-Hawwari (d. 3<sup>rd</sup>/9<sup>th</sup> century) assert that this declaration should be made in public.<sup>456</sup>

Furthermore, scholars debate the exact wording of repentance that a convict of *qadhf* should observe. For instance, the Shafi‘i jurist al-Istakhri (d. 328/939)<sup>457</sup> maintains

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<sup>454</sup> Al-Tabari, *Jami‘ al-Bayan*; al-Razi, *al-Tafsir al-Kabir*; al-Mawardi, *al-Nukat*; Ibn ‘Atiyya, *al-Muharrar*; al-Qurtubi, 15:133-134; al-Tha‘labi, *al-Kashf*; Ibn al-Faras, 3:343; al-Jaza’iri, 3:374-76; al-Suyuti cites a relevant *hadith* in which the Prophet explains that the repentance of offenders in the case of *qadhf* can be accepted if they declare themselves liars. The chain of narrators for this *hadith*, as stated by al-Suyuti, is the Prophet ← Ibn ‘Umar ← Ibn Mardawayh. In the available sources, al-Suyuti is the only scholar who provides this *hadith*; al-Suyuti, *al-Durr*.

<sup>455</sup> Al-Tabari, *Jami‘ al-Bayan*.

<sup>456</sup> Al-Tabari, *Jami‘ al-Bayan*; al-Kashani, *al-Safi*; Hud al-Hawwari, *Tafsir Kitab Allah*.

<sup>457</sup> Al-Istakhri is a Shafi‘i jurist, who lived in Baghdad. His name is al-Hasan b. Ahmad b. Yazid b. ‘Isa b. al-Fadl b. Yasar al-Istakhri, and his *kunya* is Abu Sa‘id.

that the convict should say: “I lied in what I said, and I would not do it again.”<sup>458</sup> Nonetheless, Abu Ishaq al-Marwazi maintains that the offender should not say that he lied in his accusation because he might have said the truth.<sup>459</sup> He suggests that the convict should say, “I regret for what I said, I retract it, and I would not do it again.” The opinions of the Shi‘i jurist Ibn Mutawwaj al-Bahrani as well as Miqdad al-Suyuri can be seen as a hybrid between the opinions of al-Istakhri and Abu Ishaq. Al-Bahrani and al-Suyuri postulate that a convict of *qadhif* should say “I made a mistake” if he believes that he is truthful in his accusation. Otherwise, he should declare himself as a liar.<sup>460</sup>

Acting upon the apparent meaning of Q. 24:5, several scholars do not consider the condition of declaring oneself a liar as a prerequisite for the validity of repentance in the case of the fixed punishment for *qadhif*.<sup>461</sup> These jurists observe that repentance means that the convict becomes righteous, regrets committing *qadhif*, seeks God’s forgiveness, and refrains from committing *qadhif* again.<sup>462</sup> Malik, al-Tabari, Ibn al-Faras, and al-Shawkani advocate this opinion. The Maliki jurist Ibn al-Faras notes that the basic meaning of repentance is reversion (*ruju’*) from the state of disobedience to the state of

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<sup>458</sup> Al-Razi, *al-Tafsir al-Kabir*; al-Thula’i, 4:389.

<sup>459</sup> Al-Razi, *al-Tafsir al-Kabir*.

<sup>460</sup> Al-Bahrani, 362, 371; al-Suyuri, part 4, 38.

<sup>461</sup> Ibn ‘Atiyya, *al-Muharrar*; al-Qurtubi, 15:134; al-Tabari, *Jami’ al-Bayan*; Ibn al-Faras, 3:343.

<sup>462</sup> Al-Tabari, *Jami’ al-Bayan*; al-Mawardi, *al-Nukat*; al-Shirbini, 2:665; al-Qurtubi, 15:134; Ibn al-Faras, 3:343.

obedience and that this reversion can be effected through regret and righteousness in the case of *qadhf* as God does not mention a specific type of reversion in Q. 24:5.<sup>463</sup>

Furthermore, al-Biqa‘i and al-Khatib al-Shirbini stipulate that the righteousness of a repentant convict of *qadhf* should cover a period of time, after the elapse of which one can ascertain that the convict has become righteous.<sup>464</sup> Along the same line, al-Qushayri (d. 465/1072)<sup>465</sup> explains that during this period the convict should become widely known for his righteousness in the same way his accusation that violated Muslims’ honor is widespread.<sup>466</sup> Moreover, al-Biqa‘i and al-Khatib al-Shirbini suggest that this period should be one year during which the convict’s character can be tested by the four seasons that unveil personal traits.<sup>467</sup> These scholars fix this time frame in analogy to other *shari‘a* rulings that involve a one-year period, such as *zakat* (mandatory alms-giving).<sup>468</sup>

#### 4.6 Conclusion

When a person insults somebody and accuses him of committing fornication, he would receive the fixed punishment for *qadhf* that comprises three penalties: flogging eighty times, eternal rejection of testimony, and labeling as immoral. If this person repents of his crime, he would still be flogged, but he would no longer be considered as

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<sup>463</sup> Ibn al-Faras, 3:343.

<sup>464</sup> Al-Shirbini, 2:665; Ibn ‘Adil, *al-Lubab*; al-Razi, *al-Tafsir al-Kabir*; al-Biqa‘i, *Nazm al-Durar*.

<sup>465</sup> Al-Qushayri is a Shafi‘i jurist, legal theorist and a scholar of Sufism, who lived in Nishapur. His name is ‘Abd al-Karim b. Hawazin b. ‘Abd al-Malik b. Talha al-Qushayri, and his *kunya* is Abu al-Qasim.

<sup>466</sup> Al-Qushayri, *Lata‘if al-Isharat*, <<http://www.altafsir.com/>>.

<sup>467</sup> Al-Shirbini, 2:665; al-Razi, *al-Tafsir al-Kabir*; al-Biqa‘i, *Nazm al-Durar*; Ibn ‘Adil, *al-Lubab*.

<sup>468</sup> Al-Razi, *al-Tafsir al-Kabir*.

immoral. The validity of his testimony in the future has been the subject of considerable scholarly debate. Jurists who advocate the cancellation of this punishment believe that Q. 24:5 exempts repentant offenders from facing this penalty, whereas scholars who deny the mitigating impact assert that the exceptive clause in Q. 24:5 does not refer to the sentence about testimony in Q. 24:4. Each group of scholars bases its contentions upon textual analysis of Q. 24:4-5. Group A construes the offence of *qadhf* as the reason why the testimony becomes invalid. When the offender repents, he would become upright and thus his testimony would become valid. Nevertheless, Group B perceives the act of flogging as the rationale behind the rejection of testimony. Therefore, repentance would not constitute a mitigating factor after the culprit is flogged eighty times.

Furthermore, *hadith* and *athar* reports are utilized by the two opposing sides. Group A mainly depends on an *athar* report in which a *sahabi* caliph accepted the testimony of a convict of *qadhf* after declaring repentance. In contrast, Group B cites two *hadith* reports in which the Prophet explains that the testimony of a person who received a fixed punishment, especially *qadhf*, would be rejected. These reports, as stated by Group A, do not address the impact of repentance upon invalid testimonies. Rather, they demonstrate the types of testimonies that should be considered as invalid. Therefore, they apply in case a convict does not repent of his offence. The analysis reveals the centrality of the Qur'an, *hadith* and *athar* reports, and Arabic grammar in the juristic discourse across the eight schools regarding the mitigating impact of repentance upon the three penalties that comprise the fixed punishment for the accusation of fornication.

Among the jurists who cancel the penalty of eternal rejection of testimony are some scholars who stipulate that convicts of *qadhif* cannot give their testimony in some cases, especially those related to fornication and *qadhif*. Even the Hanafis, who do not recognize the mitigating impact, allow convicts of *qadhif* to give testimony in cases related to the acts of worship. However, the predominant opinion in the school is that these offenders would not be eligible to give any testimony in any court case. Furthermore, almost all scholars from Group A and Group B do not apply the laws of rejection of testimony to the sphere of *hadith* narration. Therefore, a convict of *qadhif* may have his testimony rejected, but the *hadith* reports that he narrates would be accepted. Overall, there is a tendency among jurists to closely follow the *athar* report on the authority of ‘Umar. This has led them to consider declaring oneself a liar as a precondition for the validity of repentance in the case of *qadhif*. Unexpectedly, this *athar* report is cited by the Imamis in support for their arguments.

## CHAPTER 5: CONCLUSION

One facet of the legal significance of repentance is its role as a mitigating factor in the context of worldly punishments. This thesis attempted to assess this significance by analyzing in depth the mitigating impact of repentance upon a representative sample of punishments in the field of Islamic law, namely the fixed punishments for brigandage (*hiraba*), theft, and the accusation of fornication (*qadhf*). These penalties fit the two categories of the Islamic theory of rights: God's right and individuals' rights. The focus of this research was to find out whether these fixed punishments can be cancelled when the offender repents of his crime. This study compared the views of independent jurists and exegetes as well as scholars who belong to any of the eight legal schools, namely the Hanafis, Malikis, Shafi'is, Hanbalis, Zahiris, Zaydis, Imamis, and Ibadis. It used a wide array of primary sources in the genres of Qur'anic exegesis (*tafsir*), Islamic law (*fiqh*), and legal theory (*usul al-fiqh*). The exegetical works constitute the core of this thesis as the impact of repentance upon the punishments under review is not widely discussed in the other two genres.

I consulted various types of exegetical works: A-Z exegesis that explains the entirety of the Qur'an chapter by chapter and verse by verse; law-centered exegesis that focuses on the Qur'anic verses that contain legal rulings; language-centered exegesis that pays special attention to linguistic considerations while explaining the Qur'an; and Sufi exegesis that provides symbolic readings of the Qur'anic text. I was able to utilize eighteen references in the sub-genre of legal exegesis across the eight schools with the exception of the Zahiris as I have not found any published material that fits this category

of exegesis in the Zahirī literature. In order to compensate for this lack of Zahirī sources, I benefited from Ibn Hazm's analysis of the Qur'anic verses around which the thesis revolves—namely Q. 5:33-34, 5:38-39, and 24:4-5—in his famous book *al-Muhalla*. One contribution that this research makes is the citation of several legal commentaries that may have not been utilized in scholarly works written in English. Notwithstanding its focus on classical Islamic law, the thesis brings to the scope of analysis some contemporary works in Qur'anic exegesis.

In Chapter 1, I provided an introduction to the topic of my research and surveyed the available literature in Arabic and English. Chapter 2 assessed the mitigating impact of repentance upon the fixed punishment for brigandage. It concluded that scholars are unanimous that a repentant brigand would be exempted from receiving the four penalties that comprise the fixed punishment for brigandage, namely execution, cutting off the right hand and left foot, putting onto a cross after execution, and exile. However, jurists debate as to whether repentant brigands would be subject to the laws of retaliation and financial liability in case the victim or his family demands justice. Another point over which unanimity is achieved is that repentance has to take place before arrest, or else repentant brigands would face the fixed punishment for brigandage. Moreover, the case of brigandage has prompted several scholars to declare that repentance would cancel all fixed penalties that are perceived as God's right (Paradigm 1). Nevertheless, the majority of jurists construes the case of brigandage as an exception to the general rule that fixed punishments are not mitigated by repentance (Paradigm 2).



The mitigating impact of repentance upon the fixed punishment for theft was analyzed in Chapter 3. The Shafi'is (in one opinion), Hanbalis, and Imamis exempt repentant thieves from the penalty, whereas the majority of jurists states that convicts would have their right hand cut off despite their repentance. The scholarly camp that recognizes the mitigating impact of repentance obliges repentant thieves to return the stolen property to the rightful owner. Furthermore, the notion of pre-arrest repentance is invoked by these jurists and declared by the Shafi'is as a condition for the validity of repentance. In the same vein, the Hanbalis and Imamis (in one opinion) require that repentance should take place before the crime is proven in court, or the thief would face the punishment. Differentiating between two scenarios, the Imamis (in another opinion) assert that repentance should take place before the offence is established through evidence. If the crime is proven through confession, the ruler would have the option to either punish or pardon the repentant thief. Following the same line of reasoning, the Hanbali jurist Ibn al-Qayyim maintains that the ruler would have this choice in all cases of fixed punishments when the offence is established through confession.

I examined in Chapter 4 the mitigating impact of repentance upon the fixed punishment for the accusation of fornication (*qadhf*). Unanimously, all jurists and schools rule that repentance cancels two out of three penalties that comprise the fixed punishment for *qadhf*, namely flogging the offender eighty times and labeling him as immoral. Rejecting the convict's testimony for the remainder of his life is the remaining penalty for *qadhf*. The majority of jurists affirms that repentant offenders would be eligible to give testimony in the future, whereas the Hanafis and several independent scholars stress that

the convicts of *qadhf* would never have their testimony accepted even were they to repent. The scholarly camp that relieves repentant offenders from this punishment requires that they declare themselves liars so that their testimony would be accepted in the future. Moreover, some jurists from this camp consider the testimony of repentant convicts as invalid in some cases, whereas some scholars from the opposing camp perceive this testimony as valid in some cases. Both camps do not apply the rules that govern the validity of testimony in the case of *qadhf* to the sphere of *hadith* narration. Thus, the *hadith* reports that a convict of *qadhf* narrates would not be rejected notwithstanding the potential invalidity of his testimony.

In the main, the fixed punishment for *qadhf* (flogging) is not mitigated by repentance. However, a few scholars contend that repentance cancels this penalty as well as any other punishment without exception (Paradigm 3). It seems that the three paradigms that govern the mitigating impact of repentance upon fixed punishments emerged during the era of *tabi'un* (2<sup>nd</sup> Muslim generation) then was refined later during the era of legal schools. For instance, al-Sha'bi (d. ca. 100/718) may be considered as a proponent of the third paradigm as he cancels flogging in the case of *qadhf* when the convict repents and declares himself a liar. Later, this opinion constituted a minor trend within the Shafi'i school. Likewise, 'Ata' (d. ca. 114/732) may be perceived as an advocate of the second paradigm as he cancels hand-cutting in the case of theft when the offender repents and returns the stolen item to the rightful owner before the case is reported to the authorities. Later, the Hanbalis and Imamis postulated that this penalty is cancelled when the culprit repents before the offence is proven in court.

The mitigating impact of repentance upon the fixed punishments for brigandage, theft, and *qadhf* constitutes a case of casuistry as jurists assign legal significance to the concept of repentance in the case of brigandage rather than the case of *qadhf*. Scholars unanimously agree on the cancellation of the four penalties that comprise the fixed punishment for brigandage because of convicts' repentance. They also agree on the enforcement of the penalty of flogging in the fixed punishment for *qadhf* despite convicts' repentance. This unanimity of opinion transcends both school affiliation and theological orientation as the eight legal schools assign legal significance to the concept of repentance in the case of brigandage rather than *qadhf*. Even when jurists are not unanimous in the case of theft, we have not seen that there is a single school that holds an opinion that is contrary to the contention of the remaining seven schools. The Shafi'is (in one opinion), Hanbalis, and Imamis cancel the penalty of hand-cutting if the thief repents, whereas the Hanafis, Malikis, Shafi'is (in another opinion), Zahiris, Zaydis, and Ibadis enforce this penalty despite offenders' repentance.

## APPENDIX A: AUTHORS AND BOOKS (ALPHABETICAL)

Name of Scholar	Date of Death	School Affiliation	Title of Work	Category of Work
'Abd al-Rahman al-Tha'alibi	875/1470	Maliki	<i>Al-Jawahir al-Hisan fi Tafsir al-Qur'an</i>	A-Z Exegesis
Abu al-Hawari	3 <sup>rd</sup> /9 <sup>th</sup> century	Ibadi	<i>Al-Diraya wa Kanz al-Ghinaya fi Muntaha al-Ghaya wa Bulugh al-Kifaya fi Tafsir Khamsumi'at Aya min al-Qur'an al-Karim</i>	Law-centered Exegesis
Abu al-Ma'ali al-Juwayni	478/1085	Shafi'i	<i>Kitab al-Talkhis fi Usul al-Fiqh</i>	Legal Theory
Abu al-Su'ud	951/1544	Hanafi	<i>Irshad al-'Aql al-Salim ila Mazaya al-Kitab al-Karim</i>	A-Z Exegesis
Abu al-Thana' al-Asbahani	749/1348	Shafi'i	<i>Bayan al-Mukhtasar</i>	Legal Theory
Abu Hayyan	754/1353	Shafi'i	<i>Al-Bahr al-Muhit</i>	A-Z Exegesis
Abu Ishaq al-Tha'labi	427/1035	Shafi'i	<i>Al-Kashf wa al-Bayan</i>	A-Z Exegesis
Ahmad al-Jaza'iri	1150/1737	Imami	<i>Qala'id al-Durar fi Bayan Ayat al-Ahkam bi-al-Athar</i>	Law-centered Exegesis
Al-'Ulaymi	928/1521	Hanbali	<i>Fath al-Rahman fi Tafsir al-Qur'an</i>	A-Z Exegesis
Al-A'qam	9 <sup>th</sup> /15 <sup>th</sup> century	Zaydi	<i>Tafsir al-A'qam</i>	A-Z Exegesis
Al-Alusi	1270/1853	Hanafi	<i>Ruh al-Ma'ani fi Tafsir al-Qur'an al-'Azim wa al-Sab' al-Mathani</i>	A-Z Exegesis
Al-Amin al-Shinqiti	1393/1973	Maliki	<i>Adwa' al-Bayan fi Idah al-Qur'an bi-al-Qur'an</i>	A-Z Exegesis
Al-Amin al-Shinqiti	1393/1973	Maliki	<i>Tafsir Surat al-Nur</i>	Exegesis
Al-Baghawi	516/1122	Shafi'i	<i>Ma'alim al-Tanzil</i>	A-Z Exegesis
Al-Baydawi	685/1286	Shafi'i	<i>Anwar al-Tanzil wa Asrar al-Ta'wil</i>	A-Z Exegesis
Al-Biqqa'i	885/1480	Shafi'i	<i>Nazm al-Durar fi Tanasub al-Ayat wa al-Suwar</i>	A-Z Exegesis
Al-Dah al-Shinqiti	1403/1982	Maliki	<i>Al-Ayat al-Muhkamat fi al-Tawhid wa al-'Ibadat wa al-Mu'amalat</i>	Law-centered Exegesis
Al-Farra'	207/822	?	<i>Ma'ani al-Qur'an wa I'rabuh</i>	Language-centered Exegesis
Al-Fayruzabadi	817/1414	Shafi'i	<i>Tafsir al-Qur'an</i>	A-Z Exegesis

Al-Fayruzabadi	817/1414	Shafi'i	<i>Basa'ir Dhawi al-Tamyiz fi Lata'if al-Kitab al-'Aziz</i>	Language-centered Exegesis
Al-Janabidhi	14 <sup>th</sup> /19 <sup>th</sup> century	Imami	<i>Bayan al-Sa'ada fi Maqamat al-'Ibada</i>	A-Z Exegesis
Al-Jassas	370/980	Hanafi	<i>Ahkam al-Qur'an</i>	Law-centered Exegesis
Al-Jassas	370/980	Hanafi	<i>Al-Fusul fi Usul al-Fiqh</i>	Legal Theory
Al-Kashani	1090/1679	Imami	<i>Al-Safi fi Tafsir Kalam Allah al-Wafi</i>	Sufi Exegesis
Al-Khatib al-Shirbini	977/1569	Shafi'i	<i>Al-Siraj al-Munir fi al-I'ana 'ala Ma'rifat ba'd Ma'ani Kalam Rabbina al-Hakim al-Khabir</i>	A-Z Exegesis
Al-Khazin	725/1324	Shafi'i	<i>Lubab al-Ta'wil fi Ma'ani al-Tanzil</i>	A-Z Exegesis
Al-Mahalli and al-Suyuti	864/1459 and 911/1505	Shafi'i	<i>Tafsir al-Jalalayn</i>	A-Z Exegesis
Al-Mawardi	450/1058	Shafi'i	<i>Al-Nukat wa al-'Uyun</i>	A-Z Exegesis
Al-Mawardi	450/1058	Shafi'i	<i>Kitab al-Hudud min al-Hawi al-Kabir</i>	Law
Al-Qarafi	684/1285	Maliki	<i>Al-Istighna' fi al-Istithna'</i>	Legal Theory
Al-Qassab	ca. 360/970	None	<i>Nukat al-Qur'an al-Dalla 'ala al-Bayan fi Anwa' al-'Ulum wa al-Ahkam wa al-Munbiya 'an Ikhtilaf al-Anam</i>	Law-centered Exegesis
Al-Qurtubi	671/1272	Maliki	<i>Al-Jami' li-Ahkam al-Qur'an wa al-Mubayyin li-ma Tadammannah min al-Sunna wa al-Furqan</i>	Law-centered Exegesis
Al-Qushayri	465/1072	Shafi'i	<i>Lata'if al-Isharat</i>	Sufi Exegesis
Al-Samarqandi	ca. 375/985	Hanafi	<i>Bahr al-'Ulum</i>	A-Z Exegesis
Al-Samin al-Halabi	756/1355	Shafi'i	<i>Al-Durr al-Masun fi 'Ulum al-Kitab al-Maknun</i>	A-Z Exegesis
Al-Shawkani	1250/1616	None	<i>Fath al-Qadir al-Jami' bayn Fannay al-Riwaya wa al-Diraya min 'Ilm al-Tafsir</i>	A-Z Exegesis
Al-Suyuti	911/1505	Shafi'i	<i>Al-Durr al-Manthur fi al-Tafsir bi-al-Ma'thur</i>	A-Z Exegesis
Al-Suyuti	911/1505	Shafi'i	<i>Al-Iklil fi Istinbat al-Tanzil</i>	Law-centered Exegesis
Al-Tabarani	360/970	None	<i>Al-Tafsir al-Kabir</i>	A-Z Exegesis
Al-Tabari	310/923	None	<i>Jami' al-Bayan 'an Ta'wil Ay al-Qur'an</i>	A-Z Exegesis

Al-Tabarsi	548/1153	Imami	<i>Majma' al-Bayan fi Tafsir al-Qur'an</i>	A-Z Exegesis
Al-Tabataba'i	1401/1980	Imami	<i>Al-Mizan fi Tafsir al-Qur'an</i>	A-Z Exegesis
Al-Tusi	460/1067	Imami	<i>Al-Tibyan al-Jami' li-'Ulum al-Qur'an</i>	A-Z Exegesis
Al-Zajjaj	ca. 311/923	Hanbali	<i>Ma'ani al-Qur'an wa I'rabuh</i>	Language-centered Exegesis
Al-Zamakhshari	538/1143	Hanafi	<i>Al-Kashshaf 'an Haqa'iq Ghawamid al-Tanzil wa 'Uyun al-Aqawil fi Wujuh al-Ta'wil</i>	A-Z Exegesis
Al-Zarkashi	794/1348	Shafi'i	<i>Al-Bahr al-Muhit</i>	Legal Theory
Atfiyyash	1332/1913	Ibadi	<i>Hamayan al-Zad ila Dar al-Ma'ad</i>	A-Z Exegesis
Fakhr al-Din al-Najri	877/1472	Zaydi	<i>Shafi al-'Alil Sharh al-Khamsumi'at Aya min al-Tanzil</i>	Legal Exegesis
Fakhr al-Din Al-Razi	606/1209	Shafi'i	<i>Al-Tafsir al-Kabir</i>	A-Z Exegesis
Hud al-Hawwari	3 <sup>rd</sup> /9 <sup>th</sup> century	Ibadi	<i>Tafsir Kitab Allah al-'Aziz</i>	A-Z Exegesis
Ibn 'Adil	ca. 880/1475	Hanbali	<i>Al-Lubab fi 'Ulum al-Kitab</i>	A-Z Exegesis
Ibn 'Ajiba	1224/1809	Maliki	<i>Al-Bahr al-Madid fi Tafsir al-Qur'an al-Majid</i>	Sufi Exegesis
Ibn 'Ashur	1393/1973	Maliki	<i>Al-Tahrir wa al-Tanwir</i>	A-Z Exegesis
Ibn 'Atiyya	546/1151	Maliki	<i>Al-Muharrar al-Wajiz fi Tafsir al-Kitab al-'Aziz</i>	A-Z Exegesis
Ibn al-'Arabi	543/1148	Maliki	<i>Ahkam al-Qur'an</i>	Law-centered Exegesis
Ibn al-Faras	597/1200	Maliki	<i>Ahkam al-Qur'an</i>	Law-centered Exegesis
Ibn al-Jawzi	597/1200	Hanbali	<i>Zad al-Masir fi 'Ilm al-Tafsir</i>	A-Z Exegesis
Ibn al-Qayyim	751/1349	Hanbali	<i>I'lam al-Muwaqqi'in 'an Rabb al-'Alamin</i>	Legal Theory
Ibn Hajar al-Haytami	973/1565	Shafi'i	<i>Tuhfat al-Minhaj bi-Sharh al-Minhaj</i>	Law
Ibn Hazm	456/1064	Zahiri	<i>Al-Muhalla bi-al-Athar</i>	Law
Ibn Hazm	456/1064	Zahiri	<i>Al-Ihkam fi Usul al-Ahkam</i>	Legal Theory
Ibn Hubayra	655/1257	Hanbali	<i>Al-Fiqh 'ala Madhahib al-'A'imma al-Arba'a</i>	Comparative Law
Ibn Juzayy	741/1340	Maliki	<i>Al-Tashil li-'Ulum al-Tanzil</i>	A-Z Exegesis
Ibn Kathir	774/1372	Shafi'i	<i>Tafsir al-Qur'an al-'Azim</i>	A-Z Exegesis

Ibn Mutawwaj al-Bahrani	820/1417	Imami	<i>Minhaj al-Hidaya fi Bayan Khamsumi'at al-Aya</i>	Law-centered Exegesis
Ibn Qudama	620/1223	Hanbali	<i>Rawdat al-Nazir wa Jannat al-Munazir fi Usul al-Fiqh</i>	Legal Theory
Ibn Rashiq	632/1234	Maliki	<i>Lubab al-Mahsul fi 'Ilm al-Usul</i>	Legal Theory
Ilkiya al-Harrasi	504/1110	Shafi'i	<i>Ahkam al-Qur'an</i>	Law-centered Exegesis
Isma'il Haqqi	1127/1715	Hanafi	<i>Ruh al-Bayan fi Tafsir al-Qur'an</i>	Sufi Exegesis
Makki b. Abi Talib	437/1045	Maliki	<i>Al-Hidaya ila Bulugh al-Nihaya</i>	Sufi Exegesis
Miqdad al-Suyuri	826/1422	Imami	<i>Kanz al-'Irfan fi Fiqh al-Qur'an</i>	Law-centered Exegesis
Muhammad al-Muzi'i	825/1422	Shafi'i	<i>Taysir al-Bayan li-Ahkam al-Qur'an</i>	Law-centered Exegesis
Muhammad b. al-Qasim	1067/1656	Zaydi	<i>Muntaha al-Maram fi Sharh Ayat al-Ahkam</i>	Law-centered Exegesis
Nizam al-Din al-Naysaburi	728/1327	Shafi'i	<i>Ghara'ib al-Qur'an wa Ragha'ib al-Furqan</i>	A-Z Exegesis
Sa'id al-Rawandi	573/1177	Imami	<i>Fiqh al-Qur'an</i>	Law-centered Exegesis
Siddiq Hasan al-Qannuji	1307/1890	None	<i>Nayl al-Maram fi Tafsir Ayat al-Ahkam</i>	Law-centered Exegesis
Yusuf al-Thula'i	832/1428	Zaydi	<i>Al-Thamarat al-Yani'a wa al-Ahkam al-Wadiha al-Qati'a</i>	Law-centered Exegesis

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