

# Late Roman Law and the Quranic Punishments for Adultery

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The most extraordinary thing about the Islamic law of adultery is that the prescriptions of the foundational text, the Qur'ān (c. 610-632), were widely set aside by Abbasid-era jurists and governments in favor of a Judaizing oral tradition of Medina originating in the eighth century. While Jewish law was clearly one of the influences on Islamic law, it was hardly the only one and, in some instances, positions are taken in the Qur'ān that are antithetical to *halakha*. For instance, the Qur'ān permits forms of inter-marriage among Abrahamic communities, whereas rabbinical law prescribes Jewish endogamy.<sup>1</sup> Although quranic decrees on adultery overlapped with Jewish ones in ordaining counseling and separation, they never mention stoning and the verses that command house arrest and stripes for adultery do not have exact parallels in Jewish law.

The Qur'ān allows for repentance and reconciliation. Even whipping, the harshest permitted punishment, underlined community justice and yet the possibility for reconciliation. As Foucault argued, public flogging was performative and not just procedural: “the condemned . . . published his crime and the justice that had been meted out to him by bearing them physically on his body.”<sup>2</sup> Stoning in contrast, as a form of capital punishment, signaled the revenge of the divine and of society on a member who had irreparably violated the law and could not be redeemed. In the Qur'ān, there are crimes that can receive the death sentence, such as brigandage (*al-fasād fī al-arḍ*), but adultery does not appear to be one of them.

I will argue that in seeking the origins of quranic punishments for adultery, we must look not only to the Jewish tradition but to Christian Rome. Justinian (r. 527 - 565) moved away from capital punishment for adulteresses at least. Julia Hillner argued that the late antique

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<sup>1</sup> For Jewish, Christian and quranic positions on endogamy and their scriptural contexts see Holger M. Zellentin, “Gentile Purity Law from the Bible to the Qur'ān: the Case of Sexual Purity and Illicit Intercourse,” in *The Qur'ān's Reformation of Judaism and Christianity: Return to the Origins*, edited by Holger M. Zellentin (London: Routledge, 2019) 124-125.

<sup>2</sup> Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (New York: Vintage, 1977), 43.

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Roman legal approach, informed by Christianity, put an emphasis on reformatory punishing in three distinct ways. The publication of laws in itself was seen as impressing upon the public the consequences of wrongdoing. The penalties prescribed for non-capital crimes were seen as having an educating effect, and for this reason magistrates were given wide discretion in how harshly to penalize those convicted, with some seen as curable and others as incorrigible, a Platonic distinction. Third, the Eastern Roman Empire often incorporated into the statutes the possibility of penance on the part of the miscreant, seeing punishments as a cure for the sick soul.<sup>3</sup> An Eastern Roman context for some Islamic law has become increasingly plausible as historians and archeologists have gained a firmer understanding of how intertwined the Hijaz was with Roman provinces to the north, of the three Palestines and Roman Arabia.<sup>4</sup> This understanding has not yet been applied in the case of laws on sexual morality, our subject here.

## Stoning in Jewish Legal Traditions

Regarding adultery, biblical law punishes only in the case where a married or betrothed woman has sex with a man other than her husband. Men could have sex with persons other than their wives, including prostitutes, concubines and secondary wives.<sup>5</sup> Leviticus 20:10 says, "If a man commits adultery with the wife of his neighbor, both the adulterer and the adulteress shall be put to death." The Bible explicitly commanded stoning in one instance. Deuteronomy 22:23-24 says, "If there is a young woman, a virgin already engaged to be married, and a man meets her in the town and lies with her, you shall bring both of them to the gate of that town and stone them to death . . ." The punishments mentioned in Deuteronomy were the harshest allowable, but it was understood, as was customary in the wider Near East, that lesser sanctions could also be imposed. It is unclear how common it was among Jews for adulterers to be put to death. There is some evidence in the Hebrew Bible that in practice, adulterous wives were simply divorced and sent away, rather than executed (Jer 3:8). In the

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<sup>3</sup> Julia Hillner, *Prison, Punishment and Penance in Late Antiquity* (Cambridge: Cambridge University Press, 2015), 113-114.

<sup>4</sup> Juan Cole, "Muhammad and Justinian: Roman Legal Traditions and the Qur'an," *Journal of Near Eastern Studies* 79, 2 (2020): 183-196; Andrew Marsham, "Public Execution in the Umayyad Period: Early Islamic Punitive Practice and its Late Antique Context," *Journal of Arabic and Islamic Studies* 11 (2011):101-136; Andrew Marsham, "Attitudes to the Use of Fire in Executions in Late Antiquity and Early Islam: The Burning of Heretics and Rebels in Late Umayyad Iraq," in *Violence in Islamic Thought from the Qur'an to the Mongols*, eds. István Kristó-Nagy and Robert Gleave (Edinburgh: Edinburgh University Press, 2015), 106-127; and Sean W. Anthony, *Crucifixion and Death as Spectacle: Umayyad Crucifixion in its Late Antique Context* (New Haven, Connecticut: American Oriental Society, 2014). See also Aziz al-Azmeh, *The Emergence of Islam in Late Antiquity: Allah and His People* (Cambridge: Cambridge University Press, 2014), and the essays in Greg Fisher, ed., *Arabs and Empires before Islam* (Oxford: Oxford University Press, 2015).

<sup>5</sup> Bruce Wells, "Sex Crimes in the Laws of the Hebrew Bible," *Near Eastern Archaeology* 78, 4 (December 2015): 294-300.

New Testament, John 8:3-7 does depict the Pharisees as preparing to stone a woman caught in adultery (μοιχεία).<sup>6</sup>

In late antiquity, the question became moot. After the Roman destruction of the Second Temple in 70 CE and the failure of the Bar Kochba revolt against the empire in 135, the Jerusalem legal council (Sanhedrin) ceased judging capital crimes such as adultery, perhaps with the implication that capital punishments had become the prerogative of Roman civil law. By about 220 CE, rabbinical commentators had developed an oral body of rabbinical law, the Mishna. By about 400 CE, the Palestinian Talmud, a further corpus of commentary and super-commentary on the Mishna, had been completed. And by sometime in the 600s CE, the Babylonian Talmud was finished. Although it must have been a purely abstract exercise, the Tractate Sanhedrin in the Talmud specified means of execution in various cases. If two men in turn have illicit sex with an affianced virgin, the first is to be stoned and the second strangled. A man who commits adultery with a married woman is to be strangled. A fiancée who commits adultery is to be stoned at the door of her father's house or at the place where the crime was committed.<sup>7</sup> Of this body of Jewish legal material, the Qur'ān refers to Mishna teachings (Sanhedrin 4:5) preserved in the Palestinian Talmud when it prohibits murder (The Table 5:32).<sup>8</sup> Nevertheless, it will be shown that the punishments prescribed for adultery in the Qur'ān predominantly show late Roman influences along with some influence of Jewish law.

## Adultery in Rome

Roman law on adultery changed significantly through time. Augustus (r. 63 BCE – 14 CE) legislated on marriage early in his reign as the first emperor, in part over anxieties that the Roman aristocracy was not marrying and having children under what he saw as an increasingly decadent republic, and in part to better regulate the inter-generational transmission of property among the elite. He for the first time made adultery a crime that was adjudicated in court, rather than leaving it to private justice. Adultery cases concerned only respectable wives of the notable classes. From the old practice of private justice, he kept only the provision that a father could kill his adulterous daughter if he discovered her with her lover in his own house or that of his son-in-law. Outside of that occasion, the case went to a standing court. Women found guilty forfeited part of their dowry and property, were divorced, and could be exiled and forced to wear a man's toga rather than female dress, as was the custom among prostitutes and actresses. In theory, their male paramour was also fined property and banished to a different island, though literary sources suggest that

<sup>6</sup> Jeffrey Howard Tigay, et al. "Adultery." *Encyclopaedia Judaica*, edited by Michael Berenbaum and Fred Skolnik, 2nd ed., vol. 1, Macmillan Reference USA, 2007, pp. 424-427. Gale Virtual Reference Library, <http://link.galegroup.com/apps/doc/CX2587500495/GVRL?u=umuser&sid=GVRL&xid=59850fbb>. Accessed 2 May 2019.

<sup>7</sup> Herbert Danby, trans., *Tractate Sanhedrin: Mishna and Tosefta* (New York: Macmillan, 1919), 102-103

<sup>8</sup> Herbert Danby, trans., *The Mishnah: Translated from the Hebrew with Introduction and Brief Explanatory Notes* (Oxford: Oxford University Press, 1933), 387-388 (Sanhedrin 4:5); Holger Zellentini, "QS 8 Q5:32," in *Qur'ān Seminar*, ed. Mehdi Azaiez (Berlin: De Gruyter, 2017), 110; Michel Cuypers, *The Banquet: A Reading of the Fifth Sura of the Qur'ān* (Miami: Convivium Press, 2009), 200-203, 214-215.

only women were de facto punished.<sup>9</sup> The court in Rome could in later centuries be busy. The historian Cassius Dio, made consul there in the early 200s, discovered a backlog of 3,000 adultery cases.<sup>10</sup>

Emperor Constantine threw his support to Christianity in the early fourth century, though in more ambiguous and less reified ways than historians once thought.<sup>11</sup> Constantine legislated anew on adultery. He restricted those with standing to alert the courts to an adultery case to the father, husband or other close relatives, whereas Augustus Caesar had permitted such informing by any citizen. Constantine also made it clear that adultery charges were criminal, not civil, and could only be brought against propertied women and their paramours. The wife of a landowner could be charged, but not her maid.

Christian Rome at some point made adultery a capital crime, at least for the male interloper. The Code of Theodosius II (r. 401-450) specified the punishment for adultery as being sown into a sack and burned alive (which was also the punishment for killing one's father), and some authors asserted that this provision went back to Constantine. A law of 459 hearkened back to Augustus in allowing an adulterous woman instead to be exiled.<sup>12</sup> Literary sources suggest that adultery was handled differently by various local authorities in the Christian Roman Empire. In some instances, a divorce was ordered, in others an execution. For officials to give criminals lesser sentences than prescribed in imperial codices was common throughout the empire and over the centuries.<sup>13</sup>

In the first years of his long reign, Emperor Justinian (r. 527-565) upheld the death penalty for upper-class adultery. He maintained this attitude with regard to men. The Novel ("new law") 134:10 of the year 556 awards some of the male adulterer's property to his wronged wife and urges that law commissioners impose on him the punishment prescribed by Constantine, which implies a death sentence.<sup>14</sup> The emperor appears to have had a change of heart with regard to the erring woman, however. For her, the

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<sup>9</sup> Catharine Edwards, *The Politics of Immorality in Ancient Rome* (Cambridge: Cambridge University Press, 2009); Judith Evans Grubbs, *Women and the Law in the Roman Empire: a Sourcebook on Marriage, Divorce and Widowhood* (London: Routledge, 2002).

<sup>10</sup> Kyle Harper, *From Shame to Sin: The Christian Transformation of Sexual Morality in Late Antiquity* (Cambridge, Ma.: Harvard University Press, 2013), 42.

<sup>11</sup> David Potter, *Constantine the Emperor* (Oxford: Oxford University Press, 2013); H. A. Drake, "The Impact of Constantine on Christianity," and Mark Edwards, "The Beginnings of Christianization," in Noel Lenski, ed., *The Cambridge Companion to the Age of Constantine* (Cambridge: Cambridge University Press, 2005), chaps. 5 and 6 respectively; Morten Warminde, "The religious administration of Constantine," *Temenos* 54, 1 (2018):47-62; John R. Curran, *Pagan City and Christian Capital: Rome in the Fourth Century* (Oxford: Clarendon Press, 2000).

<sup>12</sup> Mathew Kuefler, "The Marriage Revolution in Late Antiquity: The Theodosian Code and Later Roman Marriage Law," *Journal of Family History*, 32, 4 (October 2007): 343-370, at 356-357.

<sup>13</sup> Geoffrey Nathan, *The Family in Late Antiquity: The Rise of Christianity and the Endurance of Tradition* (London: Routledge, 2002), 98-100.

<sup>14</sup> Corp. Jur. Civ. 134.10; David J. D. Miller and Peter Sarris, ed. and trans., *The Novels of Justinian* 2 vols. (Cambridge: Cambridge University Press, 2018), 2:897-898; Julia Hillner, "Monastic Imprisonment in Justinian's Novels," *Journal of Early Christian Studies*, 15, 2 (Summer 2007): 205-237, at 214.

contemporary Latin translation of his Novel speaks of “*competentibus vulneribus*,” which Minnucci glosses as scourging.<sup>15</sup> Reno translates the sentence, “[We order], however, that an adulterous woman, after undergoing the appropriate corporal punishment, be sent to a monastery.”<sup>16</sup> The Latin *Authenticum*, was produced in the late 550s in Constantinople as a word for word and therefore inelegant translation of the Greek and was very quickly transmitted to Italy. It may be viewed as containing information on the mid-sixth-century contemporary understanding of the Greek in Constantinople. Since the *Authenticum* was intended as a study aid for law students, it is understandable that it elaborated in Latin where the Greek original was telegraphic or obscure.<sup>17</sup> The Greek text used a bland phrase, saying that the adulteress is to “undergo appropriate punishments (προσηκούσας πινάξ).” It is difficult to understand why the author of the Latin word-for-word translation would have introduced corporal punishment into the law if it was wholly unauthorized by imperial practice and intentions.

That flogging was prescribed in 134:10 would be no surprise, since it was widely used in the Eastern Roman Empire.<sup>18</sup> Justinian’s Novel 14 of 535 had decreed lashing for pimps when he outlawed pedophilic brothel-keeping and trafficking in young girls. The text said that henceforth such traffickers would be arrested “and suffer the most extreme of penalties.”<sup>19</sup> The Augustus later explains what he meant, saying of the pimp, “He himself will, as we have just said, be subject to corporal punishment, and will be banished as far as possible away from this great city.” Flogging had initially been associated with slavery, and until the sixth century was not applied to upper class criminals. Its use with regard to a pimp was class-appropriate. Justinian, however, expanded the use of flogging, threatening to apply it even to provincial judicial officials found guilty of giving kickbacks to gain their post or of taking bribes.<sup>20</sup>

<sup>15</sup> Giovanni Minnucci, “La condizione giuridica della donna tra Medio Evo ed Età Moderna: qualche riflessione,” in *Anuario de Historia del Derecho Español* 81 (2011):997-1007, at 1006.

<sup>16</sup> Edward A. Reno III, “Ad Agendam Penitentiam perpetuam detrudatur: Monastic Incarceration of Adulterous Women in Thirteenth-Century Canonical Jurisprudence,” *Traditio* 72 (2017): 301-340, at 308; see also Philip Lyndon Reynolds, *Marriage in the Western Church: The Christianization of Marriage During the Patristic and Early Medieval Periods* (Leiden: Brill, 2015), 60.

<sup>17</sup> Simon Corcoran, “Roman Law and the Two Languages in Justinian’s Empire,” *Bulletin of the Institute of Classical Studies*, 60, 1 (2017): 96-116, at 113-116; Simon Corcoran, “Authenticum (UCL Ms Ogden 5): Roman legal history in the UCL Special Collections,” *Projet Volterra* <https://www.ucl.ac.uk/volterra/texts/authenticum>; Timothy G. Kearley, “The Creation and Transmission of Justinian’s Novels,” *Law Library Journal* 102, 3, (Summer 2010), 377-397; Wolfgang Kaiser, “Die Zweisprachigkeit reichsweiter Novellen unter Justinian,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 129, 1 (2012):392-474 at 404-410.

<sup>18</sup> G. Geltner, *Flogging Others: Corporal Punishment and Cultural Identity from Antiquity to the Present* (Amsterdam: Amsterdam University Press, 2014), 44-62.

<sup>19</sup> *Corp. Jur. Civ.*, 14; Miller and Sarris, *The Novels of Justinian*, 1:183 (14).

<sup>20</sup> *Corp. Jur. Civ.*, 8.8.1; Miller and Sarris, *The Novels of Justinian*, 1:36 (8.8.1); Smith and Cheelham, *A Dictionary of Christian Antiquities*, 1:470; the Greek is βλάσιν, the Latin *verbera*.

There is, moreover, indirect evidence of whipping as a punishment for adulteresses in Justinian's own time. Writing some six years before Novel 134.10, the historian Prokopios in his *Secret History* wrote of the court under the influence of his wife Theodora,

It was during this time that the morals of almost all women too were corrupted. For they were given full license to cheat on their husbands and no risk or harm could come to them because of their behavior. Even those convicted of adultery remained unpunished, because they would go straight to the empress and turn the tables by hauling their husbands into court through a counter-suit, despite the fact that the men had been charged with no crime. All the men could do, even though they had not been convicted of anything, was to pay back to their wives the dowries that they had received, only two-fold, to be whipped and then, for most of them, led off to prison.<sup>21</sup>

The men were punished by the courts for a false allegation of adultery not only with repayment of the dowry twice over but with whipping and prison. These were, however, not just punishments for false witness. Novel 117.4.9 of A.D. 542 says, "because of the accusation of adultery, brought and unproved, the husband is also to be subject to the penalties that the wife would have been going to suffer, had such accusation been proven."<sup>22</sup> This passage in the *Secret History*, in the context of this Novel, suggests that already around 550 adulteresses were whipped and then put under house arrest, punishments that the court then applied to husbands who slandered their wives. It seems, then, probable that Justinian in Novel 134.10 formalized what had become a routine informal practice of magistrates, prescribing corporal punishment and then jailing. His innovation was to specify the place of imprisonment for the woman as a nunnery.

After Justinian, officials in regions with a Roman heritage prescribed lashes for some sexual crimes. In the seventh-century Visigothic kingdom in Spain, a married woman who slept with another's slave was sentenced to 100 lashes and women who were convicted of

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<sup>21</sup> Procopius, *Anekdotia: Geheimgeschichte Des Kaiserhofs Von Byzanz*, ed. and trans. Hartmut Leppin, Mischa Meier, and Otto Veh (Düsseldorf: Artemis & Winkler, 2005), 58 (17.24-26): Τότε και ταῖς γυναῖξι σχεδόν τι ἀπάσαις τον τρόπον διεφθάρθαι ξυνέβη. ἐξήμαρτον γάρ ες τους ἀνδρας ἐξουσία τη πάση, ου φέροντος αὐταῖς κίνδυνόν τινα ἢ βλάβην του ἔργου, ἐπεὶ και ὅσαι μοιχείας ἀλοιέιν, αὐται κακῶν ἀπαθείς ἐμενον, παρά δε την βασιλιδα αὐτικά ιούσαι ἀντίστροφοί τε γενόμενα και δικημου γεγοῦότων ἐγκλημάτων ἀντιλαχοῦσαι τους ἀνδρας ὑπήγον. περιήν τε αὐτοῖς ἀνεξελέγκτοις οὔσι την μεν προίκα ἐν διπλάσια ἀποτινῶναι, μεμαστιγωμένοις δε ἐκ του ἐπὶ πλείστον ἐς το δεσμοτήριον ἀπαχθῆναι, και ἀν πάλιν τὰς μοιχευτρίας ἐπιδείν κεκομψευμέναις τε και πρὸς των μοιχῶν ἀδεέστερον λαγνεομένας, των δε μοιχῶν πολλοί ἀπ' αὐτοῦ του ἔργου και τιμῆς ἔτυχον. διόπερ οι πλείστοι το λοιπόν; quoted from Prokopios, *The Secret History with Related Texts*, translated by Anthony Kaldellis (Indianapolis: Hackett, 2010), 78

<sup>22</sup> Corp. Jur. Civ. 117.9.4; Miller and Sarris, *The Novels of Justinian*, 2:759; Hillner, "Monastic Imprisonment," 215 misses the implication that by 550 the actual punishment in positive law for adulteresses was flogging and imprisonment; she notes that it is unclear how often the older punishment of death was applied to the upper classes.

prostitution received 300 lashes, which was the largest number of stripes given for any crime in that code.<sup>23</sup> In eighth-century Byzantium, men were lashed for fornication.<sup>24</sup>

In Justinian's Novel 134:10, the guilty woman would be first subject to corporal punishment and then be sent to a monastery. The wronged husband could retrieve her from the cloister within the space of two years. This grace period allows for reconciliation after she has been scourged and done penance in the nunnery and may be intended to make a provision for her being pregnant at sentencing and giving birth. It may also derive from a Christian concern for reconciliation and the sanctity of marriage, which outweighs the crime, unlike in old pagan Roman thinking. Hillner argues that Justinian substituted internment in a monastery for the previous Roman custom of exile.<sup>25</sup> If the cuckolded husband declines to take her back, she is to take the tonsure and become a nun for life.<sup>26</sup> The technical term for this form of imprisonment was *detrusio*. In the West, Justinian's legislation had its greatest impact in Italy, and Reno notes that immediately after this Novel, "Pope Pelagius I (556-61) directed that the female malefactor--if her husband refused to accept her back -- should be relocated to a place where she would not be permitted to 'misbehave' (*locum in quo ei non liceat male vivere*)."<sup>27</sup>

In the last quarter of the sixth century in Constantinople, Athanasios of Emesa produced a digest for law students of Justinian's novels. It refers to 134.10 twice. At 1.P.5.4 the author says that the law prescribes that chastened (*σωφρονιζομένης* [i.e. already punished by whipping?]) adulterous women are to be thrust into a monastery and then their wealth should be expropriated, whether or not they have children or parents.<sup>28</sup> Elsewhere the author explains that the woman's personal property (presumably her jewelry and other valuables about her person) is to be confiscated from the monastery in which she is interned.<sup>29</sup> This jewelry and other personal property was likely from her dowry and so this measure is consonant with Novel 17.8, which awards the dowry and any gifts given before marriage to the cuckolded husband.<sup>30</sup> This concern with the woman's property led Hillner to suggest that the "appropriate punishment" mentioned in the Greek text of Novel 134.10 was this fine.<sup>31</sup> The Latin *Authenticum*'s specification of corporal punishment cannot,

<sup>23</sup> P. D. King, *Law and Society in the Visigothic Kingdom* (Cambridge: Cambridge University Press, 1972), 202, n.5; William Smith and Samuel Cheelham, eds., *A Dictionary of Christian Antiquities*, 2 vols. (London: John Murray, 1893), 1:470-471.

<sup>24</sup> Harper, *From Shame to Sin*, 243.

<sup>25</sup> Hillner, "Monastic Imprisonment," 212.

<sup>26</sup> Corp. Jur. Civ. 134:10; Miller and Sarris, *The Novels of Justinian*, 2:897.

<sup>27</sup> Reno, "Ad Agendam Penitentiam perpetuam detrudatur," 309.

<sup>28</sup> Athanasios of Emesa, *Das Novellensyntagma des Athanasios von Emesa*, edited and translated by Dieter Simon and Spyros Troianos (Frankfurt-am-Main: Löwenklau, 1989), 76.

<sup>29</sup> *Ibid.*, 122.

<sup>30</sup> Corp. Jur. Civ. 117.8; Miller and Sarris, *The Novels of Justinian*, 2:757.

<sup>31</sup> Hillner, *Prison, Punishment and Penance*, 315 n6. The same source notes, 97, that *σωφρονισμός* was the Greek term used in Christian Eastern Rome for the Latin *emendation*, an educative punishment such as lashes or fines for non-capital offenses.

however, be ignored, and since jurists tended to be bilingual it would have influenced late sixth- and seventh-century interpretations of the Novel even in the Roman East. Athanasios, for example, clearly knows Justinian's long Latin preface to Novel 17 in the *Authenticum*, which either did not appear in the Greek compilation of the Novels.<sup>32</sup> Moreover, in Athanasios's gloss, the confiscation of property comes after she has been immured in the nunnery, whereas the "appropriate punishment" in the text of Novel 134.10 comes before her detrusion.

The idea of monastic confinement for adulterers was new with Justinian. Formal Roman law had until that point usually prescribed the penalties of "execution, exile, forced labor, property confiscation, and corporal punishment."<sup>33</sup> Nevertheless, Roman imperial officials had routinely imposed imprisonment for crimes on an ad hoc basis.<sup>34</sup> Being sent to a monastery fit with a Christian ethos since it allowed for penitence and a reformation of the soul. Historians have seen this decree on the detrusion of adulteresses as the embryo of the later European institution of the prison.

## The Qur'ān

Roughly 70 years after the Justinianic Novel on adultery and 2,900 km. to the southeast of Constantinople, very similar punishments for adultery were prescribed in the Qur'ān. While some language in the Muslim scripture's treatment of adultery bears a likeness to later rabbinical counsels, it differs from biblical law, where adultery is a capital crime punished by such forms of execution as strangulation or stoning. Although the post-Second Temple rabbis did widely prescribe flogging as a punishment for various infractions, they only permitted 39 lashes. The Qur'ān's prescribed punishments also differ from Zoroastrian law and practice in the Sasanian period. One legal text from that era commands mutilation in the form of cutting off the nose of the adulteress, while under some circumstances the punishment was death, though evidence exists for less severe penalties, such as being divorced and fined.<sup>35</sup>

In the Muslim scripture the problem of illicit sex is seen as posing a danger to society.<sup>36</sup> The Qur'ān speaks tenderly of marriage and faithfulness. Rome 30:21 says, "Among his signs is that he created for you from among yourselves spouses so that you might find tranquility in them, and he instilled between you love and compassion. In this are signs for a thoughtful

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<sup>32</sup> Athanasios, *Novellensyntagma*, trans. Simon and Troianos, 144; Simon Corcoran, "Roman Law and the Two Languages in Justinian's Empire," *Bulletin of the Institute of Classical Studies*, 60, 1 (2017): 96-116 at 112 n97

<sup>33</sup> Hillner, "Monastic Imprisonment," 206; Hillner, *Prison, Punishment and Penance*, 315-331.

<sup>34</sup> Hillner, *Prison, Punishment*, 203.

<sup>35</sup> Matthew Canepa, "Emperor," in Catherine M. Chin and Moulie Vidas, eds., *Late Ancient Knowing: Explorations in Intellectual History* (Berkeley: University of California Press, 2015), 165; Fereshteh Davaran, *Continuity in Iranian Identity: Resilience of a Cultural Heritage* (London: Routledge, 2010), 95-96.

<sup>36</sup> Nadia Abu-Zahra, "Adultery and Fornication," in Jane Dammen McAuliffe, ed., *Encyclopaedia of the Qur'ān Online* (2001-2006). <[https://doi.org.proxy.lib.umich.edu/10.1163/1875-3922\\_q3\\_EQCOM\\_00004](https://doi.org.proxy.lib.umich.edu/10.1163/1875-3922_q3_EQCOM_00004)>



people.” In contrast, adultery brings with it the danger of depravity and its slippery moral slope. The Night Journey 17:32 admonishes, “Do not go near to adultery, for it is debauchery and evil as a path.” Holger Zellentin argues that the Arabic *al-fāhisha*, which I render as “debauchery,” is likely a loanshift from the Greek πορνεία, understood in late antiquity as a catch-all term for illicit sex.<sup>37</sup>

At the same time, unjust allegations directed at innocent women for some ulterior purpose are also dangerous for public order. In The Light 24:4-5, the Qur’ān warns: “Those who accuse chaste women, but then do not provide four witnesses, lash them with eighty stripes and never thereafter accept any testimony from them, for they are morally corrupt—except those who afterward repent of this deed and make things right. For God is forgiving, compassionate.” The singling out of “chaste women” for special protection from slander and false accusations continues the Roman convention that adultery is a crime pertaining especially to respectable women.

The Code of Justinian also prescribes corporal punishment or literally “torment” for false witness, though this is a general principle whereas the Qur’ān deploys it specifically for scurrilous accusations of adultery. The Code 4.20.13 says “Whoever gives false testimony first perjures himself; then he is prosecuted as a forger, and if he is suspected of lying in the very moment of his testimony is subject to torture (βασάνοις).”<sup>38</sup> Hillner explains that the term *basanois*, meaning painful tests, has New Testament overtones (Matthew 4:24, Luke 16:23). Justinian in the Codex is “probably indicating corporal punishment.”<sup>39</sup> As we saw above, with regard specifically to false charges of adultery, Novel 117.9.4 stated that a wife may divorce her husband were he to accuse her of adultery without sufficient proof. The wife would receive financial compensation and, in addition, could initiate a countersuit for false accusation. The husband would be punished in the same way that the wife would have been if the offense had been proven, which the *Secret History* suggests was, by 550, flogging and jailing.<sup>40</sup>

<sup>37</sup> Zellentin, “Gentile Purity Law from the Bible to the Qur’ān,” 125-126, 154-157.

<sup>38</sup> Bruce Frier, ed., *The Codex of Justinian: A New Annotated Translation, with Parallel Latin and Greek Text*, 3 vols. (Cambridge: Cambridge University Press, 2016), 2:860-861 (4.20.13).

<sup>39</sup> Hillner, *Prison, Punishment*, 99.

<sup>40</sup> Corp. Jur. Civ. 117.9.4; Miller and Sarris, *The Novels of Justinian*, 2:759; Hillner, “Monastic Imprisonment,” 215. Zellentin shows that although the Bible (Dtn 25:3) limits lashes to 40 and the rabbinical tradition limits them to 39, one second-century rabbi is alleged to have urged 80 lashes for false witness in the Mishna Makkot 1:3. This prescription closely parallels The Light 24:4-5, though, again, in the Qur’ān the punishment is only for false witness pertaining to adultery. One has to wonder, however, whether this non-biblical and non-halakhic number of lashes in one passage is the influence on Rabbi Meir of Roman practice, and whether this passage in the Mishna and Light 24:4-5 share this background (it would have been an informal practice of Roman magistrates, since the imperial edicts tend to be vague in referring to flogging). See Zellentin, “Gentile Purity Law from the Bible to the Qur’ān,” 162-164; Beth A. Berkowitz, “Negotiating Violence and the Word in Rabbinic Law,” *Yale Journal of Law & the Humanities* 17, 1 (2005): 125-150, on 129 points to a new extra-biblical rabbinical forms of flogging in the second century.

## Immurement of Adulteresses

In the Qur'ān various punishments are prescribed for the crime of adultery, though it may make a distinction between adultery and flagrant, public sexual indiscretions.<sup>41</sup> The Women 4:15 says, "Those of your women who commit debauchery (*al-fāḥisha*), seek the witness against them of four among you. If they so testify, immure them in houses until they die or until God makes a path for them." Writing likely in the 760s the author of the earliest extended Qur'ān commentary, Muqātil b. Sulaymān, interpreted "debauchery" as the adultery of a married woman.<sup>42</sup> In contrast, Ṭabarī (A.D. 839-923), writing in the ninth or tenth century said that the woman at issue could have a husband or be without a husband and he glosses *al-fāḥisha* as *al-zinā*, saying that these terms referred to any sort of illicit sex including adultery or fornication.<sup>43</sup> The word, however, does not seem to mean simply adultery. It implies an open flouting of community standards, as in Divorce 65:1, where husbands divorcing their wives are forbidden to expel them from their homes during the *`idda* or three-month delay to see if they are pregnant. The exception is if they have committed *fāḥisha mubīna*, open debauchery. I suggest that *al-fāḥisha* connotes "flagrant or public sexual immorality," since for most acts of adultery it would not be plausible that four witnesses could be gathered. One sort of debauchery that could have resulted in a sentence of immurement may have been temple prostitution, which may be referred to at The Heights 7:28, "When they commit sexual improprieties, they say: 'We found our forebears doing that, and God ordered us to behave that way.'"

This commandment that the debauched woman be immured recalls Justinian's decree of detrusion in a nunnery for life. The Qur'ān, however, rejects the institution of monasticism (Iron 57:27). Thus, the flagrantly straying wife was likely confined in a house (presumably the father's) until something changed her fate. If the immurement was influenced by Novel 134:10, which mentions the possible escape of the adulteress if her husband took her back, the "way" God might find for her could possibly include a decision by her husband to relent. Or, since The Light 24:3 speaks of divorced adulterers marrying other adulterers, perhaps she could escape through an offer of marriage from another divorced adulterer among the believers after they had repented.<sup>44</sup> Marsham has noted that imprisonment was known as a punishment in Arabia, and that the poet `Adi b. Zayd (d. 600) composed verse complaining of his jailing by the Nasrid Nu'mān III in Hira at the end of

<sup>41</sup> John Burton, "Law and Exegesis: The Penalty for Adultery in Islam," in *Approaches to the Qur'ān*, edited by G. R. Hawting and Abdul Kadir A. Shareef (London: Routledge, 1993), 269-284; Muhammad Abdel Haleem, *Exploring the Qur'ān: Context and Impact* (London: I. B. Tauris, 2017), 95-97.

<sup>42</sup> Muqātil b. Sulaymān, *Tafsīr*, 1:362 apud Q. 4:15.

<sup>43</sup> Abū Ja'far Muḥammad ibn Jarīr Ṭabarī, *Tafsīr al-Ṭabarī: Jāmi' al-bayān `an tawīl āy al-Qur'ān*, ed. `Abd Allāh ibn `Abd al-Muḥsin al-Turk, 26 vols. (Cairo: Dār Hijr, 2001), 6:493.

<sup>44</sup> Abdul Haleem, *Exploring the Qur'ān*, 95-97; Ṭabarī cites earlier exegetes who instead insisted that the only escape from home imprisonment was to be stoned or whipped. The stoning makes no sense at all, since the Qur'ān is speaking of an alternative to immurement until death and never speaks of stoning: Ṭabarī, *Tafsīr al-Ṭabarī*, 6:492-497.

the sixth century.<sup>45</sup> Although, as Zellentin says, rabbinical law prescribed confinement for repeat offenders, it was not specifically prescribed for adultery, and it seems to have been envisaged as a form of capital punishment, since those immured were to be fed bad food until their stomachs ruptured (Mishna Sanhedrin 9:5 and Babylonian Talmud Sanhedrin 81b).<sup>46</sup> The Women 4:15 seems much closer to the spirit of Justinian's Novel 134:10 here.

I reason that the Qur'ān 4:15 is most likely speaking of the wives of Muhammad's followers who openly have affairs with persons outside the fledgling community of believers or who engaged in sex outside or prostitution (hence the possibility of four witnesses). I say this because 4:15 does not use the dual or mention any punishment for the man, speaking only of "your women." In adultery, it takes two to tango. How to explain this absence of the partner from the verse? I would suggest that if the man was a pagan, he would not have been under the authority of the Prophet. He would have been liable for a clan demand for recompense for a tort, but that mechanism was part of tribal law and outside the scope of the Qur'ān. It was only inside the community of Believers that the writ of the Qur'ān ran.

In The Cow 2:221, a verse probably dating to the period soon after the Emigration of the Prophet and his community to Medina in 622, marriage with pagans is forbidden. The adultery of a believing woman with a pagan therefore would have been especially shameful. Late-antique church principles offer some support for this interpretation. The *circa* 306 Council of Elvira, which, despite having been convened in the West influenced subsequent canons throughout the empire, forbade marriage between Christians and pagans and commanded five years of penance where a Christian committed adultery with a pagan or a Jew.<sup>47</sup>

## Flogging

The Light 24:2 says, "The male sexual sinner (*al-zānī*) and female sexual sinner (*al-zāniya*)--give each a hundred lashes. Let no tenderness overtake you in the service of God, if you truly believe in God and the last day. Let a band of believers witness their chastisement." The Light 24:3, goes on to forbid these sinners to marry any but other sinners or pagans, "and this has been forbidden to the believers." Tabari interprets the sinners here as unmarried persons, that is, he sees the verse as about fornication rather than adultery, and this is the consensus of the later exegetes. There is nothing in the verse, however, to suggest this interpretation, and elsewhere (apud Q. 4:15) Tabari sees *al-zinā* as synonymous with *al-fāḥiṣha*, having them both refer to adultery among other sexual crimes. One of the earliest Arabic dictionaries, the *Kitāb al-'Ayn* of al-Khalīl b. Aḥmad, ties *al-zinā* to

<sup>45</sup> Andrew Marsham, "Prisons," in *Medieval Islamic Civilization: An Encyclopedia*, ed. Joseph W. Meri, 2 vols. (London: Routledge, 2006), 2:641-642.

<sup>46</sup> Zellentin, "Gentile Purity Law from the Bible to the Qur'ān," 161.

<sup>47</sup> Nathan, *The Family in Late Antiquity*, 87-88; Judith Evans Grubbs, "'Pagan' and 'Christian' Marriage: The State of the Question," *Journal of Early Christian Studies*, 2, 4, (Winter 1994), 403; Zellentin, "Gentile Purity Law from the Bible to the Qur'ān," 124, 180, note 52.

having an illegitimate child, and so it could mean more than adultery and imply having children out of wedlock.<sup>48</sup> Although the ordering of chapters of the Qur'ān is a controversial subject and most authorities put The Light after The Women, I would point out that 24:57 assures the Prophet that the pagans are not invincible (*mu'jizīn*), which seems to me an issue that would have arisen early in the Medina period, since both the Qur'ān and the later tradition speak of reverses visited on the pagans later in the 620s. I therefore suggest that The Light 24 precedes The Women 4.

The Women 4:16 says of “debauchery” (*al-fāḥisha*), “Those who commit it from among you, punish both of them. If they repent and make things right, then let them be. Truly, God is forgiving and compassionate.” Ṭabarī interprets the phrase “let them be (*a'riḍ`anhumā*, ‘turn away from them’)” as “Forgive them (*iṣḥāḥū`anhumā*), and cease the punishment I commanded you to mete out to them to penalize them for having committed debauchery (*al-fāḥisha*), and do not punish them after their repentance.”<sup>49</sup> In my view, this is the correct interpretation of the phrase, and like Ṭabarī in his gloss on Q. 4:15, I interpret *al-fāḥisha* here as any unmarried sex, including fornication and adultery, but I believe the implication is that the misbehavior be very public or repeated. The verse firmly indicates that in the Qur'ān adultery is not considered a capital crime, since its text holds out forgiveness to the repentant, a possibility that execution would forestall. This forgiveness for both sexes is a stark departure from Roman law. The Qur'ān took even further than did Justinian the principle of forgiveness, extending it to both the repentant adulterer and the adulteress.

The verb “to torment” or to “punish” (*adhūhumā*) in Women 4:16, which recalls Justinian's βασιλικός, is perhaps purposely vague, since there is reason to think that in the Qur'ān multiple punishments are envisaged for adultery, depending on whether the crime was a lapse or was habitual and flagrant. The vague diction here resembles the Greek of Novel 134:10, which speaks only of “appropriate” punishment, whereas the contemporary Latin gloss specified corporal punishment. Ṭabarī reveals that some exegetes maintained that the chastisement consisted of “a punishment by word and tongue, such as scolding and rebuking for the debauchery they committed.” It is possible that one of the penalties envisaged here was the flogging mentioned in The Light 24.2, though that was likely reserved for egregious or repeat offenders, or perhaps for having a child out of wedlock. As noted, many exegetes maintained that the latter passage was revealed after the The Women 4:16, but we cannot be sure of this sequence.

Other commentators alleged different meanings for the two different terms that are used in the verses for illicit sex, with The Light 24:2 referring to *al-zinā* while The Women 4:16 refers to *al-fāḥisha*. I believe these two terms, however, are exact synonyms, as Ṭabarī sometimes held but sometimes did not, with *al-fāḥisha* being an Arabic loanshift from the Greek

<sup>48</sup> Al-Khalīl b. Aḥmad al-Farāhīdī, *Kitāb al-'Ayn*, ed. 'A. Hindāwī, 4 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 2003), 2:197.

<sup>49</sup> Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 6:506.

πορνεία and *al-zinā* being a cognate of the Hebrew *zanah*.<sup>50</sup> In the Hebrew Bible, *zanah* is like πορνεία in signifying any unsanctioned sex between unmarried people, but it has the connotation of flagrancy and frequently refers to prostitution.<sup>51</sup> Some Abbasid commentators defined *al-zinā* as fornication between two unmarried persons, while they saw *al-fāḥisha* as adultery. There is, however, no philological basis for this distinction. It was merely convenient for some jurists writing two centuries after Muhammad in resolving what they saw as contradictions among the three verses under consideration, and there is no reason to believe that they had special insight into sixth- and seventh-century Arabic usage. Ṭabarī seems confused, since he sometimes identified *al-fāḥisha* and *al-zinā*, and sometimes tried to distinguish between them. If we consider the Hebrew cognate of *al-zinā*, it seems to me that rather than narrowing its meaning to fornication, we should widen it to “flagrant illicit sex” of all kinds and also translate it “debauchery.”

The command in 4:16 “to punish” both sinners seems on the surface to contain a discrepancy with what went before. How is it that 4:15 calls for lifetime house arrest and the subsequent verse lets the two sinners off after being “punished” in an unspecified way? I propose a different solution to the apparent contradiction between 4:15 and 4:16 than that proffered by most medieval Muslim commentators. As noted, some argued that 4:15 concerned adulteresses whereas 4:16 concerned two virgins fornicating.<sup>52</sup> The verses themselves, however, tell against any such distinction, since 4:16 says it is speaking of “those who commit it,” i.e. *al-fāḥisha* in the previous verse. There is nothing in the text itself, then, to suggest this distinction. Ṭabarī admits that some exegetes rejected the notion that Q. 4:16 concerned two young unmarried virgins.<sup>53</sup> Most commentators believed that some verses of the Qurʾān abrogated others, but this solution is unlikely here given that the verses follow one another directly and use the same term for double duty.<sup>54</sup> Rather, the apparent inconsistencies are better resolved by considering that different punishments for adultery are being prescribed for different situations.

I argued above that The Women 4:15 likely addresses the issue of a woman from among the believers who had flagrant, illicit sex with a partner from outside the community, so that it only speaks of punishment for her, with her partner in crime being beyond the reach of quranic sanction. In contrast, the Women 4:16 speaks of two persons, both “from among you,” who had unmarried sex. It is therefore speaking of a case where both trespassers were believers and under the judgment of the Qurʾān. Ṭabarī, too, held that the verse concerned “those [two] who committed it while being people of Islam.”<sup>55</sup> Whatever punishment or set of punishments are being prescribed in The Women 4:16, it is applied

<sup>50</sup> Martin R. Zammit, *A Comparative Lexical Study of Qurʾānic Arabic* (Leiden: Brill, 2002), 210.

<sup>51</sup> D. J. Slager, “The Figurative Use of Terms for “Adultery” and “Prostitution” in the Old Testament,” *The Bible Translator* 5, 4 (2000): 431-438.

<sup>52</sup> Muqātil b. Sulaymān, *Tafsīr*, 1:362-363.

<sup>53</sup> Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 6:500.

<sup>54</sup> Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 6:495, 504; Abū al-Fidā Ismaʿīl Ibn Kathīr, *Al-Yasīr fī Ikhtisār Tafsīr Ibn Kathīr*, ed. Ṣalāḥ b. Muḥammad ʿArafāt et al. (Jeddah: Dār al-Hudā li al-Nashr, 1426/ 2005), 298.

<sup>55</sup> Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 6:503.

to both guilty parties equally and nothing is said about attaching property or a death penalty. That in the Qur'ān male and female adulterers from the community of Believers are treated equally in some ways resembles the law of Augustus in antiquity, who prescribed exile for both alike, at least de jure. The Qur'ān does not, however, decree banishment for this infraction.

The Women 4:16 offers forgiveness and reintegration to both of the adulterers after repentance, whereas Justinian's Novel 134:10 had only proffered it to the woman, on condition she was taken back by her betrayed husband within two years of her conviction. Men were normally only punished for adultery in Roman law where they had an affair with a married woman of good social standing, and forgiveness was not proffered by the state where criminal charges were brought against the man. Rather, the male adulterer would have been executed, or at least lost property and been exiled. The Qur'ān offers forgiveness after repentance to both the believing female and male sinners without regard to the preference of the deceived husband. An influence here may have been the Church, where priests and monks were more closely tied to the Gospel emphasis on forgiveness than to formal Roman law. Bishops in Late Antiquity often "granted absolution to adulterous men and women after a requisite period of penance" and allowed remarriage to both men and women after divorce.<sup>56</sup>

The Women 4:34 revisits the issue of adultery. It says,

Men are responsible for the financial support of women in inasmuch as God bestowed more resources on some than on others and given that they expend their wealth on them. Righteous women are devout and keep hidden what God has safeguarded. People, those women who you fear are committing adultery (*al-nushūz*), first counsel them; and then abandon them to their own beds; and then sentence them to corporal punishment. If, however, they turn to obedience, do not seek any further punishment of them. God is exalted, All-Great.

As Saqib Husain has demonstrated, this verse is addressed to the whole community of believers but was often read by the medieval exegetes as addressed to husbands as individuals. Although the meaning of the first sentence has been controversial through Islamic history, Husain argues convincingly that contains an insistence that men are responsible for the financial upkeep of the women in their families because their gender typically has more resources. Then the issue of *al-nushūz* is addressed, which Husain used pre-Islamic poetry and the corpus of prophetic sayings to demonstrate means "adultery." That is, unlike the vaguer terms for illicit sex so far discussed *al-nushūz* is an exact equivalent of the Greek μοιχεία. In this passage, graduated punishments are set in the case of wives whose behavior raises suspicions. They are first to be admonished. If the rumors continue, the husbands should cease sharing their beds. Then if the issue continues to arise, the suspected adulteress should be flogged (*ḍaraba*), as in The Light 24:2 and Justinian's Novel 134.10. Husain has shown that the first

<sup>56</sup> David G. Hunter, "Adultery. Christianity," *Encyclopedia of the Bible and its Reception* (Berlin: Walter de Gruyter, 2009), 463-464; Zellentin, "Gentile Purity Law from the Bible to the Qur'ān," 160-161.

two steps of admonishment and abandoning the suspected adulteress to her bed are consistent with rabbinical prescriptions.<sup>57</sup> The third, of corporal punishment, however, is in my view Roman in this context.

This further passage supports the proposition that the vague “punishment” in The Women 4:16 was multiple and graduated. As with the tradition of Roman law, several possible punishments are mentioned for a crime and wide latitude is proffered with regard to how severely it should be punished, taking circumstances into account. It might be a good talking to, or it might be separation from the husband, or it might involve corporal punishment. That the “punishment” here might be corporal was admitted by the classic exegetes, though they did not typically tie The Women 4:16 to The Light 24:2 or even to The Women 4:34, and, as we have seen, others believed it meant scolding.<sup>58</sup> It is perhaps worth noting that the most lenient punishments are suggested for *al-nushūz*, which likely means adultery per se, whereas flagrant debauchery (*al-zinā*, *al-fāhisha*) is punished with long-term house arrest or public flogging.

It is worthwhile stepping back now to lay the Novel 134.10 side by side with the relevant Qur’ān passages (I have bolded the parallelisms). Justinian first wrote, “As for the woman with whom he has committed adultery, she is to undergo the **appropriate [corporal] punishment...**”

This decree is paralleled in two Qur’ān verses. The Women 4:34 says, “People, those women who you fear are committing adultery (*nushūz*), first counsel them; and then abandon them to their own beds; and then **sentence them to corporal punishment.**” The Light 24:2 commands, “The adulterer and adulteress -- **give each a hundred lashes.** Let no tenderness overtake you in the service of God, if you truly believe in God and the last day. Let a band of believers witness their chastisement.”

Justinian then continued in 134.10, “and **be enclosed in a monastery.** Should her husband decide to take her back within two years, we give him authority to do so ... If the aforesaid time has elapsed... we command that she is to...live in the said monastery **for the whole duration of her life.**”

The Women 4:15 says, “Those of your women who commit debauchery, seek the witness against them of four among you. If they so testify, **immure them in houses until they die** or until God makes a path for them.”

Looking at these quranic prescriptions through the lens of late Roman imperial traditions allows us to discern how likely or unlikely later legal interpretations are. Abdul Haleem noted that some later Muslim commentators saw 4:15 as outlawing Lesbianism, but he pointed out that the verse does not use the dual and this seems unlikely.<sup>59</sup> Although Ṭabarī considered the further argument that the dual indicates that the two sinners in 4:16 are homosexual men, he rejected that position, saying that in Arabic one would have to

<sup>57</sup> This analysis depends on Saqib Husain, “The Bitter Lot of the Rebellious Wife: Hierarchy, Obedience, and Punishment in Q. 4:34,” *Journal of Qur’anic Studies* 23, 2 (2021): 66–111.

<sup>58</sup> Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 6:503-504

<sup>59</sup> Abdul Haleem *Exploring the Qur’ān: Context and Impact*, 95.

speak differently about a man penetrating another man.<sup>60</sup> The notion of some exegetes that the dual suggests a homosexual couple rests on shaky philological grounds, since classical Arabic grammar requires the use of the dual when speaking of precisely two individuals, whatever their sex. Nothing about this verse suggests homosexuality, and the parallels of these quranic laws on adultery with the Novel of Justinian are such as to indicate instead heterosexual infidelity.

Sometime in the second Islamic century specialists in the sayings and doings of the Prophet Muhammad and his companions and exegetes began importing from Jewish *halakha* the punishment of stoning for adultery and attempting to understand some of the quranic prescriptions as abrogating others. They also began alleging that the various Qur'ān verses on this subject addressed different classes of people, making a distinction between fornicators and adulterers, which, however, does not appear in the Qur'ān itself. Ultimately the 'ulama' favored stoning as the punishment for adultery.<sup>61</sup> If, however, the quranic precepts are situated in late Roman law, which they clearly resemble, this proposal may be dismissed as fantastic. It constitutes one of several Foucauldian epistemic ruptures between the quranic period of very early Islam and the later Umayyad and Abbasid forms of Islam, which often altered key quranic principles and understandings.<sup>62</sup>

The Justinianic legislation and that of the Qur'ān on punishments for adultery are like two different recipes for the same dish, with similar ingredients in different proportions. The quranic punishment of public lashing for two sinning Believers is significantly more lenient than the pre-Justinian Christian Roman legal tradition. Adultery is not treated as a capital crime, as it was in the fifth and early sixth century. There is no mention of exile for either sex. In the Qur'ān, the Justinianic punishment for the adulterous wife, of being first scourged and then sentenced to monastic confinement is separated out. Flogging is applied to two believers who had flagrant illicit sex with one another. Detrusion is likely imposed on the wife of a believer who betrayed her husband with an outsider. In both instances, repentance seems to be a possible way to rejoin the community. This leniency for the repentant may reflect actual provincial legal practice, or ecclesiastical practice, in the Eastern Roman Empire, which could be more forbearing than the sometimes harsh and categorical imperial decrees. The Justinianic and quranic legal corpora hold the two punishments of flogging and immurement for life for the woman in common. The notion

<sup>60</sup> Ṭabarī, *Tafsīr al-Ṭabarī*, 6:501; Zellentin observed that other exegetes such as Abū Muslim al-Iṣfahānī (868–934) held that the use of the dual indicates that the two sinners in 4:16 are homosexual men: Zellentin, "Gentile Purity Law from the Bible to the Qur'ān," 159–163.

<sup>61</sup> Mālik b. Anas, *al-Muwatta'*, ed. Muḥammad Fu'ād `Abd al-Bāqī, 2 vols in one (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1985), 819–820; Burton, "Law and Exegesis," looks at the way juridical consensus operated in this substitution of later exegesis and interpretation for the Qur'ān, noting that "death by stoning" is "nowhere mentioned in the Qur'ān texts." See also Pavel Pavlovitch, "The Ubāda b. al-Sāmit tradition at the crossroads of methodology," *Journal of Arabic and Islamic Studies*, 11 (2011):137–235; and Pavel Pavlovitch, "The Islamic penalty for adultery in the third century ah and Al-Shāfi'ī's *Risāla*," *Bulletin of the School of Oriental and African Studies* 75, 3 (2012):473–497.

<sup>62</sup> Patricia Crone, "Two Legal Problems Bearing on the Early History of the Qur'ān," *Jerusalem Studies in Arabic and Islam* 18 (1994) 1–37.



of lashes as a punishment for sexual impropriety that obtained in the seventh and eighth centuries in Constantinople, Tarragona and Medina was a common legacy of sixth-century Christian Rome.

Both with regard to Constantinople and to Medina, the immurement of the adulteress is a “ceremony of submission,” to God and the Christian Roman emperor and to God and his prophet, respectively.<sup>63</sup> Likewise, both monastic detrusion and house arrest in the city of the Prophet served as forms of “educative punishment,” in Hillner’s analysis: “punishment that aimed not only at the body but also the ‘soul,’ through segregation, surveillance and discipline of behavior,” such that late antiquity anticipated many themes that Foucault associated with nineteenth-century modernity.<sup>64</sup> The punishment prescribed for debauchery in Qur’ān 4:15, of perpetual house arrest, is analogous to Justinian’s innovation of monastic confinement for life as a sentence for adulterous women repudiated by their husbands, with the difference that the Qur’ān appears to make a provision for parole for the woman under certain unnamed circumstances, perhaps deep repentance and restoration to her husband or the contracting of a new marriage.

One of the Muslim scripture’s penalties for adultery committed by two believers is an occasion for severe public humiliation, inasmuch as the lash, usually reserved for slaves and menials in Roman society, is applied to free persons as a spectacle before witnesses in public. There is a break in the Qur’ān with the classical tradition of seeing adultery (μοιχεία) as an offense by a cuckold (μοιχός) and the unfaithful wife against the husband.<sup>65</sup> It appears in the Muslim scripture instead to be an offense against God and the believing community. Public scourging satisfies the injury against the community, allowing the two to be left alone thereafter.

In the The Light 24:2 both women and men guilty of flagrant illicit sex are punished with the same penalty, in an egalitarian departure from Justinian’s own distinctions. Justice is inscribed on the bodies of the sinners before the community, signaling a resolution of their conflict with divine authority and with the commonwealth of believers, after which they appear to be accepted back into communion with it. This resolution aims not just at expressing the authority of the prophet and the values he preached but in forestalling feuds in the anarchic clan-based society of the Hejaz, which lacked a state.

As in Christianity, penance in the Qur’ān is a major means of the reformation of the soul. The multiple possible penalties mentioned in the Qur’ān for adultery parallel the late Roman legal practice of prescribing several possible punishments, some of them severe, while allowing local magistrates to choose among them or even impose lesser penalties where these were felt to be educative of the straying soul. The Qur’ān, like late Roman law, is interested in reforming the sinner. The promulgation of its verses is often referred to as a clear proof to the

<sup>63</sup> Foucault, *Discipline and Punish*, 28-29.

<sup>64</sup> Hillner, *Prison, Punishment*, 348.

<sup>65</sup> Lin Foxhall, “Pandora unbound: a feminist critique of Foucault’s History of Sexuality,” in *Dislocating Masculinity: Comparative Ethnographies* edited by Andrea Cornwall and Nancy Lindisfarne (London: Routledge, 1994), 133-145, at 141-142.

believers in the text itself, from which they are invited to “take a lesson” (*tadhakkara*). The announcement of the punishments is therefore, as in Christian Roman law, educative. Of the punishments specified, of counseling, separation, corporal punishment and house arrest, all but the last seek reform of the soul and potential reintegration into the family and society. The possibility of escape from house arrest is acknowledged, so that even it might be educative. The most lenient punishments mentioned, for women seen as having the potential for rehabilitation as wives, are paralleled most strongly in the rabbinical tradition. Stoning, as in some passages of the Hebrew Bible, however, was not a feature of either late Roman or quranic law. The later Abbasid imperial tradition defined adultery as potentially a capital crime for both women and men and reached back beyond late antique rabbinical practice to Deuteronomy to impose stoning. The later jurists and exegetes thus undid the signal innovation of the Qur’ān in abolishing capital punishment for adultery for both sexes, putting emphasis instead on repentance and rehabilitation.