STUDIES IN EARLY MUSLIM JURISPRUDENCE

BY

NORMAN CALDER

CLARENDON PRESS · OXFORD

1993

Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Kuala Lumpur Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland Madrid
and associated companies in
Berlin Ibadan

Oxford is a trade mark of Oxford University Press

Published in the United States
by Oxford University Press Inc., New York

British Library Cataloguing in Publication Data
Data available
ISBN 0–19–825813–5

Library of Congress Cataloging in Publication Data
Calder, Norman.
Studies in early Muslim jurisprudence / by Norman Calder.
Includes bibliographical references (p.) and index.
1. Islamic law—History. I. Title.
LAW (ISLAM 7 Cald 1993) 340.5'9—dc20 92–27068
ISBN 0–19–825813–5

Typeset by Hope Services (Abingdon) Ltd.
Printed in Great Britain
on acid-free paper by
Bookcraft Ltd
Midsomer Norton, Avon

For my parents

number of important commentaries: these books, in some sense, worked.

In what sense they worked is precisely the second point. Their purpose is clearly educational. They were the earliest constituents of a formal curriculum, and they mark, accordingly, the transition from the world of the jurist who gained his knowledge through experience of life and participation in the process of juristic discussion, to the world of the academic trainee who, embarking on a course of study, required formal classes, text books, and literary and hermeneutic skills. The gradual instantiation of that social situation (with the concomitant result of creating a class who could appreciate and enjoy the finer products of authorial skill) signals the end of the formative and the beginning of the classical period.

The educative process generated commentaries. The earliest still extant commentary on Ṭaḥāwī's *Mukhtaṣar*—by Abū Bakr al-Jaṣṣāṣ—was completed by 370. Al-Marwazī's *Mukhtaṣar* might not have survived without the magnificent commentary of Sarakhsī (d. 483). And Qudūrī's work, which generated through the centuries a considerable number of commentaries, had already acquired two important ones in the course of the fifth century. For the Mālikīs, Ibn Abī Zayd al-Qayrawānī (d. 386) produced the first *Mukhtaṣar* of any significance. Though apparently a popular textbook, it was not until the eighth century and beyond that it generated commentaries which have survived. This was partly because the *Muwaṭṭa'* of Yaḥyā, being of a very manageable size, itself became a basis for pedagogical comment. It appears to have generated a number of commentaries in the fourth century, though all were eclipsed by the immense erudition of Ibn ʿAbd al-Barr's *Istidhkār* and al-Bājī's *Muntaqā*, both products of the fifth century. The Ḥanbalī school too, perhaps surprisingly, produced a significant *Mukhtaṣar* in the fourth century, that of al-Khiraqī (d. 334), on which the first major commentary was that of Abū Yaʿlā. For the Shāfiʿīs there is recorded the *Talkhīṣ fī 'l-fiqh* of Ibn al-Qāṣṣ (d. 335), reduced now to a single manuscript, and, more significantly, the *Lubāb fī 'l-fiqh* of Ibn al-Mahāmilī (d. 415), which attracted a number of commentaries and abbreviated editions in later centuries.[2] (The *Mukhtṣar* of Muzanī, discussed in Chapter 5 of this work, is not, of course, a *mukhtaṣar* in the sense here being defined.)

[2] For easy and quick reference to these works, Sezgin, i. ad loc.

From the far West of the Muslim world, in Qayrawān and Cordoba, to the Transoxanian oasis of Marw, the needs of a developing discipline prompted the production of books similar in form and function. If that scattering of dates, from early in the fourth to early in the fifth century, does not converge upon a convenient marker, that is perhaps all to the good. The transition in question was naturally gradual and geographically uneven. Its results must be measured in the literary forms of the great classics of the fifth century and beyond, works which are the product of social and literary constraints markedly different from those that have been the subject of this book.

PREFACE

EARLY Muslim jurisprudence is constituted for us today as a bundle of texts, products, apparently, of named authors of the late second and early third centuries AH. The central (the largest and the most important) items within this bundle are associated with three early masters, Abū Ḥanīfa, Mālik, and Shāfi'ī, and their pupils. (Abū Ḥanīfa is not credited with any juristic compositions of his own, his opinions being mediated through the writings of his pupils, Abū Yūsuf and Shaybānī.) These works contain rules covering all areas of public ritual and community life, and arguments that justify the rules. Though clearly laying claim to 'religious' authority, they do not deal with private devotion (which was, later, to produce its own literature). They are the primary subject matter of this book.

In the Muslim tradition, the works of early (and indeed later) jurisprudence have no meaning outside of an established narrative context. That context is a theological construct: it justifies and explains the law by demonstrating its divine origins. Briefly stated, it is thus. The words and deeds of the Prophet Muḥammad (his *sunna*), being an embodiment of the divine command and an expression of God's law (*sharī'a*), were preserved by the Companions of the Prophet, in the form of discrete anecdotes (*ḥadīth*). These were transmitted orally through the generations and became the source of juristic discussion (*fiqh*). The early masters mentioned above, together with other masters (notably Ibn Ḥanbal, and a number of sectarian thinkers), brought to these discussions a distinctive authority which led in time to the emergence of divergent schools or traditions of juristic thinking. These were named after the masters: Ḥanafī, Mālikī, Shāfi'ī, etc. The juristic schools were committed to a hermeneutical task—it was for a thousand years their existential *raison d'être* and the principal focus of religious scholarship in Islam—namely, to justify tradition by demonstrating that it could be harmonized with revelation.

Revelation, in the classical period, meant a large but finite and

more or less canonically established collection of hadith, together with (but not *qua* authority inferior to) the Qur'an. (The latter of course, in its origins and nature—Word of God, miracle—not in its authority, was superior to hadith. The how and wherefore of that superiority belongs to the history of Muslim theology, not jurisprudence.) It will be evident that of the three bodies of literature that were held together by the jurists in a hermeneutical nexus (justified by the theological construct described above) two were (more or less) static—Qur'an and hadith—and only one was open, to intellectual play and to the historical process—*fiqh*.

The history of the achievement of the schools does not belong to this book, which is concerned with the period prior to their definitive emergence, and prior also to the (full) realization of their existential task. In the study of early Islam, scholarship, unsurprisingly, has been concerned to break the hermeneutical nexus, and to separate history from theological construct. In the remarkable works of Ignaz Goldziher (1889–90), Joseph Schacht (1950), and John Wansbrough (1970), first the hadith and then the Qur'an have been (or so it is argued) separated from the lifetime of the Prophet. Not the product of one lifetime and the cause or impetus to Islam, they emerge, in the works of these scholars, as the end-product of something like 200 years (or more) of community history and therefore, in some sense, the result of Islam, or at least part of the process of community formation. Scholarship, in effect, has situated revelation in history in a manner quite alien to that conceived of within the theological construct, and has brought forward the community (rather than, or possibly as well as, the Prophet) as the creative agent.

Joseph Schacht, following the methodological and historical presuppositions of Goldziher, in his study of early Muslim jurisprudence (1950), broke the historical link between hadith and *fiqh*. He argued, against the implications of the Muslim hermeneutical tradition, that the structures of *fiqh* were initially independent of (and so, in time, provoked) the major corpus of hadith literature. The real origins of *fiqh*, for him, lay in the 'living tradition' of local schools, i.e. in a juristic adaptation of real social norms, which was only gradually transformed into the structures of the classical hermeneutical nexus.

The existential task of Muslim jurists was not history, and it is permissible to wonder whether the message created by the

theological construct and the hermeneutical task is in any way affected by the assertions of historians. But nor, in this case, are the historians theologians (though Wansbrough, at least, of these three, is conscious of the theological implications of his work). Their conclusions, being the achievement of secular historians working within the rules of their discipline, are not (at least in retrospect) unexpected, and, though subject to the qualifications and reformulations of the academic tradition within which they emerged, are likely to be in their outlines and in their implications broadly correct.

The situation in Islam is not now markedly different from that which has been gradually uncovered in the long history of academic inquiry that began with J. Wellhausen's critical approach to the Old Testament. It would appear to be the case that, for secular historians, revelation is not explicable or demonstrable except as a function of community history. For theologians who recognize the principles of historical analysis that are here being brought to bear, there may be compensations. Rudolf Bultmann, to name but one, developed a theology of salvation that was directly linked to his understanding of the history and development of the Gospels. For Muslims, to date, the activities of Western scholars, when they turn their attention to the origins of revelation or to the early history of the community, have seemed to offer few or no compensations, which must be inevitable, until Muslim scholars participate more widely in the game, and in the rules, of textual scholarship.

But Western scholars, too, have been dismayed at the disintegration of the theological construct (in its classical version), for they interpret this as a loss of history and the creation of a vacuum. The immediate reactions to Goldziher, to Schacht, and, most recently, to Wansbrough have been acts of salvage (and possibly of faith), efforts to reclaim historical reality from those whose interests, it seems, are limited to the history of literary forms, or the structure of arguments, or simply of texts. These worried reactions do not constitute a suitable response to the problems posed by this tradition of analysis, which relates to an effective and principled epistemology of historical reconstruction. The texts are not quite all we have (we have also, for example, archaeology) but they remain the principal foundation of all historical recovery. The failure to distinguish clearly between history and construct, and to

admit the historical importance of the latter, has led in Western scholarship (and in Muslim piety) to an impoverished and emaciated vision of the Muslim Prophet, and a consequent inability to explain the richness of historical Islam. Scholars too often turn out to be both 'protestant' and essentialist; the real Islam can only be one that is consistent with the history (of the Prophet, or the Qur'an, or law) that (they think) they can recover. It is apparently easy to forget that ideas (theological constructs, literary traditions, salvation history) are real things; they also play a part in history.

The present *Studies in Early Muslim Jurisprudence* are an emphatically secular exercise in historical reconstruction. The basic methodology, exemplified throughout Chapters 1 to 6, depends on close literary analysis of illustrative passages from all the major early juristic texts. Readers who are not familiar with these works, on turning now to Chapter 1, will find themselves precipitately in the midst of curious juristic problems, and unexpected formal constructions. The path through these is a path towards a history of texts and a history of at least some of the social structures that conditioned the emergence of these texts. I have tried, through extensive translation, gloss, and systematic provision of background information, to ensure that it is an accessible path, even to the inexperienced reader, though I cannot pretend that it will not be hard work. I offer a larger history of the emergence of Muslim jurisprudence in Chapters 7 to 9, which deal respectively with literary form, juristic norms, and hermeneutical theory. These chapters are not intended to be read separately from the textual analyses.

I am conscious of a diffuse methodological debt to the academic tradition signalled above in my references to Wellhausen and Bultmann, and a more specific debt (better though still inadequately represented in the footnotes) to the tradition of Islamic scholarship represented by Goldziher, Schacht, and Wansbrough, and by those who have responded to them. The recent transfer of the models of biblical scholarship to the field of early Rabbinical studies, with a consequent sharpening and recreation of methodological techniques, has been particularly inspiring. It is necessary to mention here the name of Jacob Neusner, not because I have understood all the implications of his work, but because I have learnt much from his *obiter dicta* on methodology, and because I

have borrowed (and adapted) some of his tools. I am grateful for his demonstration that translation is a way to understanding, and that an adequate marking of subdivisions is part of a methodology of analysis, at least for the type of texts represented for him in Mishnah and Talmud, and for me in early Muslim jurisprudence.

I owe numerous debts to friends and colleagues. First among these are three colleagues in the Department of Middle Eastern Studies at the University of Manchester. For more than a decade Professor Philip Alexander and Dr Colin Imber (respectively in Rabbinical and in Ottoman studies) have discussed with me substantial and methodological issues, related to the history of law, literature, and politics in the Middle East, generously, tactfully, and critically. More recently Dr Alexander Samely, also in the field of Rabbinical studies, has continued this tradition of professional and collegial encouragement. All three, at various times, have read and commented on substantial drafts of this work, invariably to my benefit. I owe a considerable and specific debt to Patricia Crone. Appointed by Oxford University Press as first reader of the manuscript I submitted, her anonymity could not survive her thoroughness, which sent me back to hone and sharpen (I trust) several arguments.

I should like finally to thank the staff of Oxford University Press who have been responsible for preparing this book for publication. They have been helpful, courteous, and professional throughout.

CONTENTS

TABLE OF DATES xii

LIST OF ABBREVIATIONS xiii

1. The *Mudawwana* of Saḥnūn 1
2. The *Muwaṭṭa'* of Mālik 20
3. Early Ḥanafī Texts 39
4. The *Kitāb al-Umm* of Shāfi'ī 67
5. The *Mukhtaṣar* of Muzanī 86
6. The *Kitāb al-Kharāj* of Abū Yūsuf 105
7. Literary Form and Social Context 161
8. The Origin of Norms 198
9. The Development of Hermeneutic Skills 223
10. Transitions 244

BIBLIOGRAPHY 248

INDEX 255

TABLE OF DATES

ALL dates in this book are given according to the normal Muslim system of dating. Nearly all the characters and events described and referred to belong to the second, third, and fourth centuries AH. The following table will help readers to pinpoint the Christian equivalents to Muslim era dates, for this period. I have given the Christian year which corresponds to the larger part of the Muslim year. The second part of the table provides a rougher guide to dates after the fourth century, in order to cover the scattering of references to later periods that are contained in this book. Year 1 of the *hijra* begins in July 622 AD.

100	719	250	864
110	728	260	874
120	738	270	884
130	748	280	893
140	757	290	903
150	767	300	913
160	777	310	922
170	787	320	932
180	796	330	942
190	806	340	951
200	816	350	961
210	825	360	971
220	835	370	981
230	845	380	990
240	855	390	1000

500	1107
600	1204
700	1301
800	1398
900	1496
1000	1592
1100	1689
1200	1786
1300	1883
1400	1980

ABBREVIATIONS

BSOAS	*Bulletin of the School of Oriental and African Studies*
EI(i) and *EI*(ii)	*Encyclopaedia of Islam* (Leiden, 1st edn. 1913–36, 2nd edn. 1960–)
HUCA	*Hebrew Union College Annual*
JAOS	*Journal of the American Oriental Society*
JJS	*Journal of Jewish Studies*
JNES	*Journal of Near Eastern Studies*

I

THE *MUDAWWANA* OF SAḤNŪN

I

The *Mudawwana* is a juristic work of the Māliki school of law, covering all the major topics of the Islamic legal tradition, and associated with the name of ʿAbd al-Salam b. Saʿīd al-Tanūkhī known as Saḥnūn. Of Saḥnūn it is reported that he was born in 160 in Qayrawan, where also he died 80 years later. In his youth he travelled and studied, notably in Tunis and Egypt, meeting many of the great jurists of the age. On his return to Qayrawan he became himself a famous jurist. The earliest sources already associate him with a dogmatic struggle against heretics—whose meetings in the mosque he banned—and with an appropriately distant approach to government; themes which were elaborated in later biographies. He became Qadi of Qayrawan under the Aghlabid governor Muḥammad b. al-Aghlab in 234. Later sources emphasize his reluctance and hesitation in accepting this public office. This is a common motif of juristic biography; it is not present in the earliest life of Saḥnūn.[1]

The following passage from the *Mudawwana*, intended to illustrate the structural features of that work, deals with the

[1] The earliest biographical notice is found in Abū 'l-'Arab (d. 333), *Ṭabaqāt*, 101–4; for a representative later biography, see Al-Qāḍī 'Iyāḍ, *Tartīb*, 585–626. See also *EI*(i), 'Saḥnūn'; D. M. Houdas, 'Sahnoun'; M. Talbi, 'Kairouan', 322–7. The story of the role of Asad b. al-Furāt ('Iyāḍ, *Tartīb*, 465–80) in inspiring or provoking Saḥnūn's organization of the *Mudawwana* has caught the attention of some scholars, e.g. Talbi, 'Kairouan'. Juristic biographies however have not been adequately analysed: something at least as methodologically stringent as, say, from another discipline, Jacob Neusner, *Eliezer ben Hyrcanus*, is required (see further P. Schäfer, 'Research into Rabbinic literature', 142–3). The narratives of the relationship between Asad and Saḥnūn are likely to be imaginative constructs based on analysis of competing texts. For the motif of reluctance to accept the post of Qadi, see N. J. Coulson, 'Doctrine and practice'.

question whether water which has been lapped at, or otherwise used or touched by an animal, can be used for performing ablutions prior to prayer. The technical term for this left-over water is *su'r*; the term for (minor) ritual ablutions is *wuḍū'*. Punctuation, paragraph structure and the provision of numbers for ease of reference are all introduced in the process of translation, and are here, as throughout these studies, to a considerable degree, interpretative.

1.1. [Ibn al-Qāsim] said, I asked Mālik about the *su'r* of donkeys and mules. He said, There is no harm in it.

1.2. I said, Consider,what if [animals] other than this (*ghayru-hu*) touch [the water]? He said, This and others [of the same kind—*huwa wa-ghayru-hu*] are the same.

1.3. [Ibn al-Qāsim] said, Mālik said, There is no harm in the sweat of a work-horse (*birdhawn*), a mule or a donkey.

2.1. [Ibn al-Qāsim] said, Mālik said, concerning a vessel containing water at which a dog has lapped, Mālik said, If a man performs ablutions with that water, and then prays, it suffices him.

2.2.a. He said: Mālik did not consider a dog like other [animals of the same type] (*lam yakun yarā 'l-kalb ka-ghayri-hi*).

b. Mālik said, An animal drinks from a vessel; if it is an eater of carrion, whether bird or beast, one does not use that water for ablutions.

c. He said, If a dog laps at a vessel in which there are milk-solids, there is no harm in eating them.

2.3. [Saḥnūn:] I said [to Ibn al-Qāsim], Did Mālik say that a vessel should be washed seven times if a dog laps at it, whether at milk or at water? He said, Mālik said, There is such a hadith; I do not know the truth of the matter (*mā adrī mā ḥaqīqatu-hu*). It seems that Malik considered (*ka-anna-hu kān yarā*) the dog as if it were part of the household (*min ahl al-bayt*) and so not like other predatory animals (*laysa ka-ghayri-hi min al-sibā'*). He used to say, If it must be washed, then the reference is to water alone. He used to repeat this; he said it should not be washed if it contains milk or fat. When a dog laps at these they may be eaten; I consider it a terrible thing (*arā-hu 'aẓīman*) that a part of God's provision should be thrown away because a dog laps at it.

3.1.a. I said, And if the milk is drunk from by a carrion-eating animal, whether a bird or a beast or a chicken which eats putrid matter (*natin*), can the milk be consumed or not? He said, If you are sure there is dirt (*qadhir*) on its beak, then it is not to be consumed. But, as long as you see no dirt on its beak, there is no harm in it.

b. Milk is not like water; for water is thrown out and not used for ablutions.

4.1. Ibn Wahb from 'Amr ibn al-Ḥārith from Yaḥyā ibn Sa'īd and Bakīr ibn 'Abdallāh: they used to say, There is no harm in a man performing ablutions in the water used by donkeys or mules or other riding animals (*wa-ghayru-humā min al-dawābb*).

4.2. Ibn Shihāb used to say the same about donkeys.

4.3. Ibn Wahb from 'Aṭā' ibn Abī Rabāḥ and Rabī'a and Abū 'l-Zinād: they said the same about donkeys and mules. 'Aṭā' recited God's word, 'The horse, the mule and the donkey, that you might ride them and as a decoration' (Q.16:8).

4.4. Mālik said it too, according to the report (*ḥadīth*) of Ibn Wahb.

5.1. 'Alī ibn Ziyād from Mālik, concerning one who performs ablutions with water at which a dog has lapped and then prays: he said, I do not consider he must repeat, even if he realizes within the time (when repetition is permissible).

5.2.a. 'Alī and Ibn Wahb from Mālik: he said, I do not like ablutions in water left by a dog if the water is little.

b. He said, But if the water is plentiful, there is no harm in it.

c. Like a pool (a waterhole, *hay'at al-ḥawḍ*) in which there is plenty of water, or anything in which water is plentiful.

5.3. Ibn Wahb from Ibn Jurayj: he said that the Prophet of God arrived at a waterhole (*ḥawḍ*) accompanied by Abū Bakr and 'Umar. The people who controlled that water came out and said, O Prophet of God, predatory animals and dogs lap at this pool. He replied, What they have taken is in their stomachs; what remains is ours to drink and to purify ourselves.

5.4. 'Abd al-Raḥmān ibn Zayd informed me from Zayd ibn Aslam from 'Aṭā' ibn Yasār from Abū Hurayra from the Prophet of God; the same story.

5.5. 'Umar said, Do not inform us, O keeper of the pool, for we arrive after the animals and they arrive after us.

5.6. Now, the dog is an easier burden (*aysaru ma'unatan*) than predatory animals, and the cat is the easiest of these two (*aysaru-humā*) for these two are adopted by the people.

5.7. Ibn al-Qāsim said, Mālik said, There is no harm in the spittle of a dog, if it falls upon a man's garment. Rabī'a said the same. Ibn Shihāb said, There is no harm, if you are compelled, in using the *su'r* of a dog for ablutions.

5.8. Mālik said, What it catches in hunting can be eaten; how can there be objection to its spittle?[2]

This passage is structurally divided into two sections. Paragraphs 1.1 to 3.1 exhibit a basic *qultu/qāla* (I said/he said) format,

[2] 'Abd al-Salam b. Sa'īd Saḥnūn, *Mudawwana*, i. 5–6.

rendered more than usually complex by the presence of three participants and numerous interpolations. The participants are Saḥnūn, Ibn al-Qāsim (d. 191), and Mālik (d. 179). Paragraphs 4.1 to 5.8 are for the most part authority statements, characterized by *isnād*s (= chains of transmitters) more or less rudimentary. The whole of the *Mudawwana* is constructed out of these two types of material, dialogue material characterized by the *qultu/qāla* format and authority statements characterized by *isnād*s.

II

The dialogue section can be divided on the basis of subject matter into three parts. Paragraphs 1.1 to 1.3 deal with the *su'r* of donkeys and mules. Paragraphs 2.1 to 2.3 deal with predatory animals and in particular the dog. Paragraph 3.1 deals with the question whether liquid foods are susceptible to certain types of animal pollution. While this arrangement of material reveals to a certain extent the existence of principles that lie behind the individual cases, it does not constitute a satisfactory general account of the law. The first, and indeed only, statement of a principle comes at 1.5.b which makes a category distinction between carrion-eating and non-carrion-eating animals. This distinction explains why the dog constitutes a problem. It does not however explain Paragraphs 1.1 to 1.3. If the only relevant category distinction is that between carrion-eating and non-carrion-eating animals, then mules, work-horses, and donkeys, not being carrion-eating, do not constitute a problem; and one must wonder why they are distinguished for comment.

The answer may be found in a different text. The *Kitāb al-Aṣl* of Muḥammad b. al-Ḥasan al-Shaybānī (d. 189), an early work of the Kufan/Ḥanafī legal tradition, offers the following remarks on the *su'r* of certain domestic animals.

> I said, Consider, if water is drunk from a vessel by a bird or a sheep or a cow or a camel or a horse (*faras*) or a work-horse (*birdhawn*) or anything the flesh of which is eaten, may one perform *wuḍū'* with the left-overs of that water?
> He said, Yes, there is no harm in it.

> I said, Consider, if water is drunk by something the flesh of which is not eaten, such as a donkey or a mule or suchlike?
> He said, One does not perform *wuḍū'* with it.[3]

Shaybānī here introduces a category distinction between animals whose flesh is normally eaten and animals whose flesh is not normally eaten. The latter category renders water unsuitable for *wuḍū'*. It is clear that Paragraphs 1.1 to 1.3 of the passage cited from the *Mudawwana* constitute a polemical response to this ruling. Because there was a group which claimed that donkeys and mules rendered water unsuitable for *wuḍū'*, it became necessary to deny this claim. It was unnecessary to mention, say, camels or sheep because no one had suggested that these animals adversely affected water. It is of course not necessarily the case that the adverse ruling on donkeys and mules reached the Mālikīs from the Ḥanafīs: there were other traditions of legal thought and there were disputes internal to the Mālikī tradition. The Ḥanafīs, however, remain the most likely group to have provoked Paragraphs 1.1 to 1.3: this was the legal tradition against which the Mālikīs habitually measured themselves and with which they habitually engaged in polemical debate.

The text quoted above from Shaybānī's *Aṣl* presents a familiar feature of developing legal thought. It exhibits a transition from a casuistic listing of separate items to the achievement of a general category of which the separate items are deemed to be representative. Historians of legal thought have usually considered that casuistic drafting represents an early stage of legal activity, characteristically subject to development in the direction of greater generalization.[4] This development is marked by the introduction of category concepts which subsume a number of originally discrete juristic items. There can be little doubt that a predominantly generalizing approach to the law is more characteristic of a mature tradition; but the casuistic and the generalizing styles seem likely to coexist even in early periods. Different processes of generalization, furthermore, will affect the understanding and therefore the development of taxonomy. Donkeys and mules might, for example, be understood either as instances of carrion-eating animals, or as instances of animals whose flesh is not

[3] Muḥammad b. al-Ḥasan al-Shaybānī, *Aṣl*, i. 28; for more on this work and on al-Shaybānī, see Ch. 3, Sects. I–III.

[4] See Bernard Jackson, *Theft*, 47–8 and 100–1.

eaten. The emergence of these different generalizations might cause differential development of the law; logical but not predictable. The achievement of generalizations within the tradition might subsequently be understood as causal and so obscure the reality of historical development. For Shaybānī, it looks as if mules and donkeys render water unsuitable for *wuḍū'* because they are animals whose flesh is not eaten. In fact, it is highly probable that the ruling about their flesh and the ruling about their water are both the product of (local) social perceptions of these animals not now in detail recoverable.

The text of the *Mudawwana* translated in Section I exhibits in several respects the tensions which emerge when a casuistic system is subject to logical analysis in search of general categories. At Paragraph 1.1 Malik is asked about donkeys and mules, no doubt because the Kufan/Ḥanafī ruling on these animals was known. At 1.2 he is asked to generalize, without any particular limits being given to the category at issue. The generalizing term is *huwa wa-ghayru-hu*: the formula *wa-ghayru-hu* refers to other members of the (unspecified) category. The same formula is found at 2.2.a (*lam yakun yarā al-kalb ka-ghayri-hi*), 2.3 (*laysa ka-ghayri-hi min al-sibā'*) and at 4.1. Paragraph 1.3 deals with sweat, not *su'r*, but gives a list which extends the category of donkeys and mules to include work-horses. It has been brought into the text here because it illuminates the *category* at issue. In the authority statements, at Paragraphs 4.1 and 4.3, the same concern to define a category can be discerned. At 4.1, the category deemed to be at issue is riding animals in general (*dawābb*), not working animals in particular. And at 4.3, 'Aṭā's citation of Qur'an 16: 8 has no other purpose than to indicate the category that is at issue when there is specific mention of mules and donkeys; namely a category that also contains riding horses (*khayl*). The general tendency of the Mālikī text to classify donkeys and mules with riding animals is not arbitrary; it is polemical. The intention is to show that donkeys and mules belong to a category which does not adversely affect the status of water for the purposes of purity; thereby the Mālikīs argue against the Ḥanafī assertion that these animals do have such an adverse effect. The Ḥanafīs, by contrast, adopted the view that donkeys and mules constituted a distinct category, namely of (domestic) animals whose flesh was not eaten, as opposed to (domestic) animals whose flesh was eaten.

It is clear that the dog emerged as a problem (see Paragraphs 2.1 to 2.3) for similar reasons: partly due to polemical activity and partly due to a generalizing search for categories. Presumably the law developed that wild animals (perhaps initially of a specific type or types) rendered water unfit for purification. In this context the dog (domestic, not wild) is not a problem, and Mālik is seen to state, at Paragraph 2.1, just that: dogs do not render water unfit for purposes of purification. However, it came to be felt that the category of animals which rendered water unfit was the category of carrion-eating or predatory animals. According to this interpretation, the dog was a problem and the question presented itself why, being a carrion-eater, the dog did not render water impure. This problem is what is expressed throughout 2.2.a, b, and c. First, Ibn al-Qāsim states that Mālik did not treat the dog like other animals of the same kind, then comes the category statement and, finally, an analogy is introduced: dogs do not render liquid foods inedible, so why should they render water impure? The text in its present form must be interpreted as exhibiting several layers of development. Paragraph 2.1 represents the earliest stage: a question about the dog has arisen (perhaps due to Ḥanafī polemic, though dogs tend to be problematic wherever purity rules exist).[5] It is answered casuistically, without reference to categories: the dog simply does not cause impurity in water. That there is a conflict here with a general rule is stated at 2.2.a, and this reference to a general rule not so far expressed within the text generates a formulation of that rule, 2.2.b—ascribed to Mālik. The analogy at 2.2.c is drawn into the text only when it is perceived that Mālik's ruling requires defence. The text has grown organically. It is not a logical presentation of known rules but a reflection of developing thought about rules.

Thinking about the law is thus revealed to be dominated by (1) generalizing activity, the search for categories and (2) analogical reflection, the search for parallels within the known juristic structure. A ruling on the fitness of milk-solids for consumption (2.2.c) is analogously relevant to the question of the fitness of water for purification and so is drawn into the text at this point. It may have originated in a different context. Similarly Paragraph 1.3, concerning sweat not *su'r*, was drawn into the text for its

[5] David P. Wright, *The disposal of impurity*, 104–6, esp. ad n. 48. And see Ch. 8, esp. 111.

analogical relevance; a ruling about animal sweat helped to reveal the category at issue when the problem was not sweat but *su'r*.

The question which Saḥnūn asks at 2.3 relates to a Prophetic hadith which will be discussed in Chapter 2, Section V of these studies. The reply ascribed to Mālik indicates that he knows the hadith but he 'does not know the truth about it'. The series of comments thereafter indicates how the emergence of the notion that Prophetic hadith are authoritative disrupted the natural development of legal thought and drafting technique. Mālik first suggests a category distinction (dogs are members of the household) which within the developing system might have sufficed. He then apparently concedes some force to the hadith but continues to argue against it on moral and practical grounds: if the vessel containing liquids lapped at by dogs is to be washed seven times, and *a fortiori* if the liquids are to be thrown away, then the reference can only be to water not to food; it would be a terrible thing to throw away God's provision merely on account of a dog. Neither of these arguments is effective within the system of authority associated with Prophetic hadith. Clearly the emergence of an anti-dog ruling in the form of a Prophetic hadith pre-empted development of the rules along established lines (generalizing activity, analogical parallels). In time, the participants in the Mālikī juristic tradition were required to develop new techniques of argument and thought which were hermeneutic rather than discursive. The transition from a discursive tradition (literary, characterized here by use of the *qultu/qāla* device) to a hermeneutic tradition (purporting to derive the law exegetically from Prophetic sources) was a lengthy and complex process, which will be documented throughout the subsequent chapters of this book.

This text, then, exhibits processes of thought, which also function as processes of argument—category creation and analogy. It also indicates how arguments arise: either as a result of reflection on the tradition, or as a result of inter-school polemic, or both. It is clear also that the existence of a Prophetic hadith constituted an argument; it is not clear that such a form of argument was immediately decisive. There was considerable resistance to the implications of the hadith referred to (not cited) in this text. There are in fact no systematic arguments implying acceptance of Prophetic hadith as an analogical source of the law in any early juristic work except those attributed to Shāfi'ī (for which see Chs.

4 and 5). It is important in this context to distinguish between structural analogy, where one aspect of the legal structure is compared with a different but parallel aspect of that structure, and hadith-analogy, where a particular ruling or narrative item becomes the focus of generalizing activity. Both types are called *qiyās* in early juristic works and later.[6]

A further feature of the dialogue material in the *Mudawwana* may be noted here. It is a characteristic of many sections that the first problems dealt with are difficult cases or even that the only problems dealt with are difficult cases, and that the generalization which alone enables the reader to understand why they are difficult cases emerges relatively late in the text or does not emerge at all. This feature reflects the organic growth of the text, which was initially a record of difficult questions and only later an attempt to present the whole of the law.[7]

III

This passage was chosen for analysis because of its complexity: it shows the tradition at work. One result of this complexity is that the basic *qultu/qāla* format is obscured. It can, however, be distinguished even here and manifests itself in a more systematic manner elsewhere in the *Mudawwana*. Fundamentally Saḥnūn (d. 240) reports a conversation with Ibn al-Qāsim (d. 191), who reports a conversation with Mālik (d. 179). Only intermittently and for special reasons is the dialogue format obscured or abandoned or provided with a different dramatis personae. Throughout, the verbal pivot of the dialogue, the means whereby legal questions are introduced or extended, is the phrase *a-ra'ayta*, translated here (and, systematically, elsewhere in this work) as 'Consider'. Exemplified only once in this passage (1.2), almost any bondage will reveal its fundamental importance to the literary style. Associated with this phrase are the verbal forms *arā*, *yarā*, etc. (as at 2.2 and 2.3) expressing measured judgement and only later and elsewhere associated with arbitrary opinion.[8]

[6] See Joseph Schacht, *Origins*, 98–9; and below, Ch. 3, Sects. II–III and Ch. 4, Sects. III–IV.
[7] Cf. Ch. 3, Sect. II and Ch. 4, Sect. III.
[8] Cf. Schacht, *Origins*, 98–132.

The *qultu/qāla* format and the attendant use of *a-ra'ayta* are devices of literary presentation common to both Mālikī and Ḥanafī legal texts of the early period. The short citation from Shaybānī's *Kitāb al-Aṣl* given above shows the two figures at work in a highly stream-lined presentation of the law. Analysis of these texts, both Mālikī and Ḥanafī, suggests that the attempt to provide an identification for the 'I said' and 'he said' figures is secondary: this is a literary technique for the presentation of the law, it is not a memory of a real (and very lengthy) conversation (though it may reflect a discursive *Sitz im Leben*). In the case of the *Mudawwana* it is notable that, in spite of a school tradition which identifies the 'I said' figure with Saḥnūn, he figures also in the formula *qāla Saḥnūn*/Saḥnūn said. One explanation for this might be that the work was composed or compiled originally under Saḥnūn's supervision (generating I said material) but remained open to interpretation and gloss after his death, at which stage it acquired (amongst other material) the memories of Saḥnūn's opinions expressed by the formula *qāla Saḥnūn*. It is possible, however, that the *qultu* figure was never intended to be a historical person, but was from the beginning a drafting device; it certainly functions as such. It is highly probable that the *qultu/qāla* style began amongst the Ḥanafīs and was adopted by the Mālikīs as representing a fashionable form of juristic presentation. Sustained throughout the *Mudawwana*, the dialogue style is always distinct from the authority statements which are irregularly interpolated after sections of dialogue.[9]

The regularity of the dialogue device should not obscure the fact that the text is built up by juxtaposing discrete statements about the law, and that it was an open and developing text for an indeterminate period of time prior to achieving canonical status and fixed form. In this passage three distinct issues have been integrated, roughly, into a dialogue structure: (1) the donkey, (2) the dog, and (3) the chicken which drinks milk. In the first section two well-formed paragraphs of the I said/he said type are followed by a non-integrated item, having the form not of dialogue but of an authority statement. The section about the dog exhibits little of the dialogue format, being obviously an accumulation of sequentially interpolated material reflecting juristic dismay. The third section,

[9] See Ch. 3, Sect. II for more on the *qultu/qāla* style.

on the chicken (3.1), is a well-formed fragment of dialogue (I said/he said) which, on closer inspection, breaks down. The reply responds to only a part of the question (suggesting, perhaps, that the question has been expanded). Paragraph 3.1.a, in any case, does not deal with water for purposes of purification and has been attracted to this point in the text only because it is analogically relevant. It makes the point that only if there is visible evidence of putrid matter on a chicken's beak does it affect milk for consumption. Analogically the same ought to be true about water for purification: but 3.1.b denies the analogy. Shortly after the passage translated above the text reverts briefly to dialogue format and continues Ibn al-Qāsim's dialogue thus:

> I asked Mālik about the chicken or duck which drinks at a vessel, does one perform ablutions with the water? He said, No, unless it is caged and cannot get at filth.

This fragment exists now, incongruously, in the midst of a group of authority statements. It was probably intended at one time to continue the dialogue section that deals with the susceptibility of water to animal impurity, i.e. 3.1. It has been displaced by the addition and expansion of authority statements and by other redactional processes not now recoverable.

In an earlier essay I have shown how sections of material in the *Mudawwana* which emerged in one context have been transferred *en bloc* and with very little verbal change to other sections in order to establish analogical solutions to problems. These and other formal features (juxtaposed rules, systematic disjuncture, interpolation, etc.) prompted there the conclusion which is also affirmed here: the *Mudawwana* is not an authored text. It is a school text which grew organically in response to ongoing problems and perceptions that emerged and disturbed the scholars who preserved this material.[10]

IV

The literary devices of the *Mudawwana*, in spite of all the problems that the text presents, reflect at least two convictions about the nature of authority within the juristic tradition at the

[10] Norman Calder, 'Ḥinth', 227, 229, and 233–4.

time of its compilation. First, Mālik or his near contemporaries are the primary authority, and second, authority is discursive. The dialogue structure is designed to discover and demonstrate the opinion of Mālik. He is the final authority and there is no hint of an authority beyond him. There are alternative authorities, but they are of the same kind and roughly the same generation as Mālik. Though he is the most revered authority, Mālik's views are not always dogmatically adhered to. For example, Ibn al-Qāsim records a matter of dispute between Mālik and Ibn Shihāb (d. 124) and prefers to follow Ibn Shihāb;[11] Saḥnūn records an opinion shared by Mālik and Ibn al-Qāsim but has an independent view of his own;[12] and there are some lengthy passages where the *qultu/qāla* format abandons Mālik entirely in favour of Ashhab (d. 204).[13] The generative concept throughout is *ra'y*, meaning not (arbitrary) opinion but reflective consideration and mature judgement, something that works in a degree of tension with the principle of submission to older authority. Throughout the dialogue part of the *Mudawwana* it is the phrases *a-ra'ayta* and *arā* that constitute the verbal pivot of the process whereby the law is discovered, elaborated, and presented in literary form. The law emerges as a deliberative process, product of a tension between past authority and personal consideration. Of material or literary forms which suggest that the law is hermeneutically derived from Prophetic hadith there are only hints throughout the *Mudawwana*. Where such hadith emerge they are frequently disruptive, as in the case of the hadith about the dog (which is not actually recorded in the text), or they are incorporated into the authority statements, where they are not formally distinguished from jurists' opinions. Only rarely does a reference to a Companion or a Prophetic hadith become a principle which is incorporated into the dialogue structure.[14]

V

A group of authority statements reflecting the subject-matter of a particular segment of the dialogue, and interpolated after the

[11] Saḥnūn, ad *zakāt*, *Mudawwana*, ii. 67–8.
[12] Calder, 'Hinth', 227. [13] Saḥnūn, *Mudawwana*, v. 11–12.
[14] A possible example may be found in the discussion of *ṣarf* (*Mudawwana*, viii. 101 ff.). Here the introduction of a standard Prophetic hadith is effected in a *qāla*-Saḥnūn item, immediately following a dialogue section based on difficult questions.

relevant segment, constitute a not quite consistent feature of the *Mudawwana*. A significant number of dialogue segments, even early in the text, exhibit no appended authority statements, and these become more rare and uneven in later sections, finally disappearing well before the end of the book. The biographical tradition interprets this phenomenon by asserting that Saḥnūn initiated the incorporation of authority statements (*āthār*) into the text but left the task unfinished. 'He provided proofs (*iḥtajja*) for some problems in the form of *āthār* derived from the *Muwaṭṭa'* of Ibn Wahb (d. 197) and others. A part of this work remained uncompleted by Saḥnūn.'[15] It is indeed quite clear that the *āthār* were incorporated into the main text after it was composed (not necessarily after it had received its final form), and it is evident too that the task of incorporation was not carried through. The function of this material was perceived by the biographers to be verificatory, possibly polemical: the authority statements were *ḥujja*s (proofs, evidence). That this is a correct (though possibly not a full) perception will be acknowledged below.

The authority statements are provided with *isnād*s, of a kind, which indicate the immediate and sometimes the ultimate source of the material. Here in this passage the Ibn Wahb source dominates. All of the material at 4.1, 4.3, 4.4, 5.2, and 5.3 is cited under the authority of Ibn Wahb. The various lines of disjuncture, however, militate against the supposition that all of this material is derived from one source-book. 'Alī b. Ziyād (d. 183) is the immediate source at 5.1 and (with Ibn Wahb) at 5.2. It has already been conceded that this passage is particularly complex and there are other sections which show simpler arrangements of material. Frequently the Ibn Wahb source dominates to the exclusion of all else, a feature reflected in the sentences quoted above about Saḥnūn's provision of proofs 'from the *Muwaṭṭa'* of Ibn Wahb' etc. There are a number of sections where it is specifically stated that the authority material is derived from one source or another. For example, at volume xi, reference is made to *hadhihi al-āthār li-Ibn Wahb*,[16] and *hadhihi al-āthār li-Ashhab*.[17] This kind of reference certainly suggests utilization (for a block of material) of a single source-book, but the incidence of split citations (for example, Ibn

[15] Cited in the introduction to the *Mudawwana*, p. 11, derived from Al-Qādī 'Iyāḍ, *Tartīb*.
[16] Saḥnūn, *Mudawwana*, xi. 60, 62. [17] Ibid. 69.

Wahb, Ashhab, Ibn Wahb),[18] or mediated citations (Saḥnūn *'an* Ibn Wahb),[19] or hiatuses of the type exhibited here at 4.1 to 4.4 and at 5.2 and 5.3 suggests a plurality of sources and a mixture of written and oral sources. None the less there clearly were written collections of *āthār*, gathered under the authority of named jurists, and used by the compilers of the *Mudawwana*. (See further on these, Chapter 7.) These extra-*Mudawwana* collections may be represented in the extant and edited fragments known as the *Muwaṭṭa' of Ibn Ziyād* and the *Jāmi' of Ibn Wahb*.[20] As it happens, in neither case can the contents of these fragments be compared with relevant passages in the *Mudawwana*, for the former contains material lacking authority statements in the *Mudawwana* and the latter consists of material largely non-juristic. In any case, such a comparison would prove little, for the early *Muwaṭṭa'*s were, like the *Mudawwana* itself, subject to ongoing editorial activity.

VI

The authority statements inserted here have been arranged in three groups corresponding to the three subjects dealt with in the dialogue. Paragraphs 4.1 to 4.4 deal with the donkey etc., Paragraphs 5.1 to 5.8 with the dog, and a subsequent series, not translated here, deals with the chicken and associated problems. That these materials have been developed through processes similar to those affecting the dialogue material is obvious. Paragraphs 4.1 and 4.3 show examples of argument by category creation; 5.7 and 5.8 show examples of structural (intra-legal) analogy. There is plentiful evidence of textual accretion and interpolation. Paragraph 5.6 is an unattributed statement which may have come into existence originally as a marginal addition to the text; its import is clear enough, its formulation rather unsatisfactory. Paragraph 5.8 seems to be devoid of any immediate authority; it might be interpolated or it may be read as coming under the authority of Ibn al-Qāsim at 5.7, or both. The material at 5.1 to 5.6, about the dog, is very complex indeed.

At Paragraph 5.1 there is an independent report from Mālik via 'Alī Ibn Ziyād confirming the report at 2.1 from Mālik via Ibn al-Qāsim: dogs do not render water unfit for ablutions. Paragraph

[18] Saḥnūn, *Mudawwana*, vii. 3.
[19] Ibid. [20] See Bibliography, ad Ibn Wahb and Ibn Ziyād.

5.2, however, represents a defensive reaction: it can be analysed as exhibiting two or three stages of development. First there is a report qualifying Mālik's favourable attitude towards dogs: he does not like water left by a dog if it is in small quantities (a) but there is no harm in it in large quantities (b). These items may be interpreted as minor concessions to the anti-dog lobby, but item (c) is clearly a gloss intended to reverse Mālik's opinion by stealth. It contrives to suggest that Mālik's permission to use water left by a dog refers only to bodies of water corresponding to the size of a water-hole. This, of course, contradicts the specificity of the reference to 'vessels' at Paragraphs 2.1 to 2.3 and must be seen as a not very satisfactory attempt to bring Mālik into some kind of agreement with the Prophetic hadith which condemned dogs. Mention of water-holes generates reference to a Prophetic hadith which deals with these in a context of ablutions. This hadith is given at 5.3 and 5.4 with two different *isnād*s. Paragraph 5.3 is undoubtedly the earlier version and has a very weak *isnād* indeed. Paragraph 5.4 has been added at a later date, when a much better *isnād* had emerged, to provide confirmation of the earlier version. While clearly relevant to the overall question of the susceptibility of water to impurity, these hadith are hardly logically integrated in the text, which is predominantly about vessels. Paragraph 5.5 is a phrase taken from a different hadith which also deals with the question of water-holes. It is taken from a Companion hadith going back to 'Umar, which may be found in its complete form in the *Muwaṭṭa'* in the recension of Yaḥyā. Clearly the two Prophetic hadith within the *Mudawwana* have called to mind a similar hadith, and generated a key-phrase allusion to it (possibly originally marginal), and this has been incorporated into the text, without comment, or *isnād*, or source reference. The allusion, of course, would not be missed by anyone familiar with the *Muwaṭṭa'*. Paragraph 5.6 is an item of independent thought, unattributed, establishing a hierarchy of carrion-eaters, in which the domestic cat comes off lightest. It may contain a covert allusion to a juristic discussion about the cat; for which see Chapter 2, Section III.

It is clear, then, that the authority statements have been subject, like the dialogue material, to complex editorial and redactional management of a kind that precludes more than a limited judgement about the nature of the sources that were used by the editors of the *Mudawwana*. None the less, some generalizations

may be attempted. ʿAli b. Ziyād was the Qadi of Tunis, and the notebook ascribed to him may be associated with that city. Ashhab, not represented in this passage, but a common source, is described as head of the Mālikīs in Egypt in succession to Ibn al-Qāsim. Ibn Wahb is also associated with Egypt. Though often cited as a follower of Mālik, the material ascribed to him suggests rather that he looked back to the broad tradition of Hijazi authority. Here he cites the opinions of ʿAmr b. Ḥārith (d. 147, Madina and Egypt), Yaḥyā b. Saʿīd (d. 143, Madina), Bakīr b. ʿAbdallāh (d. 122, Madina and Egypt), Ibn Shihāb (d. 124, Madina and Syria), ʿAṭāʾ b. Abī Rabāḥ (d. 114, Makka), Abū al-Zinād (d. 131, Madina), and Ibn Jurayj (d. 150, Makka). These are all scholars of the Hijazi tradition, slightly older than Mālik. Their extensive citation in this manner suggests that the Ibn Wahb tradition, as available to the editors of the *Mudawwana*, had not achieved the kind of focus on Mālik that became standard later. None the less, just as the dialogue material of the *Mudawwana* is designed to give expression to the authority of Mālik (and not of any more antique source), so too, it is clear, the *āthār* material goes back only one generation: it is the opinions of jurists that are preserved, specifically of Hijazi scholars who flourished in the first half of the second century. Instances of Prophetic and Companion hadith are later. Paragraph 5.7 shows Ibn al-Qāsim, who otherwise functions in the *Mudawwana* dialogue as a medium only (or predominantly) of Mālik's views, functioning more like Ibn Wahb and conveying the opinions of three scholars of the older generation: Mālik, Rabīʿa (d. 136, Madina), and Ibn Shihāb.

Clearly much or most of the *āthār* material existed originally in a literary form independent of the *Mudawwana*, was finally incorporated, in whole or in part, into the canonical *Mudawwana*, and thereafter for the most part gradually disappeared. The *āthār* books grew up around the names of scholars like Ibn Wahb, Ashhab, ʿAlī b. Ziyād, and Ibn al-Qāsim, all of whom flourished in the second half of the second century. It is not necessary to believe that these scholars actually wrote law-books, or even random lists of authority statements. They may, of course, have initiated this task but they are more likely to have been (like Mālik and his immediate predecessors in Madina) human repositories of a juristic tradition, mediators of a law which was, originally, orally passed on and locally relevant. The evidence of the *Mudawwana*

suggests that the emergence of written materials within this tradition cannot have been much earlier than 200, and that its earliest form was broad collections of authority statements deriving from Hijazi authorities, only gradually narrowing in focus to Mālik. (The counter-evidence of texts ascribed to Mālik, Shāfiʿī, and the early Ḥanafīs will be dealt with throughout the succeeding chapters of this work.) The notebooks and collections of authority statements which survived to be used by the compilers of the *Mudawwana* are probably to be associated with the students of Ibn Wahb etc. and certainly cannot have been free from the organic processes of development which have been demonstrated for the *Mudawwana* and which affected, to a greater or lesser degree, all the early Muslim juristic texts.

VII

The *Mudawwana* is one of the two major canonical texts of the Mālikī legal tradition in North Africa and Andalusia, the other being the *Muwaṭṭaʾ* of Mālik in the recension of Yaḥyā b. Yaḥyā (to be distinguished from the *Muwaṭṭaʾ* in the recension of Muhammad b. al-Hasan al-Shaybani, for which see Ch. 3, Sect. V). The *Mudawwana* is associated with Qayrawan, the *Muwaṭṭaʾ* of Yaḥyā with Cordoba: they are local canons reflecting the state of legal thought in a particular place at a particular time or period of time. The ascription of the *Mudawwana* to Saḥnūn, the influential Qadi of Qayrawan, who died in 240, may be accepted, but only with caveats. He certainly belongs to the generation after Ibn al-Qāsim, Ibn Wahb, Ashhab, etc., and in that respect his name fits. But he did not author the text. It is not an authored text; it could not have reached its present form in a single authorial or even redactional process. There are reasons for thinking it did not reach its present form in the lifetime of Saḥnūn. One such reason is the incorporation of *qultu* and *qāla Saḥnūn* formulae in one text. This is not decisive and I would prefer to rely on the extensive evidence of interpolation, gloss, etc., as indicative of a redactional process requiring more than one redactor and more than one generation.

Comparing the formal structure of the dialogue with that of the authority statements (which are predominantly but not exclusively derived from older sources), certain processes of historical

development may be noted. The dialogue style is a later development, probably a product of Ḥanafī influence—this is hinted at in biographical narrative[21] and, very roughly, is confirmed by the apparent dates of similar Ḥanafī material.[22] It exhibits also a concept of authority, namely the predominant focus on Mālik, which if not new, was none the less a narrowing of focus as compared with the notebook material. This narrowing of focus may have developed in various geographical areas (for example, not only in Qayrawan but also in Tunis, with ʿAlī b. Ziyād whose fragmentary *Muwaṭṭa'* displays the same feature) but must certainly be recognized as a phenomenon of the third century, beginning perhaps at about 200 and being confirmed by a work like the *Mudawwana* which, reflecting no doubt the political status of Qayrawan, gained a general acceptance. One should not too easily suppose that the historical Ibn al-Qāsim was a prime mediator of Mālik's dominant authority since the authority statements suggest the possibility of an Ibn al-Qāsim notebook in which Mālik was only one of several Hijazi authorities. It is the Ibn al-Qāsim of the *Mudawwana* who elevates Mālik to unique authority, and whether that is the same as the historical Ibn al-Qāsim is a difficult question.

The reasons for the incorporation of the authority statements within the *Mudawwana* may be assessed as twofold. As the biographical tradition suggests, they constituted evidence or proofs for school views, and had their importance in a polemical context. The parallel evidence of the Ḥanafī tradition tends to confirm this—see Chapter 3. But it is clear too that the quality of institutional backing achieved by the *Mudawwana* was greater than that achieved by any other legal collection in North Africa and the incorporation of (possibly rival) notebooks was perhaps a part of the process whereby the *Mudawwana* achieved its wide recognition and its canonical status, whereby it and not the other texts became the ongoing focus for academic commentaries. The closing of the canon, the final cessation of redactional activity, no doubt reflects the emergence of a professional class of jurists, requiring and creating a legitimate academic task; but it may also be the result of a radical change in the theoretical understanding of the law. The concepts of authority reflected in the *Mudawwana* are

[21] See n. 1 above, ad Asad b. al-Furāt.

[22] Ch. 3, below.

not those that were destined to win out in Islam: the conviction became absolute that law is justified only if it can be related hermeneutically to Prophetic exempla, and not if it is presented discursively as emanating from an ongoing juristic tradition. This conviction intercepted and cancelled the organic development of the *Mudawwana* and created a new task: to demonstrate that its contents could be derived from Prophetic hadith. This was achieved, through new literary formats or through commentaries.

VIII

Joseph Schacht's depiction of the stages through which Islamic law developed, though frequently challenged, has never been seriously undermined.[23] His remains the best, perhaps the only, background theory, for a reading of early legal texts and their interaction with hadith. His dating of the process that he demonstrates seems to me less secure. The *Mudawwana* presents precisely the characteristics which Schacht would recognize as pertaining to the oldest discernible phase of Muslim juristic thought. It has a discursive approach to the subject, adequately symbolized in the phrase *a-ra'ayta*. The dominant figures of authority are Medinese jurists of earlier generations, above all, though not exclusively, Mālik himself. The dialogue format affirms the authority of Mālik, while demonstrating the flexibility of the tradition. Proof texts in the form of Companion hadith had achieved considerable popularity prior to the closing of this text and have been incorporated in significant numbers. But Prophetic hadith were relatively few and are for the most part clearly secondary or intrusive additions to the text. The *Mudawwana* could hardly have reached its final form before 250 (ten years after the death of Saḥnūn). It is accordingly difficult to accept that there was widespread recognition of the authority of Prophetic hadith—for legal purposes—much before that date. I shall demonstrate in the next chapter that the *Muwaṭṭa'* of Yaḥyā cannot be used to counter this observation.

[23] Schacht, *Origins*. For critiques of his theory, see M. M. Azmi, *Studies*; N. J. Coulson, *A History*, 64–70. Coulson's remarks have given rise to an ongoing debate: see D. S. Powers, 'On bequests' and *opera cit.* there.

2

THE *MUWAṬṬA'* OF MĀLIK

I

The *Muwaṭṭa'* of Mālik b. Anas in the recension of Yaḥyā b. Yaḥyā al-Maṣmūdī (d. 234) is usually considered to be amongst the earliest of Islamic juristic works, and to represent Mālik's latest views.[1] The biographical tradition affirms the latter point by asserting that Yaḥyā, who was to become the pre-eminent jurist of Cordoba under the Spanish Umayyad caliph 'Abd al-Rahmān II, met Mālik and reconfirmed the text of his *Muwaṭṭa'* in the last year of Mālik's life, i.e. in 179.[2] Like many other features of the biographical tradition this is not to be accepted as independently known historical fact; it is biographical polemic intended to defend and justify the authority acquired by this work. It is a fact inferred from, or created to promote, the status of the work, and not a 'historical' fact precipitating it.

The *Muwaṭṭa'* is composed of numerous discrete items, exhibiting two basic forms. First, there are hadith-items, characterized by formal *isnād*s, introduced by the phrase *ḥaddatha-nī Yaḥyā 'an Mālik* or simply *ḥaddatha-nī 'an Mālik*. These *isnād*s may end at the Prophet, or at a Companion, Successor, or ancient jurist. Secondly, there are juristic dicta characterized by the introductory formula *qāla Mālik* and not usually exhibiting a *ḥaddatha-nī Yaḥyā* element, nor any appeal to more distant authority. Occasionally, these dicta are contextualized, using the formula *su'ila Mālik 'an . . . wa-qāla . . .* There are some minor variations in the deployment of these formulae but the only serious deviation is

[1] Ignaz Goldziher, *Studies*, ii. 197 ff.; Schacht, *Origins*, 6–7, 311 ff.; Schacht in *EI*(ii) 'Mālik b. Anas'; John Wansbrough, *Milieu*, 72 ff.

[2] For the political career of Yaḥyā, R. Dozy, *Spanish Islam*, 260–1; E. Lévi-Provençal, *Histoire*, i. 275–6. For a more general biography, 'Iyāḍ, *Tartīb*, 534–47.

found in some chapters in the *Kitāb al-i'tikāf* where the hadith-items exhibit the alternative introductory formula *ḥaddatha-nī Ziyād 'an Mālik*. (This textual characteristic gives rise to the biographical observation that Yaḥyā, in 179, heard the whole of the *Muwaṭṭa'* from Mālik except a few chapters in the *Kitāb al-i'tikāf*.) All of this material is distributed under the conventional books (*kitāb*s) and chapters (*bāb*s) of Muslim jurisprudence in an arrangement which is orderly and consistent with the arrangement of other comprehensive law-books of the third century and later. The headings and subdivisions are none the less not so finely perceived nor so widely expanded as in later works, indeed probably less sophisticated than in the *Mudawwana*; and much of the less manageable material is grouped towards the end of the collection under an appropriately vague book-heading, *Kitāb al-Jāmi'* (Miscellaneous). Orderly then to a degree, the distribution of material and organization of hadith none the less displays some curious collocations and separations which prompted Schacht to characterize Mālik as 'exceedingly careless as far as order is concerned in his treatment of [hadith]'.[3] The hadith-items have been counted and consist, according to Zurqānī,[4] of 822 from the Prophet, 613 from Companions, and 285 from Successors. Both Goldziher and Schacht, though aware to varying degrees of the problematic nature of this text,[5] treat it as if it could be used directly as an indication of Mālik's juristic technique. This is not justified. I shall argue in what follows that the form of the work, the principles governing its organization, and many details of its content show that it cannot be by Mālik but must be dated to some time after the completion of the *Mudawwana*.

II

In spite of Schacht's strictures, there is a clear principle affecting the arrangement of hadith under each separate chapter heading of the *Muwaṭṭa' Yaḥyā*. Simply, Prophetic hadith come first, then Companion hadith, then hadith from Successors or ancient jurists.

EI(ii), 'Mālik b. Anas'.

[4] Cit. in Schacht, *Origins*, 28.

[5] Goldziher, *Studies*, ii. 204. Schacht knows that the *Muwaṭṭa'* is a 'record of [Mālik's] teachings . . . written down by his disciples' (*Introduction*, 44) but generally accepts it as a book by the master. See also *EI*(ii), 'Mālik b. Anas' (vi. 1041). 'In transmitting the *Muwaṭṭa'*, Mālik did not make a definitive text' etc.

the aspirations evident in the *Muwaṭṭa'* that, for many areas of the law, Mālik (appearing in the *qāla Mālik* material) remains by far the most important single authority. But even here, the trick of presentation achieves much. Because the *qāla Mālik* material is invariably situated after one or a number of hadith, it takes on the appearance of commentary and thereby initiates the problems of a hermeneutic approach to the law.

The primary role of the Prophet, the mediating role of Malik, and a hermeneutic approach to the law are all essential elements in the structure of Islamic law (here, Mālikī) as it developed in the literature of the classical period and beyond. That these principles were acknowledged in Mālik's lifetime, then ceased to exist during the development period of the *Mudawwana*, then reasserted themselves for the period of classical development is not the most obvious conclusion. (Though indeed some such pattern is asserted by historical sources, both traditional Muslim and modern European; see Section VII below.) There is evidence in the *Mudawwana* that at least the first two of these principles were beginning to emerge and find some kind of literary expression; but where they can be detected, it is in material which is relatively late and due to processes of interpolation which scarcely mitigate a literary presentation of authority that is systematically opposed to these principles. The *Muwaṭṭa'* clearly represents a later stage in the development of Islamic juristic theory than the *Mudawwana*. This conclusion will be considerably buttressed by the material and arguments presented in Chapter 3 (on developments in the early Ḥanafī tradition), in Chapters 4 and 5 (on the works attributed to Shāfi'ī), and in Chapter 6 (on the *Kitāb al-Kharāj* of Abū Yūsuf). Though Schacht failed to note the particular case of the relationship between the *Muwaṭṭa'* and the *Mudawwana*, his general theory of legal development in early Islamic jurisprudence is consistent only with the assumption that the *Mudawwana* precedes the *Muwaṭṭa'*. Analysis of selected details in the *Muwaṭṭa'* will both illustrate what is claimed here and elucidate the processes which led to the formation of this text.

III

The question whether and under what conditions water is subject to pollution by animals is reflected in three hadith recorded in the

Muwaṭṭa'. Two of these are recorded in the *Bāb al-ṭuhūr li-'l-wuḍū'* and one in the chapter entitled *Bāb jāmi' al-wuḍū'* (Miscellaneous on *wuḍū'*). The former chapter comprises four hadith, of which the two that concern this study relate to (1) the use of water that has been lapped at by a cat (Prophetic) and (2) the use of water from a water-hole that is also used by predatory animals (from 'Umar). Here is the first of those hadith.

1. [Yaḥyā] from Mālik, from Isḥāq b. 'Abdallah b. Abī Ṭalḥa, from Humayda bint Abī 'Ubayda ibn Farwa, from Kabsha bint Ka'b b. Mālik, daughter-in-law of [the Companion] Abū Qatāda.
2. She said that Abū Qatāda came in one day and she poured out for him his water for ablutions. A cat arrived, desiring to drink at the water, and Abū Qatāda tilted the vessel to let it drink.
3. She said that Abū Qatāda, on seeing her watching him, said, Are you surprised? Yes, she replied. He said, The Prophet of God said, They are not polluting (*najis*); they are amongst those [animals] which are always around you, both male ones and female ones (*innamā hiya min al-ṭawwāfīn 'alaykum aw al-ṭawwāfāt*).
4. Yaḥyā said, Mālik said, There is no harm in it except when some polluting filth can be seen on its mouth.

In the text of the *Mudawwana*, it was possible to detect that a juristic problem arose when the condemnation of predatory (wild) animals as conveyors of pollution was generalized to cover also the household dog (and cat). The response, initially casuistic, and focused on the dog, took the form of a category explanation based on the assertion that household animals constituted a category relevantly different from predatory (wild) animals. There was, however, embarrassment in the face of a Prophetic hadith—alluded to but not cited in the *Mudawwana*—which proposed an extreme condemnation of dogs as particularly polluting. This hadith about the cat is clearly a response to the same problem. It is charmingly circumstantial, it avoids the contentious dog, and yet it points firmly towards the fact that the cat here is to be seen as representative of a category, namely that of animals which are habitually around human beings. It is clear that this represents a juristic advance on the situation reflected in the *Mudawwana* in two respects. First, and simply, it makes a clear statement of a category distinction and thereby transcends some of the confusion that has crept into the *Mudawwana*. And secondly, it responds to a Prophetic hadith in the only form in which an authoritative

response could be made, namely in the form of another Prophetic hadith. It is inconceivable that this hadith could have been made available by Mālik, in or before 179, with the backing of Prophetic authority and in a situation where Prophetic authority counted, and yet not have affected the text of the *Mudawwana*, which exhibits after all not only a need for authority on this matter but also a broad concern to gather all relevant material. The elevation of Prophetic authority is a marginal feature of the *Mudawwana*; it was the continued development and ultimate ascendancy of this principle—after the completion of the *Mudawwana*—that led to the emergence and formulation of this hadith, and its incorporation into a canonical work associated with the city of Cordoba.

Immediately after the hadith proper, at Paragraph 4, there is a *qāla Mālik* item, here reported on the authority of Yaḥyā. In form it is exactly the same as some of the authority statements recorded in the *Mudawwana* (Ch. 1, Sect. I above). There, statements of this kind were integrated into a dialogue structure (Para. 1.1), or simply interpolated, without integration, into a dialogue structure (Paras. 1.3 and 2.2.c), or cited as part of a series of authority statements (Paras. 5.2, 5.7; cf. 4.1—not from Mālik). In all of these examples the basic unit consists of the phrase 'there is no harm in', *lā ba's bi*. This is contextualized by a variety of means:

He said, There is no harm in X (1.3).
He said, If A and B . . ., there is no harm in X (2.2.c).
He said, There is no harm in X, if A and B . . . (5.7).
I asked Malik concerning X and he said, There is no harm in it (1.1).

The phrase 'there is no harm in it' is one of the basic building blocks of juristic diction. Other examples of such basic units include 'he must repeat' or 'it suffices', formulae which will also be found in the examples of Ḥanafī literature analysed in Chapter 3, Section II. The language of early juristic writing is highly formulaic, only gradually achieving looser more inventive styles; compare the translated material in Chapters 1 to 3 with that in Chapters 4 and 5, from Shāfi'ī sources. One of the conveniences of the dialogue format, as found in the *Mudawwana* and in early Ḥanafī texts, is that the questioner creates the context for a ruling: I asked Mālik about X and he said, It suffices. The ruling can then

be expanded or qualified by an open-ended string of 'what if' questions. An authority statement, devoid of a dialogic context, is much less flexible: Mālik said, concerning X, It suffices; or, He must repeat, etc. Here in the *Muwaṭṭa'*, in contrast to all this, it is the hadith that creates the context. This is not just a matter of literary convenience, since, as I have shown, these literary modes have implications relative to the nature of authority. Mālik, who, in a dialogic structure, represents the final authority, here functions as an exegete. He explains the law which has its source and its ultimate authority in a hadith going back to the Prophet.

While Malik's remark here could scarcely be interpreted without the hadith's provision of a context, it clearly did not emerge initially in this context. It is simply a variant of a standard formula of juristic diction. Almost exactly the same remark was ascribed to Mālik in the *Mudawwana* about the dirt on a chicken's beak: Paragraph 3.1, As long as you see dirt on its beak there is no harm in it. A subtle reformulation of this ruling has rendered it relevant to the cat, and its situation immediately after a hadith transforms Malik from independent authority to commentator or exegete.

In many respects, then, the *Muwaṭṭa'* represents a continuation of the processes that are evident in the *Mudawwana*: its modes of thought (category creation) are similar, and the formulaic units of juristic language are the same. But the transformation of Mālik into mediator (through the *isnāds*) of ideally Prophetic authority (the *matn*) and into exegete (through the appended juristic dicta—*qāla Mālik*) are the key elements in the creation of a hermeneutic tradition that was to survive for a thousand years.

Within the units which constitute the *Muwaṭṭa'* it is sometimes possible to detect certain other processes of development which reflect organic growth and changing principles of authority. In spite of the foregrounding of Prophetic hadith and their numerical superiority, Companion hadith play a very considerable role in the *Muwaṭṭa'*. The work evidently represents a moment of transition from broad reliance on mediated 'apostolic' authority—associated with the Prophet and his Companions—to the later near exclusive reliance on Prophetic authority. (It is illuminating to note that much of the effort of later commentaries on the *Muwaṭṭa'* was directed at providing Prophetic authority that would justify

Malik's use of Companion authority.)[7] One of the stratagems whereby this transition was achieved may be evident in the hadith about the cat. The transition from Paragraph 2 to Paragraph 3 is a transition from Companion to Prophetic authority. It is perfectly conceivable that the first unit of this hadith to emerge was Paragraph 2, as an independent anecdote, and that Paragraph 3 developed later, by a process analogous to the familiar backward extension of *isnād*s from Companions to Prophet.[8]

IV

The hadith in the chapter on *al-ṭuhūr li-'-wuḍū'* which is concerned with the use of water from a water-hole is as follows:

1. [Yaḥyā], from Mālik, from Yaḥyā b. Sa'īd, from Muḥammad b. Ibrāhīm b. al-Ḥārith al-Taymī, from Yaḥyā b. 'Abd al-Raḥmān b. Ḥātib.
2. 'Umar b. al-Khaṭṭāb went out with a party amongst whom was 'Amr b. al-'Āṣ. They arrived at a water-hole (*ḥawḍ*) and 'Amr b. al-'Āṣ said to the keeper of the pool, Hey do predatory animals (*sibā'*) drink at your pool? 'Umar interrupted, saying, Keeper of the pool, do not tell us; for we arrive after the animals and they arrive after us (*innā naridu 'alā al-sibā' wa-taridu 'alay-na*).

If, on consideration of the hadith about the cat, it is conceivable that the redactors of the *Muwaṭṭa'* had before them the text of the *Mudawwana*, such is not easily conceivable on consideration of this hadith. For, obviously, the *Mudawwana* contains an altogether superior (by the standards of the *Muwaṭṭa'* itself) version of this ruling: it contains a Prophetic hadith, provided with two different *isnād*s, which establishes that water-holes are not susceptible to impurity caused by animals drinking at them (Paras. 5.3 and 5.4 at Ch. 1, Sect. I above). Furthermore, in this case, the *Mudawwana*—in its present form—clearly knows the hadith in the *Muwaṭṭa'*, for it contains a key-phrase reference to it (Para. 5.5). Did the compilers of the *Mudawwana* have before them a copy of the *Muwaṭṭa'*?

It is undesirable to formulate the problem in that way. Both texts can be shown to be organic texts, growing and developing

[7] See e.g. Yūsuf Ibn 'Abd al-Barr's *Istidhkār*; or Sulaymān b. Khalf al-Bājī's *Muntaqā*.
[8] Schacht, *Origins*, 163–75.

over a period of time. Preserved initially in widely separate geographic regions, Cordoba and Qayrawan, they could have influenced one another at any stage in their development, and their prehistory is of course hardly accessible. We shall see in Chapter 5 how two parallel texts may have reciprocal influence on one another at different stages in their development. In any case, it may not be the developing canons as such which influenced one another: the individual items which make up the *Mudawwana* and the *Muwaṭṭa'* had a literary history independent of their incorporation in the canons; see Chapter 7.

My argument that the *Muwaṭṭa'* is later, as a compilation, than the *Mudawwana* does not mean that every single item in the *Muwaṭṭa'* is later than every single item in the *Mudawwana*. It is none the less frequently possible to argue in such a manner. The hadith about the cat emerged after and, to a degree, in response to the arguments evident in the *Mudawwana*. Some passages in the *Muwaṭṭa'* can be analysed as stringently edited versions of material made available in the *Mudawwana*,[9] and certain specific rules are different in the two works in a way that can only be plausibly explained in terms of development from the *Mudawwana* to the *Muwaṭṭa'*.

Mālik's judgement on atonement for failure to comply fully with the rules of fasting in Ramadan is an example of the latter phenomenon. In the dialogue part of the *Mudawwana*, Mālik specifies that provision of food to sixty poor persons is the only appropriate atonement; he rejects the notion that the emancipation of slaves or fasting can, in this context, constitute atonement. In the authority statements there are three Prophetic hadith, all made available by Ashhab, contradicting this: the Prophet offers three modes of atonement, either fasting (for two months), emancipation, or feeding sixty poor persons. Thus preserved, Mālik's rule flagrantly contradicts the Prophet's rule. Turning to the *Muwaṭṭa'*, we find a Prophetic hadith which is clearly a narrative development of the earlier hadith from Ashhab. Following Ashhab, we see the Prophet specifying three modes of atonement. When faced with a particular miscreant who declares himself incapable of managing any of the permitted modes, the Prophet provides him with dates and urges him to distribute them to the poor, thereby to enact a

[9] See Calder, 'Ḥinth', 233.

permitted mode of atonement. So in the *Mudawwana* from Ashhab. The version in the *Muwaṭṭa'* continues. The man declares that he is himself one of the needy. The Prophet laughs and urges him to eat the dates himself. The Prophet has thus stated a rule and subverted it; he has permitted the miscreant to avoid any real form of atonement. Mālik, in a *qāla-Mālik* item, now indicates that atonement is not required from one who breaks his fast in Ramadan; all that is required is *qaḍā'*, i.e. a replacement day of fasting. From the *Mudawwana* to the *Muwaṭṭa'*, we see a progressive amelioration of the law on this matter. This is accompanied by a modification of the content and consequently the significance of an established Prophetic hadith. Now this is understandable if we assume a parallel development of Mālikī law in two centres, and a slightly later date for the Cordoban material. It is incomprehensible if we assume that Mālik's *Muwaṭṭa'* had been established in a final form in 179, and was available therefore to the compilers of the *Mudawwana*.[10]

In these and in numerous other ways some of the expressions, the arguments, the judgements, and the hadith of the *Muwaṭṭa'* can be argued to be later than parallel material in the *Mudawwana*. There are however counter-examples, of which one perhaps is the hadith about the water-hole. In this case the Prophetic hadith in the *Mudawwana* seems to be the more developed statement of the law in terms of standard Islamic juristic theory. It should however be noted that there is a strictly formal reason why, even if the redactors of the *Muwaṭṭa'* had wanted to incorporate the Prophetic hadith about the water-hole, they could not have done so. The *Muwaṭṭa'* contains only hadith in which Mālik is a transmitter. The *isnād*s provided for the hadith in the *Mudawwana* do not exhibit this criterion.

V

The third and last hadith in the *Muwaṭṭa'* which refers to the question of the pollution of water by animals is the notorious hadith of the dog. It is curiously displaced: a natural expectation demands that it be in the same chapter as the hadith about the cat, but this is not so. It is included towards the end of the chapter

[10] See Saḥnūn, *Mudawwana*, iv. 218–19; Mālik, *Muwaṭṭa'*, ch. on *Kaffārat man afṭara fī Ramaḍān*, in *Kitāb al-ṣiyām*.

entitled *Bāb jāmi' al-wuḍū'*, or Miscellaneous on *wuḍū'*. This is a chapter of some complexity which may serve to illustrate some of the processes that affected the growth of the *Muwaṭṭa'*. The chapter contains ten hadith—of which No. 9 is about the dog—and no exegetical comment. Its content may be set out schematically as follows:

1. From the Prophet: a juristic ruling, on cleansing after defecation (*istitāba*).
2. From the Prophet: an eschatological hadith, in which the Prophet explains that on the last day, he will recognize his community because they will be marked about the forehead and about the limbs as a result of their practice of *wuḍu'*.
3. From the Prophet: on the capacity of *wuḍū'* to cause forgiveness of sins.
4. From the Prophet: on the capacity of *wuḍū'* to wash away error and sin.
5. From the Prophet: ditto.
6. From the Prophet: a Prophetic miracle, in which at a time of water-scarcity he produced water for *wuḍū'* from his fingertips.
7. From Abū Hurayra: on the capacity of *wuḍū'* to occasion forgiveness of sins and to generate reward, proportionate to every step between *wuḍū'* and the place of prayer.
8. From Sa'īd b. al-Musayyib: a juristic ruling on cleansing (*wuḍū'*) after defecation.
9. From the Prophet: 'If a dog drinks at a vessel of any one of you, let him wash it seven times.'
10. From the Prophet: a theological hadith, reflecting a dispute about the relationship between faith and works, suggesting that only a believer will persist in performing *wuḍū'*.

This is the kind of grouping that might lead a casual reader to agree with Schacht's strictures on the organization of hadith within the *Muwaṭṭa'*. Numbers 1–8 however, reveal a conventional order. The first six are Prophetic, followed by a Companion, followed in turn by a jurist/Successor. Within this overall structure there is some evidence of subject-grouping. Numbers 3, 4, and 5 all deal with the capacity of *wuḍū'* to cause forgiveness of sins, and are accordingly juxtaposed. Number 7 deals with the same subject but is separated. Clearly the principle of subject-grouping has conflicted

with the principle of hierarchical grading of *isnāds*, and a Prophetic hadith (No. 6) has been allowed to enter the text, thereby cutting off the Companion hadith (No. 7) from its subject group.

Numbers 1 and 8 also deal with the same subject, but Number 8, being from a Successor, is cut off from its subject group (No. 1!) by a whole series of Prophetic and Companion hadith. On consideration it will be evident that Numbers 1 and 8 do not deal at all with *wuḍū'* in the technical sense of ablutions before prayer. They deal with the subject of cleansing after defecation, a subject associated with but not confused with *wuḍū'* in the technical sense. The words for cleansing after defecation were various (*istinjā'*, *istitāba*) but included the word *wuḍū'* in a non-technical sense, meaning cleansing, as at Number 8. At Number 1, the Prophet, asked concerning *istitāba*, replies, Can you not find three stones? The point is elaborated at Number 8 where Sa'īd b. al-Musayyib characterizes the use of water after defecation (*al-wuḍū' min al-ghā'iṭ bi-'l-mā'*) as women's *wuḍū'*. Stones, presumably, are more manly. These two hadith must originally have been grouped together as a subsection within the general collection of materials on *wuḍū'*. However, since only tangentially relevant to the issue of *wuḍū'* before prayer, they were perhaps separately organized. All of the other Prophetic hadith here are also significantly tangential: they deal with *wuḍū'* but they do not relate to juristic matters. They are edificatory, eschatological, hortatory but they are not directly related to practice. Clearly they were grouped near or next to the hadith on cleansing after defecation, until this miscellaneous group, mistaken for a unity, was subject to the mechanical reordering on the basis of graded *isnāds* which characterizes (in spite of all anomalies) the *Muwaṭṭa'*. This gave rise to something like the present order.

An astute redactor might have moved Number 6 to a position before Number 3 and so preserved the obvious grouping of 3, 4, 5, and 7, without disrupting the hierarchical principle; he might also have preserved a separate chapter for Numbers 1 and 8. There is, however, plenty of evidence that at least some redactional processes are mechanical and liable to produce illogical and unharmonious results.[11] Further, in dealing with layers of material

[11] Norman Calder, 'The *ummī*', sects. 2 and 3.

successively incorporated into a text, it must be recognized that principles of organization will vary. It seems likely that the present position of Number 7 may be referred to the operation of the principle of *clausula finalis*: this is the phenomenon whereby an established code, or other group of juristic rulings, may be emended by adding a new ruling at the end of the code, even if the emendation refers to something in the middle.[12] Here, a Prophetic hadith emerging late and becoming eligible for inclusion was added at the end of the Prophetic grouping, without any concern for the break thereby occasioned in the subject-grouping.

Numbers 9 and 10 present problems of their own. Number 10, as it happens, has a defective chain of authorities. Its complete *isnād* as preserved here is Yaḥā–Mālik–the Prophet. Hadith of this type are frequently dealt with in the *Muwaṭṭa'* by relegation to the end of a chapter. Examples may be found in the chapters on *mawāqīt al-iḥlāl*, and *wuḍu' al-nā'im*. This redactional principle, that extremely weak *isnāds* should be relegated to a final or to a late position in a group, is compatible with the general concern for *isnād* hierarchy which characterizes the text as a whole.

There is no decisive answer to the question why Number 9 (the dog) has emerged at this particular place in the organization of hadith. Numerous possible factors spring to mind. It was a hadith which ran counter to the transmitted feelings of Mālik, feelings which were adhered to as far as possible within the exegetical structure of argument that emerged in the Mālikī tradition.[13] It may therefore have been accepted into the canon fairly late (we have seen that it was not incorporated into the *Mudawwana*) and been inserted before the weak hadith at Number 10, but after all the rest, as a token of dissatisfaction. It has not been incorporated into the group of hadith which includes the hadith about the cat and the predatory animals, again, perhaps, in order to weaken its effect or to register a desire that it should not be subject to analogical extension. Or, perhaps that particular group had become an established unit not permitting extension at a time when the Miscellaneous section was still capable of receiving new material. And so on. Further speculation is unnecessary. There are reasons within the Mālikī tradition of thought why this hadith

[12] David Daube, 'Codes and codas'.

[13] Ibn 'Abd al-Barr, *Istidhkār*, i. 258–62, but see also 206–12. A key term is of course *ta'abbud*, for which see also Shāfi'ī, in Ch. 4, Sect. IV below.

should not be liked; and there are reasons why, granted the complex redactional process affecting the growth of this work, it may finally have been incorporated at this position within the group. The compilers of the *Muwaṭṭa'* did not indulge in overt exegetical argument, of the type exemplified for the Mālikīs, much later, in Ibn ʿAbd al-Barr, for the Shāfiʿīs in the *Umm* and in Muzani's *Mukhtaṣar*, and for the Ḥanafīs in Ṭaḥāwī's *Maʿānī al-Āthār*. But they do manage to express their views about hadith by the arrangements and ordering principles that they adopt, and these principles, though differentially imposed over a period of time, are sufficiently analysable for modern readers to perceive at least that there was a consciousness of difficulty before this hadith. There are numerous other anomalies of hadith-arrangement throughout the *Muwaṭṭa'* and only further study will reveal whether they are susceptible to the kind of argument that I have advanced here. There can be no doubt, however, that this is not an authored text: its present form is explicable only on the assumption of a fairly extended process of development (and indeed some carelessness in the final stages of redaction).

VI

The *Muwaṭṭa'* is not an adequate presentation of the law. In the case at issue, for example, the totality of material dealing with the capacity of animals to cause pollution in water is represented by the three hadith discussed here. They refer to the dog, the cat, and the water-hole. There is no exegetical *point d'appui* for the legal point that predatory animals in general cause pollution in water. There is no doubt, however, that the latter point was a part of the law. (The Shāfiʿī school, who inherited this exegetical absence, abandoned the principle that predatory animals cause pollution; for them only dogs and pigs did so; see Ch. 4, Sects. II–IV.) The conclusion is inescapable: anyone who wished to use the *Muwaṭṭa'* had to have some prior knowledge of the law and to interpret it in the light of that knowledge. We have already seen evidence that the *Mudawwana* grew up initially as a record of difficult cases; it is likely that the *Muwaṭṭa'* started in the same way. However, whereas the *Mudawwana* grew into a highly articulated document, of immense scope and detail, the *Muwaṭṭa'* did not. It is not simply a smaller work, it is markedly underdeveloped in exploration of

detail, it is not particularly concerned with comprehensive coverage, it is uncertain in the articulation of book and chapter headings, and, as we have seen, there are occasions where the final redactors do not exhibit full conscious control of their material. On the other hand, it is a work which is clear and definite in presenting a theory of authority. It is possible that a stringent theory of authority would occasion the removal or deletion of unsatisfactory or unnecessary material. But the overall lack of detail, coverage, and fine articulation seems best accounted for by the assumption that the accumulation of materials for the *Muwaṭṭa'* took place over a shorter period than for the *Mudawwana*. It is also likely that the final canonical redaction was rather a hurried affair.

The primary notion of authority articulated in the *Muwaṭṭa'* is Prophetic. The difference between satisfactory and weak *isnāds* as buttress of that authority is registered through the organization of hadith. Companions and Successors as mediators of Prophetic authority are accepted and ranked according to a conventional and familiar scheme of distance from the Prophet. But this whole scheme of authority is integrated into a system where Mālik dominates. Not only is he exclusive transmitter of all preserved material but he is sole exegete and interpreter of the law.[14] What this book finally asserts is the role of Mālik as mediator of Prophetic law.

This complex resolution of Prophetic and Mālikī authority is transmitted to posterity through the sole mediation of Yaḥyā b. Yaḥyā al-Maṣmūdī, who figures throughout in the introductory formula *ḥaddatha-nī Yaḥyā*. Influential at the court of ʿAbd al-Raḥmān II in Cordoba, Yaḥyā is associated with an increase in the effective authority of the Mālikī school of law in Muslim Spain, in particular with an increase in the number of formally appointed Mālikī qadis. His career symbolizes the forging of an alliance between court and school which was to last for generations, and which was embodied in the real administrative power held by the head of the Mālikī school in Cordoba. It is perfectly reasonable to suppose that he provided some kind of impetus towards a collection of materials that would represent the formal authority of the Mālikī school. That he is personally responsible for the

[14] Except as indicated in Ch. 2, Sect. I above.

Muwaṭṭa' in its present form is unlikely. The book is clearly the product of organic growth; it needed time to grow. Time, and perhaps more than just time, was also required for the Mālikī judges, settling into the habit of official administration, to realize there was a need for a canon that would signal their commitment to a specific theory of authority. The formula *ḥaddatha-nī Yaḥyā* suggests composition by a student of Yaḥyā rather than by Yaḥyā himself. In any case, as I have argued, the theory of authority articulated in the *Muwaṭṭa'* should be recognized as later than that articulated in the *Mudawwana*. The *Muwaṭṭa'* belongs to the period after 250.

According to E. Lévi-Provençal, after the reign of 'Abd al-Rahmān II the Mālikī school retained its influence and prestige at court, and the qadi in Cordoba remained a counsellor to the monarch. The Mālikī *fuqahā'* (the jurists) were constantly required to respond to questions and problems emanating from the central government. Amongst the most celebrated of these *fuqahā'* was Baqī b. Makhlad (d. 276). Having travelled and studied in Eastern Islam, he, it appears, had brought reforming ideas to Andalus. The Andalusian *fuqahā'* had, it is suggested, at an earlier date, substituted for Prophetic hadith an attitude of respect and servile imitation based on the opinions (*ra'y*) of their predecessors. Baqī, in opposition to the corporation of Mālikī jurists, brought back the principle of reliance on Prophetic hadith. In this he eventually won the support of the court.[15]

This analysis correctly reflects the bias of Muslim historical and biographical sources which dogmatically maintain that the Mālikī tradition began by recognizing the authority of Prophetic hadith. The reforms of Baqī must accordingly be seen as restitution of what once had been. This is not correct: the natural development of the Mālikī school in North Africa had stressed the authority of Mālik (and other Hijazi jurists), expressed predominantly through use of the term *ra'y* and without systematic appeal to Prophetic authority. The argument for a central role for Prophetic hadith was innovatory. According to the *History of the 'ulamā'* by Ibn al Faraḍī (d. 403), Baqī b. Makhlad, a pupil of Yaḥyā b. Yaḥyā, after his travels in the East, filled the land of Andalus with *ḥadīth* and *riwāya* (= transmitted knowledge). Opposed by his Andalusian

[15] So in Lévi-Provençal, *Histoire*, i. 288–9.

colleagues, Baqī won the support of the Sultan and was thus enabled to publish his hadith and promulgate his transmitted knowledge—*nashara ḥadītha-hu wa-qara'a li-'l-nās riwāyata-hu*. From that time onward hadīth became established in Andalus—*min yawma'idhin intashara al-ḥadīth bi-'l-anadalus*.[16] All this may be accepted at face value. The authority of hadith, meaning Prophetic hadith, had not previously been firmly established in Mālikī Spain. Baqī, coming with ideas from the East, was an innovator in demanding that they be given a central role in legal matters.

Amongst those who followed Baqī was Ibn Waḍḍāḥ (d. 287), also a pupil of Yaḥyā. Through him, according to Ibn al-Faraḍī, Andalus became the land of *ḥadīth* and *isnad*, having previously been dedicated to memorization of the opinions (*ra'y*) of Mālik and his companions.[17] The 'opinions' of Mālik and his companions is, of course, precisely what we find dominating in the *Mudawwana*. The transition from *ra'y* to *ḥadīth*, associated with the biographies of Baqī and Ibn Waḍḍāḥ, reflects the transition from the *Mudawwana* to the *Muwaṭṭa'*. It is a fitting and reasonable conclusion that the familiar *Muwaṭṭa'* in the recension of Yaḥyā was a product of Spanish Cordoba during that period when Baqī and Ibn Waḍḍāḥ were introducing, with the backing of the court, reforms of which the central component was a stressing of hadith at the expense of *ra'y*. It is a book specifically designed to reformulate the Mālikī system of law in formal subordination to Prophetic authority. Such a need can hardly have been recognized in Spain prior to the period of political influence of Baqī b. Makhlad and it is to that period that the *Muwaṭṭa'* should be dated, i.e. *c.*270.

This conclusion finds some support in the *Istidhkar* of Ibn 'Abd al-Barr (d. 463). This is one of the earliest major commentaries on the *Muwaṭṭa'*. In his introduction, Ibn 'Abd al-Barr informs his readers that he has restricted himself to that version of the *Muwaṭṭa'* which derives from Yaḥyā; and he gives the chain of teachers and transmitters by which he has received this work. These are three. Two of them show the common links Ibn Waḍḍāḥ–Yaḥyā–Mālik. The third is a composite chain exhibiting both the link Ibn Waḍḍāḥ–Yaḥyā–Mālik and a link through

[16] 'Abdallāh b. Muḥammad Ibn al-Faraḍī, *Ta'rīkh*, i. 107–9 (no. 283).
[17] Ibn al-Faraḍī, *Ta'rīkh*, ii. 17 (no. 1136).

Yaḥyā's son 'Ubayd Allāh. The value of such chains of transmission varies but is at least more secure in periods of established pedagogic institutions than in an age of predominantly informal oral transmission. (See Ch. 7, and Ch. 9, Sect. IV.) Here, a set of initial conclusions relating to the nature and date of the *Muwaṭṭa'* have been established on the basis of the text itself. With these conclusions in mind, the biographical materials have been found to confirm and sharpen our perception of the situation in which the text emerged. (The biographical texts, of course, ideally should be read and analysed for their own sake; pending that exercise, they must at least be read in the light of the early juristic texts, not vice versa.) Ibn 'Abd al-Barr's chains of transmission may be legitimately brought in at this stage as subsidiary evidence. The prevalent presence there of Ibn Waḍḍāḥ as transmitter from Yaḥyā fits neatly with the conclusions that have already been established. It seems reasonable to conclude that he is in fact the final redactor of the *Muwaṭṭa'* in the form we now know it. His production of this work must be associated with a campaign to establish the authority of Prophetic hadith in Muslim Spain, a campaign primarily associated with Ibn Waḍḍāḥ's teacher and political superior, Baqī b. Makhlad.

The earliest manuscript of the *Muwaṭṭa'*, now held in the Chester Beatty Library in Dublin, is dated 277. A particularly fine achievement of calligraphic and decorative art, it must be one of the earliest and may well be the first authoritative publication of the standard Mālikī canon.[18]

[18] Cf. A. J. Arberry, *The Chester Beatty Library: a handlist*, i. 1; Fuat Sezgin, *Geschichte*, i. 458–9.

3

EARLY ḤANAFĪ TEXTS

I

The largest body of early Ḥanafī juristic material is now contained in the work known as the *Aṣl* or the *Mabsūṭ*, attributed to Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189). Muḥammad was a pupil of Abū Ḥanīfa (d. 150). After training in Kufa, he moved to Baghdad where he flourished in the reign of Hārūn al-Rashīd. It is reported that towards the end of his life he was appointed judge at Raqqa. Biographical sources depict him as a jurist of outstanding intellect and debating skills, if, perhaps, less competent in the field of hadith. Shāfi'ī (in Ḥanafī sources) is said to have described him as physically fat but mentally agile, and as the only jurist who ever faced him (Shāfi'ī) in debate without quailing. Ibn Ḥanbal confessed that his own subtlety in juristic detail was acquired from the books of Muḥammad ibn al-Ḥasan. (Similarly, also in Ḥanafī sources, it is reported that when Ibn Ḥanbal began to collect hadith he went first to Abū Yūsuf, the second major pupil of Abū Ḥanīfa and colleague of Muḥammad. It is a trick of biographical technique to bolster the authority of one's own school by locating praise—implicit or explicit—in the mouths of rivals.)[1]

Like other early works of *fiqh*, the *Aṣl* is organized in books (*kitāb*s) and chapters (*bāb*s). It is unlikely, however, that the various books which make up this work were brought together—as if they were one work—until well into the medieval period. The earliest substantial manuscript edition belongs to the seventh century AH (thirteenth century CE). The most comprehensive effort

[1] The most extensive biographies of Shaybānī, Abu Ḥanīfa and Abū Yūsuf are found in Muḥammad b. Aḥmad al-Dhahabī, *Manāqib*, where all the details given here will be found. Shorter biographies in Abū 'l-Ḥasanāt Muḥammad 'Abd al-Ḥayy al-Laknawī, *Fawā'iḍ* and Abū Muḥammad 'Abd al-Qādir al-Qurashi, *Jawāhir*, ad loc.

at a 'definitive' version is the twentieth-century edition of Abū 'l-Wafā' al-Afghānī—and it is of uncertain value. That the various books developed separately is clear from a number of factors. First, medieval reference is to individual books and not to a single organized work. Fuat Sezgin still lists the books separately from the *Mabsūṭ* or *Aṣl*. Afghānī and his medieval forebears know better: the books of Muḥammad ibn al-Ḥasan al-Shaybānī, though referred to separately, are the same as those that constitute the *Mabsūṭ*.[2]

Secondly, the books as they now exist are evidently the product of different redactional approaches. The *Kitāb al-Ṣalāt*, the first book in the printed edition, is a single integrated unit. It is characterized by a stringent *qultu/qāla* format, remorseless in its capacity to assimilate diverse materials. Emerging only occasionally within this overall structure are three types of secondary material: *āthār*, statements of dispute (*ikhtilāf*), and cross-references to other books. The *āthār* are usually associated with a problem in the known rules, requiring justification. On the question, for example, of rinsing out the mouth, the *qāla*-figure considers that to omit this practice in *wuḍū'* (minor ablutions) does not affect its validity; but to omit it in *ghusl* (major ablutions) will entail repetition of prayer. Why does he distinguish? The two situations, he states, are analogically parallel (*humā fi 'l-qiyās sawā'*) but he abandons *qiyās* here in view of the *āthār* from Ibn 'Abbās.[3] On other occasions, the *qāla*-figure refers to *āthār* from other Companions and from the Prophet;[4] or simply refers to (one or more) anonymous *āthār*.[5] These *āthār* characteristically offer no *isnād*s and do not pretend to represent the *ipsissima verba* of the cited authorities. Though formally integrated within the *qultu-qāla* format, they are probably a secondary development. The *ikhtilāf* material (much larger in quantity than the *āthār*) is not usually integrated into the *qultu-qāla* format. Such material involves the distribution of variant views between (usually) Abū Ḥanīfa, Muḥammad, and Abū Yūsuf (so named, though this is at odds with the supposition that any one of these is identical with the

[2] Sezgin, *Geschichte*, i. 421–33; Abū 'l-Wafā' al-Afghānī in his introduction to Shaybānī, *Aṣl*, i. (see esp. his quotation from the *Kashf al-Ẓunūn* on p. 2).

[3] Shaybānī, *Aṣl*, i. 41.

[4] Ibid. 44–5, 59, 61–2, 156, *et al.*

[5] Ibid. 76–7: *jā'a fī dhālika atharun*; cf. 159.

qultu-figure). It is clearly interpolated.[6] The cross-reference material (a very minor category) is also interpolated. Thus, interrupting the *qulta/qāla* format: *wa-qāla Muḥammad fī 'l-Nawādir . . .* or *qāla Abū Ḥanīfa fī 'l-Jāmi' al-Ṣaghīr . . .* Both the *Nawādir* and the *Jāmi' al-Ṣaghīr* are books attributed to Muḥammad al-Shaybānī. These and similar formulae are clearly marginal comments, product of comparative study, and only later incorporated into the main text.[7]

The second book in the printed edition is entitled the *Kitāb al-Ḥayḍ* (On menstruation). This subject has in fact already been touched on, in accord with the normal practice of juristic presentation, within the section on purity near the beginning of the *Kitāb al-Ṣalāt*.[8] The *Kitāb al-Ḥayḍ* is a special treatise on a particular subject. It has no instances of *qultu/qāla* presentation. Its dominant mode of exposition is constituted by successive conditional sentences: *wa-idhā . . . wa-law . . . wa-in . . .* This is a familiar and universal mode of juristic drafting particularly associated with the early stages in the development of a juristic tradition.[9] Like the *Kitāb al-Ṣalāt*, the book exhibits numerous statements of *ikhtilāf* where variant views are distributed amongst the three Ḥanafī authorities. Citation of more antique authorities (*āthār*) is rare but includes a number of references to the Prophet. It is significant that the latter are associated with a formulaic pattern reflecting a polemical situation: if they say . . . reply is made (*qālū* or *in qālū* or *in qāla qā'il . . . qīla la-hum/la-hu*). It is these model disputes (exhibiting a form known also in early Islamic theological works)[10] that generate reference to a Prophetic (or Companion) ruling (again without *isnād*s or *ipsissima verba*).[11] We shall see in Sections IV–VI below that it is precisely incidence of dispute that generates authority statements (*āthār*) of all kinds.

All the books of the *Aṣl* printed to date exhibit either the *qultu/qāla* editing device or successive conditional sentences. The former is exemplified also, for example, in the *Kitāb al-Zakāt* and the *Kitāb al-Mukātab* (vols. 2 and 3–4), the latter in the *Kitāb al-*

[6] See ibid. 49, 55, 57, 58, 65, 73, 74, *et al.*; also Calder, 'The *ummī*', paras. 5, 8, and 15 of the passage translated on 116–19 and the comments at 119 ff.

[7] Shaybānī, *Aṣl*, i. 65 n. 1, also n. 2, 75 n. 6.

[8] Ibid. 24, 39, 49, 54.

[9] David Daube, *Roman legislation*, 6–8.

[10] Cf. Michael Cook, 'The origins of *kalam*'.

[11] Shaybānī, *Aṣl*, i. 462: *su'ila rasūl Allāh 'an dhālik*; 489–90: *fa-qad jā'a 'an 'Alī b. Abī Ṭālib wa-Ibn 'Abbās.*

ʿAql (vol. 4). In a fragment published by Chafiq Chehata, entitled *Kitāb al-Buyūʿ wa'l-salam*, there are no examples of the *qultu/qāla* device, but only successive conditional sentences (*wa-idhā*, etc.) and successive formulaic statements (*wa-lā ba's fī . . .*, *wa-la khayr fī . . .*, etc.).[12] All the books, irrespective of their basic redactional type, exhibit some examples of *ikhtilāf* statements and of *āthār*; some of them also contain cross-references to other books. The quantity and the forms of such material vary.

In sum, even a casual survey of the books indicates not only that they are the product of different redactional processes, but, where the processes are similar, there are differences in modes of manipulation and in the range and expression of appeal to authority, *ikhtilāf*, etc. It is evident that the *Aṣl* or *Mabsūṭ*, unlike the *Mudawwana*, was never subject to a formal final redaction. It is significant that the tradition produced no commentary on the *Mabsūṭ*—again in contrast to the *Mudawwana*. This is because there was no such work: there were only books on particular subjects, the product, as we are beginning to perceive, of organic processes similar to those described for the early Mālikī texts.

There is a third feature which tends to confirm this impression. It is the varied and uncertain *isnād*s which introduce books and chapters. The introductory sentence of the printed *Aṣl* is as follows: 'Abū Sulaymān al-Jūzjānī from Muḥammad ibn al-Ḥasan, he said, I have explained to you the opinion of Abū Ḥanīfa, Abū Yūsuf and myself. Where there is no mentioned *ikhtilāf* it is the opinion of all of us.' This is indeed a possible description of the work as a whole. It should be understood, however, as an inference from the nature of the material, recast as an introductory statement. A similar introductory statement has been placed at the head of the work known as Muzanī's *Mukhtaṣar* (see Ch. 5, Sect. I) and is equally unhistorical. The first chapter (*bāb*) in the *Kitāb al-Ṣalāt* exhibits a new introductory *isnād*, namely, Abū Sulaymān, from Muḥammad ibn al-Ḥasan, from Abū Ḥanīfa, he said . . . The second chapter offers a similar formula, Abū Sulaymān, from Muḥammad, he said . . .; and the third chapter, Abu Sulayman, from Muḥammad, he said, I said . . . All of these introductory *isnād*s work in context to suggest that the *qultu*-figure is Muḥammad and the *qāla*-figure Abū Ḥanīfa. In spite of this, Muḥammad also

[12] Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Buyūʿ wa-'l-salam*.

appears in the third person in the *ikhtilāf* material. Later chapters in the *Kitāb al-Ṣalāt* have no introductory *isnād*s; they exhibit only a continuation of the basic *qultu/qāla* exposition. It is probable that these *isnād*s, appearing only in the first four *bāb*s, were late insertions intended to identify the *qultu*- and *qāla*-figures, otherwise anonymous.

The *Kitāb al-Hayḍ* exhibits a different introductory *isnād*, namely *qāla sami'tu Muḥammad ibn al-Ḥasan yaqūl idhā . . .* This introduces the first of the sequences of conditional sentences which constitute the bulk of this book. The *Kitāb al-Zakāt* offers yet another formula: *ḥaddatha-nī Ziyād ibn ʿAbd al-Raḥmān ʿan Abī Sulaymān ʿan Muḥammad ibn al-Ḥasan qāla qāla Abū Ḥanīfa* etc. The *qultu/qāla* format begins only after two such introductory *isnād*s which govern authority statements. Though, again, it is probable that the *isnād*s are intended to identify the *qāla*-figure as Abū Ḥanīfa, the matter is hardly clear; and recognition of Muḥammad as the *qultu*-figure is incongruous since he appears, as usual, in the third person in the *ikhtilāf* material. Whereas all of the books in Afghānī's edition are either explicitly referred to or tacitly accepted as transmitted from Abū Sulaymān al-Jūzjānī (some, for example the *Kitāb al-ʿAql*, do not identify the transmitter) the segment edited by Chehata is transmitted by Abū Ḥafṣ Aḥmad ibn Ḥafṣ al Bukhārī. These various items of transmission information are perhaps of minor significance but they tend to confirm the general impression that the individual books were subject to separate redaction and have separate histories. Only later, long after the emergence of established juristic genres, did scholars and scribes acquire the conviction that these books must have been intended as a single expository work of *fiqh*, conforming to the familiar pattern which such works had by then developed. This conviction controlled scribal practice; it has also controlled modern editorial activity.

Traditional Ḥanafī biography identifies Abū Sulaymān Mūsā ibn Sulaymān al-Jūzjānī (d. after 200) and his colleague (*mushārik*) Maʿlā ibn Manṣūr al-Rāzī (d. 211) as the dominant transmitters of Muḥammad's *fiqh*. Of Abū Sulaymān it is said, in Qurashī's *Kitāb al-Jawāhir al-Muḍīʿa*, that amongst his compositions—*min taṣānīfi-hi*—are the *Kitāb al-Siyar al-Ṣaghīr*, the *Kitāb al-Ṣalāt*, and the *Kitāb al-Rahn*.[13] These are in fact works now assumed to be by

[13] Qurashi, *Jawāhir*, ii. 186 (no. 580).

Muḥammad al-Shaybānī himself. The books on *ṣalāt* and *rahn* are those with the same title now contained in the *Mabsūṭ*. Questions of course arise as to why the tradition should preserve this memory in particular; why mention these three books if Abū Sulaymān is assumed to be transmitter of all Muḥammad's works? Alternative reports, making different reference to named books, only confuse the issue. It is none the less worth stressing that although the late Ḥanafī tradition tends to see Abū Sulaymān as only a transmitter and in no way a producer of books,[14] the particular phraseology of the biographical tradition, here and elsewhere, does not confirm this.

Abu Sulaymān, Ma'lā, and the latter's son Yaḥyā ibn Ma'lā (transmitter of his father's material) all lived in Baghdad and may be accepted as dominant influences on the development of Ḥanafī *fiqh* in that city in the decades after 200. Aḥmad ibn Ḥafṣ, the other major transmitter of Muḥammad's jurisprudence, and his son were inhabitants of Bukhara. They represent a different (though undoubtedly related) tradition of juristic thought which was to culminate in the astonishing vitality of Transoxanian Ḥanafī jurisprudence in the middle fourth century and later.[15] The evidence so far discussed, together with that brought forward in the following sections of this Chapter, does not suggest that transmission within a school tradition meant transmission of books with fixed texts. Books grew up through the slow accumulation of material and successive redactions designed to bring that material under control. Abū Sulaymān, Ma'lā, and Ḥafṣ may have promoted the collection and preservation of school material but even they can hardly be responsible for the final texts of the works ascribed to Shaybānī.

[14] Abū 'l-Wafā' al-Afghānī in Shaybānī, *Aṣl*, i. 1 (n. 2); here Afghānī simply denies the report in the *Jawāhir*: Abū Sulaymān did not produce any books of his own, he simply transmitted those of Muḥammad.

[15] Sarakhsī and Qaḍīkhān are the outstanding names of the Transoxanian school, but they did not exist in isolation. The basic biographies of Mūsā b. Sulaymān, Ma'lā, and Aḥmad b. Ḥafṣ may be found in Qurashi, *Jawāhir*, ii. 186, ii. 177, and i. 67; also in Laknawi, *Fawā'id*, 216, 215, and 18.

II

In an earlier analysis of a section from the *Kitāb al-Ṣalāt*, the first book in the printed *Aṣl*, I concluded that the passage under consideration showed 'signs of interpolation, conflation, redactional activity involving a possible re-ordering of material, the imposition of an editorial format, and, perhaps, the ingenious elaboration of new material as a result of exploring the imposed editorial format.'[16] The passage studied there was particularly rich in anomalies, but most of these features can be demonstrated also on consideration of that part of the work which deals with the pollution of water by animals. The editorial format is the *qultu/qāla* device—not the record of a conversation but a literary means for the integration of disparate material. It is marked in the following translation by the conventional Q[uestion] and A[nswer]. Each new item for consideration is introduced by the phrase *a-ra'ayta*, translated here, throughout, as, Consider.

1. Q. Consider; if a cat drinks at [a person's] vessel, does he perform *wuḍū'* with that water?

A. I prefer that he use other water (*aḥabbu ilayya*).

Q. But if he does, and prays?

A. It suffices him (*yujzī-hi*).

2. Q. Consider; if a hen drinks at his vessel, does he perform *wuḍū'* with [the water]?

A. If the hen is free-ranging, I dislike (*akrahu*) the use of the water for *wuḍū'*. But if it is penned, there is no harm in it (*lā ba's*).

Q. Consider; if it is free-ranging, and if it drinks from the water, and he performs *wuḍū'* with it, and then prays [what then]?

A. It suffices him.

Q. Why?

A. Because he did not see any filth on its beak, so it suffices him. But I prefer that he use other water (*aḥabbu ilayya*).

Q. If he sees filth on its beak, and it drinks, does he perform *wuḍū'* with it?

A. No.

Q. If he does, and prays [what then]?

A. He must repeat the *wuḍū'* and the prayer (*'alay-hi an yu'īd al-wuḍū' wa-'l-ṣalāt*).

3. Q. Consider; if a bird, or a sheep, or a cow, or a camel, or a horse, or a

[16] Calder, 'The *ummī*', 123.

work-horse (*birdhawn*), or anything the flesh of which is [normally] eaten drinks at [a person's] vessel, does he perform *wuḍū'* with the water?

A. Yes, there is no harm in it (*lā ba's fī-hi*).

Q. If [an animal] the flesh of which is not [normally] eaten drinks at the water, such as donkeys or mules or such like [what then]?

A. He does not perform *wuḍū'* with it.

Q. And if he does and prays . . .?

A. He must repeat the *wuḍū'* and the prayers.

And so on. Formally this material is of the utmost simplicity. A problem is introduced by *a-ra'ayta* followed by a conditional question. The series of problems here, which is lengthy, relates to one issue: if water is affected by a particular animal or thing, does one use it to perform *wuḍū'*? The answer may be an expression of dislike (*akrahu*), of preference (*aḥabbu ilayya*), or of no harm (*lā ba's*). All of these are associated with a judgement of sufficiency (*yujzī-hi*) and no repetition of prayer or *wuḍū'*. Insufficiency is registered by the requirement to repeat (*'alay-hi an* . . .). Further discrimination is achieved by providing the *qultu*-figure with 'what if' or 'why' questions. The phrasing is formulaic, elastic, and familiar from similar devices in the *Mudawwana* (and to a lesser extent in the *Muwaṭṭa'*). Any quantity of new material might be integrated, either by generation of new questions under an established topic (Para. 2), or by creating and extending a list (Para. 3), or by starting a new topic (Consider; if an elephant . . .). The editorial format is neat, schematic, flexible, and capable of disguising many hiatuses. But the underlying material, when considered at length, is chaotic. In order to illustrate its nature, I give now a schematic presentation of the rest of the passage, reserving complete translation for only Paragraph 8, which has the characteristic form of an *ikhtilāf* item.

4. Q. Consider; [flies, bees, scorpions . . . fall into water and die . . .]
5. Q. Consider; [wine, blood, urine, excrement . . .]
6. Q. Consider; [the spittle of an animal whose flesh is eaten; it does not pollute—*lā yufsid*]
7. Q. Consider; [the urine of an animal whose flesh is eaten; it pollutes—*yufsid*]
8. This is the view of Abū Ḥanīfa and Abū Yūsuf. Muḥammad (al-Shaybānī] says, As to animals the flesh of which is eaten, there is no harm in their urine. If it falls into water it does not pollute it, unless it exceeds the water, in which case one does not perform *wuḍū'* with it. Abū Yūsuf says, There is no harm in drinking the urine of animals whose flesh is eaten, such as the camel and such like. But the urine [of these animals] pollutes water, even if the quantity [of urine] is small.
9. Q. Consider; A man performs *wuḍū'* and begins with his legs before his arms, or his arms before his face . . .
10. Q. [bird-droppings fall into a vessel]
11. Q. Consider; [a mouse, a snake, a ghecko . . . drink from a vessel . . .]
12. Q. Consider; [predatory animals (*sibā'*) and dogs . . . drink from a vessel . . .]
13. Q. Consider; [the urine of a bat; a mosquito or a flea]
14. Q. Consider; [birds whose flesh is not eaten; falcons and hawks . . . drink from a vessel]
15. Q. Consider; [a well, in which a fish or crab or tortoise dies]
16. Q. Consider; [the spittle of riding animals (*dawābb*) whose flesh is [not] eaten, and of predatory animals—one repeats]

In many respects similar to the parallel material in the *Mudawwana*, this passage is both disorderly and confusing. Formally it is unified by the *qultu-qāla* device and by the introductory *a-ra'ayta* (missing, however, at Para. 10). Substantially, it exhibits some tension between a straightforward casuistic approach (cat, chicken, mouse, snake, ghecko, etc.) and an aspiration towards general categories (edible v. non-edible at Para. 3, predatory v. non-predatory at Para. 12). (The listing of mouse, snake, and ghecko at Para. 11 is in fact a category: these are animals that live in the house, common household pests.) There is clearly some degree of conflict and overlap between the general category of predatory and that of non-edible, which is not dealt with. There is some evidence of the material expanding towards a taxonomy of things (not just animals) that might cause impurity in water (cf. Paras. 4 and 5), and an irregular attempt to deal with bodily fluids (spittle, urine, bird-droppings) and to relate these rules too to the general categories (see especially Paras. 6 and 16), though the task is not rigorously carried through. (I have introduced a textual emendation at Para. 16 in order to harmonize the rules).

Paragraph 9 is intrusive and may signify that at some point the discussion of animal-pollution ended with Paragraphs 1–8. Paragraph 15, too, initiates a new subject involving wells, not vessels, and dead animals, not living ones, but is immediately followed by a reversion to the previous topic, namely animal fluids, at Paragraph 16; that in turn is followed by a continuation of the

theme of dead animals in wells. It is not clear whether these are examples of collation mistakes, interpolatory processes (for example *clausula finalis*), or simply carelessness.

As in the material of the *Mudawwana*, there is a delay in the introduction of the basic and familiar categories of the law (predatory animals introduced at Para. 12) which, from a logical point of view, is intolerable. The explanation for this has already been suggested: wild/predatory animals are in nearly all systems of purity paradigmatically impure and do not require to be asked about. The text begins with genuine problems arising out of uncertain cases. The cat is predatory, but domestic (1). The chicken is domestic, but liable to eat carrion (2). Donkeys and mules were different from horses because not eaten and, in addition, had become a part of Mālikī–Ḥanafī dispute (3). This text, then, like the parallel material in the *Mudawwana*, originally emerged as a collection of responsa to particular problems, all of which may be recognized as a natural result of reflection. They represent grey areas in the known law. The known law did not have to be collected and preserved precisely because it was known. 'Ancient lawgivers do not usually state that which goes without saying.'[17] In time, the text began to look like a general statement of the law and all the more familiar cases as well as an increasing burden of refined cases (the mosquito, the urine of a bat) were incorporated. It seems likely that most new material in this section was incorporated in the final position (by successive application of the principle of *clausula finalis*). This must account for the relatively late appearance of the generalization about predatory animals, as also, in a striking example, of Paragraph 16, which so obviously ought to be a pair to Paragraph 6. While Paragraphs 1–3 deal with *su'r*, the subsequent Paragraphs abandon this subject, until Paragraph 11 when it is reintroduced for the refined case of the snake, the ghecko, and the mouse. This reintroduction of the theme of *su'r* prompts, belatedly, a formulation of the fundamental principle regarding predatory animals. Marginal addition and/or interlinear comment may account for Paragraph 7, which is both a relevant clarification of Paragraph 6 and a linguistic parallel.

The collocation of items as a whole is messy and disorderly, a situation which is effectively, if only partially, disguised by the

[17] Daube, *Roman legislation*, 30.

uniformity of literary expression. All the material is caught in a continuous dialogue, which, based on simple, flexible formulaic clauses, easily incorporates and standardizes the most diverse items. It is clear, none the less, that the items are diverse, that their emergence and collocation have been a product of time and *ad hoc* recording, which have militated against rational grouping and precipitated evident discontinuity. In my earlier study of a similar passage from the *Kitāb al-Ṣalāt*, it was possible to produce arguments suggesting that the Q and A format was imposed upon originally discrete material.[18] Fractionally less obvious in this passage, this remains the most likely interpretation. That even after this editorial process the text remained open to development, notably by the addition of *ikhtilāf* material, is proved by pointing to the differential development of such material in different manuscript traditions.[19] The *ikhtilāf* item in this passage (Para. 8) is characteristic of the form and intentions of such material. While *ikhtilāf* material, and, in many cases, authority statements stand out as likely to be interpolated, it does not necessarily follow that all of the material captured in the dialogue was incorporated in one editorial process. Once the format was created, it could digest new material seamlessly.

Granted then that this book is the end-product of a lengthy period of development, involving accumulation of basic materials, successive redactions, and the interpolation of *ikhtilāf* items and authority statements, it must be resistant to simple conclusions about dating. It is clearly the record of a broad tradition of, initially, oral law (known independently of texts, through training and experience), which was gradually acquiring literary forms. The texts that emerged as a result of this process—and they are more than the component Books of the *Aṣl*—were attracted to the name of Muḥammad ibn al-Ḥasan al-Shaybānī, not because he authored them, but (presumably) because he was an acknowledged figure of authority, and perhaps also because his teaching was a genuine impetus towards the modes of thought that are reflected in the books. I do not know how the last point could be proved and the formal as well as the material diversity of the books (and views) attributed to him militate against his being anything other than a distant influence.[20]

[18] Calder, 'The *ummī*', 119–23. [19] Ibid. 120–1.

[20] In spite of the neat schematic distribution of variant views amongst the three

The *qultu/qāla* technique is used in other early Ḥanafī works, amongst them the *Kitāb Aḥkām al-Waqf*, attributed to Hilāl ibn Yaḥyā al-Baṣrī, known as Hilāl al-Ra'y (d. 245). The first paragraph of this work begins with the phrase, *qāla Abū Ḥanīfa*. Subsequently the *qāla*-figure simply expounds the law in his own person, with only a handful of locutions, mostly in the first few pages, which establish the identity of the *qāla*-figure as Abū Ḥanīfa. A small number of *ikhtilāf* passages, again mostly near the beginning,[21] give expression to the usual tripartite division of opinion in the Ḥanafī tradition with third-person reference to Abū Ḥanīfa and Abū Yūsuf, together with a first-person reference, *qawlu-nā*. In this formulation the *qultu*-figure is to be understood as Muḥammad ibn al-Ḥasan. Some passages, however, show third-person reference to Muḥammad.[22] For the bulk of the book, exposition of the law is achieved through skilful and orderly manipulation of the *qultu/qāla* format. As so often, it is difficult to avoid the impression that the efforts to identify the *qultu*- and *qāla*-figures are secondary. A different book on the same subject was produced by Aḥmad ibn 'Amr al-Khaṣṣāf (d. 261). This work has an introductory section made up entirely of hadith and authority statements, arranged in a familiar hierarchic order: the Prophet, Abū Bakr, 'Umar, 'Uthman, 'Alī, Al-Zubayr, Mu'ādh ibn Jabal, etc. (The ambition to rank authorities may have been an influence on those who produced the *Muwaṭṭa'* in Cordoba; see Ch. 2, Sect. II.) The book proper begins abruptly with a *qultu/qāla* exposition, sustained rigorously throughout, with no *ikhtilāf* and no authority statements. The *Kitāb al-Nafaqāt*, also attributed to Khaṣṣāf, and preserved only with the commentary of 'Umar ibn 'Abd al-'Azīz Ibn Māza (d. 536), similarly uses the *qultu/qāla* form of exposition, and, like Khaṣṣāf's *Aḥkām al-Waqf*, exhibits no

great authorities of the Ḥanafī school, close observation will quickly reveal that the distribution is frequently arbitrary. The achievement and possibly the purpose was to establish flexibility and to justify variety, pre-empting its ability to divide. The precise lines of division were not important. The commentary on Aḥmad b. 'Amr al-Khaṣṣāf's *Kitāb al-Nafaqāt* illustrates one method of dealing with problems. In that work two views are distributed in the pattern Abū Ḥanīfa + Muḥammad *v.* Abū Yūsuf. But the commentator knows an alternative distribution namely Abū Yūsuf + Muḥammad *v.* Abū Ḥanīfa. He concludes that Muḥammad held both views: *ṣāra 'an Muḥammad riwāyatānī* . . . Khaṣṣāf, *Nafaqāt*, 25.

[21] e.g. Hilāl al-Ra'y, *Waqf*, 4, lines 6 ff.; but cf. 198–9.

[22] Ibid. 59.

device intended to identity the *qāla*-figure. In Khaṣṣāf's works, it is clear that the *qultu/qāla* format is merely a literary means for expressing the law. This was probably also true of the *Aḥkām al-waqf* of Hilāl al-Ra'y, as also, originally, of the works having this format and attributed to Shaybānī.

All law books produced in the third century were open to a certain degree of interpolation and editorial manipulation. The ascription of the works just mentioned to Hilāl al-Ra'y and Khaṣṣāf, however, may be accepted since they are orderly works with relatively few signs of disjuncture and interpolated material. This dating suggests that the *qultu/qāla* format had been established prior to 241 (when Hilāl al-Ra'y died) and that it remained fashionable, at least for a time, amongst younger scholars (Khaṣṣāf died in 261). Taking this into consideration, it is probably to the same period, i.e. the middle decades of the third century, that one should assign the final emergence of the *Kitāb al-Ṣalāt* and, presumably, most of the other books which now constitute the *Aṣl*. That is the period when this very characteristic juristic style flourished. That the texts reflect and contain older material is not in doubt. A period of growth from *c.* 200 to *c.* 250 would seem a fair estimation for the accumulation of material, with final redactions taking place towards the end of that period, and minor interpolations continuing into the second half of the century.[23]

The various books attributed to Shaybānī were summarized in the first half of the fourth century by Muḥammad ibn Muḥammad Abū 'l-Faḍl al-Marwazī (d. 334). His summary of the passage translated above reveals that he had before him precisely the text we have now. He gives clear expression to such general principles as may be derived from it, bringing all material susceptible to generalization to the beginning of his analysis. The more refined items, he lists, more or less in the order he found them, including the item at Paragraph 9, which is so obviously out of place. He knows and explains the *ikhtilāf* material at Paragraph 8. He

[23] Editorial activity on early Ḥanafī material certainly continued until well into the 4th cent. The current edition of the *Kitāb al-Jāmi' al-Ṣaghīr*, another of Muḥammad b. al-Ḥasan al-Shaybānī's attributions, owes its organization (*tartīb*) and its division into chapters (*tabwīb*) to Abū Ṭāhir Muḥammad b. Muḥammad al-Dabbās (d. 340); so in the introduction to Shaybānī, *Kitab al-Jāmi' al-Ṣaghīr*. It is to Dabbās's redaction that I would ascribe the schematic *isnād* which introduces every chapter in the work: Muḥammad from Ya'qūb [Abū Yūsuf] from Abū Ḥanīfa.

introduces only one refinement which is not in our text (it relates to the droppings of birds which are not eaten), which he explicitly derives from a different work, the *Kitāb al-Jāmiʿ al-ṣaghīr*. In other instances, Marwazī's text cannot be shown to reflect all the *ikhtilāf* material that exists in the modern edition.[24] But, in general, his work confirms, at least for the *Kitāb al-Ṣalāt*, and, as far as can be easily judged, for most of the component parts of the *Aṣl*, that they had achieved a stable format before he set to work on them. The generation of Ḥanafī scholars who worked in the first three or four decades of the fourth century, represented by Marwazī in Bukhara, Dabbās (d. 340) in Iraq, and Ṭaḥāwī (d. 321) in Egypt, reveals itself as uniformly concerned to tidy up the tradition it inherited from the past. These scholars represent the last stages of the formative period of the Ḥanafī tradition, and the beginnings of what may be called the 'classical period'. (See further, Ch. 10.)

III

The *Mudawwana* and the *Aṣl* or *Mabsūṭ* have much in common, and may be judged to represent similar stages in the development of Islamic juristic thought, in Qayrawan and in Baghdad (and/or Bukhara). The Mālikī biographical tradition suggests that the form and some of the content of the *Mudawwana* was a product of Eastern influence.[25] In fact the final redaction (or redactions) of the *Aṣl* (its component parts) cannot be much earlier than that of the *Mudawwana*. The Ḥanafī works, however, probably had a longer history and we have seen that the *qultu/qāla* format emerged prior to 240. It may be accepted that influence in this period was indeed from East to West, as it was again prior to the emergence of the *Muwaṭṭaʾ* (see above Ch. 2, Sect. VI).

Both the *Mudawwana* and the *Aṣl* exhibit identical formulaic language, a concept covering not only the *qultu/qāla* format but also such formulae as *a-raʾayta*, *lā baʾs*, *yujzī-hi*, etc. This coexists with a variable quantity of looser inventive language. There are a number of technical terms which occur in the *Aṣl* but not in the

[24] Marwazī's text may be found embedded in Muḥammad b. Abī Sahl al Sarakhsī's commentary, *Al-Mabsūṭ*, i. 47 ff. See for another analysis of Marwazī's material, Calder, 'The *ummī*', 119 and 123.

[25] See Ch. 1, n. 1.

Mudawwana, notably *qiyās* and *istiḥsān* ('preference'); these do not reflect real differences in technique.[26] Both texts use the term *athar* to indicate appeal to older authority. Both texts exhibit some degree of appeal to practice as authoritative. This is more marked in the Mālikī text and became even more so in the later *Muwaṭṭaʾ*.[27] With regard to principles of authority, both traditions are dominated by the intention to reveal the opinions of authorities who lived in the second half of the second century or a little earlier.

In one respect the *Aṣl* is markedly different from the *Mudawwana*: it contains no (or very few) formally cited authority statements, with *isnād*s and the *ipsissima verba* of ancient authorities. The reason for this is very simple: such materials were collected and preserved in the Ḥanafī tradition in separate corpora concerned less with presenting the law than with defending and justifying it, specifically against the Mālikī tradition. Whereas the *qultu/qāla* device (and, for example, successive conditional sentences) was appropriate to presentation of the law, the authority statement or exemplum found its natural place in a polemical context.

IV

Early juristic literature exhibits two major types of juristic exposition: the dialogue and the list of exempla. The former presents the law in a manner which emphasizes the dynamic, reflective, and productive capacities of legal thinking. Its characteristic term is *raʾy* (*a-raʾayta, arā, yarā* etc.). Discrete rules are preserved initially as such, casuistically, but are subject to expansion or modification by category considerations and by the application of analogical thought of one kind or another. Authority is represented by the not too distant figures of Mālik, for the Medinan tradition, and, for the Kufan tradition, of Abū Ḥanīfa

[26] See Schacht, *Origins*, 98–132. The word *istiḥsān* is found in some Mālikī materials (ibid., 116–19) but not, apparently, the word *qiyās*.

Ibid. 58–81, esp. 61–70. Instances of appeal to practice in the *Mudawwana* at i. 11, 17, 22, 39, 43, *et al.* Such appeal is rarer in Ḥanafī material but not absent: see e.g. in the *Kitab al-Ṣalāt*, *Aṣl*, i. 72: *wahakadhā amr al-nās* and in the *Kitab al-Ṣiyām*, *Aṣl*, iii. 183: *wa li-anna-hā aymān al-nās*; and 184: *li-anna aymān al-nās ʿalā dhā hiya* etc. The tendency of the two traditions to diverge in such technical matters as appeal to practice (Mālikī) and appeal to *qiyās* and *istiḥsān* (Ḥanafī) may be due to competition. It should not obscure fundamental similarities in technique and approach. Cf. Ch. 8, Sect. I.

and his two pupils. There are numerous examples of these figures being abandoned for equivalent figures of roughly the same period: Ashhab and Ibn Shihāb (Mālikī); Ẓafar, Sufyān, and Ibrāhīm Al-Nakha'ī (Ḥanafī). Examples, too, of their views being abandoned or tacitly corrected in the light of continuing reflection on the law. Exempla, by contrast, are static and non-dynamic. Their function originally was certainly to prove or justify the known law and not to act as exegetical sources for the law. They are characteristically presented in lists. They accumulate initially around problem points and, in particular, areas of inter-school dispute. Though there is no formal difference between an exemplum attributed to, say, Mālik and one attributed to an older authority (both may figure in one list), there is none the less a tendency for exempla to acquire longer *isnād*s, giving greater antiquity and culminating in the authority of Companions and of the Prophet. Further, while exempla have in their earliest phase the exclusive form of juristic statements, there is a gradual emergence of anecdotal forms which reveal rather than state the law (Abū Qatāda and the cat; the Prophet and the water-hole) and of second-person imperative forms as opposed to third-person indicative forms.[28]

Analysis of a simple point of dispute between the two ancient schools will provide an opportunity to demonstrate the accumulation of exempla around disputed points. The question arose whether a man, being in a state of purity, was rendered impure if he touched his penis. The terms used are *mass al-dhakar* (touching the penis, males only) and *mass al-farj* (applicable to males and females). The question was whether *mass al-dhakar* entailed cancellation (*intiqāḍ*) of an original state of purity and so required that a person repeat or initiate a performance of ablutions (*wuḍū'*). The Mālikīs adopted the position that *mass al-dhakar* did cause cancellation of purity and required renewal of *wuḍū'*; the Ḥanafīs adopted the opposite position.

For present purposes all that need be known of the Mālikī

[28] These are frequently characterized by the locution *aḥadu-kum*: *idhā sullima 'ala aḥadi-kum wa-huwa yuṣallī fa-lā yatakallam wa-'l-yushir bi-yadi-hi*, Muḥammad ibn al-Ḥasan al-Shaybānī, *Muwaṭṭa'*, 76 (no. 175, from 'Umar); see also the Prophetic hadith from Busra translated in the next paragraph but one, and the Prophetic hadith about *mass al-dhakar* discovered in the Shāfi'ī tradition, translated in Ch. 5, Sect. IV below.

tradition is that they discovered a major prop for their position in the following Prophetic hadith:

> Ibn al-Qāsim, 'Alī ibn Zayd, Ibn Wahb, and Ibn Nāfi', from Mālik, from 'Abdallah ibn Abī Bakr ibn Muḥammad ibn 'Amr ibn Ḥazm that he heard 'Urwa ibn al-Zubayr say: I visited Marwān ibn al-Ḥakam and we discussed the question (*tadhākarnā*) what actions require [renewal of] *wuḍū'* [i.e. what actions break or cancel a previous state of purity]. Marwān said, One must perform *wuḍū'* after touching the penis. 'Urwa said, I didn't know that. Marwān said, Busra bint Ṣafwān told me that she heard the Prophet of God say, If any one of you touches his penis, he should perform *wuḍū'*. 'Urwa went on: Then Marwān sent a messenger to Busra to ask her about this. The messenger returned, confirming it.

This (which will be referred to as the hadith of Busra) is one of five exempla included in the *Mudawwana*, where it is promoted to initial position. It appears also in the *Muwaṭṭa'*, where it is one of six exempla. It is the only Prophetic hadith used in this context by the Mālikīs, their other authorities being Companions or Successors.

V

The *Kitāb al-Aṣl* or *Mabsūṭ* is an expository work of Ḥanafī law (or a collection of expository works), couched largely in the *qultu/qāla* format, and displaying only a minimal quantity of authority statements (exempla) or of Prophetic hadith. The question of *mass al-dhakar* is taken up and dealt with in a single question-answer unit: it does not cancel a state of *wuḍū'*, does not require renewal of *wuḍū'*, and does not even require a washing of hands.[29]

There exist two early Ḥanafī polemical works, both attributed to Muḥammad ibn al-Ḥasan al-Shaybānī. One is the famous *Muwaṭṭa'* of Mālik in the recension of Muḥammad ibn al-Ḥasan (henceforth the *Muwaṭṭa' Shaybānī*). Sometimes thought of as a Mālikī work, this is in fact a Ḥanafī juristic work in which certain Mālikī positions are recorded with a view to being compared with corresponding Ḥanafī positions, and either confirmed or refuted. The work displays, chapter by chapter, a standard format, only rarely subject to disruption. First, one or more hadith, Prophetic or otherwise, are recorded from Mālik (*akhbara-nā Mālik*) in order to establish the Madinan position. (These hadith are

[29] Shaybānī, *Aṣl*, i. 46.

frequently also available in the *Muwaṭṭa'* of Yaḥyā, but there are overall fewer hadith in the *Muwaṭṭa' Shaybānī*. There are, further, considerable differences in arrangement of material. Clearly the Cordoban text was not the source of the Ḥanafī one.)[30] The Mālikī hadith are always followed by a comment from Shaybānī, introduced by *qāla Muḥammad*, expressing agreement (*bi-hādhdā na'khudh*), or giving some qualification or disagreement, with explanatory comment. Where there is disagreement there is likely to be citation of exempla, and these may be numerous, as in the text given below, or few. They are explicitly referred to, like the similar material in the *Mudawwana*, as *āthār*. Sometimes the actual exempla—with their *isnāds*—are not cited, but a list is provided merely of the names of authorities.[31] The explanation and comment on the Ḥanafī position is closed with the phrase, This is the position of Abū Ḥanīfa and the generality of our *fuqahā'*, *wa-huwa qawl Abī Ḥanīfa wa-'l-'āmma min fuqahā'i-nā*—or a variant of that phrase.

The second early Ḥanafī polemical work is the *Kitāb al-Ḥujja 'alā ahl al-Madīna*, *The book of argument [or proof] contra the people of Madina*. It displays chapter by chapter a basic four-part structure:

1. a statement of Abū Ḥanīfa's view (*qāla Abū Ḥanīfa*)
2. a statement of the Mālikī position (*qāla ahl al-Madīna*)
3. a comment from Muḥammad al-Shaybānī (*qāla Muḥammad*)
4. a list of exempla (*akhbara-nā . . .*).

This work is probably bigger than the *Muwaṭṭa' Shaybānī*. For the most part, only areas of dispute are recorded, and both argumentation and exempla can be considerably extended. Where areas of agreement enter the text, Item 2 above is replaced by the phrase *wa-kadhālika qāla Mālik ibn Anas*, followed immediately by exempla (*wa-qad jā'a fī-hi āthār, akhbara-nā . . .*).[32] Where there is dispute, the comments from Muḥammad al-Shaybānī (Item 3 above) are more likely to be based on rational argument than on exempla or appeal to authority. The fourth element in the structure, i.e. the list of exempla, is sometimes omitted. Though recovery of this standard structure is usually possible, there are

[30] See further, Goldziher, *Studies*, ii. 206–9.
[31] Shaybānī, *Muwaṭṭa'*, 81, para. 198; 151, para. 446.
[32] Muḥammad ibn al-Ḥasan al-Shaybānī, *Kitāb al-Ḥujja*, i. 362–4, 364–6, *et al.*

numerous deviations, which may be explained on the grounds of continued organic development over a lengthy period of time.

A theory about the development of these texts and the relationship between them will be advanced after consideration of how they deal with the problem of *mass al-dhakar*. That problem, which occasioned only a simple statement in the expository *Kitāb al-Aṣl*, becomes, in the polemical works, a focus for argument and for a considerable accumulation of exempla. The almost complete absence of exempla from the expository material and their dense accumulation in the polemical material helps to confirm the origins of exempla: they are a response to dispute.

The *Muwaṭṭa' Shaybānī* cites only two hadith from Mālik on the subject of *mass al-dhakar*.[33] The first of these is an anecdotal exemplum from Sa'd ibn Abī Waqqāṣ in which his son scratches himself while holding the Qur'ān. This is available in the *Muwaṭṭa' Yaḥyā* but not in the *Mudawwana*. The second is a general ruling from Ibn 'Umar on *wuḍū'* after *ghusl*. It is available in both the *Mudawwana* and the *Muwaṭṭa'*. The Prophetic hadith from Busra (translated at Sect. IV above) is not included. Now, it is inconceivable that the Ḥanafī tradition would compose a refutation of a familiar Mālikī position and fail to cite the major piece of evidence used by the latter group. It seems necessary, then, to infer that the redactors of the *Muwaṭṭa' Shaybānī* were dealing with a Mālikī group who did not know or utilize the hadith from Busra. This means a group who did not know the *Muwaṭṭa'* or the *Mudawwana* in their canonical forms. It is likely to have been a group of Mālikīs in Iraq, where they would have been in direct contact with a dominant Ḥanafī group. These cannot, of course, have been entirely cut off from their companions in North Africa, and it is at least clear that they had shared access to some of the exempla that were used in that tradition. The fact that they did not use/know the Busra hadith certainly suggests that the *Muwaṭṭa' Shaybānī* represents a Mālikī position rather earlier than that represented in the final versions of the *Mudawwana* and the *Muwaṭṭa'*.

The *qāla Muḥammad* section of the *Muwaṭṭa' Shaybānī* responds to these two Mālikī hadith with the categorical statement, There is no *wuḍū'* after *mass al-dhakar* and on this there are many *āthār*.

[33] Shaybānī, *Muwaṭṭa'*, 35–8.

frequently also available in the *Muwaṭṭa'* of Yaḥyā, but there are overall fewer hadith in the *Muwaṭṭa' Shaybānī*. There are, further, considerable differences in arrangement of material. Clearly the Cordoban text was not the source of the Ḥanafī one.)[30] The Mālikī hadith are always followed by a comment from Shaybānī, introduced by *qāla Muḥammad*, expressing agreement (*bi-hādhdā na'khudh*), or giving some qualification or disagreement, with explanatory comment. Where there is disagreement there is likely to be citation of exempla, and these may be numerous, as in the text given below, or few. They are explicitly referred to, like the similar material in the *Mudawwana*, as *āthār*. Sometimes the actual exempla—with their *isnāds*—are not cited, but a list is provided merely of the names of authorities.[31] The explanation and comment on the Ḥanafī position is closed with the phrase, This is the position of Abū Ḥanīfa and the generality of our *fuqahā'*, *wa-huwa qawl Abī Ḥanīfa wa-'l-'āmma min fuqahā'i-nā*—or a variant of that phrase.

The second early Ḥanafī polemical work is the *Kitāb al-Ḥujja 'alā ahl al-Madīna*, *The book of argument [or proof] contra the people of Madina*. It displays chapter by chapter a basic four-part structure:

1. a statement of Abū Ḥanīfa's view (*qāla Abū Ḥanīfa*)
2. a statement of the Mālikī position (*qāla ahl al-Madīna*)
3. a comment from Muḥammad al-Shaybānī (*qāla Muḥammad*)
4. a list of exempla (*akhbara-nā . . .*).

This work is probably bigger than the *Muwaṭṭa' Shaybānī*. For the most part, only areas of dispute are recorded, and both argumentation and exempla can be considerably extended. Where areas of agreement enter the text, Item 2 above is replaced by the phrase *wa-kadhālika qāla Mālik ibn Anas*, followed immediately by exempla (*wa-qad jā'a fī-hi āthār, akhbara-nā . . .*).[32] Where there is dispute, the comments from Muḥammad al-Shaybānī (Item 3 above) are more likely to be based on rational argument than on exempla or appeal to authority. The fourth element in the structure, i.e. the list of exempla, is sometimes omitted. Though recovery of this standard structure is usually possible, there are

[30] See further, Goldziher, *Studies*, ii. 206–9.
[31] Shaybānī, *Muwaṭṭa'*, 81, para. 198; 151, para. 446.
[32] Muḥammad ibn al-Ḥasan al-Shaybānī, *Kitāb al-Ḥujja*, i. 362–4, 364–6, *et al.*

numerous deviations, which may be explained on the grounds of continued organic development over a lengthy period of time.

A theory about the development of these texts and the relationship between them will be advanced after consideration of how they deal with the problem of *mass al-dhakar*. That problem, which occasioned only a simple statement in the expository *Kitāb al-Aṣl*, becomes, in the polemical works, a focus for argument and for a considerable accumulation of exempla. The almost complete absence of exempla from the expository material and their dense accumulation in the polemical material helps to confirm the origins of exempla: they are a response to dispute.

The *Muwaṭṭa' Shaybānī* cites only two hadith from Mālik on the subject of *mass al-dhakar*.[33] The first of these is an anecdotal exemplum from Sa'd ibn Abī Waqqāṣ in which his son scratches himself while holding the Qur'ān. This is available in the *Muwaṭṭa' Yaḥyā* but not in the *Mudawwana*. The second is a general ruling from Ibn 'Umar on *wuḍū'* after *ghusl*. It is available in both the *Mudawwana* and the *Muwaṭṭa'*. The Prophetic hadith from Busra (translated at Sect. IV above) is not included. Now, it is inconceivable that the Ḥanafī tradition would compose a refutation of a familiar Mālikī position and fail to cite the major piece of evidence used by the latter group. It seems necessary, then, to infer that the redactors of the *Muwaṭṭa' Shaybānī* were dealing with a Mālikī group who did not know or utilize the hadith from Busra. This means a group who did not know the *Muwaṭṭa'* or the *Mudawwana* in their canonical forms. It is likely to have been a group of Mālikīs in Iraq, where they would have been in direct contact with a dominant Ḥanafī group. These cannot, of course, have been entirely cut off from their companions in North Africa, and it is at least clear that they had shared access to some of the exempla that were used in that tradition. The fact that they did not use/know the Busra hadith certainly suggests that the *Muwaṭṭa' Shaybānī* represents a Mālikī position rather earlier than that represented in the final versions of the *Mudawwana* and the *Muwaṭṭa'*.

The *qāla Muḥammad* section of the *Muwaṭṭa' Shaybānī* responds to these two Mālikī hadith with the categorical statement, There is no *wuḍū'* after *mass al-dhakar* and on this there are many *āthār*.

[33] Shaybānī, *Muwaṭṭa'*, 35–8.

There follows a list of sixteen exempla, one from the Prophet and fifteen from Companions and others. They are translated in full in the next section.

VI

The *Kitāb al-Ḥujja* is better informed. It knows that the chief prop of the Mālikīs is the Prophetic hadith from Busra. It also knows the text of the *Muwaṭṭa' Shaybānī*: all of the *qāla Muḥammad* section from that book is incorporated, without acknowledgement, in the discussion of the *Ḥujja*. The *Ḥujja*, then, is undoubtedly later than the *Muwaṭṭa' Shaybānī*; and its Mālikī opponents know and use the hadith from Busra. Here is the complete discussion from the *Ḥujja*. (Paras. 9–25 are those taken from the *Muwaṭṭa' Shaybānī*.)[34]

1. Abū Ḥanīfa says: A man touches his penis while in a state of purity, his purity is not thereby cancelled.
2. The people of Madina say: A man touches his penis while in a state of purity, he is subject to *wuḍū'*. The act of touching must be with the inside of the hand; if he touches it with the back of his hand, he is not subject to *wuḍū'*.
3. The people of Madina used to say, before this, that if a man touches his penis with any of those parts of his body which are subject to *wuḍū'*, he is required to perform *wuḍū'*. Subsequently they abandoned this argument and said, He is not subject to *wuḍū'* until he touches it with the inside of his hand.
4. Muḥammad ibn al-Ḥasan al-Shaybānī says: How is the inside of the hand to be distinguished from the back? If *wuḍū'* is cancelled by touching with the inside of the hand, it would be cancelled too by touching with the back of the hand.
5.a. Consider (*a-ra'aytum*); if a man touches his backside, the anus, does that cancel *wuḍū'*? They say, Yes; this and the penis are the same.
b. For the hadith of the Prophet retailed by Busra bint Ṣafwān has come to us, stating that she heard the Prophet of God say, If one of you touches his penis, let him perform *wuḍū'*.
6. Reply is made thus (*qīla la-hum*): It has reached us from the Prophet of God that he was asked about that and he did not consider it subject to *wuḍū'*.
7. There is no *ikhtilāf* amongst us on the fact that 'Alī ibn Abī Ṭālib, 'Abdallāh ibn Mas'ūd, 'Ammār ibn Yāsir, Ḥudhayfa ibn al-Yamān, and

[34] Shaybānī, *Kitāb al-Ḥujja*, i. 59–65.

'Imrān ibn Ḥasīn did not consider (*lam yaraw*) that touching the penis occasioned *wuḍū'*. And who is Busra bint Ṣafwān compared with them?
8. And do you record this view from anyone other than her? They say: Ibn 'Umar gave this view. We reply: Ibn 'Umar was a man given to extremes in *wuḍū'* and *ghusl*. You have recorded from him that he used to splash water in his eyes if he became polluted but you do not follow him in that practice. This, it appears, is something in which Ibn 'Umar subjected himself to extremes.
9. Muḥammad ibn al-Ḥasan [al-Shaybānī] says, We have many *āthār* on this.
10. Ayyūb ibn 'Ataba, Qadi of al-Yamāma from Qays ibn Ṭalaq, that his father related to him that a man asked the Prophet of God concerning a man who touches his penis, does he perform *wuḍū'*? The Prophet replied, Is it anything other than a part of your body?
11. Ṭalḥa ibn 'Amr al-Makkī, from 'Aṭā' ibn Abī Rabāḥ, from Ibn 'Abbās: he said concerning *mass al-dhakar* while at prayer, I do not care whether you touch it or touch your nose.
12. Ibrāhīm ibn Muḥammad al-Madīnī, from Ṣāliḥ, Mawlā al-Taw'ama, from Ibn 'Abbās: he said, There is no *wuḍū'* after *mass al-dhakar*.
13. Ibrāhīm ibn Muḥammad al-Madīnī, from Ḥārith ibn Abī Dhubāb, that he heard Sa'īd ibn al-Musayyib say, No *wuḍū'* after *mass al-dhakar*.
14. Abū 'l-'Awāmm al-Baṣrī: A man asked 'Aṭā' ibn Abī Rabāḥ, saying, Ya Abā Muḥammad! A man touches his penis after *wuḍū'*? One of the group answered, Ibn 'Abbās used to say, If you think it polluting, cut it off. 'Aṭā' said, This, by God, this is the view of Ibn 'Abbās.
15. Abū Ḥanīfa, from Ḥammād, from Ibrāhīm al-Nakha'ī, from 'Alī ibn Abī Ṭālib: he said, concerning *mass al-dhakar*, I don't care whether I touch it or the end of my nose.
16. Abū Ḥanīfa, from Ḥammād, from Ibrāhīm al-Nakha'ī, that Ibn Mas'ūd was asked about *wuḍū'* after *mass al-dhakar*. He said, If it is polluting, cut it off!
17. Muhill ibn Maḥraz al-Ḍabbi, from Ibrāhīm al-Nakha'ī, concerning *mass al-dhakar* in prayer. He said, It is only a part of your body.
18. Salām ibn Salīm al-Ḥanafī, from Manṣūr ibn al-Mu'tamar, from Abū Qays, from Urqum ibn Shuraḥbīl, who said, I asked 'Abdallāh ibn Mas'ūd, [What] if I scratch myself during prayer and touch my penis? He replied, It's a part of your body.
19. Salām ibn Salīm al-Ḥanafī, from Manṣūr ibn al-Mu'tamar, from al-Sadusī, from al-Barrā' ibn Qays, who said, I asked Ḥudhayfa ibn al-Yamān concerning a man who touches his penis in prayer. He replied, It's just the same as touching his head.
20. Mis'ar ibn Kidām, from 'Umayr ibn Sa'd al-Nakha'ī, who said, I was in a session with 'Ammār ibn Yāsir, and the question of *mass al-dhakar*

came up. He said, It's only a part of your body; but your hand has other places to rest!

21. Mis'ar ibn Kidām, from Ayyād ibn Laqīṭ, from al-Barrā' ibn Qays, who said, Ḥudhayfa ibn al-Yamān used to say about *mass al-dhakar*, Touch your nose.

22. Mis'ar ibn Kidām, from Qābūs ibn Abī Ẓibyān, from Abū Ẓibyān, from 'Alī ibn Abī Ṭālib, who said, I don't care whether I touch it or touch my nose or my ear.

23. Abū Kadīna Yaḥyā ibn al-Muhallab, from Abū Isḥāq al-Shaybānī, from Abū Qays 'Abd al-Raḥmān ibn Tharwān, from 'Alqama ibn Qays, that a man came to 'Abdallāh ibn Mas'ūd and said, I touched my penis while at prayer. 'Abdallāh said, What! You haven't cut it off. Then he said, Is your penis any different from the rest of your body.

24. Yaḥyā ibn al-Muhallab, from Ismā'īl ibn Abī Khālid, from Qays ibn Abī Ḥazim, that a man came to Sa'd ibn Abī Waqqāṣ and said, Is it permissible that I touch my penis during prayer? He replied, If you know that some part of you is polluting, cut it off.

25. Ismā'īl ibn 'Iyāsh, from Ḥarīz ibn 'Uthmān, from Ḥabīb ibn 'Ubayd, from Abū 'l-Dardā', that he was asked about *mass al-dhakar*. He replied, It's only a part of your body.

26. How can the hadith of these, all of them, and their agreement on this matter be abandoned for the hadith of Busra bint Ṣafwān, a woman unaccompanied by any male [transmitter—to confirm her view], knowing how weak women are in transmission. For Fāṭima bint Qays informed 'Umar ibn al-Khaṭṭāb that her husband had divorced her three times and the Prophet had not allotted to her either lodgings or expenses. But 'Umar refused to accept her word, saying, We do not consider a woman's view permissible in [establishing] our law (*dīn*). The same is true of Busra bint Ṣafwān, we do not consider her view permissible, especially in view of the Companions who oppose her.

The Mālikī group against whom this text was directed held the view that both the penis and the anus conveyed impurity through touch (Para. 5). There is independent confirmation of the existence of such a view amongst some Mālikīs, in that Shāfi'ī too adopted it. Since he had no Prophetic hadith to back him in this, it is evident that he derived it from the Mālikī school tradition, which forms the basis of so much Shāfi'ī law. It is presumably from this same Mālikī group that the Ḥanafīs learnt of the abandoned view that any part of the body which was wiped during *wuḍū'* could become a mediator of impurity (Para. 3). This group is not the same as the group responsible for the *Mudawwana* (Qayrawan) and *Muwaṭṭa' Yaḥyā* (Cordoba), both of which reject the

extension of this rule to the anus; and not quite the same as the group against which the *Muwaṭṭa' Shaybānī* was directed, since that group did not use the hadith of Busra. (It might be the same group at a later period). Clearly they are an Eastern Mālikī group who have developed an independent line of thought derived from an original ruling that the penis conveys impurity through touch. The very complex structure of the text given above tends to confirm that the Busra hadith is a late addition to Mālikī exempla. The following analysis is, like the material it discusses, very complex.

Paragraph 4 offers a clear, simple, rational argument by Muḥammad, designed to cast doubt on the Mālikī position. Paragraph 5 represents an abrupt transition to a fragment of dialogue which refers to the anus. The fragment is imperfectly formulated since it begins in the second person and transfers to the third person in a very clumsy manner (5a). This fragment is formally linked by the causal preposition *li-anna* to the following sentence, which makes reference to the hadith of Busra (5b). Unfortunately this does not, in context, make sense. The hadith from Busra does not represent a causal explanation of the extension of the ruling from the penis to the anus. The incoherence of this passage may indicate a careless attempt to introduce reference to materials which emerged subsequent to the first editing of the *Kitāb al-Ḥujja*. The standard format of the *Ḥujja* (in spite of numerous deviations) is represented precisely by Paragraphs 1, 2, and 4. Paragraphs 5a and 5b were no doubt introduced into the text owing to the discovery, by the Ḥanafī redactors, of two items of information which seemed worthy of record, in addition to the original contents of Paragraph 2. These two items were a category extension of the law to include the anus, and a Prophetic hadith related through Busra. The formulations of 5a and 5b are clumsy in context, perhaps because they have been lifted straight from some Mālikī (or other) source where their context was different.

Paragraph 6 exhibits again a very clumsy transition. The formula *qila la-hum* ought to be the answer to an earlier *qālū* or *in qālū* (they say . . . or, if they say . . .). But the only earlier incidence of that formula (5a) is emboxed within a different dialogue structure and refers to the question of the anus. Paragraph 6 is in fact a response to Paragraph 5b. Paragraph 5b makes the claim for the Mālikīs that they have a Prophetic hadith which supports their

view; and, as the theoretical predominance of Prophetic hadith came to be conceded, the only possible response to this was a Ḥanafī claim that they too had a Prophetic hadith supporting their view. This is the claim put forward in Paragraph 6.

Paragraphs 1, 2, and 4 represent a coherent piece of polemical argument, initiated with a statement of two rival positions followed by a rational critique, directed against the Mālikī position. Paragraphs 5 and 6 represent a later extension of the polemical argument, based on additional materials elaborating and supporting the Mālikī view and, consequently, an additional critique, responding to the most significant part of that additional material. These two arguments (1, 2, and 4 v. 5 and 6) are significantly different in their approach to authority. The first relies on rational, reflective argumentation, the second on appeal to authority (Prophetic). The appeal to authority is continued in Paragraph 7, in which Muḥammad gives a list of the authorities, in addition to the Prophet, whom he wishes to set up against Busra. It is permissible to conjecture that this appeal to Companions came into existence prior to the interpolation of the reference to a Prophetic hadith. The technique of listing authorities but not citing exempla in detail, with *isnād*s, is familiar from the *Muwaṭṭa' Shaybānī*. It represents an older type of argument which was phased out as the principle of (near exclusive) appeal to Prophetic hadith began to dominate. It seems perfectly possible that Paragraph 7 originally came immediately after Paragraph 4. In its present context, with the rhetorical question asking that these authorities be contrasted with Busra, it involves a subtle breakdown of logic. Busra, after all, does not act as an authority in her own right, but as a transmitter of the Prophet's ruling. The personal rulings of five Companions could not stand against a Prophetic hadith, not at least without some comment and argument. The emergence of a Prophetic hadith supporting the Ḥanafī position shows that the point was irresistible, though it had to be accompanied by a careful critique of Busra's capacity (Para. 26).

It is thus possible to propose an older text consisting of Paragraphs 1, 2, 4, and 7 (the latter possibly excluding at first the rhetorical question). Paragraph 5 developed as those points became known to the Ḥanafī redactors, and Paragraph 6 was added in response to the new points. Paragraph 3 was interpolated at whatever point that information came to the Ḥanafīs (though

it interrupts the continuity between 2 and 4). And Paragraph 8, too, was added as an *ad hoc* response to another item in the Mālikī argument. Like Paragraph 5 it exhibits clumsy juncture and internally inconsistent dialogue format.

The whole of Paragraphs 1 to 8 then represents the record of an ongoing argument. An initial statement of the Mālikī position, with a possible response to it, was expanded by *ad hoc* interpolations, designed to act as the record of Mālikī argument, and as a prompt for Ḥanafī counter-argument.

Paragraphs 9 to 24 are lifted in their entirety from the *Muwaṭṭa' Shaybānī*. This incorporated passage consists of an introductory formula (Para. 9), a Prophetic hadith (Para. 10), and fifteen exempla, composed of *isnād*s and statement. The exempla show some evidence of grouping according to the first person in the *isnād*: Ibrāhīm ibn Muḥammad al-Madīnī at 12 and 13; Abū Ḥanīfa at 15 and 16; Salām ibn Salīm at 18 and 19; Mis'ar at 20, 21, and 22. In other respects the list is muddled. Paragraphs 11 and 12 go back to the Companion Ibn 'Abbās, but Paragraph 13 goes back only to the Successor Sa'īd ibn al-Musayyib. Paragraphs 14 to 16 go back to Companions, in the case of the last two, through Ibrāhīm al-Nakha'ī. Paragraph 17 goes back only to Ibrāhīm al-Nakha'ī. The remaining items all go back to Companions.

Clearly these items could have emerged at any time. The accumulation of so many exempla on one point weakens their effectiveness. But one may infer that what happened was the gradual emergence of a consistent Ḥanafī response to this problem, based on ridicule, expressed with various degrees of irony and wit (see especially 20 and 23). It seems a pity the Prophet got one of the duller formulations. These various expressions were attributed to a number of known masters and acquired appropriate *isnād*s. The Prophetic hadith must have been one of the last to emerge. Once in existence and allied to a theory advocating the sufficiency of Prophetic hadith as legal authority, it would prevent the continued accumulation of Companion and other exempla. The *Muwaṭṭa' Shaybānī*, then, where this hadith was first recorded, might reasonably be supposed to have come to the end of its organic growth at about the time when the Prophetic hadith was incorporated in the text, for, at that time, a different mode of argumentation had emerged. (The long list of Companion exempla were not used in subsequent times: the hadith of the

Prophet sufficed, with only incidental reference to Companions as confirmatory of its implications.)

Incorporated next to a passage which grew up independently in the *Kitāb al-Ḥujja*, this passage (Paras. 9 to 25), not surprisingly, does not fit. Consider how Paragraph 7 in its present form and position within the complete text seems to act as introduction to the exempla cited at Paragraphs 11 to 25; but the authorities cited do not match. Notably, Ibn 'Abbās, cited thrice in the interpolated passage (Paras. 11, 12, 14), is omitted from Paragraph 7; as are Sa'd ibn Abī Waqqāṣ and Abū 'l-Dardā' (Paras. 24 and 25). Conversely, 'Imrān ibn Ḥaṣīn, who is mentioned at Paragraph 7, is not found in the interpolated passage. The composer of Paragraph 7 obviously had no idea about the passage from the *Muwaṭṭa' Shaybānī* that was to be incorporated in his work.

Paragraph 26, cut off from Paragraph 7 by the lengthy interpolated passage, probably followed it directly when first written. The rhetorical question about Busra which completed Paragraph 7 required some kind of reply, and this is provided explicitly at Paragraph 26, in an argument designed to undermine her authority. The last line of Paragraph 26 comments on the Companions who oppose Busra: the reference is to the list of Companions in Paragraph 7 and not to the interpolated passage. For the interpolated passage contains a Prophetic hadith and that, after all, was a rather more triumphant argument than any number of Companion exempla. But the writer of Paragraph 26 did not know about it, for the reference to a Prophetic hadith at Paragraph 6 and the explicit provision of one at Paragraph 10 were both later interpolations.

And so on. Analysing these texts into their layers of juristic thinking is a process that might be continued indefinitely. The conclusions reached have, necessarily, a tentative aspect. For the present, no more specific conclusion is aimed at than that early Islamic juristic literature displays a uniform susceptibility to organic development. The attributions to specific named authors are not to be trusted. The processes of canonization, whereby a text ceased to develop, and became a source for new material or a basis for commentary, are also unclear. The emergence of a firm theory of the predominance and sufficiency of Prophetic hadith as exegetical source or justification for the law may be a reason for the abandonment of a mode of text production that clearly had a

lengthy history. When the modes of exegetical argument had been assimilated it became possible to return to the older texts and demonstrate their consistency with the new forms of argument.

The two Ḥanafī texts discussed in this section are clearly school texts and both have developed over a period of time. They represent, presumably, the polemical approaches of two different Ḥanafī schools in the face of (local) Mālikī opposition. The *Muwaṭṭa' Shaybānī* has adopted an approach based on the citation of exempla, all of which contain Mālik in their *isnād*s, but make consistent appeal to more ancient authority, including, erratically, Prophetic. The response to these exempla is a parallel development of Ḥanafī exempla, displaying roughly parallel characteristics. The editorial format of this text, based almost exclusively on discrete exempla, is capable of considerable development without any obvious surface disruption of argument. It is accordingly a much more consistent work, in its present form, than the *Kitāb al-Ḥujja*.

The basic format of the latter work does not make appeal to exempla but to statements of the law, reported on the authority of Mālik (the people of Madina) and Abū Ḥanīfa, without recourse to more ancient authority. And the earliest layer of argumentative material seems to rely on rational argument rather than exempla. None the less various layers of argument based on exempla have been incorporated into the text, including many of the exempla that had emerged in the *Muwaṭṭa' Shaybānī*. The work as a whole therefore shows many signs of surface disruption and structural incoherence. There are grounds for suspecting that the oldest layers of the *Ḥujja* are older than the *Muwaṭṭa' Shaybānī*, but that editorial and redactional activity continued to a period after the *Muwaṭṭa' Shaybānī* had closed.

In both cases a scenario for the end of redactional activity must include the decisive emergence of Prophetic hadith as a means for justification of the law. The whole principle of appeal to rational argument (the early stages of the *Ḥujja*), or appeal to accumulated Companion and other exempla (the *Muwaṭṭa' Shaybānī* and, apparently, the later stages of the *Ḥujja*), upon which these books were built, was called into question. Exegetical argument about the significance of Prophetic hadith became the basic principle of juristic scholarship and all other forms of argument took on a marginal status. The development of exegetical argument of this kind is already evident in the numerous Prophetic hadith which

have entered the texts of the *Ḥujja* and the *Muwaṭṭa' Shaybānī*, but in that context they are not fully developed and always subject to interference from the accumulated number of Companion exempla. The Ḥanafī scholar most associated with the development of exegetical argument based on Prophetic materials, within the broad tradition of Ḥanafī thought, is Ṭaḥāwī (239–321), who lived in Egypt and is said to have received much of his juristic training from al-Muzanī, the pupil of Shāfi'ī (see, for Muzanī, Ch. 5; for Ṭaḥāwī, Ch. 9, Sects. II and IV). A plausible dating for the final redactions of these early Ḥanafī polemical texts would be the lifetime, possibly the early lifetime, of Ṭaḥāwī; that is, in their present form, they represent the product of *c.*250 AH. This dating is supported by the similar dating for the *Mudawwana*, which, in formal presentation, literary technique, terminology, and principles of authority (including the partial intrusion of Prophetic hadith) is, in that part of its text which lists exempla, very similar to the Ḥanafī material.

Providing an approximate date for these texts is a practical convenience, but a necessarily tentative one. The organic nature of the texts precludes anything definitive or final. The Ḥanafī polemical texts are companions to the expository works of the *Aṣl*, and, unsurprisingly, seem to be of roughly similar date in their development and redaction.

4

THE *KITĀB AL-UMM* OF SHĀFI'Ī

I

Muḥammad ibn Idrīs al-Shāfi'ī (d. 204) has become for Western scholars, since the writings of Joseph Schacht, the intellectual heavyweight of early Muslim jurists. According to Schacht, he was the first to argue consistently, vehemently, and absolutely that legal rulings must be based on Prophetic hadith; he was one of the first to develop a systematic approach to hadith and a terminology of legal argument that fitted with the priority he accorded to hadith; the first to elaborate a set of hermeneutic rules which permit a consistent approach to revealed sources (i.e. in his *Risāla*, for which see Ch. 9, Sect. V). 'Shāfi'ī's legal theory is a magnificently consistent system and superior by far to the doctrines of the ancient schools. It is the achievement of a powerful individual mind, and at the same time the logical outcome of a process which started when [hadith] from the Prophet were first adduced as arguments.'[1] These conclusions derive from, are indeed completely justified by, the contrast between the terminology and argumentation characteristic of Shāfi'ī's *Kitāb al-Umm* and those evident in other early juristic works. It may, however, be noted as a problem that the magnificent totality of his juristic achievement was not recognized by Muslim writers, and had no tangible influence on juristic thought, before perhaps the beginning of the fourth century.

Muslim sources do not give Shāfi'ī so high or so exceptional a status, since, in the end, each of the major schools claimed for its founder and his pupils a roughly similar concern for Prophetic hadith, and a roughly similar combination of piety and brilliance.

[1] Schacht, *Origins*, 137. Schacht's conclusion depends on the totality of his argument through pp. 1–137.

The Mālikīs perhaps lay greater stress on piety, the Ḥanafīs on brilliance; but both Mālik and Abū Ḥanīfa have attracted tales that testify to their outstanding wisdom, wit, and piety. So too for Shāfi'ī. He was born in the year 150, perhaps on the very day that Abū Ḥanīfa died, which was an auspicious start to a life dedicated to *fiqh*, though whether he was born in Ghazza, Ascalon, or the Yemen is not sure. His biographer Bayhaqī (d. 458) prefers Ghazza, a site which, being in the Holy Land, he considered the most fitting of the three. Converted by a vision to the study of *fiqh*, Shāfi'ī trained first with Mālik in Madina and later perfected the art of debate with Muḥammad b. al-Ḥasan al-Shaybānī in Baghdad. (He thus inherited the best qualities of the two older schools.) He arrived in Baghdad, a prisoner of Hārūn al-Rashīd, having opposed the Government while on service in the Yemen (a certain degree of opposition to governors was *de rigueur* amongst the early great jurists—or their biographers). He travelled much but eventually settled in Fustat in Egypt in 198 (or 199 or 200) and died there in 204, a date first mentioned by Mas'ūdī (d. 346). The earliest recorded praise for Shāfi'ī is that found in the *Kitāb al-jarḥ wa-'l-ta'dīl* of Ibn Abī Ḥātim (d. 327). He is not mentioned in the *Kitab al-Ma'ārif* of Ibn Qutayba (d. 276), which mentions most of the early jurists (under the rubric *aṣḥāb al-ra'y*), and also gives a comprehensive list of the transmitters of hadith (*aṣḥāb al-ḥadīth*). He achieves one mention in Ibn Qutayba's *Ta'wīl Mukhtalif al-ḥadīth*, where it is asserted of a particular hadith that it was accepted by some *fuqahā'*, amongst them Shāfi'ī and Isḥāq ibn Rahawayh (d. 238). If Shāfi'ī was an outstanding jurist and founder of a school, Ibn Qutayba had not noticed.[2]

His works are said to have been preserved in Iraq and in Egypt, the former being known as the 'old' (*qadīm*) books, the latter as the 'new' (*jadīd*) books. It seems that only the latter have been preserved, as transmitted by Al-Rabī' ibn Sulaymān al-Muradī,

[2] For Shāfi'ī's biography, see Heffening in *EI*(i) and Schacht, *Origins*, 330; also Joseph Schacht, 'On Shāfi'ī's life and personality'. Aḥmad b. Ḥusayn al-Bayhaqī, *Manāqib*: prefers Ghazza, i. 74; Shāfi'ī's conversion to *fiqh*, i. 92–9; his involvement in politics, i. 106–7 and 111–17. Schacht gives his arrival in Egypt in 198 (following Kindī); Bayhaqī gives 199 or 200 (i. 237 ff.). 'Abd al-Rahman Ibn Abī Ḥātim's biography of Shāfi'ī, *Al-jarḥ wa-'l-ta'dīl*, iii(1), 201–4; see also Ibn Abī Ḥātim, *Ādāb al-Shāfi'ī wa-manāqibu-hu*. The latter is certainly not by Ibn Abī Ḥātim (d. 327); it is possible to wonder whether the totality of the contents of the *Jarḥ wa-'l-ta'dīl* emerged prior to 327. 'Abdallāh b. Muslim Ibn Qutayba, *Mukhtalif al-ḥadith*, 314, for the single mention of Shāfi'ī.

known as *rāwī al-kutub al-jadīda*. Rabī' died in 270, sixty-six years after the death of Shāfi'ī; he was the third successor to Shāfi'ī, after al-Buwayṭī (d. 231) and al-Muzanī (d. 264). Unsurprisingly the tradition makes much of Rabī''s memory. Shāfi'ī said, 'The best of you in memory is Rabī' and he is the most useful to me'; which is certainly true, though Muzanī, too, transmitted much.[3]

II

Here follows the passage in the *Umm*, as transmitted by Rabī', which deals with the susceptibility of water to impurity. The passage is necessarily lengthy, for the arguments are both more complex and more integrated than any of the passages previously presented in this work.

1.1. He said: All haram things (*al-muḥarram kullu-hu*) are the same; if they fall into less than five *qirba* of water, they render it impure (*najis*).
1.2. If a dead fish falls into a small quantity of water, or a dead locust, it does not become impure (*lam yanjas*); because they are halal when dead.
1.3. Likewise all things possessed of life (*kullu mā kāna min dhawāt al-arwāḥ*), whether they live in water or otherwise, if they fall into water that is susceptible to impurity, being dead, they render the water impure.
1.4. That is if they have a blood-system (*idhā kān mimmā la-hu nafsun sa'ila*).
1.5. As to things which do not have a blood-system such as flies, beetles, etc., there are two views on these:

1. If these things die in water of small or large quantity, they do not impart impurity. Those who say this argue as follows: If someone says, But they are carrion, so how can you claim that they do not impart impurity? we reply, They do not change the water at all and they do not have a blood-system. If proof is demanded, we say, The Prophet of God commanded that if a fly falls into water, it should be dipped into it. He ordered the same for a fly that falls into foodstuffs. Now, a fly may well die when dipped in this manner. The Prophet would not order it to be dipped into water and food if, on dying, it caused impurity; for that would constitute a deliberate imparting of impurity.

2. If these things die in something susceptible to impurity, it is rendered impure. For these things are forbidden (*muḥarram*). The Prophet may have ordered the dipping of the dead fly because of the curative property contained in it. Also, the most probable thing is that it will not die.

[3] For the successors to Shāfi'ī, Muḥammad b. Aḥmad al-'Abbādī, *Tabaqāt*, 7–14; 'Abd al-Wahhāb b. 'Alī al-Subkī, *Tabaqāt*, ii. 132–9 (Rabī'), 162–70 (Buwayṭī), and 93–109 (Muzanī). Also Bayhaqī, *Manāqib*, ii. 337 ff.

My preferred view is that anything which is haram to eat, if it falls into water . . . and dies there, imparts impurity. This applies to beetles, flies, mosquitos, and fleas.

2. He said: Bird droppings of all types, whether from birds whose flesh is eaten or from birds whose flesh is not eaten, if they mix with water, render it impure; because they become liquid on mingling with the water.

3.1. Rabī' said: The sweat of a Christian woman, of a ritually impure [woman], and of a menstruating woman is pure (*ṭāhir*).

3.2. Likewise the Magian [person].

3.3. The sweat of all animals (*dābba*) is pure.

3.4. The *su'r* of animals (*dābba*) and predatory animals (*sibā'*), all of them, is pure; except the dog and the pig.

4. Rabī' said: That is Shāfi'ī's view.

5.1. If a man prepares some water, then uses his tooth-stick, dipping it into the water, he may perform *wuḍū'* with that water. For, the most that is on the tooth-stick is saliva; and if he spits or hawks or blows his nose into the water, it does not cause impurity.

5.2. Even an animal (*dābba*) which drinks at water, thereby mixing its saliva with it, does not impart impurity; except for the dog and the pig.

6. He said: Likewise if [a person or an animal] sweats and the sweat drips into the water, it does not impart impurity; because the sweat of men and animals (*'araq al-insān wa-'l-dābba*) is not impure, no matter where the sweat comes from . . .

7. If something haram is present in water, even if the water is plentiful, [the water] is not purified by any amount of scooping from it. But if the water is so plentiful that the haram thing becomes as it were non-existent . . . the water is pure. This can be achieved by pouring water on to (*yuṣabbu 'alā*) [the original body of water in sufficient quantities to render the haram thing non-existent] or, if it is a spring, if the water of the spring reaches such quantities etc. . . .

8. He said: If a vessel containing a small quantity of water becomes impure, or if the earth or built-up well containing a large quantity of water [becomes impure], as a result of a haram thing that mixes with the water and remains in it; [if] then other water is poured on (*ṣubba 'alā*) such that the haram thing becomes non-existent in it; or [if], the water being small in quantity and susceptible to impurity, other water is poured into it so that it reaches a quantity not susceptible to impurity; and if the haram thing is removed; then the water is pure and the vessel or the earth which contains the water is also pure. For, they became impure only through the impurity of the water. If the status of the water returns to purity, so likewise does the status of that which the water touches. It is not permissible (*lam yajuz*) that the status of the water be changed and not that of its container, for it follows the status of the water, becoming pure if the water is pure, impure if the water is impure.

9.1. If the water is small in quantity, in a vessel, and some impurity (*najāsa*) becomes mixed with it, then the water is poured away, and the vessel is washed. I prefer (*aḥabbu ilayya*) that it be washed three times. But if it is washed once completely, it is purified.

9.2. This is true of all [impure] things that become mixed with water except if a dog or a pig drink at it. In the latter case it is only purified if it is washed seven times, the first or the last of these washings to be carried out with earth.

10.1. If this happens at sea where there is no earth then it is washed with something which functions like earth for cleaning purposes, like potash or palm-leaves or such like.

10.2. On this, there are two views:

1. The vessel is not purified except it be cleaned with earth.

2. It is purified by that which is better than or more cleansing than earth, such as those things I have mentioned. This resembles our views on cleansing after defecation (*istinjā'*).

11.1. Since the dog and the pig cause impurity by their drinking at water, they cause impurity too by any part of their body that touches the water, even if there is no [other] impurity (*najāsa*) on their bodies.

11.2. All animals that do not cause impurity by drinking, also do not cause impurity by inserting their front or hind limbs or any other part of their body into water. Unless there is filth on [those parts of the body concerned], in which case it is the filth which causes impurity, not the body.

12.1. If someone should say (*in qāla qā'il*): Why do you rule that a vessel, at which a dog or a pig has drunk, is purified only by seven washes, whereas, if carrion falls into [the water], or blood, [the vessel] is purified by one washing . . . Answer is made (*qīla*): in obedience to the Prophet of God.

12.2. Shāfi'ī said, from Ibn 'Uyayna, from Abū al-Zinād, from al-A'raj, from Abū Hurayra, that the Prophet of God said, If a dog laps at the vessel of any one of you, let him wash the vessel seven times.

12.3. From Mālik, from Abū al-Zinād, from al-A'raj, from Abū Hurayra, that the Prophet of God said [the same].

12.4. From Ibn 'Uyayna, from Ayyūb ibn Abī Tamīma, from Muḥammad ibn Sīrīn, from Abu Hurayra, that the Prophet of God said, If a dog laps at the vessel of any one of you, let him wash it seven times, the first or the last time with earth.

12.5. Shāfi'ī said: hence we rule on the dog in accord with the command of the Prophet.

13. The pig is, if not worse than the dog, at least not better, so we rule on it by analogy (*qiyās*) with the dog (*fa-qulnā bi-hi qiyāsan 'alay-hi*).

14.1. We rule on other types of impurity (*najāsa*) in accord with [the hadith] from Ibn 'Uyayna, from Hishām ibn 'Urwa, from his wife Fāṭima

bint al-Mundhir, from her grandmother Asmā' bint Abi Bakr. She asked the Prophet of God about menstrual blood which fell onto clothing. He said, Rub it, scratch it, then sprinkle it with water and pray in it.

14.2. From Mālik, from Hishām ibn 'Urwa, from Fāṭima bint al-Mundhir, from Asmā', from the wife of the Prophet of God . . . [a variant of 14.1].

14.3. Shāfi'ī said: So, the Prophet of God commanded the washing of menstrual blood, specifying no particular number of times . . . [and therefore once will suffice].

14.4. He said: All instances of impurity (*al-ajnās kullu-hā*) are judged by analogy (*qiyās*) on menstrual blood . . . They are not judged by analogy on the dog (*lam naqis-hu 'alā al-kalb*). Because [the ruling on the latter] is a [special requisite of] worship (*li-anna-hu ta'abbud*).

14.5. Don't you see that the word 'wash' can signify once or more than seven times; and vessels are cleaned by one and by less than seven washes; and seven or more washes is the same as less than seven [in relation to the word 'wash']?

15.1. He said: There is no impurity in any living thing that touches a small quantity of water, whether by drinking from it, or by putting any of its limbs into it; except the dog and the pig. Impurity lies only in dead [animals].

15.2. Don't you see that a man may ride a donkey that sweats while he is upon it, and his touching the donkey is halal?

15.3. If someone says: What is the proof for that? Reply is made (*in qāla qā'il . . . qīla*):

15.4. From Ibrāhīm ibn Muḥammad, from Dāwūd ibn al-Ḥaṣīn, from his father, from Jābir ibn 'Abdallāh, that the Prophet of God was asked, Do we perform *wuḍū'* with the leavings of the donkey? He replied, Yes, and with that of all predatory animals.

15.5. Shāfi'ī said, from Sa'īd ibn Sālim, from Ibn Abī Ḥabība, or Abū Ḥabība—Rabī' was uncertain—from Dāwūd ibn al-Ḥaṣīn, from Jābir ibn 'Abdallāh, from the Prophet of God, the same.

15.6. From Mālik, from Isḥāq ibn 'Abdallāh, from Ḥamīda bint 'Ubayd ibn Rifā'a, from Kabsha bint Ka'b ibn Mālik who was wife to the son of Abū Qatāda, that Abū Qatāda came in one day . . . [the story of Abu Qatāda and the cat; see Ch. 2, Sect. III].

15.7. Shāfi'ī said, from a reliable man, from Yaḥyā ibn Abī Kathīr, from 'Abdallāh son of Abū Qatāda, from his father, from his father, from the Prophet of God, the same thing.

15.8. Shāfi'ī said: Hence we judge by analogy (*qisnā*) based on our understanding of what we have described.

16.1. The difference between the dog and the pig in contrast to other animals whose flesh is not eaten, is that the prohibition on keeping the latter is due to some particular quality (*li-ma'nan*). But the prohibition on keeping the dog [*sic*] is arbitrary (*lā li-ma'nan*).

16.2. And [because] dogs have the effect of decreasing the good works of those who keep them—though this is not due to any particular quality in the dog (*min ghayri ma'nan*)—by one or two *qirāṭ*s every day.

16.3. And [the dog] is distinguished also in so far as the angels do not enter a house in which there is a dog; and for other reasons.

16.4. So, the leavings (*faḍl*) of all animals, those whose flesh is eaten and those whose flesh is not eaten, is halal; except for the dog and the pig.[4]

Lines of cleavage in this passage and throughout the *Umm* are in part marked by the formulae, *qāla* (he said), *qāla al-Shāfi'ī* (Shāfi'ī said), or *qāla al-Rabī'* (Rabī' said). These predominantly introduce and demarcate passages which contain a larger or smaller body of logically related material, appropriately distinguished from adjacent passages. See, for example, Paragraphs 1, 2, and 3. On other occasions, the *qāla al-Shāfi'ī* is a concluding rather than an introductory formula, as at 12.5, 14.3, and 15.8; in each of these instances the *qāla al-Shāfi'ī* follows a series of Prophetic hadith and derives from it a juristic conclusion, or at least points to the preceding list as evidence for an already postulated juristic conclusion. On still other occasions a single *qāla* may introduce a body of material which exhibits one or several changes of subject-matter or other logical disjuncture. Paragraph 7, for example, though formally subsumed under the *qāla* of Paragraph 6, initiates a new topic, more clearly related to the following than to the preceding paragraph. After the introductory *qāla* of Paragraph 8 there is no subsequent introductory *qāla* until Paragraph 15 (though there are the concluding formulae at 12.5 and 14.3), in spite of considerable variation in subject-matter. The *qāla al-Rabī'* of Paragraph 4 refers back to Paragraph 3. Formally at least, it is unclear whether it is also intended to cover Paragraph 5. It is probably best to read Paragraph 4 as an interpolation called into existence by the attribution of Paragraph 3 to Rabī': the rules there attributed to Rabī' are thus brought under the authority of Shāfi'ī, by reintroducing Rabī' and having him relegate his own formulation to Shāfi'ī.

The anonymity of an introductory *qāla*, for example at Paragraphs 1, 2, 6, and 8, formally, presents problems of

[4] Muḥammad b. Idrīs Shāfi'ī, *Umm*, i. 5.10–7.6/4.15–6.7.

identification. Where the last explicitly identified tradent was al-Shāfi'ī, as is the case for Paragraphs 1 and 2, it is reasonable to assume that the pronoun in *qāla* refers to him. But for Paragraphs 6 and 8, the last-named tradent was Rabī' (at 3 and 4), and it might in turn seem reasonable to assume that the pronoun here refers to him. Such is not the case. Similar problems abound in the *Mukhtaṣar* of al-Muzanī; and in all cases, there and here in the *Umm*, it appears that the later tradition read the anonymous *qāla* as signifying Shāfi'ī.

III

The attribution of two items (Paras. 3 and 4) to Rabī' would seem to imply that these are late additions interpolated into a text which is otherwise fully attributed to Shāfi'ī. This conclusion, however, presents problems. Paragraph 3 gives expression to a number of juristic rules regarding the sweat of humans and animals, and the *su'r* of animals, all of which are formally related on the authority of Rabī'. But the sweat of animals is explicitly also the subject-matter of Paragraph 6 (anonymous, but read as from Shāfi'ī), and is raised again at Paragraph 15.2. The *su'r* of animals is the subject-matter of 5.2 (to be understood as from Shāfi'ī) and remains the main subject-matter from Paragraph 9 to the end of the passage. The problem is this: if Rabī' had before him a text including all the material that is now before us, why should he have introduced his own opinion—with miserably rudimentary arguments—into a passage by Shāfi'ī, in which the questions he, Rabī', raised were more circumstantially dealt with by his acknowledged master? The answer I would propose is that there was no such text by Shāfi'ī, not even in the time of Rabī'.

Paragraph 3, considered in detail, exhibits a number of familiar features. It begins (3.1) with a series of three cases which can be seen to be genuine problems in relation to a background law which is not stated. The background law is that human sweat in general does not impart impurity. What is being asked here is whether exceptional cases may be considered to contravene the general rule. The exceptional cases are those of a Christian woman, a menstruating woman, and a ritually impure [woman] (reading in the last case the adjective, *junub*, which cannot be marked for the feminine, as referring like the other elements in the list to a

woman). Similar problems had been raised within, for example, the Mālikī tradition[5] where there was concern with the problem of wives, especially Christian wives. This nuclear passage, then, can be interpreted as having its origins as a sequence of responsa related to marital relations. It was later expanded by the addition of a rule about the Magian, Majūsī (3.2). This expansion, however, is illogical, for the original rule referred to women—probably wives, contact with whose sweat was a routine possibility for married men. The expansion refers to Magians in general (*al-majūsī* versus *al-naṣrāniyya*) which represents quite a different issue. Following the theme of human sweat, the passage was expanded at 3.3 to include a general ruling on the sweat of animals, without any explicit exception of the dog and the pig. Subsequently, following the theme of animal-pollution, the passage was expanded again to deal with *su'r*. On this occasion there is more care to specify *sibā'*—predatory animals, the classic problem case, which are here ruled not polluting, and to enumerate the exceptions (the dog and the pig). In other words, this small passage shows the familiar characteristics of organic growth, being similar in this respect to material found in the *Mudawwana* or the *Aṣl*. Longer passages incorporating a coherent and consistent rational argument, as at Paragraphs 7 and 8, or a lengthy, subtle, and nuanced exegetical argument, as at Paragraphs 9–15, are probably to be understood as later developments.

Now, this is consistent with the supposition that these materials were added to the 'Rabī' said' passage rather than that the Rabī' material was interpolated into a previously existent text by Shāfi'ī. Both the content of the Rabī' passage (unnecessarily repeating material also presented, and in a superior manner, under a *qāla al-Shāfi'ī* rubric) and the form (rudimentary in argument, and archaic and incoherent in its formal development) suggest that the material attributed to Rabī' here is older than the material attributed to Shāfi'ī. This leads to the postulate that precisely that material in the *Umm* which is thought to be most characteristic of Shāfi'ī the jurist, namely the sophisticated exegetical argument based on explicitly adduced Prophetic hadith, may be amongst the last layers of material to enter the text.

[5] e.g. Saḥnūn, *Mudawwana*, i. 14 and 32–3.

IV

That material, too, deserves detailed analysis. Paragraph 1, like Paragraph 3, can be shown to exhibit some degree of organic growth. The most obvious disjuncture lies at 1.3. Here the word 'likewise'—*kadhālika*—which normally operates to extend the immediately preceding ruling (see Paras. 3.2 and 6) introduces a rule which contrasts with the previous one. It may originally have followed directly after 1.1, for the bodies of living things, once dead, are not automatically included in the category of haram things (for example, if slaughtered in an appropriate manner), and it was therefore necessary to extend the law—*kadhālika*—explicitly in order to make the point about dead animals. The tradition produced two exceptions to the generalization that all dead animals impart impurity to water. The first related to fish and locusts, which, as food, were distinguished from other animal foods in not requiring to be ritually slaughtered. By analogy with this rule they were deemed not to impart impurity to water when dead. The other exception was dead insects, though this was in time qualified. Both exceptions have been incorporated into this text. The ruling on the fish and locust (1.2) is introduced before the general ruling on living things, producing two adjacent rules (1.2 and 1.3), which, read strictly, contradict one another. The ruling about insects is introduced, more logically, in the form of a conditional sentence (1.4) which serves to define a category that distinguishes insects (living things but without a blood-system) from other living things. It is probable that the original intention of Paragraph 1.4 was to create a blanket exception for insects. But Paragraph 1.5 converts this into a discussion of *ikhtilāf* worked out in the form of an exegetical argument about the implications of a Prophetic hadith. The emergence and development of this passage is discussed at some length in Chapter 5, Section III. It is clear that the whole passage grew up by the familiar processes of juxtaposition, interpolation, and developing argumentation, achieving at Paragraph 1.5 a hermeneutic subtlety not paralleled elsewhere in early juristic texts.

Throughout Paragraphs 1 to 6 we are faced with a number of juristic statements all of which are formally related in the current text to the initial ruling that haram things cause impurity if they fall into water. In Paragraph 1 this is developed into a discussion of carrion. At Paragraph 2, the special case of bird-droppings is introduced: haram, but solid (to a degree) and therefore problematic. Paragraphs 3, 5, and 6 deal with sweat and saliva in the following order: human sweat, animal sweat, animal saliva, human saliva, animal saliva, human and animal sweat. The repetition serves no purpose and is rendered still more futile by the succeeding exegetical discussion which systematically derives all of these rules from an analysis of Prophetic hadith. The organization is fundamentally correct, however, because, like the bird-droppings, these are marginal or doubtful cases of haram, or potentially haram, things which fall into water. The bulk of these statements is normative in form not exegetical, the only major exception being Paragraph 1.5, and perhaps the last phrase of 2. No attempt is made to justify the statements made, for example at Paragraph 5.1 where the products of spitting, hawking, and blowing the nose are declared not to produce impurity, or at Paragraph 6 where it is declared that the sweat of man and animals does not cause impurity. This absence of justificatory argument is to be contrasted with the exegetical arguments designed to justify the ruling on sweat which follows. All of this material, Paragraphs 1–6, is expository, repetitive, and, much of it, relatively ancient compared with the exegetical material which follows, at Paragraphs 9–15.

Paragraphs 7 and 8 deal with the problem of how to purify impure water (7) and impure containers (8). At Paragraph 7, the subject at issue is the distinction between scooping out (*nazaḥ*), disallowed, and pouring on (*ṣabba 'alā*), favoured. This is certainly a polemical response to a Ḥanafī position, set out eventually in numerous hadith, which specifies, as a mode of purification of things like wells (a) that the thing causing impurity, for example carrion of one kind or another, should be removed and (b) that a certain quantity of water should be scooped out, variously specified as 30, 40, or 50 buckets-full.[6] Paragraph 8 focuses on the vessel, not the water. Again, the issues raised recall the Ḥanafī tradition. In tortuous Arabic, the passage manages to deal with large and small vessels, pouring on as opposed to scooping out, removal of the haram thing, while referring also to the Shāfi'ī ruling (denied by some Ḥanafīs) that there is a specific quantity

[6] See, for the development of Ḥanafī argument and hadith on this, Aḥmad b. Muḥammad al-Ṭaḥāwī, *Ma'ānī al-āthār*, i. 6–10 (a very complex piece of argumentation).

beyond which water is not susceptible to impurity. Everything in these two paragraphs confirms that they constitute an *ad hoc* polemical response to specific Ḥanafī rulings. In their present context, they are in a certain degree of dissociation from the surrounding text; indeed, read strictly, the reference in Paragraph 8 to vessels containing a small quantity of water make it contradictory to the whole of Paragraphs 9–15, which propose and defend a different way of dealing with impurity in such vessels. It seems these passages emerged in a polemical context and were later incorporated here, where they have a clear if uneasy relevance.

Paragraphs 9–15, starting with the question of how to deal with an impure vessel, go on to question why some animals are differentiated from others and why the mode of purification appropriate in the case of some animals is differentiated from the standard mode of purification. Of animals, only the dog and the pig, when alive, can cause impurity in water and in the attendant vessel. This form of impurity is to be distinguished from all other forms in so far as it requires a sevenfold washing of the contaminated vessel. All other forms of impurity affecting a vessel—derived from dead animals, urine, excrement, wine, etc.—can be removed by a single washing, though a triple washing is preferred. Two special animals cause a special form of impurity; all other impure things cause a 'normal' form of impurity.

Paragraph 9.1 states the rule that a polluted vessel must be washed at least once, and preferably three times. Not here, and not anywhere is there a justification for this rule: it is clearly the established tradition, known and generally unstated, and to a degree disrupted by the intrusive dog-hadith. Paragraph 9.2 states the exception: in the case of dogs and pigs which drink at a vessel, the vessel must be washed seven times, etc. It is possible that this passage was originally followed directly by Paragraph 12, which neatly expresses the reason for this rule, namely obedience to the Prophet of God whose commands are here exemplified in three versions of the dog-hadith, and a conclusion of the 'hence we rule' type. This is a genuine case of deriving the law from hadith and is the first explicit case of this kind discussed in this book. The hadith-derived law is allowed to stand side by side with the traditional law and so creates a dual system of pollution. (Compare this with the Ḥanafī tradition. The early Ḥanafī ruling

on the dog, as expressed in the *Aṣl*, simply assimilates the dog to other polluting animals, and makes no reference to the sevenfold washing or to the hadith. Only in the work of Ṭaḥāwī is the existence of this hadith acknowledged, and its effect denied: Ṭaḥāwī upholds the Ḥanafī tradition against the hadith—but by that time needs to base his argument on other Prophetic hadith.[7])

Paragraph 13 explains why the ruling on the dog is extended to the pig. It may serve here as yet another example of the unpredictable nature of *qiyās* argument. One might ask, if it is the case that the law is derived from hadith, and that one can extend the scope of a particular hadith, exegetically, by *qiyās*, why is it that one does not extend the ruling on the dog to all living things, or to all predatory animals, or even to all domestic animals, depending on what category one decides the dog belongs to? There is of course no single answer, though some later thinkers, conscious, no doubt, of precisely this kind of criticism, were to try to restrict the analogical extension of rules to those cases in which there was an *'illa manṣūṣ ilay-hā*—a reason specified in the text. The question, however, is a natural one and it was asked, obviously, at around the time the argument was first produced; for, Shāfi'ī gives his laboured response to precisely this question throughout Paragraph 15. Here, he argues that there are other Prophetic hadith which show clearly that one can use for *wuḍū'* the left-over water of respectively donkeys and predatory animals, and the cat. In fact, given the wonderfully convenient hadith about predatory animals, the hadith about the cat becomes superfluous. Shāfi'ī states at the end (15.8) that he is willing to extend these hadith by analogy and so achieve the conclusion, already expressed at 15.1, namely that there is no impurity in living things except the dog and the pig. In fact, there is not much analogy involved here, since it is precisely the established problem cases that are dealt with in the Prophetic hadith, namely the donkey and predatory animals. It seems probable that this hadith grew up as a result of a juristic ruling that emerged in the Shāfi'ī school which declared that living animals were not a source of pollution (cf. 3.3 and 3.4). This in turn was due to the fact that the accepted ruling on predatory animals had never generated a hadith—because it had

[7] Ṭaḥāwī, *Ma'ānī al-āthār*, i. 12–13.

never been questioned. For the Shāfiʿīs no hadith meant, or might in appropriate circumstances mean, no law.[8]

Conceding the argument enunciated throughout Paragraph 15, which claims that the ruling on the dog is a special act of worship which is not to be used as a basis for *qiyās* (a *taʿabbud*, cf. 14.4), one might still ask then why it is that one does extend this special rule to the pig. This question is acknowledged and answered at Paragraph 13: the pig is at least not better than the dog. This is hardly sufficient at an intellectual level; for the low status of the pig is derived from a Quranic regulation about what to eat, and since there are no general rules or categories that account for this rule, the pig, too, should be treated as a special case, an instance of *taʿabbud*. It is noticeable that the pig does not receive any special mention in the older (Mālikī and Ḥanafī) discussions of purity (see Chs. 1–3), and there is some evidence that it has been systematically interpolated into the Shāfiʿī material quoted here. Compare 3.3 and 3.4 and consider the unintegrated nature of the references to the pig, outside of Paragraph 13. At Paragraph 16.1, though the first sentence refers to the dog *and the pig*, the immediately succeeding sentence and all the proof-texts refer only to the dog. This may be an instance of the relatively late impingement of Quranic material on Muslim jurisprudence.[9] The absence of good argument however did not prevent the pig from sharing the special status of the dog when it came to the polluting of vessels.

Conceding then that the dog, and the pig, unlike other living animals, impart pollution to water and thereby to vessels, one might infer, by analogy, that the appropriate—general—response to impurity in a vessel is to wash it seven times. This inference, too, is foreseen and refuted throughout Paragraph 14, where the rule is defended that impure vessels, when the impurity is caused by anything other than the dog and the pig, are to be washed, at least once, and otherwise as many times as one likes. The real reason for this ruling is undoubtedly tradition, in the sense of established custom and practice (evident at 9.1). The rule had never been derived from a text. It was part of an unquestioned juristic tradition, which in turn probably arose ultimately from practice. Exegetical argument based on the intrusive dog-hadith

[8] Cf. Ch. 2, Sect. VI.

[9] See Ch. 8, Sect. V.

made it seem that a sevenfold washing might be the norm and so provoked a defence of the known law. The defence, characteristically, and perhaps inevitably, takes the form of a further piece of exegetical argument. The hadith selected as the basis for this argument (14.1–14.3) was discovered by the Shāfiʿīs to have more than one useful context[10] and, on the face of it, has little to do with the specific problem of pollution in water. It demonstrates that when a thing (specifically an article of clothing) is deemed to have suffered an impurity (specifically, from menstrual blood, now dry) it can be rendered pure by washing. And washing in this case is unspecified as to number and type. This can be used as the basis for analogy whereas the dog-hadith cannot, giving a ruling that all polluted things, including vessels, if polluted by something other than dogs or pigs, can be purified by washing once or several times. There might be some objections to the analogical use of a hadith which specifies dried blood to derive a rule on pollution mediated through water. But nothing related to that is raised in this text, which manages to focus fairly exclusively on the linguistic (and numerical) implications of the command to wash (14.3 and 14.5). There is, of course, still a question (14.4) why menstrual blood can be the analogical base for all types of impurity while the dog cannot become the analogical base for anything, neither for rules about animals (Para. 15), nor for rules about cleansing impurity (14, especially 14.4). The term *taʿabbud* was a useful device for sealing off a hadith and preventing it from having any influence on the legal tradition as a whole.[11]

It was suggested above that Paragraph 12 should naturally follow Paragraph 9. Paragraphs 13, 14, and 15, all analogical extensions of, or arguments about the analogical extension of, the rule at 9.2, come naturally after Paragraph 12; they represent a coherent and integrated totality of argument based on questions that arise naturally as a result of analytical thought about a particular hadith. Paragraphs 10 and 11 are probably interpolations. Paragraph 10 deals with the case where no earth is available for cleansing purposes. It seems to fall into two segments, the first suggesting that one can, in case of need, use potash and palm-leaves (10.1), the second suggesting rather that it is a case of

[10] See the passage from the *Umm*, cited below at Ch. 5, Sect. IV, on *mass al-dhakar*, at Para. 11.

[11] See also Ibn ʿAbd al-Barr, *Istidhkār*, i. 208 and 258 ff.

ikhtilāf (10.2). Paragraph 11 is a twofold analogical extension of the rule enunciated at 9.2 and defended throughout Paragraphs 12 to 15. The rule set out in Paragraph 9.2 specifies that dogs (and pigs) which drink at vessels occasion a type of impurity requiring a sevenfold cleansing of vessels; and the hadith which is the source of that rule also specifies drinking (or lapping) as the immediate cause of the impurity. A strict reading of the hadith, in close conjunction with the argument of Paragraphs 14 and 15, which pre-empts analogical extension of the ruling on the dog, might suggest that it is invalid to generalize from this hadith (about drinking) to a general rule (about the bodies of the animals concerned). But this is what is done at Paragraph 11.1. Arguments based on analogy when they are of the type discussed in this section are largely arbitrary: this after all seems to be based on an analogical extension of the word 'drinks' or 'laps' so that it is deemed to cover all types of 'touch'. Whether this is fully compatible with all the arguments of 14 and 15 is dubious. The point made at 11.2 becomes the subject-matter of Paragraph 15. Paragraph 16, effectively an appendage, witnesses a continued worrying at the question whether there is any reason (*ma'nan*) for the peculiar status of dogs and pigs. There is not. But there are other Prophetic hadith which devalue the dog, obliquely referred to at Paragraphs 16.2 and 16.3.

V

Schacht assumes that the literary formulation of exegetical argument of the type considered here at Paragraphs 12 and 13, and, especially, at Paragraphs 14 and 15, can be dated to the lifetime of Shāfi'ī. The implication of the present analysis is that these paragraphs are precisely the latest materials to enter the text. All of this material post-dates Rabī'. The citations in his name are amongst the least sophisticated parts of the text. Most of the normative material throughout Paragraphs 1 to 6 is older than the argumentative material of later paragraphs; it may be, but need not be, as old as the lifetime of Rabī'. Many originally distinct passages have been juxtaposed and interpolated to create the present text. The hermeneutic material, clearly secondary to established law, shows every sign itself of having grown in response to academic thought about the nature and limits of *qiyās*

(a technical term absolutely central to the processes of Paras. 13, 14, and 15, but not in evidence for Paras. 1 to 6). Providing a date for this kind of material is almost pointless. Conceding a (surely limited) impetus from Rabī' himself, the growth of the text can be placed in the second half of the third century, with most of the material and all of the most sophisticated argument entering the text towards the end of that period. Stabilization of the text was slow, and, as in the case of the *Aṣl*, scarcely achieved in medieval times. There are obvious (and probably minor) interpolations from much later than the third century[12] and no evidence of any major redaction achieved before the decisive intervention of Sirāj al-Dīn Bulqīnī (d. 805).

Bulqīnī is responsible for the collection, ordering, and for many of the chapter-headings of the manuscript that gave rise to the printed *Umm*. The majority of extant manuscripts represent his redaction. There are some fragments of pre-Bulqīnī material, which deserve further investigation.[13] A cursory survey of some of these[14] suggests that their detailed content is largely identical with the material gathered and edited by Bulqīnī, but they give little evidence of anything other than a rudimentary ordering. The accumulation of Shāfi'ī dicta mediated through Rabī' was clearly a long-term process associated with a particular school or schools in Fusṭaṭ; it continued throughout the second half of the third century, possibly into the fourth. The ordering and storing of this material was meticulous but casual. The production of elegant and erudite compendia in the fourth and fifth centuries relegated this material to a secondary status. It was a treasure trove—and was no doubt consulted but it remained of very limited circulation until Bulqīnī gathered it into his edition. That or something like it is the history of the present *Umm*.

The word *umm* is a verbal noun derived from the verb *amma* wa'*ummu*, meaning to lead or guide; it is related to the noun *imām*, meaning leader.[15] *Umm* thus means 'guidance' or 'authority' and, applied to a body of early Shāfi'ī material, clearly has connotations similar to those of the word *aṣl* (= source, root, authority) applied to a body of early Ḥanafī material. The material was authoritative

[12] W. Heffening, ad 'Shāfi'ī' in *EI*(i).
[13] Cf. Sezgin on Shāfi'ī, *Geschichte*, i. 484–7.
[14] Limited in practice to those available in the Chester Beatty library in Dublin.
[15] Norman Calder, 'The significance of the term *imām*', 262–3.

and deemed to be by Shāfi'ī, though in fact the end-product of school discussions arising generations after his death.

That the Shāfi'ī school was ahead of other schools in devising hermeneutic arguments that would ensure the accommodation of the law to a growing set of Prophetic hadith can be accepted, but not as far ahead as Schacht would have us believe. Already in the late third and early fourth centuries, the Ḥanafī writer Ṭaḥāwī had taken on the task of dealing comprehensively with hadith and their relationship to Ḥanafī law. He does not produce arguments that match the best of those produced in the *Umm*, but his work at least reflects a broadly parallel set of concerns. The development of hermeneutic skills in a juristic context would appear to be not so much a particularly Shāfi'ī achievement as a particularly Egyptian one, for it was in that area, and at roughly the same time, that the Ḥanafīs and Shāfi'īs began to display such skills. This was in the decades immediately before and after 300.

VI

Schacht suggests that Shāfi'ī, by adopting the principle that the law is derived solely from Prophetic hadith, cut himself off from the organic tradition of the ancient schools.[16] This is only partly true, for two reasons. First, the emergence of hadith was governed largely by the needs of the ancient schools to defend and to justify their law. And second, even when a hadith actually disrupted the known law, as is the case with the hadith about the dog, it was always possible to preserve the inherited law, side by side with the exegetical law. Notwithstanding this, the text of the *Umm* represents something quite new within the corpus of ancient juristic writing. It has developed a new literary technique based on a highly selective citation of 'sources'—the main, but not the exclusive principle of selection being a preference for Prophetic hadith—and on subtle exegetical argument based on these sources. While it is not necessarily the case that the law became cut off from the ancient tradition, or that it became cut off from the actual practice of the people (it was always possible to devise an exegetical link between a practice and a text) one result of the change in the nature of argument was that the law might become a

[16] Schacht, *Origins*, 80, 213.

purely academic task, a meditation on the significance of hadith, irrespective of practice, a search for the implications of the law, in spite of what actually happened. Formally, i.e. in its relation to Prophetic hadith, this was a new possibility; that some forms of thought about the law could be indifferent to practice was, however, a permanent possibility wherever and whenever jurists thought. See further Chapter 9, Section V.

5

THE *MUKHTAṢAR* OF MUZANĪ

I

According to Shāfi'ī school tradition, Ismā'īl b. Yaḥyā al-Muzanī took over leadership of Shāfi'ī's *ḥalqa* or *majlis* (his discussion group, or circle of pupils) on the death of Buwayṭī in 231, and held that position until his own death in 264, when he was succeeded by Rabī' b. Sulaymān (see Ch. 4, Sect. I above). This is a pleasingly neat pattern of succession. Muzanī is credited with a work known as the *Mukhtaṣar* (Summary or Digest). It is a juristic composition which purports to derive its materials partly from the extant written works of Shāfi'ī and partly from Muzanī's own memory of sessions with Shāfi'ī. This is evident both from the form and structure of the book and from the integrated chapter-headings, some of which name the sources from which material is derived. These chapter-headings are varied in distribution, in form, and in their relationship to the material which they purport to cover. Here are two examples:

1. The *mukhtaṣar* (summary) on *shuf'a* (pre-emption), taken from the *Jāmi'*, from three different sections and from the *Ikhtilāf al-Ḥadīth*.[1]
2. The *mukhtaṣar* (summary) from the *Jāmi'*, from the Books entitled *al-muzāra'a*, *kirā' al-arḍ*, and *sharika* in land (= share-cropping, land-rental, common ownership in land), containing material from the *Ikhtilāf Abī Ḥanīfa wa-Ibn Abī Laylā* along with problems which I heard directly from [Shāfi'ī].[2]

The *Jāmi'* (Collection or Compendium) referred to here is obviously a source of Shāfi'ī dicta.[3] It may be an earlier version of

[1] Ismā'īl b. Yaḥyā al-Muzanī, *Mukhtaṣar*, 119. [2] Ibid. 128.

[3] *Jāmi'* is a common term for small and large collections of juristic dicta. Cf. the *Jāmi'* of Ibn Wahb; the *Jāmi' al-kabīr*, and the *Jāmi' al-ṣaghīr* of Shaybānī.

what is now called the *Umm*, a title not referred to in Muzanī. The *ikhtilāf* works referred to are known and preserved, wholly or in part, in the *Umm*. The second of these headings shows how reference to books may be combined with reference to direct audition.

These explanatory chapter-headings are not a uniform feature of the Muzanī text. They are not found in the early parts of the work, but become a fairly consistent feature of later sections. Other early *fiqh* works have shown evidence of editorial or redactional processes which have been carried out only partially, and this may be another example. It is by no means certain that these headings—in spite of the fact that they contain first-person references purporting to come from Muzanī—are aboriginal parts of the book. They could be deductions from the contents and argument of individual sections. A deduction serves after all an academic purpose (and *fiqh* is an academic discipline) as well as a polemical purpose (it constitutes an assertion that Muzanī's work is indeed a summary of pre-existing works by Shāfi'ī). In the passages analysed below, which do not exhibit chapter-headings identifying sources, it is none the less possible to locate the putative sources, and to create a heading which would be structurally of the same value as those headings which now exist. For example, Muzanī's discussion of the question whether sleep occasions cancellation of *wuḍu'* (see Sect. IV) contains material from the (postulated) *Jāmi'*, also perhaps from the *Ikhtilāf Mālik wa-'l-Shāfi'ī*, and from direct communication between Shāfi'ī and Muzanī. This can be deduced from the text itself and from a comparison with the various Shāfi'ī materials preserved and published under the title *Umm*. It does not follow that these contents were analysed, gathered, and organized by Muzanī, in the way that one might expect from the title of his work, *Mukhtaṣar* or Digest, with its implications of a single redactional effort brought to bear upon a fixed body of materials. The chapter-headings are one way of analysing the contents of the *Mukhtaṣar*; I shall be proposing a different mode of analysis.

That the chapter-headings are not integral to the text, but a way of dealing with heterogeneous materials which pre-existed their present context, may be further indicated by the fact that they are sometimes quite inadequate as a mode of description of what the texts contain. The section translated below, in Section IV, which

deals with the general question of what occasions cancellation of purity and so requires renewal of *wuḍūʿ*, comes directly after, and without any marker of division, a discussion of *istitāba* (= cleansing after defecation). The heading for the whole section is *Bāb al-istitāba*, which simply reflects an inadequate assessment of the subject-matter and its lines of division. The editorial and redactional processes that have produced the present text, then, are not consistently applied. Different sections reveal different modes of analysis and organization. The sections analysed and discussed below show differential development: some evidently old material, if it precipitates no problems, is preserved unchanged; other material is modified, eliminated, or added to, in the light of developing argumentation.

When Shāfiʿī's biographer, Bayhaqī, said of the *Mukhtaṣar* that Muzanī had composed it from Shāfiʿī's works, and from what he, Muzanī, had heard directly from Shāfiʿī, he was expressing a historical conclusion derived directly, and reasonably, from the text that lay before him. It is unnecessary, and probably erroneous, to think that he had independent historical evidence for his claims. Analysis of the contents of the *Mukhtaṣar* had produced the assumption that Muzanī worked from known works by Shāfiʿī. These have been partly identified by the creation and interpolation of chapter-headings which aspire, not always successfully, to distinguish and order the component materials. Later readers of the Muzanī text are presented with a historical fact: Shāfiʿī wrote books, which were used by Muzanī in the creation of his *Mukhtaṣar*, together with his own personal recollection of Shāfiʿī's dicta. This analysis of the work is more or less implied, in the first sentence of the book, which states, Ismāʿīl b. Yaḥyā al Muzanī affirms that he has created this digest from the knowledge of Muḥammad b. Idrīs al-Shāfiʿī [i.e. his books] and from the implications of his words [i.e. as orally received direct from Shāfiʿī]—*ikhtaṣartu hādhā 'l-kitāb min 'ilm Muḥammad ibn Idrīs al-Shāfiʿī wa min maʿnā qawli-hi*. This sentence, however, though it reflects a plausible account of the book's contents, is not in the end an adequate one. It should be understood as a relatively late introductory explanation of the text, couched in the form of a first-person affirmation by Muzanī.

In addition to major structural problems, which will be made evident through detailed analysis of selected passages, the work

presents a different kind of problem, arising from the frequent examples of disagreement between the opinions of Shāfiʿī as preserved in the transmission of Rabīʿ (the *Umm*) and as recorded in the *Mukhtaṣar*. Bayhaqī reports that he approached Abū Zurʿa al-Dimashqī and said to him, How frequent are the attacks of Muzanī on Shāfiʿī! Dimashqī proposed a reformulation: How frequent is Muzanī's injustice to Shāfiʿī! Whatever the terminology, there was a problem which required explanation. Bayhaqī began by quoting Buwayṭī, who, on being questioned about Muzanī's participation at Shāfiʿī's lectures (*suʾila ʿan samāʿ al-Muzanī min al-Shāfiʿī*), replied, He was a child, weak [sc. in memorizing and understanding]. This was a biographical fragment preserved in order to express a distrust, within the tradition, of Muzanī's work. Bayhaqī went on to explain that it was possible to find in Muzanī's work (which was supposed to be a summary, *mukhtaṣar*, of the views of Shāfiʿī) a version of a problem (*masʾala*) in which various conditions attendant upon the problem were omitted, though they were available in the transmission (*riwāya*) of Ḥarmala or Rabīʿ. He (Muzanī) would transmit the problem in its deficient form and institute an attack upon it, on the grounds of its deficiencies, though these were remedied within the tradition. Furthermore, if Shāfiʿī dealt with a problem in a brief and abbreviated way in one place, and in another dealt with it in a comprehensive manner, Muzanī would transmit the abbreviated version and then proceed to criticize it. And so on. The problem was, in general terms, that in a number of different ways, Muzanī's work is inexplicably different from the transmission of Rabīʿ; in particular, it exhibits problems of expression, of argument, and of organization which have their solution in Rabīʿ. Since Rabīʿ's work is deemed to be a simple transmission of Shāfiʿī's words, Muzanī's disregard of Shāfiʿī is inexplicable, except on grounds of carelessness or pigheadedness. Accordingly, within the biographical tradition of *Ṭabaqāt*, the high regard for Muzanī's person and indeed for his manipulation of argument (Shāfiʿī is made to describe him as *aqyas al-nās*) is tempered by a recognition of his individualism which frequently leaves him outside the main stream of Shāfiʿī thought, the *madhhab*.[4]

[4] Bayhaqī on Muzanī, *Manāqib*, 347–8. Subkī's biography (*Ṭabaqāt*, ii. 93–109) reveals on many narrative levels the reconciliation of school tensions.

There is of course another way of interpreting the undoubtedly correct observations of Bayhaqī on the relationship between the writings of Muzanī and those of Rabī'. It is possible that the starting-point for Muzanī's *Mukhtaṣar* is not identical with the materials now in the *Umm*. Certainly the *Mukhtaṣar* presupposes the prior existence of some texts that contained a body of Shāfi'ī dicta. Whether these were works by Shāfi'ī, whether indeed they were stable works at all, as opposed to fluid and developing records of school discussions, and whether they were identical with works of the same title, published now in the *Umm*, these are more difficult questions.

II

To a degree it is not only possible but easy to identify the longer form of a passage which has been abbreviated in the *Mukhtaṣar*. Paragraph 3 in the Muzanī passage quoted below, at Section IV, introduced by a single 'he said'—*qāla*—represents a conflation of two passages each introduced by a separate 'he said' in the corresponding text of the *Umm*. The abbreviation consists of a slight reformulation of the words attributed to Shāfi'ī, a conflation executed by a simple conjunction (*wa*) and a shortened version of both the *isnād* and the *matn* (text) of a hadith reported from Anas bin Mālik.[5] There are many examples where a complex presentation of evidence in the *Umm* is correctly summarized by Muzanī after the introductory formula, *wa-'ḥtajja fī dhālik bi . . .*—he argued on that matter as follows . . . See, for example, Paragraphs 10 and 11 in the same passage below.

More complex than these is the passage in which Muzanī summarizes Shāfi'ī's views on *su'r*. This occurs in a chapter entitled *Bāb mā yufsid al-mā'* (On that which pollutes water). Here, nearly all the material and argumentation given in Paragraphs 9–15 of the Rabī' passage translated in Chapter 4, Section II above is recapitulated in shorter form. Muzanī begins by stating that small quantities of impure substances, *najāsa*, render water impure if the water is contained in a vessel (see Para. 9.1). This is followed by a digression, not represented in this part of the Rabī' text, in which the question is raised whether water that has been used once for

[5] The original passage from the *Umm* will be found at Paras. 5 and 6 of the passage translated in Ch. 5, Sect. V below.

wuḍū' can be reused by a different person. Muzanī then takes up the question of the dog and the requirement of sevenfold washing (9.2 and 12). The *ikhtilāf* on whether some other cleansing agent may be substituted for each is explained (10.1 and 10.2) and Muzanī adds two remarks of his own, introduced by *qāla al-Muzanī*, in which he expands the analogy with *istinjā'*, and adds an analogy with the cleansing agents used for tanning. He then explains that vessels affected by impurities other than that of the dog require a threefold or at least a single washing (9.1), and that the bodies of both the dog and the pig (introduced rather late in this discussion, as in the original) render water in a vessel impure (11.1). This limited analogical extension is contrasted with the wide analogical extension of the hadith from al-Asmā' (14). Muzanī explains that the pig is incorporated within the ruling on the dog because it is worse (*aswa' ḥālan*) than the dog (13). He then introduces a summary of Shāfi'ī's argument that animals other than the pig and dog do not cause impurity by drinking at a vessel: *wa-'ḥtajja fī jiwāz al wuḍū' bi faḍli mā' siwā al-kalb wa-'l-khinzīr bi . . .* Here he refers to three hadith, namely the donkey-hadith (15.4 and 15.5), the cat-hadith (15.6 and 15.7), and a third hadith in which the Prophet states, If a fly falls into a vessel [containing liquids], dip it in.[6]

This last hadith is not used in the current text of the *Umm* for the purpose of this argument. In all other respects, the Muzanī passage is an adequate summary of the positions adopted, the structure of argument, and the proofs cited in the *Umm*.

It follows from these observations that the formula 'Shāfi'ī said', which in the *Mukhtaṣar*, as in the *Umm*, is a major introductory device, is certainly not to be taken literally in the Muzanī text, for in no sense at all is he giving the words as he (presumably) read them in his source. He would appear to paraphrase, summarize, omit, and add material (as in the addition, in this context, of the material on water already used for *wuḍū'*; and of course in the addition of his own thoughts, introduced by *qāla al-Muzanī*). It seems also to be the case either that Muzanī felt free to change quite radically the order of the material before him, or, equally possible, that the text before him did not include all of the material in the same order as we now have it.

[6] Muzanī, *Mukhtaṣar*, 8.

That Muzanī's source-text was not identical (though very similar) to the current form of the Rabī' material is evident too from a significant divergence in argumentation. The argument that living animals other than the dog and the pig did not cause impurity in water was supported in Muzanī's source-text by three different hadith. But only two are recorded in the *Umm*. Whatever Muzanī was summarizing, it was not the Rabī' material we now have. It seems preferable to suggest that both texts are drawing their material from a common body of Shāfi'ī dicta. Muzanī, on the whole, summarizes, but also systematizes, expands, adds comments, and, as we shall see, even contradicts his source-material. He refers to but rarely cites hadith in full, and almost never gives *isnāds*. Rabī' gives a fuller presentation of material, but not necessarily a verbatim one: he too tries to improve the arguments and the ordering of material. He gives hadith and *isnāds* in full, sometimes with multiple versions. It can be shown that Rabī' omits material that has become problematic and systematically reformulates more complex arguments as they develop out of older material. These processes, complex though they are, can be illustrated from the case of the hadith about the fly.

III

Muzanī asserts that his source contains an argument in which a Prophetic hadith about a fly that falls into liquid is adduced as evidence to prove that living animals other than the dog and the pig do not cause impurity in water. There can be no reason to doubt this claim. In spite of anomalies, his work is generally an adequate summary of material that can be found somewhere in the Shāfi'ī tradition and there are numerous examples of his summary being precisely correct. In this particular case, his summary, though not following the order of his putative source, is correct in nearly every detail, except in its mention of this hadith. Further, the hadith about the fly is clearly relevant. If the Prophet suggested that a fly, landing on water, should be dipped under the water (rather than that the water should be thrown away, etc.) then this certainly can be used to confirm that living things do not cause impurity in water.

However on reflection this hadith suggests problems and these are drawn into the Muzanī text, immediately after the summary. Here are the comments that follow the hadith on the fly:

> 1 He said: dipping the fly into the vessel doesn't mean killing it. The fly is not eaten, so if a fly, or a beetle, etc. dies in a vessel it causes impurity.
> 2 He said in a different place: If it falls into water which is capable of being rendered impure [read *yanjusu mithlu-hu*] it renders it impure, if it is something with a blood-system (*nafsun sā'ila*).[7]

Paragraph 1 here is a response to an objection. If a fly falls into water, and is dipped into the water, it is likely to die. And since a fly belongs to the category of things not to be eaten, its carcass imparts impurity. In order to preserve the value of the hadith in the context in which it is adduced, we are told that dipping the fly does not necessarily kill it. Paragraph 2 represents an advance on this. It gives a report from Shāfi'ī, evidently derived from a different section of the source material, in which he states that only things with a blood-system, *nafsun sā'ila*, cause impurity in water—when dead (we know the reference is to dead animals because we know the source, see Ch. 4, Sect. II). Thus, the relevance of the hadith, in context, is maintained after a fashion. If the fly lives, it does not cause impurity, and so confirms that living animals in general do not cause impurity; if it dies it still does not cause impurity, because it does not have a blood-system—a point which is relevant to understanding the motive of the Prophet in ordering that flies should be dipped under the water. The text thus reveals evidence of doubts and arguments that have arisen concerning the relevance of a particular hadith in a particular argument. Overall the relevance of the hadith to its context is defended but with some loss of cohesion. The original point was a summary of Shāfi'ī's alleged argumentation about the capacity of living animals to cause pollution, but as the text develops, a new problem becomes the focus of attention, namely whether dead flies cause impurity in water. There is uncertainty about the category to which (dead) flies belong: at Paragraph 1, not being eaten, dead flies cause impurity in water; at Paragraph 2, not possessing a blood-system, dead flies do not cause impurity in water.

[7] Muzanī, *Mukhtaṣar*, 8.25–7.

It is hardly surprising that the next paragraph, introduced again by 'he said', *qāla*, refers to dead fish and locusts. This is a ruling which has been logically attracted into the text at this point because the discussion has come to focus on the capacity of dead things to cause impurity in water. But the passage set off to be a summary of an argument relating to living things.

The Muzanī text then, like all the early *fiqh* texts, shows signs of organic growth, and bears witness to the development of Shāfi'ī dicta, expressly designed to deal with juristic problems arising out of earlier Shāfi'ī dicta. Muzanī had a source-text which, summarized, generated problems, then solutions; and these, sequentially incorporated into the text, gave rise to disorder. All such material was subsumed under the formulaic *qāla*, implying the authority of Shāfi'ī.

In the current text of Rabī' (translated at Ch. 4, Sect. II above), the distracting hadith about the fly is simply removed. The argument about living animals (Para. 15) is in any case adequately dealt with by the other two hadith—that about the donkey and predatory animals, and that about the cat. The argument about dead things, emerging towards the end of the Muzanī section on what pollutes water, is rediscovered, however, in Paragraph 1 of the Rabī' passage. And, interestingly, Paragraph 1 is not represented in Muzanī's summary of what he claims to be Shāfi'ī's argumentation; at least, not represented in a properly integrated manner. Only what is apparently the last item to enter the Muzanī text (under the rubric, He said in a different place) reflects in part what Rabī' had produced in Paragraph 1.

Let us look again at two items from Rabī':

1.3 and 1.4. All things possessed of life . . . being dead . . . render water impure . . . if they have a blood-system.

1.5. As to things which do not have a blood-system such as flies, beetles, etc., there are two views on these:

1. If these things die in water of small or large quantity, they do not impart impurity. Those who say this argue as follows: If someone says, But they are carrion, so how can you claim that they do not impart impurity? we reply, They do not change the water at all and they do not have a blood-system. If proof is demanded, we say, The Prophet of God commanded that if a fly falls into water, it should be dipped into it. He ordered the same for a fly that falls into foodstuffs. Now, a fly may well die when dipped in this manner. The Prophet would not order it to be dipped into water and food if, on dying, it caused impurity; for that would be deliberate imparting of impurity.

2. If these things die in something susceptible to impurity, it is rendered impure. For these things are forbidden (*muḥarram*). The Prophet may have ordered the dipping of the dead fly because of the curative property contained in it. Also, the most probable thing is that it will not die.

My preferred view is that anything which is haram to eat, if it falls into water . . . and dies there, imparts impurity. This applies to beetles, flies, mosquitoes, and fleas.

Here, the contradictory views that a dead fly does and does not cause impurity in water are worked out as explicit *ikhtilāf*, and systematically related to a Prophetic hadith. The whole is subsumed under the Shāfi'ī-said formula provided earlier. However this passage, now in the *Umm*, is clearly a response to the problem that was (first) generated in the *Mukhtaṣar*.

How did this complex of material develop? I propose the following reconstruction:

1. A body of 'Rabī'' material emerged, containing most of the arguments that are now contained in the *Umm* relating to things which cause impurity in water. This included, as proof that living things do not cause impurity, the hadith about the fly.
2. 'Muzanī' summarized this material, with minor additions, changes of order, etc.
3. The 'Muzanī' text developed new material as a result of the observation that flies, when dipped in water, sometimes die. Ruling: dead flies cause impurity.
4. 'Rabī'' became aware of the fact that discussion on the fly had modulated into a discussion about dead animals. That hadith was therefore removed from its original context and placed in a context that related it to dead things which do or do not pollute. Ruling: dead flies, lacking a blood-system, do not cause impurity.
5. 'Muzanī' became aware of this new material, and summarized it too, under the rubric, 'He said in a different place'.
6. The 'Rabī'' material continued to develop, generating in the end a well-wrought *ikhtilāf* statement, giving a precise hermeneutic argument for and against the dead fly as a cause of impurity.

Reality of course was not as neat as this schematic account. But certain conclusions are reasonably permitted. The current Rabīʿ text closed later than the current Muzanī text. Prior to closure the texts were subject to slow organic growth and influenced one another. The most likely context for all this is school competition. Two schools (perhaps nothing more than informal groups of scholars who gathered regularly to discuss the law) preserved, created, and sequentially modified a body of material deemed to be from Shāfiʿī and transmitted through competing authorities, Rabīʿ and Muzanī. Each school developed a distinctive style, respectively expansive and summarizing. The schools were sufficiently aware of one another to develop parallel modes of argument and to pick up and reflect on developments in the opposing school. The ongoing processes of reflection and debate generated textual records (no doubt fragmentary and discrete) which were preserved and from time to time redacted, probably in a loose and informal manner and with varying degrees of academic skill. (The evident competition between the schools must cast doubt on the neat schematic temporal sequence of leadership claimed by the tradition for the post-Shāfiʿī era; see Sect. I above).

The *Umm* and the *Mukhtaṣar* each show the familiar signs of organic development. That Rabīʿ and Muzanī provided some impetus towards the collection of materials under their names may be conceded. But we have already seen that most of the material in the *Umm* and all its most characteristic arguments must be dated late in or later than the lifetime of Rabīʿ. Since the *Mukhtaṣar* had access to much or most of this material, its arguments too should be recognized as emerging, mostly, after the death of its eponymous author. It would be risky indeed to assume that anything in these texts could reveal the historical Shāfiʿī.

These conclusions deserve further exemplification.

IV

Consider the following passage from Muzanī.

1.1. Shāfiʿī said: That which renders *wuḍūʾ* necessary is [the following]:
1.2. Defecation
1.3. Urination

1.4. Sleep—whether lying down or standing up, bowing or prostrating oneself, or deviating from an upright position, whether the sleep is little or much
1.5. Loss of sense due to insanity or illness—whether lying down or not
1.6. Wind emitted from the backside
1.7. Touching a woman—by a man, that is applying any part of his body to hers, or vice versa, if there is nothing between them
1.8. Kissing a woman
1.9. Touching the penis (*mass al-dhakar*) with the inside of the hand—whether one's own penis, or someone else's, whether a child's or an adult's, whether of a dead or a living body. Male and female are the same for the purposes of this rule. It matters not whether the orifice concerned is the front or back, or whether it is the sphincter itself of the anus. But *wuḍūʾ* is not necessary for one who touches that part of an animal, because animals' genitals are not forbidden (*la ḥurma la-hā*) and they are not subject to the requirements of worship (*la taʿabbud ʿalay-hā*).
1.10. Anything that emerges from the front or back orifices—whether worms or blood or sexual fluids (*madhy* or *wady*) or moisture or anything else.
1.11. All of these render *wuḍūʾ* necessary.
2. Local cleansing (*istinjāʾ*) is not required for one who sleeps or produces wind.
3. He said: We prefer (*nuḥibbu*) for one who sleeps sitting up, that he perform *wuḍūʾ*; but (*wa*) it is not clear that I declare it necessary for such a one. For, it is related from Anas bin Malik that the Companions of the Prophet of God used to wait for the evening prayer and sleep—I think he said, while sitting upright. [Also] from Ibn ʿUmar that he used to sleep sitting upright, then pray without *wuḍūʾ*.
4. Muzanī said: Shāfiʿī said, If we go on to consider this (*law ṣirna ilā al-naẓar*), one should perform *wuḍūʾ* if overcome by sleep, in whatever of its states one is (*kāna idhā ghalaba ʿalay-hi al-nawm tawaḍḍaʾ bi-ayyi ḥālāti-hi kāna*).
5.1. Muzanī said: I say, It is related from Ṣafwān ibn ʿAssāl that he said, The Prophet used to command us, if we were travelling or on a journey, that we need not take off our boots for three days and nights, except on account of *janāba* (= major ritual impurity); but on account of urination, defecation, and sleep [occasioning minor ritual impurity, requiring *wuḍūʾ*] there was no need to take off the boots.
5.2. Muzanī said: Since the Prophet made these [three] equal in respect of entailing impurity (*fī maʿna al-ḥadath*), the impurity is the same with respect to all three, whether lying down or sitting up. If the impurity caused by sleep differed according to the different situations of the sleeper [i.e. standing versus sitting] so likewise would the impurity caused by defecation and urination.

6. The Prophet would have explained this just as he explained that eating during the fast deliberately means breaking the fast; while eating out of forgetfulness does not mean breaking the fast.
7. It is related from the Prophet that he said, The eyes are the thong on the sphincter muscle: if the eyes sleep, the thong is loosened.
8. Further, it is related from ʿĀ'isha, He who falls asleep, lying down or sitting up. And from Abū Hurayra, He who falls asleep is required to perform *wuḍū'*. And from Ḥasan, If he sleeps, sitting or standing, he performs *wuḍū'*.
9. Muzanī said: This is a degree of *ikhtilāf* which makes consideration necessary (*hādhā ikhtilāf yūjib al-naẓar*). Shāfiʿī, on consideration, put it into the category of (*fī maʿna*) one who faints (*ughmiya ʿalay-hi*); however that happens, he performs *wuḍū'* (*kayfa kāna tawaḍḍa'*). Likewise, the sleeper: however it happens, he performs *wuḍū'* (*kayfa kāna tawaḍḍa'*).
10. His argument as to touching a woman consisted in (*wa-'ḥtajja fī 'l-mulāmasa bi . . .*) God's word, 'Or you touch women' (Q.4:43), and the words of Ibn ʿUmar, 'A man's kissing his wife'; and, from Ibn Masʿūd, a ruling similar to that of Ibn ʿUmar.
11.1. His argument as to *mass al-dhakar* consisted in the hadith of Busra, from the Prophet of God: if any of you touches his penis, let him perform *wuḍū'*.
11.2. He judged the backside by analogy on the penis (*qāsa al-dubur bi-'l-farj*).
11.3. Together with the transmission from ʿA'isha that she said: If a woman touches her *farj*, she performs *wuḍū'*.
11.4. And he argued on the basis of the Prophet's words: He who emancipates a share that he has in a slave should compute it. Here the meaning 'slave-girl' is contained within the meaning of the word 'slave'; and likewise is the backside contained within the meaning of the word *dhakar*.[8]

Paragraph 1 here is, structurally, a list of items that cause cancellation of purity. Item 1.9, relating to *mass al-dhakar*, stands out. A relatively long and complex discussion, it disrupts the syntax of the list and suggests the possibility of interpolation. The expanded items at 1.4 and 1.7 may also betray interpolation.

The subject of *mass al-dhakar* returns at Paragraph 11. This Paragraph, like Paragraph 10, is introduced by a conventional formula (*wa-'ḥtajja fī . . . bi . . .*) signalling a summary of argument. Paragraph 10 is a correct summary of the material in the *Umm* that relates to touching a woman.[9] Paragraph 11, on the

[8] Muzanī, *Mukhtaṣar*, 3–4.

[9] See Shāfiʿī, *Umm*, i. 15–16/12–13.

other hand, shows little relationship to the material in the *Umm* that relates to *mass al-dhakar*. There is no hadith from ʿĀ'isha (11.3) in the *Umm*, nor is there the far-fetched *qiyās*-argument of 11.4. Furthermore, the *Umm* has recourse not simply to the hadith of Busra but also to a more explicit and useful hadith which makes the same point, and is provided with three different *isnād*s.

Here is the relevant part of the *Umm*.

1.1. Shāfiʿī said, from Mālik b. Anas, from ʿAbdallāh b. Abī Bakr b. Muḥammad b. ʿAmr b. Ḥazm, that he heard ʿUrwa b. Zubayr say, I visited Marwān b. al-Ḥakam and we discussed what events render *wuḍū'* necessary. Marwān said, *Mass al-dhakar* renders *wuḍū'* necessary. ʿUrwa said, I didn't know that. So Marwān said, I was informed of this by Busra bint Ṣafwān; she heard the Prophet of God saying, If one of you touches his penis, he should perform *wuḍū'*.
1.2. From Sulaymān b. ʿAmr, and Muḥammad b. ʿAbdallāh, from Yazīd b. ʿAbd al-Malik al-Hāshimī, from Saʿīd b. Abī Saʿīd al-Maqbarī, from Abū Hurayra, that the Prophet of God said, If any one of you brings his hand into contact with his penis (*afḍā bi-yadi-hi ilā dhakari-hi*), there being nothing separating the one from the other, he should perform *wuḍū'*.
1.3. Shāfiʿī, from ʿAbdallāh b. Nāfiʿ and Ibn Abī Fadīk, from Ibn Abī Dhi'b, from ʿUqba b. ʿAbd al-Raḥmān, from Muḥammad b. ʿAbd al-Raḥmān b. Thawban, that the Prophet of God said, If any one of you brings his hand into contact with his penis, he should perform *wuḍū'*.
1.4. Ibn Nāfiʿ gave a longer version [of the *isnād*], saying, Muḥammad b. ʿAbd al-Raḥmān b. Thawban, from Jābir b. ʿAbdallāh, from the Prophet. But I have heard more than one of retentive memory relate it, not mentioning Jābir.
2. He said: If a man brings the palm of his hand into contact with his penis there being nothing between the two, he must perform *wuḍū'*.
3. He said: It is all the same whether it was deliberately or otherwise; for everything that requires *wuḍū'* as a result of deliberate action requires it also if carried out non-deliberately.
4. He said: It is all the same whether he touches it a little or a lot.
5. Likewise if he touches his backside, or the front or the back parts of his wife, or touches that part of a child, it renders him subject to *wuḍū'*. But if he touches his testicles or buttocks or thighs without touching his penis, he is not subject to *wuḍū'*.
6. It is all the same whether he touches that part of a living or a dead body.
7. But if he touches any of these parts of an animal, he is not subject to

wuḍū'. For mankind alone possesses forbidden parts (*ḥurma*) and is subject to *ta'abbud*; animals have no share in these considerations.
8. When a man touches something forbidden such as wet blood or pus etc. he should wash what touches it, but he is not subject to *wuḍū'*.
9. If he touches his penis with the back of his hand or his arm or something other than the palm of his hand, he is not subject to *wuḍū'*.
10. If someone should say, What difference is at issue? the reply is, The words *al-ifḍā' bi-'l-yad*, bringing the hands into contact, means the palm [or inside] of the hand. As in the phrase, *afḍā bi-yadi-hi* in a sale agreement [= he shook hands on a deal], or *afḍā bi-yadi-hi*, meaning he put his hands on the ground while performing prostration (in prayer—*sujūd*), or on his knees while kneeling (*rukū'*). Since the Prophet ordered *wuḍū'* only after bringing the hands into contact, *al-ifḍā'* etc., with the penis, [this is the ruling]. It is known that if a man's penis touches his thighs and adjacent parts of his body, this does not require, on the evidence of Prophetic practice (sunna), *wuḍū'* . . .
11. *Qiyās* alone would require that *wuḍū'* is not necessary [after *mass al-dhakar*—but text is garbled]. For the *sunna* of the Prophet demonstrates that touching things which are even more polluting than the penis (*ma huwa anjas min al-dhakar*) does not require *wuḍū'*. Sufyān informed us, from Hishām, from Fāṭima, from Asmā', that the Prophet of God was asked about menstrual blood which falls upon clothing. He replied, Scrape it off, rub the spot with water, then sprinkle it; then pray in it. Shāfi'ī said, If the Prophet of God ordered with respect to menstrual blood that it should be washed by hand, and did not order *wuḍū'* after that, and given that blood is more polluting (*anjas*) than the penis [how much more might we expect that the penis does not cause pollution, but this is not so]. By *qiyās* on this ruling, [i.e. the ruling on menstrual blood, it is apparent that] no *najis* thing that is touched necessitates *wuḍū'*. If this is true of things *najis*, then what is not in itself *najis* ought, still more so, not to entail *wuḍū'*; unless there is a specific hadith [and this is the case with the penis].[10]

Clearly the text from which Muzanī summarized his *mass al-dhakar* material was not the one that is now in the *Umm*.

Look back now at the (interpolated) Paragraph 1.9 in Muzanī's text. The sequential concern there with child and adult, dead and living, male and female, front and back, human and animal, reflect and summarize a sequential concern with the same subject-matter in the *Umm*. But by no means all the material in the *Umm* has been summarized even there.

[10] See Shāfi'ī, *Umm*, i. 19–20/15–17.

For this complex of materials I propose a resolution similar to that given in the previous section. 'Muzanī' summarized a body of material relating to *mass al-dhakar*. In its original context that material was subject to development *and deletion*, giving rise in time to a formulation quite different from that which was first summarized. 'Muzanī' became aware of the later formulation, summarized it too, and interpolated it at what seemed a suitable place in his work. The Rabī' material went on developing after the closure of the Muzanī text, generating new arguments and new hadith.

When Bayhaqī asserted that Muzanī was unjust to Shāfi'ī in his summary of argumentation, he meant this kind of thing. It is a trivial example, but Muzanī clearly is not fully informed of all the developments in Rabī'. A more significant example of Muzanī's 'injustice' to Shāfi'ī is exemplified in the following section.

V

Paragraphs 3–9, in the passage cited from Muzanī above, represent a coherent set of arguments relating to the question whether and under what conditions sleep cancels a state of purity. At Paragraph 3, Muzanī states, summarizing precisely a passage in the *Umm*, that, according to Shāfi'ī, a person who sleeps while sitting is not absolutely required to renew his *wuḍū'*. At Paragraph 4, he contradicts that. This passage must be interpreted as one of those in which Muzanī recalls personally something which Shāfi'ī said, something not found in any of the preserved texts. This is what is implied by the locution, 'Muzanī said, Shāfi'ī said', which introduces this paragraph in contrast to the usual, 'Shāfi'ī said'. What Muzanī recalls Shāfi'ī to have said is that, on consideration, everyone who is actually overcome by sleep must perform *wuḍū'*; irrespective, that is, of the position in which they sleep. In other words, the relevant distinction relates to the nature of the sleep—that which overcomes and that which does not; and not to the position of the sleeper—sitting versus all other positions. (The jurists enjoyed this question; see also Ch. 9, Sect. II.)

Muzanī, *in propria persona*, defends the reconsidered view of Shāfi'ī by four arguments, set out in Paragraphs 5–8. Paragraph 9 is clearly a duplicate of Paragraph 3. Muzanī is portrayed once again as recalling that, on consideration, Shāfi'ī had in effect

changed his mind on the matter, and had recognized that all forms of sleep necessitate *wuḍū'*. It is probable that Paragraphs 3 and 9 represent differential developments of some original statement either made by Muzanī or attributed to him, both incorporated into the current text.

This passage exhibits a peculiarity in so far as the rather elaborate arguments at Paragraphs 5, 6, 7, and 8 give a polemical ring to what, on the face of it, is a record of a position sanctioned by Shāfi'ī himself, after due deliberation. In fact, the polemical tone is appropriate and the opponent is to be discovered in the Shāfi'ī of the Rabī' tradition.

Here is the relevant Rabī' material from the *Umm*.

1. Shāfi'ī said: God says, When you rise to pray, wash your hands and your face etc. . . .
2. Shāfi'ī said: The plain meaning of the verse is that he who rises to pray must perform *wuḍū'*. It is probable that it was revealed on a specific issue (*fī khāṣṣ*). I have heard one whose knowledge of the Qur'ān I approve claim that it was revealed [specifically] concerning those who rise from sleep.
3.1. He said: I consider that he said what he said because there is in the *sunna* evidence that one who rises from sleep should perform *wuḍū'*.
3.2. From Sufyān, from Zuhrī, from Abū Hurayra, that the Prophet of God said, If any one of you awakes from sleep let him not dip his hand into the vessel until he washes it three times, for he does not know where his hand spent the night.
3.3. From Mālik *et al.* [a variant].
3.4. From Sufyān *et al.* [a variant].
3.5. Shāfi'ī said: So, one who sleeps lying down must perform *wuḍū'* because he is rising from a recumbent position.
4. He said: Sleep is the overcoming of the senses (*ghalba 'alā 'l-'aql*). So, he whose senses are overcome by madness or by sickness, lying down or otherwise, must perform *wuḍū'*; because his state is more severe in this respect than that of one who sleeps . . .
5. He said: If a man sleeps while sitting upright, it is preferable to me (*aḥabbu ilayya*) that he perform *wuḍū'*.
6.1. He said: It is not clear to me that I declare *wuḍū'* necessary for him.
6.2. From a reliable man, from Ḥammād al-Ṭawīl, from Anas ibn Mālik, that the Companions of the Prophet used to wait for the evening prayer, and sleep—I think he said, while sitting upright, to the point that their heads nodded—then they would pray without *wuḍū'*.
6.3. From Mālik, from Nāfi', from Ibn 'Umar, that he used to sleep sitting upright then pray without *wuḍū'*.

6.4. Shāfi'ī said: If he sleeps sitting up, upright, it is not in my view incumbent that he perform *wuḍū'*, on the grounds of the *āthār* I have mentioned.
7.1. It is known that the verse was revealed about sleepers, and a sleeper is one who is lying down. It is also known that if one is informed that so-and-so is asleep, one does not conceive of anything except that he is lying down. The word 'sleep' is not used in an absolute sense except for one lying down.
7.2. [The concept] of one who sleeps sitting upright has a meaning that is dependent on an adjectival clause; so we say, He slept while sitting upright. In the same way, one says, He slept through something [= he was oblivious to it], meaning his mind had to waken up to it, as a matter of consideration, but not meaning the [normal] sleep of slumber.
8. The sleeper lying down is not in the same state as the sleeper sitting up, for the former sleeps deeply and his senses are overcome to a greater degree than one who sleeps sitting up. [Hence] the incidence of a polluting event, with regard to the ease of passage and the possibility of his being unaware of it, is different from the case of one who sleeps sitting upright.
9. He said: If he abandons the upright position, while sitting sleeping, he must perform *wuḍū'*. For, one who sleeps in a sitting position entrusts himself to the earth, and it is scarcely possible that anything pass from him except he be aware of it. But if he abandons [that support] he enters the definition of one lying down in respect of the incidence of a polluting event.
10. He said: If one sleeps bowing or prostrating oneself I declare *wuḍū'* incumbent on him because it is even more likely that a pollution will occur and he not know about it than in the case of one who sleeps lying down.
11. He said: If one sleeps standing, he must perform *wuḍū'* because he does not entrust himself to the earth. That he should be judged by analogy (*yuqās*) with the recumbent sleeper in so far as both are overcome in the senses by sleep is more reasonable (*awlā*) than that he be measured against the person sitting down, who is only freed, [from the need to perform *wuḍū'*] on account of the transmitted material (*āthār*), and for the reason (*'ila*) I have mentioned, namely that he entrusts himself to the ground.[11]

The nucleus of that passage and the only part of it known to Muzanī, is Paragraphs 5 and 6. These have been conflated to give Paragraph 3 of the Muzanī material. The interested reader will be able to analyse and judge the implications of the rest of this passage for himself. The most important thing to note is the polemical tone of the argument which begins with the stress on

[11] See Shāfi'ī, *Umm*, i. 12–14/10–12.

rising, i.e. from sleep, at Paragraphs 1 and 2, and culminates in the triumphant formulation of a distinction that separates the sitting sleeper from all others. He has 'entrusted himself to the ground' (Para. 9): such are the relative positions of the anus and the earth that the latter, it is claimed, functions as a support against inadvertent pollution. This became the classic argument of the Shāfi'ī tradition in favour of the anomalous ruling on one who sleeps sitting upright.

Bayhaqī might have cited this as an example of Muzanī instituting an attack on Shāfi'ī on the basis of deficiencies which were remedied in the transmitted dicta of Shāfi'ī. But these are not the transmitted dicta of Shāfi'ī. The *Mukhtaṣar* and the *Umm* are, in fact, the record of ongoing argumentation within contiguous groups or 'schools', sharing a common allegiance to Shāfi'ī, and a common approach to the law, but expressing their immediate loyalty by reference to the transmission activity of Rabī' or Muzanī. The creation and development of juristic argument within these groups was clearly a long-term process, probably enacted by circles of students and jurists meeting to discuss the law in the mosque. The recording, storing, discarding, and redacting of these discussions was likewise carried out over a long period of time, by different people, displaying different degrees of editorial skill. The group associated with the name of Rabī' was apparently the more successful in the end: it continued to develop new material and arguments after the closure and final redaction of Muzanī's *Mukhtaṣar*, and, consequently, in cases of dispute is likely to contain the better and more developed arguments (though it sometimes also preserves bad and inefficient arguments). Common to both groups was the convention of attributing the form and content of their juristic discoveries to the ever more distant master, Shāfi'ī. Taking into consideration the argument of Chapter 4, together with the arguments of this Chapter, it will be evident that the bulk of material now contained in the *Umm* or in the *Mukhtaṣar* must be attributed to the generations after Muzanī and Rabī'. Whatever personal impetus these masters gave to the texts that bear their names is unlikely now, with any degree of certainty, to be recoverable.

6

THE *KITĀB AL-KHARĀJ* OF ABŪ YŪSUF

1

It is reported that Ya'qūb b. Ibrāhīm al-Anṣārī known as Abū Yūsuf was born in 113 AH and died in 182. Of humble origins, he found his way to the study sessions of Abū Ḥanīfa, who, recognizing his merit, provided him with a bursary and was his first and most important teacher. Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī, together with their teacher, Abū Ḥanīfa, constitute the three great authorities of the Ḥanafī *fiqh* tradition. Sharing and guaranteeing variant views on juristic questions, they serve in the developed tradition to keep options open and ensure flexibility. In contrast to Muḥammad b. al-Ḥasan, who represents the school's commitment to dialectical skills and refinement of juristic opinion, Abū Yūsuf is presented in biographical works as an authority in hadith. Ibn Ḥanbal, when he started collecting Prophetic hadith, went first to Abū Yūsuf—which is a good story and a speaking credential. Abū Yūsuf's knowledge of hadith, however, was coupled with interpretative skills which distinguished him from the *ahl al-ḥadīth*. Asked by A'mash concerning a juristic subtlety, he replied on the basis of a hadith which he had originally heard from A'mash himself. 'We are only the pharmacists,' said A'mash in admiration, 'and you the doctors.' There are a great many Prophetic hadith in Abū Yūsuf's *Kitāb al-Kharāj* (one of several ways in which this book differs from other early Ḥanafī attributions), a fact which may have promoted this biographical characteristic. In contrast to Abū Ḥanīfa, whose death is represented as brought about by his refusal to accept judicial office, Abū Yūsuf rose to high rank, showing himself a willing and capable servant of

the state, a courteous and wily courtier, finally becoming *qāḍī al-quḍāt* in Baghdad in the service of Hārūn al-Rashīd. His enemies said he had wrestled with the world and been defeated but the Ḥanafīs had in him a model of honourable and cunning service to the government. These stories, sanctioning a many faceted response to *fiqh*, to hadith and to judicial office, were preserved as symbols of the flexibility and varied aspirations of the Ḥanafī juristic tradition.

Of books attributed to Abū Yūsuf, there are two tracts preserved within the Shāfi'ī corpus of law-books as objects of dispute. These are the *Kitāb al-radd 'alā siyar al-Awzā'ī* and the *Ikhtilāf Abī Ḥanīfa wa-Ibn Abī Laylā*. Just as the *Muwaṭṭa'* of Shaybānī is a Ḥanafī preservation of the Mālikī tradition, so these works are a Shāfi'ī preservation of the Ḥanafī tradition. Also attributed to Abū Yūsuf is a collection of *āthār*, and the famous *Kitāb al-Kharāj*.[1] The latter, usually accepted as an authored text dating to before 182, is analysed in this Chapter. It is claimed that the analyses which follow not only permit a fairly comprehensive understanding of the processes which brought about the emergence of this book, but also give a snapshot picture of the taxation system as organized from Baghdad in the middle of the third century.

II

The *Kitāb al-Kharāj* is available in several printed versions, the oldest of which is the Bulaq edition of 1302/1885. The Salafiyya Press has produced an edition, reprinted several times, based on a single manuscript collated with the Bulaq text. This edition exhibits only minor deviations from the Bulaq edition; it is probably based on the same manuscript or the same manuscript tradition. The Bulaq edition has no and the Salafiyya editions little significant editorial apparatus. A complete edition of the *Kitāb al-*

[1] Two of the larger biographies of Abū Yūsuf are contained in Aḥmad b. 'Alī al-Baghdādī, *Ta'rīkh*, xiv. 242 ff. and Dhahabī, *Manāqib*. Struggles with the world, Baghdādī, *Ta'rīkh*, xiv. 248; Aḥmad's recourse to xiv. 255; dialogue with A'mash, xiv. 246; cf. Dhahabī, *Manāqib*, 40. Baghdādī gives invective as well as praise. See also the smaller biographies of Qurashī and Laknawī. For Abū Yūsuf's literary production, Sezgin, *Geschichte*, i. 419–21; Schacht, ad 'Abū Yūsuf' in *EI*(ii) (where he describes the *ikhtilāf* literature as 'undoubtedly genuine', not a view I would subscribe to). See also Schacht's discussion on the authorship of the *Kitāb al-ḥiyal*, in Schacht, *Das kitâb al-maḫâriǧ*, 5–13.

Kharāj is contained in a commentary, entitled *Fiqh al-mulūk wa-miftāḥ al-ritāj*, by 'Abd al-'Azīz b. Muḥammad al-Rahbī (d. 1194 AH). The editor of this work, A. U. Kabīsī, has set the text of the *Kitāb al-Kharāj* above the text of the commentary and he has systematically compared Rahbī's edition, as made available in two manuscripts, with the printed editions. The result is a useful text, with a decent editorial apparatus. The most recent printed text, editor Iḥsān 'Abbās, is not superior to that produced by Kabīsī.[2]

The *Kitāb al-Kharāj* begins with an address to a prince, the contents of which are not particularly juristic; they consist of advice and general parænesis (more *adab* than *fiqh*), followed by an accumulation of hadith, the majority of which are from the Prophet. This is followed by juristic material relating to the distribution of booty taken in battle; then by numerous more or less clearly marked sections relating to landholding, land-taxes, and taxes on agricultural produce. Broadly, discussion of the tax termed *kharāj* precedes discussion of the tax termed *'ushr*, *zakāt*, or *ṣadaqa*—though much of the detail is inextricably interwoven, even confused. This is followed by discussion of the poll-tax or *jizya*, applicable only to non-Muslims, together with discussion of the social status, rights, and obligations of non-Muslim citizens in Islamic territory. The last sections of the book relate to such topics as how to deal with thieves, how to implement the prescribed penalties (*ḥudūd*), how to pay government officials, administer border crossings, organize warfare with non-Muslim neighbours, etc. The whole is recognizable as selected and presented with the immediate aim of elucidating administrative practice and as exhibiting a more particular concern for modes of taxation and landholding. The title *Kitāb al-Kharāj* is justified by the expansive

[2] See Bibliography under Abū Yūsuf for details of these texts. References hereafter are to the Rahbī edition of the *Kitāb al-Kharāj*; where necessary references to the Bulaq edition follow after a slash, Rahbī/Bulaq. The text of Iḥsān 'Abbās is based on the three printed editions, with the addition of material derived from the British Museum manuscript of the *Kitāb al-Kharāj*. This manuscript, described by 'Abbās as defective towards the end and with folios missing in the middle, seems to function as a source of bad readings, recorded in the footnotes. 'Abbās knows of fifteen manuscripts of the *Kitāb al-Kharāj* in Istanbul which, pressed for time at the critical moment, he was unable to use. His editorial method is eclectic. The result, of course, of an eclectic reading of four texts, only one of which is competent (that of Kabīsī/Rahbī), is that the competent text (usually) prevails. Where it does not, Kabīsī's apparatus already indicated the divergences amongst the printed texts.

nature of the material relating to this topic (in its broadest sense—taxation), but it hardly describes the nature of the book as a whole, which clearly aspires to cover all major areas of government administration.

Like all early juristic works, this one is composed of discrete segments. The predominant markers of segmentation are the formulae *qāla* and *qāla Abū Yūsuf*. In a chapter consisting of 23 such segments the formula *qāla Abū Yūsuf* occurs 6 times versus 17 instances of the anonymous *qāla*.[3] In another chapter consisting of 10 segments the formula *qāla Abū Yūsuf* occurs 7 times versus 3 instances of the anonymous *qāla*.[4] There is no apparent system at work dictating these choices, though there is a tendency for segments which initiate a new topic to have the fuller formula. Since much of the material that composes the *Kitāb al-Kharāj* is hadith material introduced by an *isnād*, a majority of the segments in the book exhibit the formulae *qāla (Abū Yūsuf) ḥaddatha-nī . . .* or *qāla (Abū Yūsuf) ḥaddatha-nā . . .* Again, there is no apparent significance in the variation. There are numerous instances of juristic exposition or statements of *ikhtilāf* governed immediately by *qāla (Abū Yūsuf)*. Carelessness or indifference in the application of these formulae is marked not only by the random distribution of the forms within one edition (or manuscript tradition), but by variations in the realization and non-realization of these formulae across different editions/manuscripts. On numerous occasions the editor of Rahbī has to indicate either that these formulae have been omitted from the printed editions or that they have been added to the printed editions.[5] It seems probable that scribes were variously creative or careless in their realization of formulaic material of this kind. It is also probable that the material accumulated over time and that sequential addition of material led to slight variations in the realization of these redactional formulae. In a sequence of five hadith that describe the events surrounding the Battle of Qādisiyya, four are introduced by *qāla [wa-] ḥaddatha-nī*, and one, the third in the sequence, by *qāla Abū Yūsuf wa-ḥaddatha-nī*.[6] It is possible to speculate that a sequence

[3] Abū Yūsuf, *Kitāb al-Kharāj*, chapter *Mā 'umila bi-hi fi 'l-Sawād*, i. 217–88/16–22.

[4] Ibid. chapter *Kayf kāna farḍ Abī Bakr wa-'Umar*, i. 307–336/24–7.

[5] Ibid. i. 341 n. 3, 342 n. 2, 350 n. 3, 359 n. 1, 390 n. 1, *et al.*

[6] Ibid. incipits at 221, 226, 239, 240, 243/16–18.

of four accounts introduced by *qāla* came into existence first, and that the fifth account was introduced at a later date together with the formula which justified its inclusion in this text. The anomalous unit, furthermore, is not directly related to the juristic point at issue, which rather confirms the possibility of a late interpolation. But this kind of speculation is not very profitable. The *Kitāb al-Kharāj* is a redacted text, composed of diverse materials rendered (more or less) homogeneous by application of the redactional formulae *qāla* and *qāla Abū Yūsuf*, imperfectly and unsystematically applied both by redactors and scribes.

These small units of text, initiated by *qāla (Abū Yūsuf)*, are organized into larger units or chapters. The larger units are also marked by a set of formulae which indicate the initiation of a new section and offer a preview of the subject-matter. These take the form of an address to a prince. 'You have asked, Commander of the Faithful, concerning'—*wa-sa'alta yā amīr al-mu'minīn 'an* or, *ammā mā sa'alta 'an-hu yā amīr al-mu'minīn min*. The material organized under these headings may take the form of hadith, juristic argument, or *ikhtilāf* statement.

The formula, You have asked O Commander of the Faithful, is sometimes, and sometimes not, preceded by the formula *qāla Abū Yūsuf*. In the Bulaq edition a majority of these headings are without an introductory *qāla Abū Yūsuf*. In the Rahbī text, this has been more or less uniformly provided throughout.[7] It makes a considerable difference to our estimation of the intentions of this work how we analyse this particular variation. 'As to your question, O Prince, concerning X, well Abū Yūsuf said' is a formula implying appeal to Abū Yūsuf's authority, but not necessarily his lifetime. 'Abū Yūsuf said, As to your question, O Prince' is a formula implying authorship.

The organization of material into sections governed by headings couched in the form of a question formulated by a prince is clearly the product of a major redactional effort. The introductory *adab*-type address to the Prince must have been produced at the same time. For reasons which will become clear, I am inclined to consider that at the original redaction the formula *qāla Abū Yūsuf* did not cover the princely questions. Rather, in response to a request from the court, a bundle of materials relating to

[7] Ibid. 289, 497, 596 *et al.*

administrative practice was collected and redacted, in forms that implied Abū Yūsuf's authority. Only later was this understood to be a book by Abū Yūsuf, a belief which promoted scribal practices that tended to confirm it, and generated too the assumption that the book was a response to a request by Hārūn al-Rashīd. In all printed versions, the first sentence of the book states, This is what Abū Yūsuf wrote to the Commander of the Faithful, Hārūn al-Rashīd. In fact the identity of the caliph in question is not revealed in the body of the text. And consistent appeal to Abū Yūsuf's authority suggests, to me at least, that he was safely out of the way.

In addition to the segmentation provided by the princely-question formula the book is currently divided into chapters, usually termed *faṣl*s, once, erratically, *bāb*.[8] At all occurrences of the princely-question formula, an appropriate chapter-heading is provided. But there are numerous instances where the chapter-headings are not associated with a princely question. These sections contain the same kind of mix of juristic argument, proof text, and *ikhtilāf* statement as the sections introduced by a princely question. The absence of a unified form for the marking of sections ('chapters'), together with, as we shall see, a great disorder in the organization of these sections, must suggest either successive redactions or carelessness and hurry at some stage in the redactional processes. The text also exhibits numerous small details which can only be explained as a result of organic growth and successive interpolation.

III

The basic typology of *'ushr* and *kharāj* land is presented in two separate short sections, translated below, each introduced by a princely question. Prior to the first of these sections, the typology had in fact been set out several times as part of the extensive arguments relating to landholding practice in the Sawād (Southern Iraq) and elsewhere; and it was recapitulated in subsequent sections. Repetition in this work is so frequent as to require some kind of explanation. Not all instances of repetition can be explained in the way proposed for the passages under consideration,

[8] Abū Yūsuf, *Kitāb al-Kharāj*, chapter *Kayf kāna farḍ Abī Bakr wa-'Umar*, i. 143 n. 1.

which are here translated in parallel columns. In order to facilitate comparison I have transposed Paragraphs 4 and 5 in Passage B.

Passage A	Passage B
1. Abu Yusuf said	1. Abu Yusuf said
2. You have asked, O Commander of the Faithful, concerning those *ahl al-harb* who submit [to Islam] on condition of preserving their lives and their lands—*aslamū 'alā anfusi-him wa-arāḍī-him*. What is the ruling on them?	2. You have asked, O Commander of the Faithful, about the definitions of *'ushr* and *kharāj* land.
3.0. Their lives are protected. Their possessions with which they have submitted to Islam, are theirs—*ma aslamū 'alay-hi min amwāli-him fa-la-hum*.	
3.1. Likewise their lands are theirs. These are *'ushr* lands, of the same status as [the lands of] Madina, where the people submitted to the Prophet of God, their lands becoming *'ushr* lands—*arāḍū-hum la-hum hiya arḍ 'ushr bi manzilat al-madīna ḥayth aslama ahlu-ha . . .*	3.1. All land whose people submit with (while preserving) their lands—whether Arab lands or non-Arab lands—their land is theirs. It is *'ushr* land of the same status as [the lands of] Madina when its people submitted—*kull arḍ aslama ahlu-hā 'alay-hā . . . fa-hiya la-hum wa-hiya arḍ 'ushr bi manzilat al-madīna ḥīna aslama 'alay-hā ahlu-hā*.
3.2. Likewise, Ta'if and Bahrayn.	3.2. And of the same status as the Yemen—*wa-bi-manzilat al-yaman*.
3.3. Likewise, the people of the desert (*ahl al-bādiyya*), if they submit with their water-holes and their grazing lands . . . their land is *'ushr* land . . .	3.3. Likewise all who may not be subject to *jizya*, those who must submit to Islam or be killed, namely idol-worshippers amongst the Arabs, their land is *'ushr* land; even if they are conquered by the imam. For the Prophet of God conquered Arab lands and left them in the possession of the people. They will remain *'ushr* lands until the Resurrection.
3.4. Likewise all lands whose people submit [with the condition of] preserving their lands; their	

Passage A	Passage B
lands and what is on those lands are theirs—*kull bilād aslama ʿalay-hā ahlu-hā fa-hiya la-hum*.	
4. Any people (*ayyumā qawmin*) of the *ahl al-shirk* with whom the imam enters into a treaty (*ṣālaḥa-hum al-imām*), on condition that they submit to [his] authority and tax-demands, based on payment of *kharāj*, they are *ahl al-dhimma*. Their lands are *kharāj* lands. They are subject to the conditions of the treaty, which may be exacted in full but not increased.	5. All lands belonging to non-Arabs whose people achieve a treaty (*ṣālaḥa ʿalay-hā ahlu-hā*), such that they become [subject to the] *dhimma*, their land is *kharāj* land.
5. Any land (*ayyumā arḍin*) conquered by force by the imam, he may divide it amongst those who conquered it if he considers that best; he has the capacity to do that, and it becomes *ʿushr* land. But if he does not consider it best to divide it, but considers that the welfare [of Muslims—*al-ṣalāḥ*] is served by confirming it in the possession of its owners (*fi aydi ahli-hā*)—as ʿUmar ibn al-Khaṭṭāb did in the Sawād—he may do that. It is *kharāj* land. He does not have the right thereafter to take it from them. It is their property (*milk la-hum*); they may inherit it and sell it. He imposes *kharāj* upon them but they are not to be charged with more than they can bear.[9]	4. Any land (*ayyumā dār*) belonging to non-Arabs, which is conquered by the imam and which he leaves in the possession of its people, it is *kharāj* land. But if he distributes it amongst the fighters, it is *ʿushr* land. Consider (*a-lā yura*); ʿUmar b al-Khaṭṭāb conquered non-Arab lands and left them in the possession of their people (*taraka-hā fī aydī-him*); hence they are *kharāj* lands.[10]

These two passages are clearly related. Each provides for a tripartite division of land based on the notions of submission prior to conquest (*aslama*), treaty (*ṣālaḥa*), or forceful conquest (*ẓahara/ iftataḥa ʿanwatan*). Each passage is introduced by the

[9] Abū Yūsuf, *Kitāb al-Kharāj*, chapter *Kayf kāna farḍ Abī Bakr wa-ʿUmar*, i. 429–32.

[10] Ibid. 468–70.

redactional formula *qāla Abū Yūsuf* and a realization of the princely question. In Passage B, the discussions at Paragraph 3 are separated from those at Paragraphs 4 and 5 by the segment marker *qāla*. Simple formulaic forms of expression are evident both within and across the passages: *ayyumā* at A4, A5, and B4; *kadhālika* (= likewise) at A3.1–4 and B3.2. There are other similarities, more extensive and more complex.

In Passage A, the question asks about non-Muslims who submit (*aslamū*) on condition of preserving their lives and their lands. The specificity of the question is such that it is fully answered at Paragraph 3, which alone deals with those who submit. Paragraph 3.0 responds to the question with a general statement about lives and possessions. This is sequentially extended four times by means of the formula *kadhālika*. At Paragraph 3.1, there is focus on lands—as specified in the question—and provision of a precedent, the situation of Madina when it submitted to the Prophet. At Paragraph 3.2 the material is extended by reference to Ṭā'if and Bahrayn, which, presumably, also constitute precedents indicating how to deal with people who submit. At Paragraph 3.3 it is not clear whether the extension is intended to be another precedent or a statement of the current law. At 3.4 there is certainly muddle, for the extension is a generalizing statement of the law, which is precisely what had been provided at 3.1. Comparing A3.1 and B3.1, it will be found that, except for minor variations, the wording is parallel. The variations include singular v. plural (*arḍ* v. *arāḍū*) and 'where' v. 'when' (*ḥīn* v. *ḥayth*), which are certainly scribal or personal selections of no significance. The early part of the sentence at A3.1 has been adjusted in order to submit to the introductory *kadhālika*. Paragraph A3.4, which repeats A3.1, is another version of the same sentence, syntactically offering a precise parallel to B3.1: *kullu bilādin aslama ʿalay-hā ahlu-hā fa-hiya la-hum* and *kullu arḍin aslama ahlu-hā ʿalay-hā . . . fa-hiya la hum*. The formulae at A3.2 and B3.2 represent different syntactical methods of extending the precedents, and, of course, different positive content. A3.3 and B3.3 exhibit the same formulaic mode of extension—*kadhālika*, deal with the same group of people, but use different concepts to define the group. In fact, these two paragraphs make subtly different points. At A3.3 the people of the desert are subject to *ʿushr* if they submit (*idhā aslamū*); at B3.3 the Arabs (desert dwellers) are subject to *ʿushr* even if they are

conquered by force. B3.3 is, here, the more sophisticated text, incorporating a juristic subtlety that had not been evident when A3.3 was produced. Conversely A4 and A5 are better developed juristically than B4 and B5. And Passage B as a whole is both slimmer and less worked than Passage A. It exhibits the abrupt segment marker *qāla* between 3 and 4–5 and the equally abrupt formula *a-lā-yurā* within Paragraph 4 to introduce the story of 'Umar.

How did these passages arise? It must be supposed that prior to redaction they were independent written fragments containing parallel statements of the tripartite division of land. They clearly developed separately while maintaining a common concern with the specific content and submitting to a common set of formulaic means for expressing and extending the basic text. In details they developed some divergence. They were brought together in this text by means of a single redactional initiative which provided the redactional formula of the princely question and, perhaps, the other redactional formula *qāla Abū Yūsuf* (this may have been added later). The creator of Passage A (not necessarily the redactor of the *Kitāb al-Kharāj*) clearly interfered with the wording of his base text at 3.1 in order to integrate it in its present context. It is possible that he is responsible, too, for the last sentence of A4 and the last three sentences of A5, which exhibit uniform concern for the rights of the landowners and the limitations on the imam's powers. The phrase 'they may inherit and sell these lands' is also contained in the untranslated part of A3.3, confirming our sense that a single hand has given to this material a sharp focus. The two passages may be distinguished by noting that Passage B focuses narrowly on the typology of land (achieving greater subtlety only at 3.3) while Passage A covers both the typology and consideration of the rights of the landowners. A thoughtful redactor might have put B before A; in fact A comes before B, making B totally redundant, except for the subtlety at 3.3—which, however, like every other point in both passages, is also dealt with elsewhere.

Here then is an example of two passages, anonymous, uniform and formulaic in modes of expression, parallel in content, divergent in detail. Originating, presumably, as a record of a scholar's opinion, and preserved in a notebook or an archive, they were subject to redaction because stored in the mosque or culled

at the time of redaction. It would seem safe to assume that they grew up independently of their present context, and that they have been subject to a certain degree of manipulation in the process of redaction. In view of the unnecessary repetition and the pointless separation of these chapters, it might further be suggested that the management of these units has not been entirely successful.

IV

The analyses in the following pages aim to cover most of the material in the *Kitāb al-Kharāj* which relates specifically to modes of landholding in Iraq and to charges on agricultural produce in that area. Since this has to be extricated from, and related to a larger context it will be convenient to have an easy mode of reference which will identify the units being discussed. The following sequence of nine *faṣls* or chapters (so marked in the text) will serve the purpose of the initial analyses. The titles are those provided in the present text of the *Kitāb al-Kharāj*:

1. On *fay'* and *kharāj*
2. On what was done in the Sawād
3. On Syria and the Jazira [NW Mesopotamia]
4. How Abū Bakr and 'Umar distributed [stipends] to the Companions
5. What should be done in the Sawād
6. On *qaṭā'i'*
7. On the Hijaz, Makka, Madina, the Yemen, and Arab lands
8. The Khawārij
9. Basra and Khurasan

References to chapter 1, chapter 2, etc. in what follows are to these chapters. In Section XII, the numbering will be extended; some pre-emptive references to the extended numbering will take place in the following analyses.

The chapter following this sequence is Passage A translated above. The chapters preceding it deal with movable booty taken in warfare. Rahbī's text has a floating chapter between chapters 4 and 5, and two floating chapters intervening between the discussion of booty and chapter 1. These floating chapters have found no stable location in the transmission of the text. (A larger context for these chapters is provided in Section XII.) Of these nine chapters

In one of the Qādisiyya stories, the Persians, informed by the Muslim general that on defeat they would have to pay *jizya*, shout out, There shall be no treaty between us; which is certainly convenient. A subsidiary theme in these stories is that the Muslim victory was by God's will—a point of some importance in a book intended to justify taxation of a subordinate people in the interests of a ruling élite.

Paragraph 5 repeats, in words ascribed directly to Abū Yūsuf, the story of 'Umar's decision to impose *kharāj* and *jizya*. In the concluding bundle of reports, the fixed sums imposed by 'Umar on specific crops are muddled. The prevailing suggestion is that grain crops are subject to 1 dirham (cash) and 1 *qafīz* (kind) per *jarīb*, but is not without contradiction. The juristic solution to the problem of variety is contained in the text, for the question as to the capacity (*ṭāqa*) of the land or its people to bear their impositions may be taken to imply that these must vary according to capacity. This, we shall see, is a most carefully planted suggestion. The true cause of the variety is more likely to be established local custom.

(Aḥmad b. Yaḥyā al-Balādhurī (d. 276), in his account of the conquest of the Sawad, also provides a series of anecdotal items relating to the fixed rates imposed by 'Umar's agents, 'Uthmān and Ḥudhayfa. These specify, if anything, a rather greater degree of muddle than do the accounts given by Abū Yūsuf. Balādhurī too offers a solution to the problem of variety. Yaḥyā b. Ādam said to Ḥasan b. Ṣāliḥ, What are these varied rates? Ḥasan replied, They were imposed sequentially, according to the distance of the lands from the markets.[12] In Balādhurī's accounts there is no mention of 'Umar's questioning his agents as to the capacity of the land to bear the burden they imposed, no instance of the tell-tale terminology of *ṭāqa* and *iḥtimāl*.)

The whole material of the chapter can be summed up thus. The Sawād was taken by force, not treaty. The people, confirmed in possession of their land, were subject to *jizya* and *kharāj*. The *kharāj* was expressed in terms of fixed sums either in cash or in kind or both. These fixed sums were related to the capacity of the land/people to pay.

[12] Aḥmad b. Yaḥyā al-Balādhurī, *Futūḥ*, 268–71, for the anecdotes; 271 (bottom) for the variety of impositions.

Discussion of the *kharāj* lands of the Sawād continues in the first part of chapter 5 (= 5(1)), What should be done in the Sawād. This is composed of a single lengthy unified juristic argument, attributed directly to Abū Yūsuf, and dealing with *kharāj* lands. In the second part of the same chapter (5(2)) there is discussion of lands known as *qaṭā'i'*. Here is a translation, with some omissions, of 5(1).

1. Abū Yūsuf said. I have looked into the question of *kharāj* in the Sawād and into the modes of its collection. I have gathered people of knowledge in the field and others and discussed the matter with them. Not one of them has failed to advocate a practice which is illegitimate (*mā lā yaḥill al-'amal bi-hi*). So I asked them about the *kharāj* which was imposed (*tawẓīf*) under 'Umar, and about the capacity of the land to bear those impositions (*waẓīfa*). For 'Umar said to Ḥudhayfa and 'Uthmān, Perhaps you have imposed more than the land will bear (*mā lā tuṭīq*)? . . . And they replied . . . I have imposed what it will bear (*hiya muṭīqatu-hu*) . . . and, I have imposed what it will sustain (*hiya muḥtamilatu-hu*). [Clearly] the land was capable of bearing what was imposed, for two Companions of the Prophet of God ['Umar's agents, Ḥudhayfa and 'Uthman] have informed us of this and none has denied what they said.

2. They [those gathered for consultation] said that in those days cultivated land was plentiful and uncultivated land was little. They then described the large quantity of waste land which is not worked [today] and the small quantity of cultivated land that is worked for that [fixed sum] of *kharāj* [sc. imposed on every *jarīb*]. They said, If we are made subject to the *kharāj* that once was, meaning that uncultivated waste land is charged the same as worked and cultivated land, we will be unable to work what is now cultivated, or even a part of it; because of our incapacity to pay the *kharāj* on the land we do not cultivate, and because of the small quantity of land that is now in our hands. As to land that has been uncultivated for about a hundred years, it cannot be cultivated or subject to *kharāj* in the near future. For anyone who cultivates this land will be subject to outgoings and expenses which cannot sustain [the *kharāj*]—*bi-man ya'muru dhālika ḥājatun ilā ma'ūna wa-nafaqa la tumkinu-hu*. This is our excuse for abandoning the cultivation of land that has gone to waste.

3. [Consequently] I considered that a fixed charge in kind (*ṭa'ām*) . . . or in cash (dirham) . . ., imposed upon the people in spite of the variety of their circumstances, constitutes a disadvantage to the government and treasury, and likewise to the taxpayer.

4. [A charge in kind is unhelpful to all concerned both when prices go up and when they go down; likewise a charge in cash. Price fluctuations come from God. Three hadith from the Prophet confirming this.]

5. Abū Yūsuf said. As to the disadvantages to the taxpayers in relation to one another [it derives from the need to measure and assess land and produce, and from the consequent disputes between the powerful and the weak . . .]
6. I therefore see nothing more beneficial to the treasury, more likely to free the taxpayers from mutual dispute and quarrel, nor anything providing greater security against the ill-will of governors and officers, than a light and just system of *muqāsama* (proportional taxation); a system that provides the government with satisfaction, and the taxpayers with freedom from mutual dispute. The Commander of the Faithful, may God grant him long life, is the highest designate to this activity and the best supervisor, because of the position given him by God in relation to his religion and his servants. I therefore ask God to grant him success in what he intends or prefers in this matter, and to provide him with help towards the right guidance and the welfare of religion and community.
7. I consider—may God grant long life to the Commander of the Faithful—that those who grow wheat and barley in the Sawād should be subject to a *muqāsama* of two fifths, for land naturally irrigated, and one fifth plus one tenth, for land artificially irrigated. As to date-palms, vines, melons, and garden produce, they should be subject to one third. As to summer grains [maize, millet, etc.], they should be subject to one quarter.

They should not be subject to these taxes on the basis of estimates; nor should [the farmers] be deprived of access to their produce. Rather, it should be sold to merchants and the *muqāsamat* imposed on the prices thus realized, or [the *muqāsamat*] should be computed in accord with a just evaluation, not constituting an excessive burden to the taxpayer, nor harmful to the government. The specific sums should be taken from them.

Whichever system is least burdensome to the tax payer should be imposed: if computing the value is the lighter burden, that should be done; if selling and dividing the price is the lighter burden, that should be done.
8. Seven hadith about the Prophet's conquest of Khaybar.

The chapter continues with the phrase, *qāla Abū Yūsuf fa-ammā al-qaṭā'i'* . . . which introduces a long discussion of a different type of land. *Ammā* is a frequent segment marker which, on other occasions, has been strengthened by a formal chapter division. Unified discussion of *kharāj* lands and *qaṭā'i'* under a single chapter-heading has obvious implications. The lands of the Sawād are of two types: *kharāj* land, subject to *muqāsama*, and *qaṭā'i'* lands for which, as we shall see, a claim is made that they are subject to the *'ushr*.

If it is true that Passages A and B, translated above, pre-existed the redaction that brought them into their present context, and if the same is broadly true of the material that constitutes chapter 2, such a claim cannot be asserted for the material just presented from chapter 5. Here is a coherent, logical argument, sustained at considerable length and unified throughout by clear principles of logical control and setting. Abū Yūsuf organizes a debate with the people of knowledge (who turn out to be ignorant, for all their suggestions are not *ḥalāl*). He establishes the inefficiency of the fixed-rate system, and proposes that it be replaced by proportional taxation on produce, *muqāsama*. Conveniently, he has the figures at hand, variously two fifths, one third, or one quarter. The argument is clearly intended and expected to please the prince. Though the tax-figures are described as light and just (Para. 6), it is permissible to surmise that they were not intended or expected to please the taxpayers, who had, after all, advocated some other system or systems, perhaps related to *their* reading of the ancient fixed-rate materials—which need not have been the same as that given here. What we are given is the government's reading of that material.

The text is clearly related to a moment of debate when the advantages of a fixed-rate system were held up over and against those of a proportional system. It is unlikely that the reader is being provided with a full account of the matter. The date of the introduction of proportional taxation to Iraq is problematic. Løkegaard accords some degree of historical veracity to Balādhurī's report that the peasantry (*sic*—Balādhurī's report says *al-nās*) requested the *muqāsama* in the reign of Manṣūr. But he knows too that there was no 'absolute or immediate abandonment of the *misāḥa*' (i.e. the fixed-rate system). His conclusion is that '*misāḥa* was the method of assessment in the lands of the peasantry most commonly employed until al-Mahdī. Under him and his successors, the *muqāsama* has taken the lead without any of the methods having sole sway at any time'.[13] Even such a conservative conclusion seems to me to claim more than is warranted, granted his necessary recourse to sources, late, complex, and frequently contradictory.

The passage from the *Kitāb al-Kharāj* translated above has been understood to imply that a decisive moment (if not the decisive

[13] F. Løkegaard, *Islamic taxation*, 115, but see the whole of chapter 5, 108 ff.

moment) in the transition from *misāḥa* to *muqāsama* was at the time of the production of this text. This seems very likely. It is not a necessary conclusion, however, for the rehearsal of an old and familiar argument might be undertaken for the purpose of inserting into it a new element. By contrast with the anecdotes reported in Balādhurī, these, in Abū Yūsuf, record, again and again, 'Umar's eliciting from his agents a reference to the capacity (*ṭāqa* etc.) of the land to bear its tax-burden. This motif recurs throughout the juristic arguments of the book.

Specifically in relation to the taxpayers of the Sawād, the point is taken up in the chapter entitled, On increasing and decreasing [tax impositions]—*fī al-nuqṣān wa-'l-ziyāda*. Here Abū Yūsuf again is asked why he imposes *muqāsama* rather than returning the lands to the fixed-rate system imposed by 'Umar. His reply focuses entirely on 'Umar's question as to the capacity (*ṭāqa*, *iḥtimāl*, etc.) of the land to provide tax returns. The implications of 'Umar's concern, unsurprisingly, are discovered to be that the imam has the right to raise or lower impositions in accord with his estimate of capacity. 'The imam has the right to consider what 'Umar imposed on the *kharāj*-payers; if they can sustain that today or if the land can bear it [he may continue that system]; otherwise he should impose what the land can bear and the people sustain (*ma taḥtamilu-hu al-arḍ wa-yuṭīqu-hu ahlu-hu [ya'nī ahl al-kharāj]*).'[14] This material is clearly a continuation of the argument produced at chapter 5(1).

Two sets of conclusions may be tentatively essayed at this point. First, with regard to the material content of this work, its composition and redaction:

1. Some of the material in the *Kitāb al-Kharāj* pre-existed the redaction. It was brought into the text by means of formal devices that rendered it homogeneous with the overall structure but it serves little or no real explanatory purpose. For example, Passages A and B.

2. Some material was perhaps specifically prepared and gathered for this book. It has been summarized and conflated, producing orderly, but repetitive and contradictory subject-matter. For example, chapter 2, and its (contradictory) hadith. It is possible

[14] Abū Yūsuf, i. 574.

that this material, though originally independent, has been rewritten to serve the purposes of the book as a whole.

3. Some of the material was specially written either at or after the initial redaction. It exhibits lengthy, unified, formal argument and systematic use of Prophetic hadith. For example, the first part of chapter 5 (and its continuation in the chapter entitled *fī 'l-nuqṣān*).

4. The material produced at or after the redaction, even when it constituted a single coherent argument, was liable to division and separation. Hence chapter 5(1) and the chapter headed *fī al-nuqṣān*, though unified in argument, are now illogically separated.

Secondly, with regard to the structure of juristic ideas:

1. The conviction that there were three types of land, as described in Passages A and B, logically, and perhaps temporally, precedes other arguments.

2. The argument that the lands of the Sawād are *kharāj* lands, by virtue of conquest without treaty, grew out of this. Hence chapter 2(1).

3. The independent (and older) material assumes that *kharāj* lands were subject to a fixed tax in cash, or in kind, or in both. The variety of materials accumulated to prove this suggests that the tax was not uniform. The materials may be local in origin. Chapter 2, the hadith.

4. A change took place whereby the fixed-tax system was replaced by a proportional tax or *muqāsama*. Chapter 5(1). The arguments in favour of *muqāsama* are presented in such a way as to stress the rights of the imam to vary taxation according to (the imam's) assessment of what the land will bear.

Now, there is a great deal to be said for the idea that a decisive change in the mode of taxation is precisely the kind of thing that would call into existence a book like the *Kitāb al-Kharāj*. Desiring to initiate a new, or to justify a recent, reform in tax collection, the government calls upon reliable *fuqahā'* to provide some sort of theoretical justification for the reforms. They gather or are provided with a mass of old or local materials, which do not serve the immediate purpose, and so proceed to create a set of new arguments which justify the transition. The old or local material is incorporated with the new (sometimes suitably emended) and the whole is prepared for presentation to a prince (but possibly never

presented, for the final stages of organization and distribution of material leave much to be desired).

This scenario in fact can be refined to a very considerable degree of academic precision. It will be helpful here to present some pre-emptive conclusions. The decisive layers of juristic argument in the *Kitāb al-Kharāj* are always such as to maximize the government's capacity to tax, at discretion, by proportional taxation. Many of the component materials, however, were originally intended to defend established custom. The technique of the redactors, working for the government, is not to reject these materials, presumably of local and juristic origins, but to incorporate (possibly modify) them and then to provide arguments which neutralize their claims. The result can be confusing, for any conclusion deduced from one chapter is liable to be falsified, and was intended to be falsified, by juristic arguments deployed in the same context or elsewhere. For example, the material in chapter 2, justifying a fixed-rate *kharāj*, is to be read in the light of the material in chapter 5(1), which accepts all the arguments of chapter 2, but makes them into the premiss for an argument in favour of the legitimacy of proportional taxation, according to the capacity of the land.

The *Kitāb al-Kharāj* belongs to a particular historical context. There is no reason to doubt that, with regard to changes in the taxation system, consultation did in fact take place with 'people of knowledge in the field', etc. and that their discussion included an assessment (or reassessment) of the arguments relating to fixed-rate versus proportional taxation. A part of these arguments has got into the text. The bulk of material, however, has been redacted and presented in the controlling light of a clever juristic device, a *ḥīla*, which specifies that all the lands of the Sawād, being subject to *kharāj*, can, irrespective of precedents adduced, be taxed, *according to capacity*, by means of a proportional culling of produce, under the controlling judgement and supervision of the imam.

VI

The lands known as the *qaṭa'i'* are the subject-matter of the second part of chapter 5 and the immediately succeeding chapter, entitled, The *qaṭā'i'*. Chapter 5(2) begins with the phrase *qāla Abū Yūsuf wa-ammā al-qaṭā'i'*. The nature of these lands is not here defined but the question of their tax imposition is discussed in detail. The general rule is that naturally watered lands of this type are subject to the *'ushr*, that is one tenth, and artificially watered lands are subject to a half-*'ushr*, that is one twentieth. The terminology used reveals that the *'ushr* here is to be understood as *ṣadaqa* or *zakāt*. This general rule is described as being agreed on by the learned, the *'ulamā'*, and proved by *āthār*. The *'ushr* on *qaṭā'i'* land is to be imposed only on crops that have a capacity to last and which are measured by volume or weight. It applies thus to wheat, barley, rice, millet, etc., but not to vegetables, melons, cucumbers, etc. The tax is imposed only if the quantity of produce reaches a threshold of five *wasaq*s; (except for saffron, which is to be taxed when its value reaches the equivalent of five *wasaq*s of the cheapest grain). There is *ikhtilāf* on the five-*wasaq* rule, Abū Ḥanīfa being presented as holding the view that all produce, no matter how small in quantity, should be subject to either *kharāj* or *'ushr*. The five-*wasaq* rule is defended, however, 'because of what has been transmitted from the Prophet', represented at this point in the argument by two hadith. These are followed by a definition of the *wasaq*, a discussion of details of assessment, and an address to the Prince: Act in this matter in whatever way you consider more beneficial to the people and more advantageous to the treasury, based on whatever opinion you prefer [i.e. accepting or rejecting the five-*wasaq* rule]. The text concludes with a sequence of twenty-one hadith, the first introduced by *qāla Abū Yūsuf* and the rest by *qāla*. These hadith, either from the Prophet or from Companions, make a number of points including the following:

1. naturally and artificially irrigated lands are subject to the *'ushr* and half-*'ushr* respectively
2. there is no *ṣadaqa*/*zakāt* on less than five *wasaq*s
3. produce of the type of vegetables, melons and cucumbers is not subject to *ṣadaqa*/*zakāt*; (one hadith from Ibrāhīm al-Nakha'ī—not a Companion, but a jurist—specifies that everything produced by the earth is subject to *ṣadaqa*)
4. this tax is referred to in the Quranic verse, *wa-ātū ḥaqqa-hu yawma ḥiṣādi-hi* (Q.6:141).

No attempt will be made here to demonstrate lines of cleavage and segmentation within the argument that precedes the group of

only two, 2 and 3, are introduced by the princely-question formula. Chapters 1, 6, 7, 8, and 9 exhibit the formulaic *ammā*, marking a transition and introducing new subject-matter. Chapter 4 has no introduction, consisting entirely of hadith; chapter 5 a very elaborate one.

V

Kharaj lands in the Sawād are discussed in chapter 2, What was done in the Sawād, in the first part of chapter 5, What should be done in the Sawād, and in a later chapter entitled, On increasing and decreasing [tax impositions]—*fī al-nuqṣān wa-'l-ziyāda*, etc. Chapter 2 consists of 23 segments, all except one introduced by *qāla* or *qāla Abū Yūsuf*.[11] The material falls neatly into two halves. In the first half, the focus is on the method of conquest. It consists of two units which express a complex juristic opinion on the conquest of Iraq and its consequences, followed by five units on the Battle of Qādisiyya and four on the Battle of Nihāwand. In the second half, the focus is on the specific tax impositions initiated by 'Umar. It consists of one juristic opinion attributed directly to Abū Yūsuf and eleven hadith variously specifying 'Umar's activities.

Here is a schematic and abbreviated presentation of this material.

1. Question from the Prince: What about:
   (*a*) the Sawād and the way its people were dealt with as to *kharā* and *jizya*;
   (*b*) 'Umar's impositions in respect of these taxes;
   (*c*) the existence of treaty agreements (*ṣulḥ*);
   (*d*) the ruling on treaty lands and on lands conquered by force?
2. Abū Yūsuf . . . from Zuhrī:
   (*a*) 'Umar conquered Iraq, Syria and Egypt;
   (*b*) The Muslims advised him (*ashāra 'alay-hi*) to divide Iraq amongst the conquerors;
   (*c*) He asked, What about those Muslims who will come after us in time?
   (*d*) He left the conquered peoples on their land (*taraka 'l-arḍ wa-ahla-hā*) and subjected them to *jizya* and *kharāj*.

[11] The exception is at Abū Yūsuf, 248, n. 2/18.17.

3. He said . . .
   (*a*) from Sha'bī: there were no treaties (*'ahd*) prior to the conquest of the Sawād
   (*b*) from other *fuqahā'*: there were no treaties except for Ḥīra, 'Ayn Tamar, Ullays, and Banqiya.
4. Nine hadith relating to the Battles of Qādisiyya and Nihāwand, and, generally, to the conquest of the Sawād.
5. Abū Yūsuf said. When 'Umar conquered the Sawād, he consulted the people (*shāwara 'l-nās*) and most of them considered he should divide it amongst the conquerors. Bilāl b. Rabāḥ was most fiercely of this view . . . 'Uthmān, 'Alī, and Talḥa agreed with 'Umar, on the view that the land should be left to its holders. 'Umar prayed for support against Bilāl and his party; and, as a result, discovered a proof text in the Qur'ān, at 59: 10. He said, How can I leave those who will come after us without a share? He confirmed the land in the possession of its people (*aqarra-hu fī aydī ahli-hi*) and imposed *kharāj* and *jizya*.
6. Eleven hadith, disorderly, covering the following points:
   (*a*) 'Umar, through his agents, Ḥudhayfa and 'Uthmān, imposed 1 dirham (cash) and 1 *qafīz* (a measure of weight) on every *jarīb* (a measure of area) of cultivable land—whether actually cultivated or not.
   (*b*) He imposed specific sums in dirhams on specific crops [varied].
   (*c*) He imposed a *jizya*, in three grades, of 12, 24, and 48 dirhams [some variation here too].
   (*d*) Ḥudhayfa and 'Uthmān, sent to measure and assess the land, when questioned as to whether they had imposed more than the land could bear, replied, No; [terminology: *kallafa, aṭāqa, ḥamala, iḥtamala*].
   (*e*) A single hadith from 'Ali implying that ownership of the Sawād lands would have caused the Muslim conquerors to squabble.

The subject-matter of this chapter is encapsulated at Paragraph 2: Iraq was conquered and 'Umar decided—against the advice of the Muslims—not to divide it but to subject it to *kharāj* and *jizya*. Paragraph 3 repeats that Iraq was conquered—no treaties—but has acquired a handful of exceptions. The nine stories about Qādisiyya and Nihāwand clearly should provide evidence for the conquest by force and absence of treaties. They serve the purpose.

twenty-one hadith. Basically the argument is coherent and orderly, and, except for the introductory sentence, not formally segmented. The *ikhtilāf* argument relating to the five-*wasaq* rule may be a secondary expansion, generating two Prophetic hadith within the text, which cover the same point as is made by three Prophetic hadith within the group of twenty-one at the end. The address to the Prince, Act . . . in whatever way you consider more beneficial etc., may have come into existence at a time when the five-*wasaq* rule was not so firmly buttressed as it now is in the text. There are no Prophetic hadith supporting the opposite view, only the opinions of Abū Ḥanīfa and Ibrāhīm al-Nakha'ī.

The more interesting problem lies at a higher level of generalization. The fundamental rule governing the taxation of the Sawād states that it is *kharāj* land because conquered by force. But this section deals with a category of land which is subject to the *'ushr*, a tax explicitly recognized as *ṣadaqa* or *zakāt*, both in the introductory argument and in the twenty-one hadith. From the point of view of a tax-collecting administration, the recognition of this type of land within the Sawād might be necessary, but could hardly be desirable. As presented here, clearly and forcefully, these lands are not only subject to a lower tax than *kharāj* lands, but some of the crops (vegetables, melons, etc.) are freed from any charges, and those that are subject to taxation are subject, fairly clearly, to a five-*wasaq* threshold. The invitation to the Prince to act in accord with whatever opinion he preferred was all very well, but the argument was heavily weighted in favour of the five-*wasaq* threshold (i.e. in favour of the taxpayer). In any case, the Prince would certainly have preferred a lot more discretion, for example, to make the land subject to *kharāj*. This material, therefore, must be interpreted as representing local claims, intended to minimize and control government exactions.

The subsequent chapter, chapter 6, On the *qaṭā'i'*, is composed of five segments marked by the formulaic *qāla* (imperfectly imposed; Rahbī offers the three hadith without *qāla*, Bulaq two of them with). The first segment is a simple juristic statement attributed to Abū Yūsuf. This is followed by three hadith: *[qāla] ḥaddatha-nī* . . . The fifth segment is a lengthy juristic exposition of the nature of the *qaṭā'i'* and the rights of the imam, exhibiting no overt segmentation. The whole of this material may be translated and set out as follows.

1. Abū Yūsuf said. As to the *qaṭā'i'* in the land of Iraq, they are all [the lands] that belonged to Chosroe, his Marzubans, and his family, all of which were not in anyone's possession at the time of the Conquest.

2. [Hadith from . . .] a man of the Banī Asad. The *ṣawāfī* in the time of 'Umar had a value of four million (dirhams, i.e. as tax-income). They are called today the *ṣawāfī al-asfār*. This means that 'Umar set aside (*asfā*) [certain categories of land, namely]
   1. the lands that belonged to Chosroe and his family
   2. the lands that belonged to those who were killed in the fighting
   3. the lands of those who fled to enemy territory
   4. lands recovered from water
   5. lands that belonged to the [Sassanian] post (*dayr barīd*).

He (the man from the Banī Asad) mentioned two other categories which the reporter did not recall.

3. [Hadith from . . .] 'Abdallāh b. Abī Hirra. 'Umar set aside (*asfā*) ten categories of land:
   1. the land of those killed in battle
   2. the land of those who fled
   3. the land that belonged to Chosroe
   4. the land that belonged to his family
   5. land recovered from water
   6. land that belonged to the [Sassanian] post (*kull dayr barīd*).

He ('Abdallāh b. Abī Hirra) had forgotten four categories. The *kharāj* on the land that 'Umar set aside was 7 millions. But when the Battle of Jamājim took place [81–2 AH] the people burned the register (*dīwān*), and the record (*al-aṣl*) disappeared, was destroyed, and became unknown.

4. [Hadith from . . .] ancient shaykhs. It was found in the *dīwān* that 'Umar set aside the possessions of Chosroe and his family, and those who fled or were killed in battle, also the land recovered from water or forests. He used to allot this land, by *iqtā'* (*kāna yuqti'u fī hādhihi li-man aqta'a*).

5.1. Abū Yūsuf said. This land was like treasury land—*wa dhālika bi-manzilat bayt al-māl*; it belonged to no one and could not be inherited. The just imam may allot (*aqta'a*) such land as reward, or give it to one who has benefited Islam. He will apportion it appropriately and not give it by whim.

5.2. Likewise this land—*kadhālika hādhihi 'l-arḍ*. This is the type of the *qaṭā'i'* in Iraq, in my view. This is what Ḥajjāj acted on; then 'Umar b. 'Abd al-'Azīz acted. 'Umar acted in accord with the *sunna*. For when righteous governors (*al-wulāt al-mahdiyyun*) allot land (*aqta'a-hu*) none may repossess it. One who takes such land from one person and allots it, by *iqtā'*, to another, he has usurped it (*ghaṣaba-hu*).

5.3. The *qaṭā'i'* are subject to *'ushr* because they are treated as subject to *ṣadaqa—li-anna-hā bi-manzilat al-ṣadaqa*.

5.4. But that is up to the imam. If he considers it appropriate to impose the *'ushr*, he should do so. But if he considers it appropriate to impose two *'ushr*s (one fifth), he may do so. And if he considers it appropriate to impose *kharāj*—if they are watered from *kharāj* lands—he may do so. He is free in this matter, with respect specifically to Iraq.

5.5. [These lands] are subject only to the *'ushr* because the owner of the *iqtā'* has the burden of expenses in digging channels, establishing buildings, and working the land. This is an expense to the owner of the *iqtā'*.

5.6. The matter is up to you. Whatever you think most beneficial, act so.

Paragraphs 1, 2, 3, and 4 constitute a juristic exploration of the origins of *qaṭā'i'* in Iraq as a separate category of land. This category is distinguished from *kharāj* land because, after the Conquest, there was no one in evident possession of it. It was distributed by *iqtā'*, but, as implied by the hadith, the records of these *iqtā'*s and their tax-income are lost. All of this should be understood as a historical construct designed to explain or justify a contemporary claim, namely that some lands in the Sawād were to be distinguished from *kharāj* lands. They were called *qaṭā'i'* and, according to chapter 5(2), they were subject to the *'ushr*. Here, at chapter 6, Paragraph 3, the income from this land is referred to as *kharāj*; this is perhaps, here, a generic term.

It is clear from Paragraphs 5.1 and 5.2 that the concept of treasury land was a contemporary one which was being used in order to create a past history for a category of land that was no longer treasury land. The juncture between 5.1 and 5.2 is characteristically abrupt. The land thus categorized was now securely and rightfully held by those to whom it had been given by the imams. The perceived danger is this: if of this land it is claimed that its origins lie in government *iqtā'*s, might this not give the government some rights of recovery? The answer is no; for the just imam has the right to give away this land (5.1) and, once alienated, there can be no legitimate recovery (5.2). The historical references to Ḥajjāj and 'Umar ibn 'Abd al-'Azīz are not made clear in the text, but are sufficiently familiar to be reconstructed. Ḥajjāj seized and 'Umar restored these lands. Note the consequence: any caliph who makes a claim on *qaṭā'i'* land—for example by seizing and reallotting it—is following the precedent of Ḥajjāj; any caliph who restores that land to its (rightful) owners is following 'Umar b. 'Abd al-'Azīz. The point built up in the

historical reference to 'Umar is the same as is stated at 5.1: a just governor may alienate state lands and thereafter there can be no legitimate interference in the rights of the recipients.[15] Paragraph 5.3 confirms the message of chapter 5(2): the *qaṭā'i'* are subject to *'ushr*/*ṣadaqa*. Paragraph 5.4, displaying little concern for argument, simply cancels this idea in favour of government discretion. The imam may impose whatever he likes; indeed he may subject this land to *kharāj* instead of *'ushr*. (The phrase 'if they are watered from *kharāj* land' is certainly, and the phrase 'with respect specifically to Iraq' possibly a secondary interpolation; cf. Sect. VII below). Paragraph 5.5 explains 5.3 and must originally have followed it directly. Paragraph 5.6 is another interpolation, probably from the same hand as 5.4, though here, in deference to one of the conventions of the redaction, expressed in second-person address. The Prince is addressed and informed that he may do whatever he likes.

The sequence of juristic arguments here is clear. The facts behind them require some reconstruction. The general rule was that the lands of the Sawād were subject to *kharāj*, initially a fixed tax and subsequently realized as a proportional tax of two fifths, one quarter, or one third. Of some lands, the *qaṭā'i'*, it was claimed that the landholders should pay the *'ushr* or *ṣadaqa*/*zakāt*. This claim was based on the argument that ownership here had arisen as a result of state alienation of state lands subsequent to the Conquest (and was backed by numerous hadith). The claim is neatly made and includes the intimation that the records of this alienation are lost, and that ownership of this type does not create any rights of reappropriation on the part of the government. Those who make this claim concede that the Sawād was conquered by force but deduce from that the existence of a special category of low-tax lands subject to *'ushr*, and justified by historical circumstances. Most of this material should be interpreted as having been

[15] The meaning of the word *iqtā'* has always bothered European writers. But it does not have one meaning: it has uses made clear by context. Here the verb *aqta'a* is systematically used to mean transfer of land in the sense of relinquishing all rights over it; it is a transfer of ownership and it is permanent. Even as the argument is being made, one can, as it were, hear the opposite view which accounts for the build-up of this argument. Someone somewhere was trying to suggest that when government land was transferred by *iqtā'*, the government retained some rights of retrieval. Transferral or allotment by *iqtā'* is not in the context of the *Kitāb al-Kharāj* to be confused with temporary assignments of tax-farming rights. This was called *tawliyya* and *taqbīl*; see Ch. 6, Sect. XII.

produced outside of government circles, by skilful jurists, who wished to oppose government proposals to subject all the lands of the Sawād to *kharāj*, assessed as a proportion of produce. These circles were also concerned to defend their lands from state appropriation, with a view to redistribution. The final redaction of the *Kitāb al-Kharāj*, however, was carried out by redactors working for the government: they accepted the material produced on *qaṭa'i'* in its totality, and undermined it by a couple of interpolations (5.4 and 5.6) which offer no arguments but assert simply that the imam may impose whatever he wishes on these lands. The claim that the government may not interfere with the established rights of the landholders in these areas is not here disputed, though it was qualified, in favour of the government, elsewhere in the text; see Section VII below.

As with the discussion of *kharāj* land proper, this material can, indeed must, be interpreted as reflecting a dispute between those who would assert local or traditional rights against those (government agents) who would impose taxation at discretion. The material of the dispute has been edited in such a way as to, in the end, sanction taxation at discretion.

VII

The lands known as *iqtā'* lands and the process whereby the state transferred or allotted lands—*aqta'a*—is discussed in chapter 9. At first sight this is a more than usually disorderly chapter. Rahbī's text provides a *faṣl* division in the middle. This is obviously misplaced and compounds the disorder.[16] In fact the divisions are quite simple. There is, first, a section beginning, As to Basra and Khurasan . . . Juristic discussion here is followed by a single hadith which relates to the topic in question. This is chapter 9(1). The whole of the rest of the chapter, 9(2), is about *iqtā'*. It may be translated and set out as follows.

1. Abū Yūsuf said. Land in Iraq or the Hijaz or Yemen or Ta'if or the Arabian Peninsula or elsewhere, being waste land, not belonging to anyone (*ghāmirun mimmā laysa li-aḥad*), or not in the possession of anyone (*wa-lā fī yad aḥad*), or not in the ownership of anyone (*wa-lā milkan li-aḥad*), or being without legitimate heirs, or being without any sign of cultivation: on such lands, if they are allotted by the imam (*aqta'a*) to a person who cultivates them, then the recipient of this allotment should pay, on *kharāj* lands, *kharāj* . . . and, on *'ushr* lands, *'ushr* . . .

2.1. All land, allotted by the imam by *iqtā'*, if it was conquered by force, is subject to *kharāj*.

2.2. Unless the imam makes it *'ushr* land.

2.3. That is up to the imam: if he gives land by *iqtā'*, *kharaj* land, if he considers it appropriate to impose upon it the *'ushr*, or an *'ushr* and a half-*'ushr*, or two *'ushr*s, or more, or *kharāj*, or whatever he thinks its people can bear, he may impose it. I trust he is free in this matter. Whatever he desires he may do.

3. Except with regard to the Hijaz, Makka, Madina, and the Yemen. There can be no *kharāj* in these areas. And the imam may not—it is not legitimate—change this or transfer these lands from the status imposed upon them by the Prophet of God.

4. I have explained this to you. So adopt whichever of the two views you prefer. Act in whatever way you consider most beneficial to Muslims, most advantageous to the élite and the masses, and most secure for you in your religion.

5.1. Abū Yūsuf said. When lands are allotted by *iqtā'*, by righteous governors (*wulāt mahdiyyun*), whether in the Sawād or the Arab lands, or the Jibāl (Western Iran, the Zagros), if the lands belong to the categories we have mentioned on which the imam has the right of *iqtā'*, then it is not legitimate (*lā yaḥillu*) for those caliphs who come after them to repossess these lands from those who have gained possession, whether through sale or inheritance.

5.2. Rulers who seize land from one person's possession and give it by *iqtā'* to another are in the position of usurpers (*ghāṣib*) . . .

5.3. It is not permissible for the imam to allot by *iqtā'* to one person what is the right of another, whether Muslim or Treaty-subject (*mu'āhid*). Nor may he deprive such a one of his possessions except by virtue of a rightful claim against him (*illā bi-ḥaqq yajib la-hu 'alay-hi*) . . .

5.4. Land in my view is just like other goods (*bi-manzilat al-māl*). The imam may reward from the treasury one who has been useful to Islam, or one who has provided strength against the enemy. He may act in this field in whatever way he considers best for Muslims and most beneficial to their situation. Likewise lands. The imam may give them by *iqtā'* to whomsoever he wishes, that is, from the categories [of land] which I have mentioned.

5.5. I do not consider that he should simply leave land in which there is no

[16] This chapter begins at Abū Yūsuf, i. 409. The natural division takes place at 414.2, unmarked. The extra—erroneous—division takes place towards the end of my Para. 1 (= i. 415).

one with rights of ownership or which is uncultivated. Let the imam give it as *iqtā'*. (*Wa-lā arā an yatruka arḍan lā milk li-aḥad fi-hā wa-lā 'imāra ḥattā yuqti'a-hā al-imam.*) For that is more conducive to productivity and likely to maximize the *kharaj—a'mar li-'l-balad wa-akthar li-'l-kharāj.*

5.6. This is the definition of *iqtā'* in my view.

6. Abū Yūsuf said. The Prophet of God used to give land by *iqtā'*. [Seven hadith, of which five present the Prophet as giving land by *iqtā'*; one relates to 'Uthmān; and one to a number of Companions who acquired possession of *kharāj* lands, presumably by *iqtā'*]

7. Abū Yūsuf said. These *āthār* show that the Prophet used to allot land, by *iqtā'*, and that the caliphs did likewise . . . They did not give away by *iqtā'* what was the right of Muslims or Treaty-subjects (*wa-lam yuqti'ū ḥaqq muslim wa-lā mu'āhid*).

8. Abū Yūsuf said . . . from the Prophet of God. Whosoever seizes one inch of earth, having no right to it, God will collar him with the seven earths.

Paragraph 1 here effectively makes two points: (1) that allotments of land (*iqtā'*) by the imam may take place in any of the categories specified, and (2) that such land is then assimilated for purposes of taxation to surrounding land. The latter ruling was not ancient and not obvious during the composition of chapter 5(2), which argued extensively for such land being subject to the *'ushr*, nor indeed during the composition of chapter 6, which contains some arguments justifying the *'ushr* tax and contrary arguments favouring government discretion (5.3 and 5.5 versus 5.4 and 5.6; see Sect. VI above). The argument in favour of government discretion was at that point without technical justification and clearly in need of theoretical support. Here, by the argument of assimilation, this is effectively supplied: *iqtā'* lands in *kharāj* areas are assimilated to that system, and *kharāj*, we have seen, is a proportional taxation controlled by the government's assessment of capacity. *'Ushr* areas are limited, within the text of the *Kitāb al-Kharāj*, only to the Arabian Peninsula. Hence all *iqtā'* lands in Iraq are subject to *kharāj*. Paragraph 1 represents the final stage in the resolution of a juristic problem. Situated here at the beginning of a lengthy section dealing with *iqtā'*, it must be understood as one of the last items to enter the text, deliberately promoted to initial position where it governs the complex material of Paragraphs 2 to 8, which reveal much greater uncertainty.

It is immediately evident that Paragraphs 2 to 8 are in part a

reworking of material already used. If one compares, for example, Paragraphs 4.1 and 4.2 with Paragraph 5.2 from chapter 6 (see above, Sect. VI), it will be evident not only that the same rules are being expressed but that the same syntax and phraseology is being exploited, with expansions. However the repetition of rules here is not simply otiose. Chapter 6 dealt with a type of land called *qaṭa'i'* whose historical origins were said to be through ancient and now unrecorded *iqṭā'*; it alleged that the same phenomenon had existed in the past; and that certain lands in the Sawād, having these historical origins, must be treated differently from other lands; in particular they must be subject to *'ushr* and not *kharāj*; there were no records of these *iqtā'*s; the claim was one of ancient rights. Effectively, in the text, the historical origins were conceded, but the type of taxation was not. The *qaṭā'i'* were to be taxed at government discretion.

The present block of material is not concerned with these claims to ancient rights, but directly with the contemporary phenomenon of *iqtā'*. It represents an attempt to express the rules governing ownership, usufruct, and taxation in *iqtā'* lands. At Paragraph 2, we are plunged immediately into muddle. Paragraph 2.1 states that land given by *iqtā'* is subject to—not *'ushr* but *kharāj*. The if-clause may be an interpolation bringing 2.1 into line with the rule at Paragraph 1. Paragraph 2.2 first accords the imam discretion to render *iqtā'* lands subject to *'ushr*, then Paragraph 2.3 extends the discretion, giving the imam rights to impose whatever he likes on such land. The wording and phraseology of 2.3 corresponds to Paragraph 5.4 in the previous section (chapter 6), both being statements of absolute Government discretion. Paragraph 3 expresses a familiar conventional rule, repeated on numerous occasions throughout this work. Paragraph 4 refers back to two views and makes no sense in its present context. Did it perhaps refer to 2.1 and 2.2 at a time when they were not separated from 4 by 2.3 and 3? In those circumstances it made sense: the imam might choose between imposing *kharāj* and *'ushr*. (It is worth noting that, in chapter 6, Paragraphs 5.4 and 5.6 gave expression to a considerable degree of government discretion, first in the third person then in the second person. Here the same pattern is repeated at Paragraphs 2.3 and 4. Clearly a redactor (or redactors) has gone through the work at least twice trying to render it suitable for presentation to the prince.)

The growth of the text reflects the growth of juristic argument. It can be recreated thus:

1. Some people claim that *iqtā'* lands were subject to *'ushr*.
2. A counter-claim was made:
   (*a*) they are subject to *kharāj*,
   (*b*) unless the imam makes them *'ushr* land;
   (*c*) in fact, the imam can tax at discretion.
3. No, in *kharāj* areas they are subject to *kharāj* and in *'ushr* areas to *'ushr*.

The last statement has the merit of being both logically satisfying and practically effective (since the area under discussion is the Sawād where all lands are *kharāj* lands, i.e. effectively taxable at discretion). Expression of this rule has been promoted to initial position (Para. 1) where it governs material which still reveals earlier layers of thought accumulating round the problem.[17]

Paragraph 5, divided here for convenience into six segments, explores two areas of thought: first, the imam's right to alienate land and secondly, the consequent rights accruing to those who receive such land. Paragraphs 5.1 and 5.2, echoing the terminology of an earlier discussion (chapter 6, 5.2), emphasize that the imam has a right to allot lands and does not have a right to repossess these allotments. Rulers who do so are usurpers. Paragraph 5.3 repeats but qualifies this generalization by reference to the possibility of a legitimate government claim against an allottee. Paragraph 5.4 repeats the general rights of the imam to allot, in the widest discretionary terms. And Paragraph 5.5 effectively undermines all those claims to permanent secure possession accruing to the allottee so much stressed at 5.1 and 5.2, as also in the earlier discussion at chapter 6. The expression is clumsy but the intention is clear: the imam may under certain conditions reallot lands which have once been alienated. The conditions are absence of ownership or absence of cultivation. The first condition is perhaps not very effective;[18] the second was probably more

[17] Later Ḥanafī thinking around the same problem was to suggest that revived and allotted lands (*aqta'a*), if irrigated by natural supplies of water, were subject to *kharāj* and, if watered artificially, were subject to the *'ushr*. This has generated secondary interpolations in the text; e.g. at Para. 5.4 in chapter 6 (see Sect. VI above). Even this does not represent the limits of Ḥanafī complexity (confusion!) with regard to the tax status of land and its relation to modes of irrigation; see Zayn al-Dīn Ibn Nujaym, *Baḥr*, v. 105.9 ff.

[18] The term *milk* is used with great restraint throughout the *Kitāb al-Kharāj*, both with reference to *kharāj* lands in general and with reference to *iqtā'* lands. One of its few occurrences is in Passage A, where it is specified that *kharāj* payers have their land in ownership (*milk*). All other references to *kharāj* payers specify possession (*fī aydī-him* etc.). Likewise in the general discussion of *iqtā'*, references to possession and usufruct are frequent; there are no specific references to ownership. Reading only this text, it is unclear whether allottees have ownership or merely possession and usufruct of *iqtā'* lands. It is probable they had ownership; but the redactors may have deliberately left a loophole for potential exploitation.

useful. If land was left uncultivated the imam had the right to reallot it. Having given land by *iqtā'*, the government retained the right to repossess it and reallot it if the land was uncultivated (or if proof of ownership was not forthcoming).

Of the seven hadith given at Paragraph 6, three not only represent the Prophet as assigning land by *iqtā'* but add that subsequent caliphs recovered and reassigned the same lands. In the first of these hadith we find 'Umar expressing the rule, If a man owns land, then abandons it for three years, without cultivating it, and if, then, others undertake its cultivation, they have more right to it. In the second 'Umar is seen to reassign an *iqtā'* to the owners of neighbouring property. In the fifth, the Prophet assigns land to Bilāl b. al-Ḥārith, and 'Umar, subsequently, announcing, 'You are unable to cultivate it', reassigns it (*yuqṭi'u-hā*). These precedents considerably weaken the rights of possession in *iqtā'* land and certainly undermine, in favour of the government, the tremendous juristic effort that goes into establishing that *iqtā'* lands cannot be repossessed and reassigned.

Paragraph 8 is a simple moral reminder about avoiding illicit seizure. Since the final rules are that the imam may give lands to whomsoever he wishes, on condition of payment of tax at his discretion, and subject to reclaim and reassignment if not cultivated or not defended by proof of ownership, the imam can hardly have felt unhappy.

We have now an apparently complete understanding of taxation in the lands of the Sawād: they are all subject to proportional taxation at government discretion. In the lands where possession arises from either ancient or recent *iqtā'*, the imam has certain rights of repossession and reassignment. It is probable, though not specifically stated, that this is true also of *kharāj* lands in general. This completely unified system of tax collection is a juristic contrivance—a truly splendid *ḥīla*—achieved in spite of a multiplicity of conflicting claims about the juristic status of these lands. From these materials, we learn a great deal about taxation at the

time the book was produced. It had been varied, local, based on fixed rates, controlled by established custom, justified by reference to precedent. It was in the process of becoming a standard proportional tax, imposed without local variance, at the discretion of the government, initially at the rates prescribed (two fifths, one third, one quarter). (Or rather, that was the aspiration; about the achievement, this text tells us nothing.) In the areas where possession was a result of *iqtā'*, either ancient and unrecorded, or recent, there were attempts to establish favourable tax status (*'ushr* not *kharāj*) but these were denied by the government.

VIII

What of areas beyond the Sawād? Of the original group of nine chapters proposed for analysis, we have now dealt with chapters 2, 5, 6, and most of 9 (= 9(2)). Chapter 7, relating to the Arabian Peninsula, need not detain us: the *arḍ al-'Arab*—land of the Bedouin, including all its major towns and cities—is subject to the *'ushr*. There is a marginal problem with part of the Yemen, which need not concern us here.

The material relating to Basra and Khurasan, chapter 9(1), is as follows:

1.1. As to Basra and Khurasan, they are in my view of the same status as the Sawād.
1.2. What is conquered by force is *kharāj* land. What is subject of a treaty agreement should be assessed in accord with the agreed sum and not increased. Where the people submit, their land is *'ushr* land.
1.3. I do not distinguish between the Sawād and these lands in anything.
2. But a custom has been established there—*jarat 'alay-hā sunnatun*—and the caliphs of the past have put that custom into effect. Hence I consider that you should confirm these lands in their present circumstance; that is the situation and practice is based on it—*fa-ra'aytu an tuqirra-hā 'ala ḥāli-hā wa-dhālika 'l-amr wa 'alay-hi al-'amal*.
3. Abū Yūsuf said. [Hadith . . . from Sha'bī: Basra, Isfahan, etc. were taken by conquest under 'Umar.]

The redactors were clumsy at Paragraph 1. If Basra and Khurasan are of the same status as the Sawad (1.1), then they were conquered by force without treaties and are *kharāj* lands. Paragraph 1.2 introduces the basic generalization about all lands—which ought not to be relevant, if 1.1 is true. Paragraph 1.3 probably came directly after 1.1, prior to the interpolation of 1.2. At Paragraph 2, the attempt to deal with Basra and Khurasan in conventional juristic terms is abandoned. There is a *sunna* there, an established practice, and they should be left to their established practice, about which we learn nothing. Compared with the quite evident desire by the redactors to collect, present, and control juristic materials relating to the Sawād, this is perfunctory in the extreme.

IX

Chapter 3, entitled On Syria and the Jazira (North-West Mesopotamia), begins with a princely question asking for information about the conquests in those areas and the incidence of treaties there. The respondent indicates that he has written for information to a shaykh in the Jazira.[19] The anonymous shaykh indicates that he has derived his information not from the *fuqahā'* but in the form of hadith from those reputed to know hadith. (The *fuqahā'* here are traditional jurists, those who rely on locally established custom rather than on stories about the distant past. The shaykh (or perhaps the redactor) in stating a preference for hadith (= ancient story) is indicating his preferred mode of justifying the law.) The information given by the shaykh can be summarized and set out schematically as follows; full translation of a small segment of material is given at Paragraph 9.

1. The Jazira prior to the Conquest belonged partly to the Greeks (Byzantium) partly to the Persians.
2. Abū 'Ubayda and his generals set out for Syria. They conquered the provinces of Jordan, Damascus, and Hims, by force; [no treaties].
3. Abū 'Ubayd sent Shuraḥbīl to Qinnisrin. He conquered it.
4. Shuraḥbīl sent 'Iyāḍ b.Ghanam al-Fihri against Ruha (Edessa). Eventually the people of the city sued for a treaty. 'Iyāḍ wrote to Abū 'Ubayda about this; and he, in turn, consulted Mu'ādh b. Jabal. Mu'ādh said, Accept the treaty from them, but give it to them on condition they pay whatever they are capable of—*'alā an yu'addū al-ṭāqa*. This was done.
5. There is dispute on how the people of Edessa responded. Some say they accepted this treaty on the basis of capacity. Some say they held out for a treaty based on a fixed sum. God knows best what happened.

[19] The Bulaq edn., confusingly, has Hīra. Though clearly erroneous the Salafiyya Press edn. preserved this reading in opposition to their own manuscript; see Abū Yūsuf, *Kharāj* (Salafiyya edn.), 42.

6. 'Iyāḍ proceeded to Harran and offered them the same terms as Edessa. These were accepted.
7. The small towns and villages allowed themselves to be assimilated to the pattern of agreement accepted by the nearest city.
8. The caliphs after the Conquest treated the small towns and villages according to the pattern of the nearest cities; except in the matter of provisioning the army—*illā fī arzāq al-jund*; that was laid on the villages not the cities.
9. Those skilled in argument say: Our established right is [recorded] in our possession—*ḥaqqu-nā fī aydī-nā*. Rulers before you have treated us in accord with [its provisions]—*ḥamala-nā 'alay-hi man kāna qabla-kum*. It is registered in your diwans—*wa-huwa thābit fī dawāwīni-kum*. You are ignorant and we are ignorant of how it was in the early days (*fī awwal al-amr*). So how can you think it permissible to submit us to new practices, different from those established, and for which you have no records? [How can you] deny the practice registered [in documents] in your possession, in accordance with which we have always been treated?
10. That part of the Jazira which was in the hands of the Persians was abandoned by them after the defeat at Qadisiyya.
11. 'Iyāḍ imposed a poll tax: for every person, one dinar plus two *madds* of wheat, and two measures each of olive oil and sesame oil. The letter-writer comments, 'I have not heard that this is based on a treaty, nor on registered practice, nor on tradition (*riwāya*) from the *fuqahā'*, nor is it based on sound transmission (*isnād*).'
12. When 'Abd al-Malik took power, he sent Ḍaḥḥāk b. 'Abd al-Raḥmān who reassessed what was to be collected. He counted the population, assumed that every person was working, calculated the annual income of a worker, subtracted from it expenses in food, clothing, servants, etc., subtracted also from this notional income the income of feast days [when there was no work and consequently no income] and found that the surplus income per person per year was four dinars. He imposed this as a poll-tax.
13. He also imposed a tax on land, which varied according to distance from the local city. Land near the city was subject to one dinar for every hundred *jaribs*; land farther off was subject to one dinar for every two hundred *jaribs*. On vineyards, the tax was one dinar per thousand grape stocks, near the city, and one dinar per two thousand, at a distance. The definition of near was less than a day's journey.

This material must be interpreted in the same way as the materials discussed previously. It is a government redaction of juristic materials provided from the Jazira. Syria is dismissed in a sentence (Para. 2); it is clearly not at issue. Edessa, however, is. The

claim—and I take it to represent the government's view—is that Edessa was taken by the Muslims as a result of a treaty in which they agreed to pay according to their capacity (Para. 4). The stipulation of payment at capacity is extended to Harran at Paragraph 6, to the small towns and villages at Paragraph 7, and effectively to that part of the Jazira which had been held by the Persians at Paragraph 10. The material at Paragraph 9 is extraordinary. I take it to be a genuine echo of arguments produced at either Edessa or Harran expressing objections to reforms in taxation. The objectors state that there had been an established practice based on records preserved by both sides and that the government has abandoned that practice in favour of innovations. The government justification was clearly a statement of what happened 'in the early days'—*fī awwal al-amr*. The objectors claim that neither they nor the government know anything about these early days.

There can be little doubt that the argument put forward by the government about 'the early days' is precisely that story which we now have in Paragraph 4. The government justified new taxation procedures by manipulating the record of historical events that were alleged to have taken place in the distant past. To argue that no one, neither the government nor the local people, now knew what had happened in those days, was perhaps not wise. An alternative mode of argument was to produce a different and more accommodating version of history. If the government bases its demands on ancient historical events, it becomes necessary to respond in like terms. This, I think, is the origin of the *ikhtilāf* statement at Paragraph 5. It was the government agents who alleged that the peace-treaty at Edessa was based on payment at capacity to pay. It was presumably the Edessans who responded that the treaty had not in fact taken this form. The objection gets a polite but ineffective mention. Paragraphs 6 and 7 must certainly be read as following on from Paragraph 4, disregarding Paragraph 5.

Paragraph 11 represents another effort to avoid government claims. It should probably be read together with Paragraph 5; i.e. these are the fixed amounts which, it is implied, were imposed as a result of the Edessans refusing to agree to a treaty that specified capacity. And these amounts are not much to worry about. It would seem reasonable to guess that these sums conform to the

established payments of the Edessans at this period (or represents what they would like to pay); this is what was preserved in their registers. For the mode of payment, we should read them in the light of Paragraph 8: the food payments were assessed per head but were made in their entirety by the rural districts. The poll-tax was assessed per head, but was presumably paid in a single lump sum by the local notables in Edessa—who may or may not have extracted a dinar from every person. That would be a matter of indifference to the government's tax agents.

If indeed the Edessans cleverly produced a version of historical narrative which worked to confirm their traditional payments, the government agents were not impressed. The 'shaykh' who wrote this letter from Jazira clearly indicates that their claims may be disregarded (Para. 11). Paragraphs 12 and 13 may safely be taken as representing the new government claims: four dinars per head together with cash payments on agricultural produce, representing, probably, a significant increase over the payments specified at Paragraph 11. Why are these attributed to 'Abd al-Malik? The government was clearly having trouble with the local Edessans, who perhaps first denied that anything was known about the Conquest and then produced a story that worked in their favour. The government accordingly turned to a slightly later period to establish the rates. It may well be the case that 'Abd al-Malik had in fact organized some kind of tax survey. Some such thing is recorded in the early Syriac source, Dennis of Tell Mahre (Dennis's account however clearly draws on the literary motifs provided by the Gospel account of a Roman census).[20] This tradition and the existence of other stories indicating 'Abd al-

[20] Dennis of Tell Mahre, 116. Cf. Daniel C. Dennet, *Conversion*, 45–6. For Dennis (or Dionysius) of Tell Mahre, see John Healey, 'Syriac sources and the Umayyad period'. Dennis locates the census in the year 1003 (= 691–2 CE) and states that this was the first time the Hagarites had imposed a poll tax. Dennet comments, 'By itself, the passage seems incredible. This census was not the first made by the Arabs, nor was this the first capitation tax. [This] . . . is in direct contradiction with the one-dinar poll-tax rate which 'Iyāḍ is reputed to have imposed.' Now, there are certainly problems with reading Dennis, notably with regard to his use of literary motifs to portray the 'census'. But he is nearer to the period in question than Abū Yūsuf or any known version of the 'Iyāḍ story. Dennet believes that 'Abd al-Malik reformed what 'Iyāḍ had imposed. I believe that the stories of 'Iyāḍ and 'Abd al-Malik in the form they have in Abū Yūsuf emerged in the middle of the third cent. in order to bolster rival arguments about the tax rates to be imposed on the people of Edessa.

Malik's interest in administrative reforms would constitute a nucleus promoting further development of similar material.

X

The material relating to the city and oasis of Najrān constitutes one more example demonstrating that, precisely in so far as it relates to the lands of Iraq (i.e. those lands that may be presumed to be directly subject to the tax administration in Baghdad), all the material in the *Kitāb al-Kharāj* is susceptible to the same interpretation. Local and juristic materials advocating traditional payments and fixed sums were gathered, controlled, and redacted by government agents who submitted them to interpretative arguments designed to advocate taxation at capacity, according to government discretion, and usually in the form of a proportional tax.

Najran was a Christian settlement in Southern Iraq.[21] The people of this area claimed to be the same people as had once lived in Najran in Yemen. Najran in Yemen had played a part in the history of the Prophet. Claiming to be the same people, the Christians of Najran in Iraq had an excellent basis for the production of arguments relating to their tax status. The Prophet, it appears, had confirmed the people of Najran (Yemen) in the possession of their lands, subject to certain conditions. These conditions had been specified in a written document transferred to the people of Najran by 'Amr b.Ḥazm acting as the Prophet's agent. This document (or a copy of it) was now (still) in the possession of the people of Najran (Iraq). It stated in effect that they were freed from all charges on land, agricultural produce, and goods, but must deliver an annual payment of a thousand *ḥullas* (an article of clothing, probably a simple cloth wrapper), whose average value would be one *uqiyya* (oke) each. They were also required to provide hospitality for the messengers and agents of the Prophet; and, in case of trouble in the Yemen, might be required to provide up to thirty suits of armour, thirty horses, and thirty camels to participate in military activities in that area. Any loss or destruction of these military supplies would be compensated by a reduction in the payment of *ḥullas*. In return for this, the

[21] Abū Yūsuf, i. 470 ff. For the position of this chapter in the overall structure of the *Kitāb al-Kharāj*, see Sect. XII below.

people of Najran had the protection of God (*jiwār Allāh*) and the guarantee of the Prophet (*dhimmat al-nabī*) as to the security of their property, their lives, their lands, their dwellings, their mode and their places of worship, their religion in general, and the independence of their bishops and other religious dignitaries.

'Umar had these people removed from Yemen to Iraq, 'because he feared their influence on the Muslims'—*khāfa-hum 'alā 'l-Muslimīn*. On that occasion, he issued a second document, confirming them in the rights that had been specified by the Prophet in his document. 'Umar's document contained two important addenda (introduced by two successive *ammā ba'd*, to be understood as segment markers). The first stated that the Muslim governors of Syria and Iraq, if any people of Najran passed through their territories, should provide them with agricultural land. This land, if worked by them, was theirs (*fa-huwa la-hum*): it was a charity given for God's sake and a recompense to the people of Najran for their land (which they had been forced to abandon). None should make a claim against them, nor make illegitimate demands on them. The second addendum stated that any Muslim should be prepared to help a person from Najran against injustice (*ẓulm*), for the people of Najran had a *dhimma*. Further, their *jizya* should not be imposed for a period of 24 months after arriving in an area (*jizyatu-hum matrūka . . . ba'da an yaqdamū*), nor should they be required to pay in anything except in the cloth which they manufactured. This document from 'Umar was confirmed by letters from 'Uthman and from 'Ali, each one repeating that the people of Najran had these established rights, and urging Muslims to act towards them with justice and to help them against injustice; indeed 'Uthmān's letter proposes a reduction in their annual payments, of 30 *ḥulla*s, because of what they had suffered at the hands of Muslims and 'for the sake of God'.

This excellent story, accompanied by a string of documents, all duly witnessed and dated, must be understood as representing the claims of the people of Najran. It will be evident how systematically these documents work in their favour. This material is presented in the first half of the chapter, introduced by *qāla Abū Yūsuf* and a princely question. The presentation is followed by a set of comments marked again with the formula *qāla Abū Yūsuf*. These explain that the one thousand *ḥulla*s are to be understood as the

equivalent of the combined land-tax and poll-tax (*kharāj* and *jizya*) in the district of Najran. The poll-tax is distributed amongst adult males and not imposed on women and children. The land-tax is applicable, irrespective of whether the land has or has not been sold to Muslims, Dhimmīs, Taghlabīs, women, or minors. The duty of hospitality and military support is no longer effective—*innamā kāna dhālika 'alā 'ahd rasūl Allāh . . . fa-ammā al-yawm fa-lā*.

Now, the implications of these comments is arguably unclear. The string of documents had nothing to say about land-tax or poll-tax: they affirmed simply that the people of Najran paid an annual donation of 1,000 *hulla*s of a specific fixed value. The comment imposes the view that this fixed payment is in fact the equivalent of a combined land-tax and poll-tax. This is not implied in the documents and must certainly be seen as a part of the unifying principle which has effectively brought most of Iraq under a standard system of proportional land-tax. What is not clear is whether these comments are intended to imply that, in practice, and accepting the one thousand-*ḥulla* claim, the people of Najran must now continue to pay not the fixed sum, but its equivalent, i.e. *kharāj* plus *jizya*. Potentially at least, government demands of this kind are here anticipated. I am inclined to read the comments as failing only through clumsy expression to make it clear that the claims of Najran to continue its traditional fixed payment of 1,000 *ḥulla*s are being rejected in favour of imposition of the standard land-tax throughout Iraq plus poll-tax on adult males. Najran is being accommodated to the uniform system that we have seen emerge elsewhere, irrespective of the claims put forward by local communities.

In a following section, introduced by *qāla Abū Yūsuf*, the first addendum to 'Umar's document, implying that the people of Najran might cultivate land in Iraq and Syria, free of taxation, is discounted. If the people of Najran buy *kharāj* land (sc. outside of Najran), they should pay *kharāj* and should not imagine that the *kharāj* and *jizya* payments (*sic*) effected for the lands and heads of Najran prevented this. The claim made in the second addendum to 'Umar's document, namely that immigrants should be relieved of poll-tax for up to twenty-four months is not separately addressed but is certainly also to be understood as discounted.

The last sentences of this section are as charming as they are

ominous: 'It is fitting that [the people of Najran] be treated well and honourably, that they should be accorded the rights of their *dhimma*, that they should not be burdened beyond their capacity, that they should not be treated with injustice, etc.' It is the reference to burdening to capacity that reveals the familiar hand of the government redactor. The redactor goes on to affirm that they will not be subject to conscription or *'ushr*, and that an agent will be sent to collect the tax in their area—*yub'ath ilay-him man yajbī-him min bilādi-him*—etc.

The final section of this chapter goes beyond our immediate concern: it deals with the lands of Najran in the Yemen. They are to be understood as delivered to those currently cultivating the land and subject to a tax of two thirds on non-irrigated and one third on irrigated land.

Excluding the last item, in which the government redactor turns to a different problem, relating to contemporary Yemen, the whole of this chapter can be read as made up of materials whose origin and organization are parallel to the origins and organization of other materials relating to taxation in Iraq (= the Sawād and the Jazira). Some of the material represents local claims and is appropriately couched in forms of argument suited to the fashions of the day, and, more particularly, to the forms adopted by the government. It seems that the people of Najran were marginally quicker than the people of Edessa in discovering for themselves a historical role that might constitute an effective argument in matters of personal taxation (and civil status). Overleaping the period of the Conquest, they found their status guarded by the even older and more valued events of the Prophet's lifetime. It did no good. Their argument and its interpretation is controlled by a government redactor, who, accepting their basic claims, adds only the effective gloss that the established payment of 1,000 *ḥullas* is a substitute for *kharāj* and *jizya*, implying that henceforth the substitute would be collected. The further claims based on the addenda to 'Umar's document were discounted.

XI

The *Kitāb al-Kharāj* of Abū Yūsuf is a compendium of documents which, in so far as they relate to the land-tax, achieve a high level

of complexity and detail only for the lands of Iraq. Syria and Khurasan are provided with only the most casual of references. Lands still more distant, such as Egypt and beyond, are given no mention at all. The Arabian Peninsula, though all the relevant materials have not been presented here, is adequately covered, if not with the same care for detail as is evident in respect of Iraq. The nature of the documents, and their incorporation within juristic argument, is such as to give a clear picture of their origins and of the intentions of those who gathered, organized, and redacted them. Some of the materials may be relatively old, expressing a very general sense of the typology of lands. Most of the materials, however, are designed to provide specific local support for a known tax system at a time when it was threatened by plans for tax reform. While possibly incorporating older views, these can be recognized as a contemporary and *ad hoc* record of local practice, product of a specific time and a specific political situation. Some of these materials have been produced by Christian jurists. All of them have been subject to a government-inspired redaction, responsible not only for the imposition of homogeneous literary forms but also for the final interpretation of the juristic claims, that interpretation being always such as to favour taxation at government discretion, subject to assessment of capacity, and usually in the form of a proportional tax. All claims to fixed-rate taxation—and these are evident in different forms for *kharāj* lands, for the *qaṭā'i'*, for *iqtā'* lands, for the lands of the Jazira, and for Najran—are cancelled in favour of arguments specifying capacity and (except in the case of Edessa) proportional taxation.

This book must then be recognized, in more or less its present form, as the product of a single redactional effort carried out over a limited period of time, and for a specific purpose. There are occasional hints of later interpolations, but it is difficult to be sure that evidence pointing in this direction is not better interpreted as evidence of developments in thought and argument during the process of redaction and the provision of comment that accompanied redaction. It is perhaps futile to attempt judgements of such a nicety. It may, however, be asserted that, although the individual chapters reveal evidence of remarkable juristic subtlety, complete mastery of relevant arguments, and absolute dedication to the achievement of a unified and justified system of taxation in Iraq,

the ordering of chapters is much less happy. This question will be taken up in Section XII below.

What was the date of the redaction of these materials? The arguments which I have put forward in Chapters 1 to 5 offer a number of relevant considerations.

1. The use of formulaic phrases of the type *qāla Abū Yūsuf*, *qāla Mālik*, or *qāla al-Shāfi'ī* is of no significance in assessing the authenticity of attributions. In fact, they are likely to signal redaction posterior to the life of the named authority.
2. There are no secure examples of any works of Islamic *fiqh* redacted before the third or fourth decades of the third century.
3. The earliest works show only marginal concern for Prophetic hadith. Terminologically, they are based on the concept *ra'y*, and demonstrate organic development of the law through logical thought about problems, founded on consideration of category and structural parallels (*qiyās*) within the legal system.
4. Systematic promotion of Prophetic hadith has one of its earliest realizations in the *Muwaṭṭa'* of Mālik, transmitted through Yaḥyā b. Yaḥyā. That book emerged *c.*270.
5. A real systematic interest in hermeneutic argument based on appeal to Prophetic hadith can hardly be demonstrated for the Ḥanafī tradition prior to the corpus of works ascribed to Aḥmad b. Muḥammad al-Ṭaḥāwī (d. 321), working in Egypt. However, the introduction to the *Kitāb Aḥkām al-waqf* of Abū Bakr Aḥmad b. 'Umar al-Khaṣṣāf (d. 261) consists of Prophetic and Companion hadith hierarchically ranked, with Prophetic hadith promoted to initial position.
6. The Ḥanafīs produced a bundle of works relating to administrative matters in the middle years of the third century. Two of the more significant of these were the works entitled *Aḥkām al-Waqf*. The first of these, ascribed to Hilāl al-Ra'y (d. 245) contains no systematic appeal, indeed no appeal of any kind, to Prophetic precedent. The second is the work just described and attributed to Khaṣṣāf. Khaṣṣāf also produced a *Kitāb Adab al-qāḍī*.

If these points are accepted and considered to be relevant, then the *Kitāb al-Kharāj* is most likely to belong to the middle decades of the third century. Its systematic promotion of Prophetic hadith suggests that we must look to the years after 240. If it may be classified with the other Ḥanafī administrative documents then the period 240–60 is likely. Internally and of itself the work offers few clues.

The *Fihrist* of Ibn al-Nadīm and later Ḥanafī biographical sources affirm that Khaṣṣāf, in addition to his known works on *waqf* and judicial office, produced a *Kitāb al-Kharāj* at the request of the Abbasid Caliph al-Muhtadī.[22] Al-Muhtadī reigned for only one year from 255 to 256. Now, if Abū Yūsuf had produced prior to 182 the book that we now know as the *Kitāb al-Kharāj* in the form we now have it and with the subtlety that we have recognized in it, there would have been little need for another call from the Caliph to a *faqīh* to produce another such work. On the other hand, if the Caliph al-Muhtadī summoned Khaṣṣāf to produce such a work, then he might well have produced a work which called upon the authority of Abū Yūsuf. There was an obvious felicity in ascribing to him systematic opinions on taxation. The form of the book is not surprising for a production of the middle third century; and it is equally unsurprising that the book, once produced, should generate, of itself, the myth that it was authored by Abū Yūsuf. The *Kitāb al-Kharāj* of Abū Yūsuf is, then, possibly, a work of Khaṣṣāf.

The political history of the period, in so far as it can be known from the extremely narrow focus of the major annalists (in practice limited to Ṭabarī and Mas'ūdī), suggests a very appropriate background for the production of a work which has the characteristics displayed by the *Kitāb al-Kharāj*. Under the Caliphs Musta'īn (248–52) and Mu'tazz (252–5), the annalists present a picture of courtly intrigue, faction, and competing Turkish generals. These caliphs were weak and incompetent, and without power, policy or will. Mu'tazz was forced to resign from office in favour of Muhtadī by the Turkish generals, led by Ṣāliḥ b. Waṣīf, and was killed several days later. The reason for this change of caliph, engineered by the Turkish troops, was that they wanted money and the treasury was empty.[23] According to Ṭabarī, the situation had been 'moving towards the disastrous for some time.

[22] Sezgin, *Geschichte*, i. 436–8; Abū 'l-Faraj Muḥammad Ibn al-Nadīm, *Fihrist*, 259 (Eng. tr., 509–10); Qurashī, *Jawāhir*, i. 87–8; Laknawī, *Fawā'id*, 29.

[23] Alī b. al-Ḥusayn al-Mas'ūdī, *Murūj*, iv. 144–97; the resignation and death of Mu'tazz, 178 ff. See, for an overview of the period, Hugh Kennedy, *The Prophet and the age of the caliphates*, 171–5.

In the year 252, he states, the totality of the stipends (*arzāq*) of the Turks, the Westerners (Maghāriba), and the Shākiriyya (three separate militias) was estimated at more than two hundred million dinars, which was the *kharāj* income of the kingdom for two years.[24] In the following year, the Turks, the Farāghina, and the Ushrūsiniyya (incorporating two minor, probably Turkish, militias) rioted, demanding their *arzāq* for the previous four months.[25] Under Muhtadī, things improved, at least in one respect, that this caliph had personality, policy, and determination. He is presented as self-consciously abstemious and careful about finances.[26] He adopted a high-profile religious policy, throwing out the singers and the singing-girls and abandoning the games, the frivolity, and the wild-beast spectacles that had pleased his immediate predecessors. He reinstituted the practice of holding *maẓālim* courts, at which he himself sat before the public, giving judgement.[27] Masʿūdī asserts that he banned the drinking of wine, made a show of justice, led Friday prayer in the mosque and gave the *khuṭba*, the Friday sermon, himself. The people consequently became fed up with the sight of him and took part in the events that led to his being killed.[28] He brought the *'ulamā'* into his entourage, raised the status of the *fuqahā'*, and treated them with civility.[29] Neither Ṭabarī nor Masʿūdī give details as to how this policy worked.

The reading of Ṭabarī and Masʿūdī is no less difficult a task than the reading of Abū Yūsuf's *Kitāb al-Kharāj*. However, the picture is adequate to establish the general point: the caliphal court was desperate for more income and a caliph had achieved office whose general attitude is compatible with the assumption that he did something about it and that his actions would be justified by appeal to religiously oriented argument. Ṭabarī is not particularly interested in tax-collecting initiatives, but, in the course of the complex events leading to the death of Muhtadī, he reveals that there had been financial innovations, the details of which, it must be admitted, are far from clear.

It seems that in the month of Ṣafar, in the year 256, the *mawālī* of Karkh and Dur, two districts in Samarra, demanded communication with the caliph. They wished, of course, to profess their undying allegiance to the elected caliph, but had a number of

[24] Muḥammad b. Jarir al-Ṭabarī, *Ta'rīkh*, 1685. [25] Ibid. 1687.
[26] Ibid. 1720. [27] Ibid. 1736. [28] Masʿūdī, *Murūj*, iv. 183.
[29] Ibid. 189.

demands to make as well. The communications, as presented by Ṭabarī, took the form of a decorous to and fro of letters through intermediaries, the brothers of the caliph. The situation was clearly extremely threatening, however, for the inability of the caliph and his Turkish generals to act against these *mawālī* was such that they repeatedly offered to do exactly what was demanded of them, conceding every single new petition, until, having placated the *mawālī*, they were able to gather loyal troops and regain control. There had been a mutiny of some kind. Resolving this situation proved no long-term advantage to the caliph, who eventually overreached himself in his attempt to divide and conquer the Turkish generals. He was ignominiously killed.

It is the demands of the revolting *mawālī* which are of present interest. Ṭabarī lists their demands on three occasions. In so far as they relate to financial matters, the following points are to be noted:

1. the stipends of the *mawālī* were still in arrears;
2. women and newcomers (*dukhalā'*) were being given stipends, thus using up the *kharāj* income; this should be stopped;
3. the organization of military payments had been changed since the days of Mustaʿīn; the changes should be rescinded;
4. allotments (*iqtāʿāt*) were being made to military leaders, causing further decrease in *kharāj* income; these too should be rescinded;
5. tax-farming concessions (*qabāla*) were being made to *mawālī*; this should be stopped.[30]

It is not by any means easy to work out precisely what social and political situation lies behind this string of complaints. Clearly there had been innovations in the financial system affecting both the distribution and the collection of *kharāj*. The *mawālī* wanted to go back to the days of Mustaʿīn (d. 252), which indicates that the changes were recent, beginning in the short reign of Muʿtazz. The government was engaged in a number of administrative and financial reforms which, whether correctly or not, had been interpreted by the *mawālī* of Karkh and Dur as causing a dilution of their income and a diminution in their prestige. The details are difficult, perhaps impossible, to recover. The point of immediate relevance is the evidence of wholesale restructuring of the financial

[30] Ṭabarī, *Ta'rīkh*, 1796, 1798–9.

system, which is consistent with the production of the *Kitāb al-Kharāj* during the reign of Muhtadī. All the points of concern articulated by the *mawālī* correspond to points of concern to the author of the *Kitāb al-Kharāj* (for those not already covered, see Sect. XII, below).

Also relevant to the argument that the *Kitāb al-Kharāj* was produced in the reign of Muhtadī is the geographical distribution of interest. The focus of interest was in Iraq because that was the area directly controlled from Baghdad. A secondary interest in the Arabian Peninsula is explained by the fact that that was the traditional apanage of the highest ranking relatives of the caliph; it was also, of course, source and focus of their religious prestige. The further extremes of the Islamic Empire were controlled by independent dynasties. Syria and the Iranian plateau were still nominally under the control of the caliph but tax collection was completely under the control of whatever military agent was posted to these areas.[31] Basra, dismissed in a sentence in the *Kitāb al-Kharāj*, had ceased to be governed from Baghdad with the revolt of the Zanj early in the reign of Muhtadī. (At no period prior to this could Basra have been a matter of indifference to the tax-collecting authorities of Baghdad.)

It may, fairly safely I think, be concluded that the *Kitāb al-Kharāj* of Abū Yūsuf is a product of the political situation in Samarra in the years 255–6. Used with care, it provides an astonishingly detailed and lively picture of the financial and, indeed, more broadly, of the social situation in Iraq in the middle years of the third century.

The historical material presented in the *Kitāb al-Kharāj* must be read for what it tells us about contemporary attitudes and arguments. Similar material is made available in the historical work of Balādhurī, the *Futūḥ al-Buldān*. This work, which belongs to the middle decades of the third century, should now be

[31] Ṭabarī reports that when Mu'tazz was deposed and Muhtadī came to power, the Turkish general in Rayy, fearful for the consequences of these intrigues, decided to return with his army to Samarra. But he needed money. Accordingly, he initiated advance collection of the following year's *kharāj*—much to the disgust of the local people, who pointed out that they paid *kharāj* in order to secure military protection, whereas he was collecting it in order to abandon them and so deprive them of military protection. The general, Mūsā b. Bughā, was unworried by these complaints. He was clearly in complete independent control of collection and distribution of taxes in the area of Rayy. Ṭabarī, *Ta'rīkh*, 1738–9.

recognized as roughly contemporary with the *Kitāb al-Kharāj* of (pseudo) Abū Yūsuf. In both works, the stories of the Arab Conquests and the treaties that brought hostilities to an end should be recognized as bearers of ideological and juristic messages. They should be read less for the information they provide about the period of the Conquests (surely limited) than for their reflection of ideological structures and juristic arguments in the third century. The attempt to reconstruct from this kind of material a picture of the social and financial situation in the early days of the Conquest is surely an act of academic futility. No amount of common sense, discrimination, and intelligence could discern the core of truth that lies behind these stories, which achieved their present form more than two hundred years after the events they purport to describe, in an atmosphere of doubt and dispute, where every fragment of a story might become the vehicle of a contemporary claim. The government reforms reflected in the *Kitāb al-Kharāj* were *new* policies, justified by manipulation of stories about the distant past. The basic components of these stories no doubt had already come to figure in local legend, where they might be enjoyed for their own sake or manipulated as a means of defending or justifying customary practices. There is no doubt whatsoever that customary practice and its modes of justification had developed in the previous two hundred years, and that a corresponding multiplicity of stories had come into existence.

It is not suggested here that these stories were totally subordinate to the exigencies of tax discussions. There is much pleasure to be derived from a good battle, and a good story-teller will know how to manipulate events to please his audience. Balādhurī was a court historian. The ends to which he organized his material were diverse but certainly included the justification of Arab, caliphal rule: the Conquests were centrally organized, by a legitimate succession of caliphs, who were the legitimate antecedents of the present incumbents; their victories, symbol of God's favour, justify the present position of the caliph and his tax-collecting initiatives. In a subtly different form, and over a narrower range of material, the same argument was being articulated in the *Kitāb al-Kharāj*. (The production of such material just at a period when caliphal power was waning is a relevant observation—legitimacy, not power, had become the issue.) Some fifty years later, Ṭabarī inherited a vast, complex set of narratives—the fossilized remains

of two hundred years of functioning, primarily oral, narrative—and created from this a history of early Islam. Modern historians have as yet made little progress in discerning what principles he brought to bear in organizing and presenting this material.

XII

In this section I will provide a complete overview of all the chapters relating to land and land-tax in the *Kitāb al-Kharāj*. It will be convenient to re-present and extend the original set of nine chapters, presented in Section IV. The chapter-headings given here are, with some minor contractions, those provided in the printed editions.

1. On *fay'* and *kharāj*
2. On what was done in the Sawād
3. On Syria and the Jazira
4. How Abū Bakr and 'Umar distributed [stipends etc.] to the Companions
5. What should be done in the Sawād
   [5(1). The *kharāj* lands
   5(2). The *qaṭā'i'*]
6. On the *qatā'i'*
7. On the Hijaz, Makka, Madina, the Yemen, and the land of the Arabs
8. The Khawārij

9(1). Basra and Khurasan
[9(2). *Iqtā'*]

10. On the submission of people of the *ahl al-ḥarb*, etc. (Passage A)
11. Dead lands etc.
12. On the ruling in relation to *murtadd*s
13. The people of the villages and lands; the cities and their people
14. Definitions of *'ushr* and *kharāj* land (Passage B)
15. The story of Najran and its people
16. On *ṣadaqāt*
17. On refusal to pay *ṣadaqāt* and on its distribution
18. On increases and decreases and on the agricultural land (*ḍiyā'*)
19. On the selling of fish from the swamps

20. On the renting of land (*ijāra*)
21. On islands in the Tigris and the Euphrates
22. On canals, wells, rivers, and irrigation
23. On hayfields and meadow lands
24. On tax-farming in the Sawād, etc. (*taqbīl*)
25. On the Christians of the Banī Taghlib, etc.
26. On those subject to *jizya*
    [Two chapters on the social status of Dhimmis]
27. On *'ushūr*
28. On churches, religious buildings, and crosses

Floating chapters:

F1. On what is taken from the sea
F2. On mines, treasure-trove, etc.
F3. On honey, walnuts, almonds, etc.

In Rahbī, F1 and F2 are situated immediately before chapter 1, and F3 between chapters 5 and 6. In Bulaq, F1 and F3 come after chapter 14; F2 is without a separate chapter-heading and forms an integral element within the chapter preceding this group.

These chapters are probably fully comprehensive in their provision of detail as to modes of landholding and taxation in the middle of the third century in Iraq, less detailed on the Arabian Peninsula, and totally inadequate for other areas. We have seen that the redactor is in complete control of his material and has a purposeful and coherent approach to the editing of all important sections and chapters. None the less there are chapters which show little or no sign of his interference. Two such are chapters 10 and 14 (Passage A and Passage B). It is true they contain nothing of great import, and everything they do contain is dealt with more circumstantially elsewhere. Chapter 13 is of a similar type: it too contains a presentation of the basic typology of land, and an assessment of 'Umar's fateful decision to immobilize, not distribute, the lands conquered by force. These chapters are repetitive and not well-placed within the bundle of chapters relating to taxation and landholding.

There are numerous other indications of inadequate systematic control over the distribution of chapters. Failure to discover the correct or any division between 9(1) and 9(2) is one example. The discussion of the basic category of *kharāj* lands in Iraq is disjointed. In order to get a clear picture of the situation it is

necessary to read chapter 2 in conjunction with chapter 5(1) and the first part of chapter 18 (see above, Section V). The last part of chapter 18 specifies the duties and obligations of tax-collectors, in highly moral terms: *lā yaḥillu li-wālī al-kharāj an* . . . Here, the situation of the chapter, its heading, and its presentation of detail all seem inadequate.

An obvious desideratum is that the rules relating to Iraq be separated from those relating to the Arabian Peninsula. The latter area has special tax-status, being subject to *ṣadaqāt*/*'ushr*/*zakāt*, three terms largely interchangeable. There are also special rules governing revolts, rebels, and warfare in that area. In order to get an overall impression of these rules, one needs first the general typological information provided at chapters 10, 13, and 14. More details are presented at chapters 7 and 8. The latter chapter is only a few lines long and specifies simply that the Khawārij have erred in treating 'Arab' villages like non-Arab villages; their practice does not constitute valid precedent. The reference is probably to the sporadic emergence of independent governors in that area, rather than to the events of 'Alī's time (*pace* Rahbī). Chapter 12 covers the rules of warfare against rebels (*murtadds*) in the Peninsula. Chapter 16 deals with *ṣadaqāt* on flocks and herds. Chapter 17 continues the discussion of this tax, i.e. the unique tax system of the Peninsula, with rather generalized injunctions against refusal to pay, and other subjects. *Inter alia*, the caliph is advised to choose a reliable man to oversee the whole system of *ṣadaqāt*, to ensure that there should be no mixing of *ṣadaqāt* income and *kharāj* income, and to disburse the *ṣadaqāt* income in accord with Q.9:60. The discussion of the Quranic eight categories is juristically neat, displaying adequate coverage of everything, and a characteristic final deference to the needs of the state. Of the recipient categories, the first to receive from revenue are the tax-collectors. The second is the category *fī sabīl Allāh*, here understood to refer to the preservation of routes (*iṣlāh turuq al-muslimīn*). (The reference is probably to the major caravan routes to Makka and Madina.) Provision for the poor comes third and should be dealt with locally. With the surplus, the imam may do what he likes as long as he distributes within the Quranically specified categories.

In practice, control of the Peninsula was traditionally handed over to a near relation of the reigning caliph. There would

therefore be no difficulty in keeping separate *ṣadaqāt* and *kharāj*. The rule implies simply that the governor of the Arabian Peninsula has independent control of his finances, remitting none of his revenue to the central treasury in Samarra. The favourable tax regime accorded to the Peninsula reflects in part the established difficulties in controlling the area but, more so, its special legitimizing role with regard to the institution of the caliphate. It was of symbolic importance that the Arab caliph of Baghdad, ruling over the Arabic-speaking and ideally Muslim communities of the Near East, should also control Arabia. Arab and Muslim: the two ideologies met in Arabia. The extreme distaste felt for the Banī Taghlib, an Arab Christian tribe (chapter 25), reflects the same ideological conviction. Arabs (tribal and Peninsular) ought to be Muslims. That was why their lands—their aboriginal lands—could not be subject to *kharāj*, symbol of submission, but only to *'ushr*, symbol of belonging to the Muslim community. That too was why *murtadds*—in the Peninsula—were subject to exemplary punishments. The loyalty that the caliph demanded was based on his Arab descent and his high status in Islam. These were ideological claims recognized even by imported troops, the *mawālī*, and could hardly be sustained without control of Arabia. It should not be imagined that the tax-status accorded to Arabia in the *Kitāb al-Kharāj* was one of great antiquity. Chapter 8, On the Khawārij, was designed to deal with the fact that recent history did not reflect the tax-status that was now given to the area. Ideologically the reform was expressed as a return, to the practice of the Companions. In fact, it was new.

A general survey of material relating to the Peninsula is considerably easier than a similar survey of material relating to Iraq. This reflects both inadequacies in organization and the complexity of the material relating to Iraq. The reason for the last feature I have already suggested: Iraq was directly subject to caliphal government, was therefore the primary source of caliphal income. In that area, and only in that area, does this book reflect a deliberate and systematic collecting and analysis of juristic materials. Miscellaneous and relatively minor material is gathered at chapters 19, 21, 22, 23, and in the floating chapters. The rulings on the revival of dead lands at chapter 11 have some systematic and symbolic importance. Systematically they are related to the discussions of *iqtā'* (similar principles and arguments are extended

to cover the cases of islands etc., presented in chapter 21). Symbolically, they confirm again the characteristic controlling hand of the redactor. A rule, probably of local and traditional origins, is presented, namely that when a man revives dead land, it is his. This is overlaid by the assertion that the imam may give dead lands as *iqtāʿ*, or otherwise do what he likes with them; and the rule of possession on revival is subject to the permission of the imam. (In the Shāfiʿī tradition we find one of numerous reassertions of a less servile attitude to the government: if a Muslim revives dead land it is his, and 'I do not care whether the Sultan grants it [formally] or not'—*wa-lā ubālī aʿṭā-hu iyyā-hu al-sulṭān aw lam yuʿṭi-hi*.)[32] Chapter 20 relates to the share-cropping contract of *muzāraʿa*.[33]

Chapter 24 deals with tax-farming (*qabāla*, *taqbīl*), i.e. the system whereby the imam gives an area into the hands of an agent or a military officer for a fixed period of time in return for a fixed sum of money, leaving them in effect to extract what they could from the peasants during the limited period of their control. Though highly conscious of the dangers and deficiencies of this practice, the redactor's presentation modulates from an entirely negative view towards—as one might anticipate—an acknowledgement of caliphal discretion subject only to rather general safeguards. 'The Commander of the Faithful is the most perspicuous in his consideration of these matters. Whatever he considers most beneficial to the *kharāj* payers and most conducive to maximizing treasury income, he should do; either by *qabāla* (farming) or *wilāya* (transfer to a military governor), subject to safeguards and subject to moving against the *mutaqabbil* and the *wālī* in order to prevent oppression of the peasantry, etc.'[34] The piety and the concern are no doubt well-meant and seriously intended, but they do not limit the discretionary powers of the imam, which are recognized here and throughout this work. There are reasons for believing that Khaṣṣāf, if indeed, as I suppose, he is the redactor and to a great degree the author of this work, did not have time to enjoy whatever reward he was offered for his labours; but it is incontrovertible that he merited reward for the patient juristic

[32] Shāfiʿī, *Umm*, vii. 230.5/213–14.
[33] For which, see further, Baber Johansen, *Land tax and rent*, ch. 3.
[34] Abū Yūsuf, ii. 8–9.

weaving that produced this intellectual masterpiece in the service of caliphal absolutism.

The tax-farming chapter finishes up with general advice about the appointment of suitable and reliable tax-agents and a passage in which the redactor urges the caliph to sit regularly in the *maẓālim* court in order to understand the needs of the people and in order to secure information and control over the activities of agents and governors. Muhtadī, we have seen, did just this, though whether effectively or not is unknown. There is no reason to doubt that the redactor/author genuinely believed that absolute government by an imam or caliph, acting in accord with piety, high principles, and systematic stewardship would be an effective means, perhaps the only effective means, of political control suited to the times.

Chapter 26 establishes the three-tier *jizya*, chapter 27 deals with customs duties charged on goods transported along the roads, and chapter 28 provides (at last) information about the tax regime as it applied to those areas which had effectively maintained a claim to a system established on the basis of a treaty, namely Ḥīra, Ullays, and ʿAyn Tamr (see chapter 2, discussed at Sect. V, above).

Two chapters remain unmentioned, chapters 1 and 4. Chapter 1 is strikingly well-placed. It is a necessary transitional argument differentiating moveable booty and land. Its sole purpose is to defend 'Umar's decision not to distribute conquered lands, a purpose effectively fulfilled by asserting the relevance of Q.59:7–10. Modern scholars have doubted whether these Quranic verses are here appropriately used, and have wondered accordingly whether 'Umar misused them or whether they were only later attributed to him.[35] 'Umar may reasonably be forgotten. The story is a juristic construct, available only in forms that emerged in or after the middle years of the third century, all of them so densely

[35] Cf. Dennet contra Hartmann: 'Whether or not 'Umar did recite these verses is a matter of no great weight; what is important is that, whatever his reasons, he decided that in the interests of all the Muslims the lands of the Sawad should *be the inalienable property of the State*. The evidence on the point is complete, precise and voluminous.' Dennet, *Conversion*, 21–2, my italics. I fear Dennet exaggerates the homogeneity of the sources. Abū Yūsuf could not in any case possibly be read as confirming that the Sawād became 'the inalienable property of the State'. It remained in the possession of, and probably the property of those who worked it. The government reserved the right to tax the land in the interests of the Muslim community as a whole. In some developments of the law, even that right might be lost; cf. Johansen, *Land tax and rent*, chs. 4 and 5.

permeated with contemporary juristic concerns that it must be impossible to recover from this a putative history of events that occurred more than two hundred years prior to these stories becoming part of written literature.

The story of 'Umar's immobilization of land must be understood as a means to explain and justify what was actually the case in the mid-third century, namely that the land of Iraq was held, apparently in ownership, by a variety of people, Muslim and non-Muslim, claiming a variety of types of ownership and tax-status. A problem arose thus: if there had been an Arab Conquest, why had the land not been transferred into the ownership of the conquerors, as was implied by the general rules relating to booty? The answer was provided, because 'Umar had immobilized the land, etc. The full neatness of the answer was not achieved all at once. The various components of this and other stories were developed in response to the needs and conflicts of governments, landowners and, perhaps, peasants. In the *Kitāb al-Kharāj*, we see how arguments were martialled in advocacy of a unified and justified system of tax-revenue. This is the purpose of the *Kitāb al-Kharāj*: to elaborate and justify a tax system by reference to a myth about conquest, to exploit the potential implications of the myth in order to secure maximum uniformity (and, no doubt, efficiency) in the tax system of Iraq. There is no reason to doubt that many component parts of that myth were in place prior to the production of this book; but the manipulation of those components in this work is masterly.

Chapter 4 is out of place, since, alone in this bundle of chapters dealing with the collection of *kharāj*, it deals with distribution. It is composed of a series of ten hadith with no accompanying commentary. The subject-matter of the hadith is the distribution of wealth to Muslims in the days of Abū Bakr and 'Umar. This must be interpreted as relating to the distribution of stipends (*arzāq* and *u'ṭiyyāt*) in the middle years of the third century. Abū Bakr is presented as originally distributing to the people (*al-nās*), all of them, without distinction of rank. 'Umar abandoned this practice in favour of a graded and hierarchical mode of distribution. He instituted a system of registers (*dawāwīn*). The factors defining rank were lineage, based on nearness of relationship to the Prophet Muhammad, and priority in Islam, based on such factors as having taken part in the Battle of Badr, or belonging to the

Muhājirūn or Anṣār, etc. Characters like 'Abbās, 'Alī, the wives of the Prophet, and other Companions are variously specified as having received so much in such and such a rank. Of those who had been early converts or witnessed Badr, both Arabs and *mawālī* were recipients of the hand-outs.

All of this material must reflect modes of distribution of stipends to military (and social) groups in third-century Iraq. It was the various tensions within and between these groups that were being expressed when statements were made about Abū Bakr or 'Umar organizing the distribution of stipends to this group or to that, in accordance with this principle or that.

In spite of the obvious intellectual control that governs most of the chapters within the *Kitāb al-Kharāj*, some chapters are free of any controlling comment. Here in the chapter on distributions, no attempt is made to harmonize the various claims that are advanced through the medium of assertions about the practice of Abū Bakr and 'Umar. The chapter is also out of place. This and the other similar deficiencies of organization which I have pointed to in this section suggest that after a period of careful preparation the accumulated materials were hurriedly or carelessly given their final form; alternatively that they were simply abandoned and only given their final form at a later date at the hands of a different person or group from those who originally prepared them. Muhtadī's fall from power after only eleven months was sudden and surprising. Usually judged by historians to be firm, able, and pious, the annalists also provide hints that he was unpopular. It seems likely that his reforms in the sphere of taxation contributed to his untimely fall from power. On the other hand, the two succeeding caliphs enjoyed relatively long and prosperous reigns, which might suggest that the reforms were temporarily effective. The Ḥanafī jurist, Khaṣṣāf, who had been raised to high status, fell with his patron, apparently hated by the local people. Ibn al-Nadīm informs us that, in the confusion following the death of Muhtadī, Khaṣṣāf's house was plundered and many of his books lost.

That Khaṣṣāf is the controlling hand behind this book cannot be unambiguously proved, but the balance of evidence points firmly in that direction. This redactor displays remarkable intellectual finesse, complete control of the relevant material, a no doubt well-

meant concern for the welfare of the people, and complete submission to the notion of absolute caliphal authority in the sphere of taxation. He does not represent Islamic law; he represents one strand of the juristic tradition, a powerful strand, frequently called upon by jurists who served governments. Both within the Ḥanafī tradition, however, and outside of it the opinions which in this book are expressed only to be overlaid could be and were, sometimes systematically, revived.

Organizational deficiencies have perhaps made it difficult to perceive clearly the remarkable intellectual skill and fixed purpose that marks this book. This does not quite excuse the fact that modern scholars have been content to ransack rather than to read it. They have exploited it repeatedly for historical information that it cannot supply. It is in fact one of the most exciting and informative sources for a direct understanding of third-century history and will in time yield much more than this summary suggests. In its own right it is, in spite of the problems I have identified, one of the most unified and controlled intellectual productions of early Islamic *fiqh*. For the history of *fiqh* as an intellectual discipline, and in particular for the history of the laws relating to the land-tax, it is, of course, a book of remarkable illumination. The understanding that what is described here is essentially a theory of taxation reflecting the political realities and claims of third-century caliphal government removes at least some of the confusion that has puzzled observers and analysts. Among the latter are later Ḥanafī *fuqahā'*, who were required to transform this and other materials reflecting different approaches to the same arguments into a timeless presentation of God's law.

7

LITERARY FORM AND SOCIAL CONTEXT

I

Questions related to the origins of Muslim jurisprudence have been most frequently framed in respect of norms (or positive law, Ch. 8) or in respect of hermeneutic technique (Ch. 9). No less instructive is the question, addressed in this Chapter, of literary form and social context. The characteristics of early juristic literature are sufficiently distinctive to prompt a search, not initially for parallels of legal content or technical methodology, but for a *Sitz im Leben*. Required is a set of social structures which match and account for literary structures.

Fundamental to this exercise is the recognition that the written *fiqh* texts that have survived are only a part of the written corpus that was produced in the period. Even the whole of the written corpus would not constitute the outer boundaries of juristic thought, for an indeterminately wide world of oral activity is implied both by the basic formulae of surviving books (*qāla*, *ḥaddatha*, *qultu-qāla*, *rawā*, *akhbara*, etc.) and by the numerous named transmitters about whom it is not suggested that they wrote anything. Further, *fiqh* was only one amongst a number of religious and secular disciplines which generated books at roughly the same period and with broadly similar characteristics. Whether in the religious disciplines of *tafsīr* or *zuhd* and *'ibāda* or in the secular discipline of *adab* (*paideia*) or in history, genealogy, and tribal lore (*sīrā*, *maghāzi*, *ansāb*, *ayyām*), the basic literary formulae confirm a universal notion of knowledge as that which is (orally) transmitted.

The paradox of written literature testifying to some kind of significant oral activity is not in itself unusual. Much of the cultural transmission of late Antiquity, in various branches of learning, was

characterized by appeal to, and exploitation of both written and oral skills.[1] The methodological problems that arise in assessing the salient features of such a culture, however, are considerable. In the case before us, these are mitigated in part by the framework of analysis provided in the first six Chapters of this work, and in part by the availability of biographical and other works which extend the field of enquiry. This totality of sources permits the identification of four interrelated factors which characterized the milieu that produced early juristic work. Pre-emptively surveyed these are:

1. the significant role of oral creativity (Sect. II), qualified by
2. widespread literacy symbolized in the use and circulation of notebooks (Sect. III);
3. the broad and informal social basis for early jurisprudence (Sect. IV), qualified in turn by
4. the gradual process of professionalization and bureaucratization, in a social and ideological context of some complexity (Sect. V).

Demonstration and elucidation of these factors will be undertaken in succeeding Sections. Much however that is relevant to social context can be distilled from the literary analyses of Chapters 1 to 6 alone. These prompt the following remarks.

The nature and function of literacy is reflected in the high degree of segmentation that characterizes early juristic texts. There, argument is built by the juxtaposition of segments to create collocations, variously skilled or careless. Segments travel. Both within books and between books, they recur, exhibiting minor or major reworking. The gathering of segments and their organization into more or less homogeneous compilations is a result of redactional activities, often sequential and over long periods of time, which must be associated with a single geographical location: invariably a city (Cordoba, Qayrawan, Cairo, Baghdad, Bukhara), probably a mosque, sometimes, perhaps, a government office (the *Kitāb al-Kharāj*), or a qadi's court (the Hanafi administrative texts, for example Hilāl al-Ra'y and Khaṣṣāf on *waqf*). This gathering of segments and their subordination to uniform formal devices implies at least rudimentary institutional control. Conversely, the scattering of segments must be related to the personal initiatives of individual scholars, who, orally or in writing, transmitted not

[1] See L. Alexander, 'The living voice'; and below, Ch. 7, Sect. VII.

books but segments; not verbatim but in accord with their private perceptions and needs; not in fixed bundles, but according to private modes of acquisition, selection, and preservation. The resultant material is uniform in expression because the scholars belonged to the same literary world and drew on the same compositional formulae. It shows parallel and divergent developments because meditation on problems generated parallel and divergent solutions.

The scholar's notebook and the institutional redaction are then the two basic types of early juristic literature. Of the former there may be no extant examples. Their existence, however, is securely inferred from the forms and sometimes from the express words of institutional redactions, and it is confirmed by numerous references in biographical and other literature; see Section III below.

In applying the word 'book' to these two basic types it is not intended to suggest that they existed as stable texts, replicated in multiple editions and distributed. The scholar's notebook was private and organic, always unique, always subject to change. The institutional redaction likewise was unique and subject to organic growth (and decay) through time. Until canonization, it was not, as a unit, copied or distributed; though it may have been a point of reference for many scholars, at any stage in its growth. Canonization achieved, the institutional redaction became subject to copying, distribution, and commentary, conforming subsequently to the normal image of the book as stable in content and replicated in many editions. The fate of private notebooks was, as will be seen, varied; see Section III.

A prerequisite for canonization is certainly the establishment of authority and that is likely to have been in many cases political, and to reflect alliances between the political and the scholarly élite. The *Kitāb al-Kharāj* is an obvious example, but so is the *Muwaṭṭa'* of Mālik (product of Andalusian, not Madinan politics). The *Mudawwana* of Saḥnūn reflects not only the achieved political status of the *'ulamā'* in Qayrawan but also the scholarly and political predominance of that city throughout North Africa. The importance of political alliances and consequent access to formal administrative posts as a factor promoting canonization is confirmed by the negative and uncertain cases. Where schools did not achieve political integration until a relatively late date (and then only partially, as was the case with the Shāfi'īs) their institutional

texts remained open and developing for a longer time. Where schools failed entirely in political integration and in institutional form (the Mālikīs in Baghdad) their texts have disappeared. It is not a full but a fairly secure conclusion that the participation of the jurists in the bureaucratic structure (political) and in the institution of 'schools' (social) conduced to the canonization of texts. (But some purely intellectual factors might also be recognized as likely to cause closure of a developing text; see Ch. 1, Sect. VII and Ch. 3, Sect. VI, which propose the decisive emergence of the use of Prophetic hadith as a source of law as just such a factor.)

Very little can be extracted from early juristic literature as to the social or professional characteristics of the class or classes involved. The scholars are not identified as a social group. There are no systematic rules relating to the profession of scholarship (as there are for, say, merchants), nor are there any rules governing relationships among scholars or between scholars and other groups (as there are rules governing relationships between a man and his wife or a slave and his owner). The inference seems permissible that the status of scholar was initially informal and undefined. The scholars were the elders of the community, bearers of transmitted knowledge, people of weight and dignity who gained their reputation and their status, not formally from the prior structures of society, but informally as a result of personality and public perception.

They did not remain thus. The third century sees a movement from a jurisprudence which is a predominantly oral and socially diffuse informal process towards a jurisprudence which is a complex literary discipline, the prerogative of a highly trained and socially distinct élite. That movement (not transition, for the end of the process was centuries off), signalled by the terms professionalization and bureaucratization, was no doubt in part a natural process but was also affected by school competition and by government policy.

There was competition between the two major schools in the early and middle decades of the third century, and added competition from the Shāfi'ī school (and numerous local schools)[2]

[2] Compare the early *ikhtilāf* documents of the Ḥanafī tradition, discussed at Ch. 3, Sect. V above and showing exclusive concern with Ḥanafī–Mālikī dispute, with later ones, e.g. the *Kitāb Ikhtilāf al-fuqahā'* of Aḥmad b. Muḥammad al-Ṭaḥāwī, which shows a considerable increase in variant authorities.

later. This competition, a significant factor promoting development in modes of argument, must also reflect the existence of social and political rewards for the winning party. The governing authorities were the primary sources of reward and demanded not only co-operation towards order and predictability in the administration of local affairs, but also systematic public defence of their policies, consistent with the legitimizing norms of the age. The juristic class was drawn into the administration and required to establish relationships with the government. Financial independence and consequent intellectual independence could be retained only if the system preserved its informality (for example, if independently wealthy merchants and traders were also jurists) or if secure and independent financial backing could be secured (for example, through donation of *waqf*s). The first of these conditions was ever less likely to be fulfilled. With increasing orientation towards authoritative canons and other written material, the informal emergence of juristic experts was in fact replaced by a formal structure for the training of a professional class. That training was based on literacy, hermeneutic skills, the preservation of canons, and the creation and study of artistically controlled legal textbooks. The second condition, in various ways and degrees for many centuries, was fulfilled.

This complex of social processes may be rendered more precise and focused by reference to works other than the juristic texts themselves, a task taken up in the next four Sections. Of available sources, two types will be exploited. The first is the biographical tradition of North African scholarship represented by the *Ṭabaqāt 'ulamā' Ifrīqiyya*, compiled by Abū 'l-'Arab Muḥammad b. Aḥmad al-Tamīmī (d. 333) and Muḥammad b. al-Ḥārith al-Khushanī (d. 366), and the *Ta'rīkh al-'ulamā'wa-'l-ruwāt li-'l-'ilm bi'l-Andalus* of Ibn al-Faraḍī (d. 403). These, relatively late works, must be read in the light of the evidence provided by the early juristic texts. The Ḥanafīs in Iraq did not produce a (surviving) biographical literature of similar date. In consequence, the second type of literature to be exploited here is the *adab* tradition of the middle third century, produced in Iraq and represented here by Jāḥiẓ (d. 253) and Ibn Qutayba (d. 276). These writers, living precisely in the period when, according to my analysis, much of the early juristic material reached or was developing towards its final forms, provide a broader picture of the literary world of the

time, a picture which will be seen to be in all respects continuous with the picture derived from the narrowly juristic material. It will be evident that many features of *fiqh* literature, and the tensions it embodies, are not to be explained solely in terms of juristic issues but rather by reference to broad social trends that affected early Muslim society as a whole.

II

Arab Muslim society of the third century, particularly in the early decades of that century, was a milieu productive of oral literature. This does not mean simply that people spoke a lot or that they were illiterate. Rather, they habitually engaged in a creative activity involving the production, reception, and transmission of oral materials, within a system of formal rules. The rules are reflected in a standard technical terminology which constitutes our primary clue to the existence and the nature of the activity. Much of this section will therefore be devoted to demonstration and elucidation of this terminology. The activity took place primarily in the mosque, but also in the market-place and, perhaps more formally, in the courts of governors. Diachronically the prestige of oral literature decreased throughout the century as the material content of the more serious and authoritative disciplines was transferred to the written milieu. (Oral display continued to be important; but the deployment of literate skills and formal rhetorical techniques around oral exhibition, one feature of mature Muslim jurisprudence, is not at issue here.)

The technical terminology of juristic discussion—the oral process—is dominated by the word *jalasa* (to sit) and its derivatives. One sat with a master, or with one's colleagues, who were one's *julasā'*. The situation was a *majlis*. The master was distinguished from those who gathered round him: they were the *qawm*, or, with intimations of higher standing, his companions (*aṣḥāb*). The circular shape of such groups generated the alternative term *ḥalqa* and the verbal form *taḥallaqa*. The dominant term for discussion is *ḥadīth*, verbs *ḥaddatha* and *taḥaddatha*; less common is *kallama* and its derivatives. To broach a subject for discussion was *dhakara* or *dhākara*.

The juristic texts provide significant exemplification. 'Umar b. Dharr said, We sat with Abū Ja'far (*jalasnā ilā*) . . . and one of the

qawm asked him.[3] 'Aṭā' b. Abī Rabāḥ reports, We were sitting with Ibn 'Abbās (*kunnā jalūsan 'inda*) . . . when one of his companions said (*fa-qāla la-hu ba'ḍu aṣḥābi-hi*) . . .[4] One of Ibn Mas'ūd's *julasā'* said . . .[5] Ḥajjāj b. 'Umar was sitting with Zayd b. Thābit (*jalasa 'inda*) . . . Asked about something, Zayd invited Ḥajjāj to give his opinion. God forgive you Zayd, said Ḥajjāj; we sit with you (*najlis ilay-ka*) to learn from you (i.e. not to give our own views).[6] 'Amr asked 'Aṭā' about something and one of the *qawm* interrupted (*rajul min al-qawm*). From 'Umayr b. Sa'd al-Nakha'ī: I was attending a *majlis* (*kuntu fī majlis*) at which was 'Ammār b. Yāsir, who proposed for discussion (*dhakara*) such and such a problem.[7] Ibn 'Umar posed a problem to the Prophet of God (*dhakara li-rasūl Allāh*).[8] 'Urwa b. al-Zubayr reports, We were discussing that which occasions *wuḍū'—tadhākarnā mā yakūn min-hu al-wuḍū'*.[9] Sa'īd b. al-Musayyib said to his companions (*aṣḥāb*), What do you say about such and such? The *qawm* were silent—*sakata 'l-qawm*.[10] Ibn al-Qāsim saw Mālik on a Friday, while the imam was in the pulpit, still sitting; Mālik and his companions were in a *ḥalqa—wa-Mālik mutaḥalliq fī aṣḥābi-hi*. Mālik was discussing something and did not stop his discussion—*yataḥaddath wa-la yaqṭa' ḥadītha-hu*. Mālik informed Ibn al-Qāsim that he had seen some of the *ahl al-'ilm* in the past sitting in a *ḥalqa* on a Friday and engaged in discussion (*yataḥaddath*).[11]

The term *ḥadīth* meant the process of discussion, but also a segment or item of transmitted information, or a precedent. Its meaning overlaps with the word *athar*. With reference to a number of Companion hadith, Shaybānī stated that Mālik himself had transmitted these hadith (*aḥādīth*); so how, he asked, can these *āthār* be abandoned, when *āthār* of a similar kind are not abandoned.[12] Here, *ḥadīth* and *athar* are synonyms; it is probable that hadith is the less specific term: Mālik has transmitted these segments of information, so how can they, *qua* precedents (*āthār*), be neglected? Technical use of the verbs *kallama* and *takallama* can just be discerned in juristic texts. Mālik was approached about

[3] Abū Yūsuf, *Kharāj*, Rahbī, i. 607–8/Bulaq, 51.10 (which gives 'Amr b. Dīnār for 'Umar b. Dharr).
[4] Shaybānī, *Muwaṭṭa'*, 48.
[5] Ibid. 182.
[6] Ibid. 184.
[7] Both ibid. 37.
[8] Ibid. 45.
[9] Mālik, *Muwaṭṭa'*, *Bāb al-wuḍū' min mass al-farj*.
[10] Saḥnūn, *Mudawwana*, i. 37.
[11] Ibid. 148.
[12] Shaybānī, *Kitāb al-Ḥujja*, i. 67.

something—*kullima fī dhālika*.[13] The locution *takallama bi-'l-islam* meant to be or become a Muslim.[14]

The North African biographical material confirms and to a degree extends this vocabulary. The Amīr Ziyādat Allāh b. Ibrāhīm b. al-Aghlab was *jālis* with a number of famous *fuqahā'*. After a time, the participants, the *qawm*, decided to leave—*arāda 'l-qawm al-qiyām*, i.e. they 'stood' after sitting.[15] Abū Haytham al-Lu'lu'ī and Daḥyūn sat with (*jalasa ilā*) Abū Ṭālib al-Abzārī in his *ḥānūt*, his booth in the market. They were joined by Yaḥyā b. Salām who imparted his learning—*dhakara ḥadītha-hu*.[16] Sa'īd b. Muḥammad b. al-Ḥaddād had 'sat' with the people of Qayrawan since reaching maturity—*jalastu al-nās bi-hādhā 'l-balad*:[17] he means of course that he had played an active part in their discussions. When Abū al-Rabī' proposed a solution to a problem, of which Saḥnūn disapproved, he (Saḥnūn) turned to the *ahl al-majlis* and denounced it as a trick, a *ḥīla*.[18] The word *qa'ada*, like its cognate *jalasa*, also functioned with some formal resonance. 'Abdallāh b. Abī Ḥassān took his place (*qa'ada*) at a session of scholars held at the Aghlabid court.[19] No one was fonder of [talking in] a session, a *majlis*, than the son of Sa'īd b. Muḥammad; when he took up his place (*qa'ada maq'adan*) no one else desired to speak.[20] Muḥammad b. 'Abdūs was found one day sitting modestly and off-centre in his own *majlis*—*ajidu-hu qad jalasa . . . mutawāḍi'an zā'ilan 'an ṣadri majlisi-hi*. You could not have told that he was *ṣāḥib al-majlis*. This same Muḥammad b. 'Abdūs, having gone on pilgrimage, never listened again to a 'speaker' (*mutakallim*) on problems relating to pilgrimage for fear he might hear something that would cast doubt on the efficacy of his own achievement.[21] Asad b. al-Furāt was holding forth one day (*ḥaddatha bi-ḥadīth*) concerning the vision of God on the last day, when Sulaymān al-Farrā', sitting at the back of the *majlis* (*fī mu'akhkhar al-majlis*), interrupted (*takallama*).[22] Abū 'l-'Abbās,

[13] Saḥnūn, *Mudawwana*, i. 87.
[14] Ibid. 178–9; cf. Shāfi'ī, *Umm*, i. 168.7/147.27.
[15] Abū 'l-'Arab, *Ṭabaqāt*, 86.
[16] Ibid. 100 and 114; note that *ḥadīth* here does not mean a segment of information, but the process of talking: *dhakara ḥadītha-hu*, i.e. he gave of his skills, he produced a discussion; he did not produce a hadith, meaning a single item of transmitted information with an *isnād*.
[17] Ibid. 104. [18] Ibid. 124–5. [19] Ibid. 88.
[20] Ibid. 151. [21] Ibid. 133. [22] Ibid. 82.

Qadi of Qayrawan, used to gather people of opposed views in his *majlis* and encourage them to debate—*kāna yajma'u fī majlisi-hi al-mukhtalifayni wa-yughrī bayna-humā fī 'l-munāẓara*.[23]

The terminology of the discursive process is consistent and continuous as between the juristic texts of the mid-third century and the biographical material of the early fourth century. This is an important control on our use of the later texts, which in many different ways read the past according to the norms of their present. The term *nāẓara* meaning to engage in formal debate is not (as far as I have found) attested in juristic works. This may be an accident, but it implies a refinement of jurisprudence into a public art form and is likely to reflect a process of development that took time. It is furthermore characteristically a court activity. In addition to the example above: when 'Abdallāh b. Abī Ḥassān visited the governor Ziyādat Allāh al-Aghlabī, he found Asad b. al-Furāt and Abū Miḥraz debating (*yatanāẓarāni*) the question of intoxicating liquors. The Amīr invited 'Abdallāh to take part in the debate—*nāẓir anta*.[24] Formal public debate is a standard feature of juristic activity in the classical period. The references here demonstrate the emergence of this activity which, with its significant stress on display, should be distinguished from the discursive process in general.

It is frequently possible to discern the etiquette of discursive sessions. Muḥammad b. 'Abdūs, we have seen, sat modestly and off-centre in his own *majlis*, implying that the norm was otherwise. Ismā'īl b. Rabāḥ al-Jazarī attended the *ḥalqa* of 'Abdallāh b. Wahb, wearing a *tallīs*—a sack. He was not invited to the front. So he shouted from the back of the *ḥalqa*, Is it because of my dress that I am kept at a distance? Ibn Wahb shouted back, Come here, come close. Ismā'īl approached so near their knees touched.[25] The story is intended to convey a message about the irrelevance of styles of dress, possibly of poverty, to scholarly status. But it shows also that the rank of scholars was normally marked by their position within a study circle.

Discussion took place in the mosque, but also, evidently, in a market booth, at the court of a ruler, and, perhaps, at a private house.[26] The mosque was undoubtedly the norm. Ismā'īl b. Rabāḥ was listening to Saḥnūn (*yasma'u 'inda*) in the mosque when he

[23] Ibid. 136–8. [24] Ibid. 88. [25] Ibid. 67–8.
[26] Ibid. 87–8, ad Malik.

saw a tailor sewing right there in the mosque. He asked Saḥnūn if this was permissible; on receiving a negative reply, he threw the tailor out.[27] Saḥnūn drove the heretics from the Friday mosque in Qayrawan: several different groups had held *ḥalqa*s there.[28]

The *Kitāb al-Bayān* of Jāḥiẓ, a work no more than incidentally concerned with *fiqh*, reflects the same oral culture. Its technical terminology is broadly the same as that of the juristic and biographical works. The main locus of oral activity is still the mosque (though that activity is not necessarily devoted to religious or juristic topics). Ibn al-Sammāk began 'talking' one day—*ja'ala yatakallamu*—while a slave girl listened to his speech (*kalām*).[29] Rabī'at al-Ra'y, the jurist of Madina, was talking one day and went on and on (*kāna yatakallamu wa-akthara*).[30] Faḍl b. 'Īsā al-Raqqāshī was a fine talker and story-teller (*kana mutakalliman qāṣṣan mujīdan*). 'Amr b. 'Ubayd, Hisham b. Ḥassān, and many *fuqahā'* (meaning wise men, not jurists) used to 'sit' with him—*jalasa ilay-hi*.[31] 'Abd al-Ṣamad talked (*takallama*) for three whole sessions (*thalāthat majālis tāmma*) about the creation of mosquitoes.[32] Raqaba b. Masqala was invited to a *majlis* to talk in it—*li-yatakallam fī-hi*.[33] Iyyās b. Mu'āwiya came to a *ḥalqa*—one of the *halqa*s of Quraysh in the mosque at Damascus.[34] He dominated the session—*istawla 'alā 'l-majlis*. You come to us in the dress of a beggar and speak with the speech of kings—*tukallimu-nā bi-kalām al-mulūk*, they said to Iyyās. Muḥammad b. Ḥafṣ, a man of great knowledge and transmitted wisdom (*kathīr al-'ilm wa-'l-samā'*) could be found in his *ḥalqa* at the mosque.[35] A Syrian said, I was in the *ḥalqa* of Abū Mushīr at the mosque in Damascus when we raised the topic (*dhākarnā*) of speech and its genius, of silence and its nobility.[36] Maymūn b. Siyāh, when he sat with a group—*jalasa ilā qawm*, used to say, We are a people far from home, so provide us with discussions that we can delight in—*ḥaddithū-nā aḥādīth natajammalu bi-hā*.[37] The diverse segments that make up Jāḥiẓ's work confirm his sense of the oral background to his work, being introduced by the usual terminology of oral transmission: *qāla*, *rawā*, *ḥaddatha-nī*, *khabbara-nī*, etc.

[27] Abū 'l-'Arab, *Ṭabaqāt*, 68.
[28] Ibid. 102.
[29] 'Amr b. Baḥr al-Jāḥiẓ, *Bayān*, i. 104.
[30] Ibid. 102.
[31] Ibid. 306.
[32] Ibid. 308.
[33] Ibid. 174.
[34] Ibid. 98.
[35] Ibid. 102.
[36] Ibid. 264.
[37] Ibid. 259.

The *Kitāb al-Bayān* is a characteristic work of *adab*, conforming to the pattern of the educational miscellany. It gathers under broad thematic headings discrete segments of material (poetry, tale, anecdote, apophthegm, joke) and by contrived juxtaposition (the long and the short, gross and refined, general and particular, etc.) aims to edify, instruct, and delight. But it also imitates reality. It is, paradoxically, a written re-creation of the oral milieu which engendered it: a session, a *majlis*, where the to and fro of discussion is enacted by historical and contemporary characters from the time of the Prophet onwards. (The subject-matter of the discussion is discussion itself, its virtues and vices, its desirable and undesirable qualities.) There is no obvious reason for doubting what the terminology signals throughout, namely that, in some sense, the origins of Jāḥiẓ's material are oral. But this is not to concede much, for this oral milieu is not one where the participants are necessarily incapable of reading and writing.

In presenting the material utilized in this and in the immediately following Sections, it is not intended to imply that the particular events and characters were historically thus; rather that the concepts and terminology represent the situation as it was in, roughly, the first half of the third century—during the period of growth and emergence of the earliest juristic texts, the period also of Jāḥiẓ's early work. It is the world picture which is at issue. It is further denied that any consideration of the biographies or biographical anecdotes according to the chronological ordering of the characters would reveal anything about the historical development of social institutions or ideas in the third century. Principles and processes that emerged in the fourth century and later were likely to be attributed to prestigious early figures, and might be used interpretatively to elucidate a biography or explain a written text.

III

Books were an intrinsic part of third-century culture though their value and their production were, at least at first, secondary to the process of oral transmission. Such as existed were for the most part private notebooks. In the *Ṭabaqāt* the word *samā'* takes on a technical colouring implying just such a work, a private written record of a master's dicta. Khalaf b. Muḥammad had a *sama'* from

so-and-so—*kāna la-hu samāʿ min . . .*[38] And Muḥammad b. al-Ḥakam had a *samāʿ* from a number of people—*la-hu samāʿ min ʿAbd al-Raḥmān wa-Mālik wa-Ibn Lahīʿa*.[39] Abū 'l-Khārija was seen with a *samāʿ* from Mālik written out (*mudawwan*) like the *samaʿs* of Ibn al-Qāsim and Ashhab—*raʾaytu li-Abī 'l-Khārija samāʿan min Mālik b. Anas mudawwanan ka-samāʿ Ibn al-Qāsim wa Ashhab*.[40] Ibn al-Qāsim and Ashhab are, of course, two of the major sources for the *Mudawwana*; it was their *samāʿs*—written works or notebooks bearing their name—which had been utilized to derive many of the segments in that work.

The existence of a *samāʿ* from A or B does not imply that A or B had produced that work; it means at best that a listener had made notes on what he had heard from A or B. Bahlūl b. Rāshid proposed to his companions that they should visit Abū 'l-Khārija who had brought the *Jāmiʿ* of Sufyān, in order to hear it from him.[41] The word *Jāmiʿ* here is a substitute for *samāʿ* (Abū 'l-Khārija had a *samāʿ* from Sufyān). There may have been a text with this title circulating at the time the *Ṭabaqāt* was produced. However, if Abū 'l-Khārija transmitted material from Sufyān, the material would undoubtedly have been his own selection and recording of Sufyān's dicta. It is possible that just as the word *Muwaṭṭaʾ*, applied to the dicta of Mālik, did not necessarily imply a published book, but rather any recording of Mālik's system, so the word *jāmiʿ* functioned for Sufyān. In any case some people doubted whether Abū 'l-Khārija's *samāʿ* or *jāmiʿ* from Sufyān was a genuine and reliable transmission. A certain man asked Abu 'l-Khārija, Did you [really] hear from Sufyān? Abū 'l-Khārija became angry, his face swelling like a Berber's. Yes, I heard from Sufyān, he said, I heard from Sufyān.[42] Modern academics are not the only ones who have doubted whether the circulation of notebooks was an adequate guarantee of reliable transmission.

It used to be said that in the books (*kutub*) of ʿAwn b. Yūsuf al-Khuzaʿī the phrase *ḥaddatha-nī* implied *samāʿ* whereas *akhbara-nī* implied *ijāza*. The distinction involved here was explained through an anecdote about Bakr b. Ḥammād. When Bakr had finished reading the books of Ibn Wahb to ʿAwn, he (Bakr) asked him (ʿAwn) about the nature of his *samāʿ* from Ibn Wahb. The situation here is that Bakr is a student with ʿAwn. He has heard

[38] Abu 'l-ʿArab, *Ṭabaqāt*, 116. [39] Ibid. 74.
[40] Ibid. 72. [41] Ibid. 72. [42] Ibid. 72.

from ʿAwn his transmission from Ibn Wahb and made notes. Bakr now reads his notes back to his teacher, ʿAwn, and asks about the nature of the transmission from Ibn Wahb to ʿAwn. ʿAwn replied defensively, Has anyone being impugning me—*a-qāla aḥad fī-nā shayʾan*? He then swore a great oath, May God negate his striving, his fasting, his prayer, and all his activities if he had received this material in any way other than through *qirāʾa*: he had read it [back] to Ibn Wahb, who had [previously] read it to him. This story derives its point from the currency of suspicions that some people had developed notebooks which did not reflect genuine transmission. What was here being implied was that a complete formal system of book production was in place at Ibn Wahb's time. Ibn Wahb had a fixed textbook; he read it to his pupil who took it down verbatim; the pupil then read it back to the master who checked it against his own copy. This is an elaborate justification of a book or books bearing the *isnād*, Bakr–ʿAwn–Ibn Wahb. It cannot be accepted as a correct reflection of book production in Ibn Wahb's time: it reflects a system that grew up in the middle and later decades of the third century, a system that responds precisely to the problems of abuse attendant upon an earlier system of private transmission.

When ʿAwn insisted that he had heard his material from Ibn Wahb *qirāʾatan*, he affirmed at the same time that had it been a matter of *ijāza* he would have said so. Here, *ijāza* implies an inferior mode of transmission. The implications of that mode are indicated in the following. A man approached Ibn Wahb with his books (*kutub*) in a sack, saying, These are your books. Have you checked and compared—*saḥḥaḥta wa-qābalta*? said Ibn Wahb. Yes. Go then and transmit them (*ḥaddith bi-hā*) for I give you my permission (*ajaztu la-ka*). Mālik, it is said, acted in the same way.[43]

The distinction between *qirāʾa* and *ijāza*, and the whole programme of checking and comparing, should be understood as a part of the developed system of book production, here backdated to Ibn Wahb and Mālik. The reality of the early situation was that the owner of a notebook controlled its contents. Interested parties wrote down their *samāʿ* from so-and-so. There is no reason to suppose that one man's *samāʿ* would be the same as another's from

[43] Ibid. 105–6.

the same master. It is perfectly possible that two listeners at the same *majlis* would take notes on different dicta; they might record them more or less in their own words; they might even read them back to the master—these different notes—and get his approval. In the end they would be preserving and transmitting their own material, not a 'book' by the master. It is the transmitters' authority or artistry that might eventually precipitate a real fixed text attributed to a named master. Between a first notebook and an achieved fixed text there might be many stages.

Books and notebooks were, of course, transferable, as were their contents. Muḥammad b. al-Ḥārith al-Khushanī, final compiler of Abu 'l-'Arab's *Ṭabaqāt*, found in the book (*kitāb*) of Daḥmān b. al-Mu'āfī such and such an anecdote.[44] The *Ṭabaqāt* itself was not originally a published text. Al-Khushanī, the final editor, acquired it (no doubt in its unique copy) from Abū 'l-'Arab and added his own material. Saḥnūn saw a book in the hands of his students (*ṭalaba*) in which there was a hadith from Ibn Razīn from 'Abdallāh b. Nāfi'. Saḥnūn summoned Ibn Razīn and asked him whether he had heard from (*sami'a min*) Ibn Nāfi'. Ibn Razīn confessed to economy with the truth and was accused of forgery (*tadlīs*). What scorpions will come out of the woodwork when I am dead! said Saḥnūn.[45] But the scorpions in the woodwork were a part of the human situation and should not be forgotten by modern scholars who might wish to portray, perhaps, the real Mālik and his jurisprudence. Even that story about Saḥnūn is not an accurate reflection of his time. The word 'students' (*ṭalaba*) is not a term used at that period to describe participants in a session. Only later, with the formalization of the social status and the qualifications of the juristic class, did there develop an institutional relationship between teacher and student, together with an increasing currency of books. The *ṣāḥib majlis* with his *julasā'*, or *aṣḥāb*, or *qawm* was participating with his peers in a discursive activity. He was not engaged in a training programme for youths. (If they wanted to learn, they sat no doubt at the back, while the acknowledged elders sat at the front, their knees touching.)

Muḥammad b. Ibrāhīm b. 'Abdūs had a book which he named the *majmū'a* or *Collection—la-hu kitāb sammā-hu al-majmū'a*. He had compiled it on the subject of *fiqh* according to the opinions

[44] Abu 'l-'Arab, *Ṭabaqāt*, 106. [45] Ibid. 119.

(*madhāhib*) of Mālik and his companions.[46] He had compiled it, not Mālik. 'Abd al-'Azīz b. Yaḥyā al-Madanī heard from Mālik—his *muwaṭṭa'* and other things—and heard also from al-Layth, Ibn Darāwardī and others. He recited his books only from memory—*wa-kutubu-hu innamā amlā-hā min ḥifẓ*. Muḥammad b. Saḥnūn amongst others heard from him—*sami'a min-hu*.[47] The *muwaṭṭa'* of Mālik here refers to the law propagated by him and not to a specific book. It is difficult to think what is implied by the suggestion that a man recited his books only from memory: what is recited from memory is not a book in the usual sense of the word. It is likely that 'Abd al-'Azīz heard from Mālik and transmitted what he liked, or remembered, or thought he had heard; that those who in turn heard from him made notes and that these notes are the 'books' of 'Abd al-'Azīz. Reference to books, then, is not infrequent in the North African biographies though little enough when compared with the ubiquitous reference to oral transmission. The handful of references that suggest a formal system for the transmission of fixed-text books reflects the later rather than the earlier decades of the century. Private records of auditions (*samā'*), on the other hand, certainly predated the *Mudawwana* and are likely to have been a consistent feature of literary life from the early to the later part of the century.

In the *Ta'rīkh al-'ulamā' wa-'l-ruwāt li-'l-'ilm bi-'l-Andalus* of Ibn al-Faraḍī, the same picture is presented of an essentially oral world of cultural activity, with a single dominant authoritative canon, the *Mudawwana* of Saḥnūn, and a large circulation of private *samā'* works. Many of the latter were eventually gathered into a compendium known as *al-Mustakhraja min al-asmi'a*, *The Selection of Samā's*, associated with the name of Muḥammad b. Aḥmad al-'Utbī (d. 255). This is an Andalusian work, apparently the product of an initial collection made by 'Utbī during his travels to North Africa. The collection acquired considerable fame and prompted a major commentary as late as the sixth century by Abū 'l-Walīd Ibn Rushd (d. 520), grandfather of the philosopher Ibn Rushd. The final edition of the *Mustakhraja* is likely to represent a slightly later period than the lifetime of 'Utbī. According to Ibn al-Faraḍī, the editing of the accumulated material took place at the hands of 'Abdallāh b. Maḥmūd al-A'raj (d. *c.*310) who divided it

[46] Ibid. 133. [47] Ibid. 78.

into chapters following the pattern of the *Mudawwana*.[48] Formally the material in this work is not substantially different from that of the *Mudawwana* and neither its origins nor its relatively early date need be doubted. Dominated by *ra'y* and giving expression to a huge variety of conflicting opinions, most of them going back to Mālik, the work was not admired by those who followed Ibn Waḍḍāḥ. The *Mustakhraja* is full of mistakes, said Ibn Waḍḍāḥ[49] (for whom see Ch. 2, Sect. VI).

While it would be an interesting and possibly valuable academic exercise to attempt to recover a series of *samā'*s from Ibn Rushd's commentary, the task need not be undertaken here. The effort behind the work confirms that private *samā'*s were the dominant form of written jurisprudence in the middle years of the third century. The creation from these of major compendia is exemplified in the *Mudawwana* and in the *Mustakhraja*, the former initiated by Saḥnūn and acquiring institutional backing, the latter retaining the character of a private initiative.

In the *Kitāb al-Bayān* of Jāḥiẓ, the ubiquity of notebooks as an adjunct to participation in oral activity is confirmed. The best of gifts, said Fuḍayl, is a saying of wisdom (*kalima min al-ḥikma*), which can be memorized and passed on. Juxtaposed to this, Jāḥiẓ offers the anonymous, A man writes down the best that he hears, and he memorizes the best that he writes down. And, Make that which is in your books a treasure stored, that which is in your heart (i.e. memorized) ready money—*ij'al mā fī kutubi-ka bayta mālin wa-mā fī qalbi-ka li-'l-nafaqa*. A Bedouin disagreed with this sentiment: a word preserved in your heart is better than ten in your notebook—*ḥarfun fi qalbi-ka khayrun min 'asharatin fī tumāri-ka*.[50] In comparing the rhetorical abilities of Ibn al-Zubayr with those of Sa'īd b. al-'Āṣ and his son, Jāḥiẓ expressed his surprise that the words of the former had filled the notebooks of the learned—*anna Ibn al-Zubayr qad mala'a dafātir al-'ulamā' kalāman*—while of the latter they had preserved almost nothing.[51] The world of oral culture no doubt had its illiterates, whose artistic skills would not thereby be diminished, but precisely at the

[48] Ibn al-Faraḍī, *Ta'rīkh*, ii. 8 (no. 1104) for 'Utbī; i. 260 (no. 665) for 'Abdallāh.

[49] Ibid. ii. 8. The material of the *Mustakh-raja* can be found in Muḥammad b. Aḥmad Ibn Rushd's *Bayān*.

[50] Jāḥiẓ, *Bayān*, i. 258.

[51] Ibid. 314.

moment when that culture became reflected in written works that have been preserved, it was a culture of private notebooks.

It must suffice here simply to affirm that a major immediate source of Jāḥiẓ's material is private notebooks, his own or other people's. He had access perhaps to some public (published) works but the majority even of these would not be authored works. When we learn of Khālid b. Ṣafwān that he was a man of eloquence and that his skills were reflected in a book 'which circulated amongst the (professional) copyists'—*kitāb yadūr fī aydī al-warrāqīn*[52]—(meaning that they copied it on spec in hope of a sale), we must not imagine that Khālid had produced the book; nor even that the book which circulated was a stable text free from emendation, omission, addition, or creative rewriting. There was no one in charge. Jāḥiẓ himself must be recognized as (not the first but) amongst the first to control the production of books: his material was gathered, selected, and organized by a single author, self-consciously aware of an artistic task, which was also a financial one. He had the intention of producing copies that would precisely replicate his finished work and he employed copyists to this end, intending also to secure profits, directly and indirectly, from this authorial activity.

It will be convenient at this point, pre-empting a more detailed analysis of Ibn Qutayba's *œuvre*, to illustrate from his *Kitāb al-Ma'ārif* the exemplary fate of some private notebooks and the casual approach to transmission of some private scholars. Sufyān al-Thawrī bequeathed his books to 'Imāra b. Yūsuf—*awṣā ilā 'Imāra b. Yūsuf fī kutubi-hi*. 'Imāra wiped them clean and burned them—*mahā-hā wa-aḥraqa-hā*.[53] It is possible that Ibn Qutayba derived some satisfaction from the thought that the books of one whom he classified with the *aṣḥāb al-ra'y* (implying disapproval) were burnt. But it was a waste; writing materials, whether vellum, papyrus, or even paper were all capable in varying degrees of being cleaned and reused. This was the likely fate of most private notebooks—unless indeed they contained some items that appealed to the new owner. These would be transferred to his own commonplace book. Ibn Qutayba tells us on the authority of Abū Ḥātim that Abū Qulāba bequeathed his books to Ayyūb. They were brought from Syria and transferred to Ayyūb with the result

[52] Ibid. 340.

[53] 'Abdallāh b. Muslim Ibn Qutayba, *Ma'ārif*, 218.

that 'they got muddled up with what I had heard from him directly'—*fa-khalaṭat ʿalā baʿḍi mā samiʿtu min-hu*.[54] Ayyūb, it is evident, did not keep the 'books' he received separately from the material he had heard orally from the same master. He copied the material he liked into his own notebooks and subsequently could not distinguish the different origins of these materials. Also from Abū Ḥātim: When Qatāda delivered a good talk (*ḥaddatha bi-'l-ḥadīth al-jayyid*) and then went on to something new, Shuʿba ran after him (*ʿadawtu warā'a-hu* = hurriedly wrote down what he had heard) so that Qatāda should not forget, for he (Qatāda) used to rely on memory and not write down—*li-anna-hu kāna yahfaz wa-lā yaktub*.[55] It was Shuʿba who passed judgement on the dicta of Qatāda and decided what to write down and what not to write down; it was Shuʿba who produced Qatāda's book.

Whether it actually happened thus with these characters is immaterial. What we infer is the same as that we inferred from the Mālikī biographies, the same indeed as we might infer from the actual forms and structures of early *fiqh*: books were originally the product of followers, not masters. Books then circulated and were destroyed, but not before their contents had been ransacked and transferred to other notebooks. In the process of circulation, the form and contents of particular items were liable to change. Not every keeper of a notebook was equally scrupulous. Wāqidī is Ibn Qutayba's source for the following. Ibn Jurayj went to Hishām b. 'Urwa and said, The notebook (*ṣaḥīfa*) you gave to so-and-so, is it your *ḥadīth*? Yes, said Hishām. Subsequently Wāqidī overheard Ibn Jurayj transmitting information in the form *ḥaddatha-nā Hishām*. Ibn Jurayj was thus claiming to have heard directly what he had found in a notebook belonging to a third party. He had admittedly made an extremely perfunctory check with the alleged source of this material, but he had certainly not heard it from Hishām. Ibn Jurayj explained his conduct: People are indeed at variance on a *ṣaḥīfa* if, having taken it away without reading it (sc. back to the owner), one then transmits it in the form *uḥaddith*. But if one reads it (back to the owner), it is the same as hearing (from the master) directly—*huwa wa-'l-samāʿ wāḥid*.[56] This was a very cavalier attitude to notebooks. In telling the story Wāqidī was destroying the credibility of any *isnād* exhibiting the link Hishām b. 'Urwa–Ibn Jurayj. Nothing follows from this story about the time of Ibn Jurayj. Since Wāqidī died in 207 and could not therefore be a direct transmitter to Ibn Qutayba, we cannot even be sure that this is genuinely Wāqidī's material. Someone, however, was determined to impugn Ibn Jurayj, for Ibn Qutayba reports also the following, again from Wāqidī. Ibn Jurayj asked Abū Bakr to write out some of his better hadith—*aḥādīth min aḥādithi-ka jayyāda*. Abū Bakr wrote out a thousand and handed them over; neither did Abū Bakr read out the material nor did Ibn Jurayj read it back to him. Subsequently Wāqidī saw that Ibn Jurayj had entered into his books (*qad adkhala fī kutubi-hi*) many *aḥādīth* of the form *ḥaddatha-nī Abū Bakr*.[57] It is probable that again the intention is to cast doubts on *isnād*s exhibiting the link Abū Bakr–Ibn Jurayj. The stories, however, reveal the practices of the third century; in good faith or in bad faith transmitted information was likely to claim pedigrees that it did not deserve. People would read to Ibn Lahīʿa hadith that were not his, and he would keep silent—implying acceptance. Someone spoke to him about this. What fault of mine is this? he replied; they come with a book, read it to me, then go away again. If they asked me, I would tell them it was not my transmission.[58]

The social response to these phenomena was naturally that the system developed controls. The master might check material transmitted in his name by insisting that the contents of a notebook be read back to him. When this proved an inadequate control, then the master was likely to take full control over production and transmission; he would compose his book in written form, read it out to his students, and require them to read back their notes to be checked against his original. Some authorities had secretaries; professional scribes (*warrāq*) emerged; a formal system of checking and correcting (*muqābala wa-taṣḥīḥ*) developed. Thus did authors and real books—multiple editions of precisely the same text—enter the world of Arabic literature, rather later, probably, in *fiqh* than in *adab*. The process was slow and uneven. Some of the first 'books' were perhaps personal collections, irregularly derived from all kinds of sources, through

[54] 'Abdallāh b. Muslim Ibn Qutayba, *Maʿārif*, 197.
[55] Ibid. 203–4.
[56] Ibid. 214.
[57] Ibid.
[58] Ibid. 221. See further al-Qāḍī 'Iyāḍ, *Al-Ilmā'*, for the classical system of teaching and transmitting texts.

perhaps generations of notebooks, finally crystallized as, say, the *Jāmiʿ* of Sufyān al-Thawrī.

The transition from a predominantly oral milieu to a book-dominated milieu was effected in the course of the third century, through the mediation of notebooks. The process was no doubt uneven, the situation different in different geographical areas and in different areas of scholarly and artistic activity. In the world of *fiqh*, in North Africa, the complete absence of any established written juristic work prior to the emergence of the *Mudawwana* confirms that private notebooks and a concomitant stress on oral activity had been the norm. It is easy to postulate, more difficult to prove, that the emergence of notebooks was itself a sequel to a period when oral law without written aid had been the norm. In Iraq, in the field of *adab*, the gradual transition from notebooks that were an aid to participation in oral creativity to notebooks that made some claim to being finished works of written art may have preceded the life of Jāḥiẓ. But the uncertainties of attribution and dating in the field of early Arabic literature suggest that this transition was, at best, a slow and uncertain process. Even conceding all the marginal and doubtful cases, it is safe to assert that the Arabic language, prior to 200, did not have a significant established canon of written literature. In a context where the surrounding communities were the proud and conscious bearers of a diverse written culture (though not necessarily in the language they habitually spoke) that was perceived as a weakness, giving rise to the cultural polemic of the Shuʿūbiyya (below, Sect. V).

The result of the cultural transition, which I have located primarily in the third century, was of course a change in the nature of public authority, not just in the world of *fiqh*. The broad processes of oral transmission which were directly responsible for some of the material that became written in the early decades of the century suffered a decline in prestige. The focus of public concern moved to the transmission and preservation of written material and to the transfer of such material into orderly, and if possible artistic, structures. Whereas the bearers of authority in the Arab-Muslim cities of *c.*200 were primarily engaged in an oral activity and were at least not handicapped by illiteracy, this could not be affirmed of the period *c.*300 (though indeed it seems likely that the liveliness of the oral milieu continued: some disciplines, for example those associated with *zuhd* and *taṣawwuf*, emerged

only later into written forms). The process and the direction of change seem clearly marked in our texts, but the dating is admittedly uncertain and subject to many constraints.

IV

Early juristic material does not identify the social status of its named tradents. Authorities in the *Mudawwana* are variously referred to as *rijāl al-ʿilm*,[59] *ahl al-ʿilm*,[60] the *ʿulamā*',[61] the *fuqahā*',[62] the *fuqahā*' and the *ʿulamā*'.[63] Ibn al-Musayyib, Ibn Yasār, ʿUmar b. ʿAbd al-ʿAzīz, and Yaḥyā b. Saʿīd simply as names appear in a list.[64] There are no clues to indicate that one in this list was first Governor of Madina and later Caliph in Damascus. The Ḥanafī books, owing probably to an accident of style, show a marked preference for the term *fuqahā*',[65] but equally fail to provide any background information on social origins.

The *Ṭabaqāt* is more suggestive: in so far as it mentions the social class of its characters it confirms that these experts in the law might come from any and every background. Yaḥyā b. Sulaymān al-Kharrāz, noted for his knowledge of arithmetic, was invited to join the *dīwān*, that is, the local chancery.[66] ʿAbd al-ʿAzīz b. Yaḥyā al-Madanī was an itinerant merchant who came to Qayrawan with musk, intending to sell it, but refrained from doing so when he discovered that the local governor claimed sole rights to buy this substance.[67] Abū Dāwūd was an *ʿaṭṭār*, dealer in medicinal drugs and perfumes.[68] ʿAwn b. Yūsuf used to sell linen (*kattān*) from his booth in the market.[69] Abū Yaḥyā Ḥammād b. Yaḥyā was a merchant—*kāna tājiran*.[70] Ibn Nāfiʿ was a goldsmith or jeweller, *ṣāʾigh*.[71] We have seen other examples of authorities who had a booth, a *ḥānūt* in the market. The presence of artisans of relatively low status is perhaps a little surprising, even to the transmitters. Marwān b. Abī Shuhma used to make mud bricks with his own hands—*kāna yaʿmal bi-yadi-hi al-ṭūb*. He would give

[59] Saḥnūn, *Mudawwana*, v. 5. [60] Ibid. vi. 52 and 97; 21.
[61] Ibid. vi. 105. [62] Ibid. v. 9.
[63] Ibid. ii. 97. [64] Ibid. v. 16.
[65] e.g. Shaybānī, *Muwaṭṭaʾ*, 53, 94 and *passim*. See also the works of Ṭaḥāwī, discussed at Ch. 9, Sect. II and Ch. 9, Sect. IV.
[66] Abu 'l-ʿArab, *Ṭabaqāt*, 90–1. [67] Ibid. 78.
[68] Ibid. 117. [69] Ibid. 105. [70] Ibid. 118. [71] Ibid. 119.

away one third of his income as charity, devote one third to his family, and with the remaining third he would buy clay for the business.[72] Ibn Ghānim was a qadi.[73] So of course was Saḥnūn. And some (but not all) of his predecessors as qadis were worthy of recall as authorities.[74] 'Abdallāh b. Aḥmad b. Ṭālib became Qadi of Qayrawan and held sessions in which he encouraged virtuoso debate—*yughnī fī 'l-munāẓara*.[75] Ḥabīb had charge of the *maẓālim* court under Saḥnūn (*ṣāḥib maẓālim Saḥnūn*).[76] Asad b. al-Furāt was put in charge of the army by an Aghlabid governor—*wallā-hu 'alā 'l-jaysh*—prior to its being dispatched to Sicily. Nothing in his early career suggests that he was a soldier; it is likely to be his organizational abilities that won him this post.[77]

The Aghlabid governors are not amongst those who know the law. They summoned the *'ulamā'* when they were faced with a difficult problem.[78] They invited the jurists to participate in sessions at their court; and they might try to bribe the jurists to win them to their side.[79] They recognize the authority of the jurists, but they are not of them.

The peculiar authority of governors and administrators perhaps meant that, given the right circumstances and their active participation in the processes of discussing the law, they might in certain areas have disproportionate influence in formulating the law. Such, however, was not inevitably nor even usually the case. When a *mukātab* (a slave in the process of buying his freedom by instalments) of Ibn al-Mutawakkil died in Makka, leaving a part of his *mukātaba* unpaid, some other debts, and a daughter, the local administrator was nonplussed and sent to 'Abd al-Malik b. Marwān. 'Abd al-Malik instructed him first to pay off the debts, then the remaining *mukātaba*, and to transfer the remainder of the inheritance to the daughter and other heirs. The story is recorded in the *Muwaṭṭa' Shaybānī* and the *Muwaṭṭa' Yaḥyā*.[80] It does not imply that the governor (habitually) made up the law but that in this case his decision was thought to give satisfactory expression to it. The solution was recorded because approved.

Equally, possibly more, characteristic is the occasion when

[72] Abu 'l-'Arab, *Ṭabaqāt*, 115–16. [73] Ibid. 116.
[74] Ibid. 85. [75] Ibid. 136–8. [76] Ibid. 116.
[77] Ibid. 83. [78] Ibid. 106. [79] Ibid. 86.
[80] Shaybānī, *Muwaṭṭa'*, 306; Mālik, *Muwaṭṭa'*, *Kitāb al-mukātaba, Bāb al-qaḍā' fī 'l-mukātab*.

Mālik was asked by the governor of Madina to reduce the number of *rak'a*s performed during the *qiyām* (vigil) of Ramadan. I forbade him to reduce the number, said Mālik—*nahaytu-hu an yanquṣ min dhālika shay'an*; this is the practice that I found the people conforming to, it is ancient custom—*al-amr al-qadīm alladhī lam yazal 'alay-hi al-nās*.[81] The governor cannot change the established law and must submit to the commands of a jurist. Saḥnūn asked Ibn al-Qāsim, with regard to straying camels, whether Mālik required the *wālī* (the local governor) to sell them—*hal kāna Malik ya'mur al-wālī*. Mālik said, Straying camels are not to be sold. He is also reported to have said that a certain governor consulted him on just this matter and he gave him this reply—*istashāra-nī, ashartu*.[82] Governors consult the *fuqahā'* in order to discover the law or in the hope of finding a way round it. Such are the implications of the early juristic texts, broadly confirmed in the biographical material (see above on the Aghlabids).

If governors did not make the law, they might none the less be influential in so far as they too were thinking members of society, capable of reflection on the known law. Some local authorities, governors, judges, or administrators might win in their own right the status of scholar or jurist; this they would do by participating in the sessions of those acknowledged already to have this status. When this happened their names appear in the named authorities of this school or that. Marwān b. al-Ḥakam (as governor of Madina) engaged in discussion with juristic authorities, even on minor points of the law of purity.[83]

The diffuse authority of the elders of the community—merchants, traders, administrators, some artisans—who met in the mosque or in the market-place to express their inherited wisdom and to discuss the ancient tradition did not last the century. By the early fourth century, sitting in the same mosques, and much less in the market-place, were professional jurists surrounded by students.[84]

[81] Saḥnūn, *Mudawwana*, i. 222. [82] Ibid., xv. 176–7.
[83] Ch. 3, Sect. IV. It is important to note that the early works of *fiqh* do not provide any evidence to suggest that caliphs as such were recognized as law-makers. See Ch. 8, Sect. VI.
[84] It is not my intention to suggest that the older more informal system just disappeared. It was marginalized. But the basic processes of informal social control could and still can be found to dominate in areas where literacy, formal education, and bureaucratic central control have not completely ousted them. Consider the role of the elders in Al-Tayyib Salih's Sudanese novella, *'Urs al-Zayn*.

Increasing literacy and the attendant processes of professionalization were factors affecting not only the jurists. The biographical material in Ibn Qutayba's *Kitāb al-Ma'ārif* relates to the general (oral, at least allegedly) transmission of Arab culture but it shows the same sense of widely diffused social authority, effectively captured already in Ibn Qutayba's time by literateurs whose skills were formal and literate. Though the information is presented unsystematically, his characters too reveal themselves to be administrators, merchants, and artisans. Ismā'īl b. 'Ulya[85] was one of the notables (*khiyār al-nās*); he had charge of the *maẓālim* court at Baghdad. Muḥammad b. 'Abdallāh al-Anṣārī[86] also had a period in charge of the *maẓālim*. Waki' b. al-Jarrāḥ[87] served in the treasury, the *bayt al-māl*. 'Āṣim al-Aḥwal[88] had charge of the market administration, the *ḥisba*, in Kufa. Zayd b. Zarī,'[89] following in his father's footsteps, looked after the governor's militia, the *shurṭa*, in Basra. 'Abdallāh b. al-Mubārak[90] died returning from a raid; he was perhaps a professional soldier. Of merchants and traders we find a coppersmith, a dealer in herbs and drugs, a seller of clarified butter, dealers in clothing and in cloths (*ṭayyālisī* and *anmāṭī*); also a teacher, a professional scribe, and a secretary.[91] Of Khālid al-Hadhdhā' (Khalid the Cobbler),[92] we learn that he was so-called because he used to 'sit' with the cobblers—*yajlis ilā 'l-hadhdhā'īn*; or, possibly, because, having talked (*takallama*) on an aspect of knowledge, he would say, Follow this hadith—*ihdhi 'alā hādhā 'l-ḥadīth*. Khālid died in 141, but these comments are an effort to explain his name in a period when it was no longer known why he had this name. Very possibly he was a cobbler, but, by Ibn Qutayba's time, it was not immediately conceivable that a low-ranking artisan should have status as an authority.

The movement of authority conceptually from an oral to a written environment entailed its movement socially from a broad spectrum of social classes to a narrower band of suitably educated persons. Within the field of *fiqh*, the emergence of a literate élite

[85] Ibn Qutayba, *Ma'ārif*, 221. [86] Ibid. 227. [87] Ibid. 221.
[88] Ibid. 222. [89] Ibid. 222. [90] Ibid. 223.
[91] Ibid., Azhar al-Sammān, 224; 'Affān b. Muslim al-Saffār, 228; Dā'ūd b. 'Abd al-Raḥmān al-'Aṭṭār, 223; Abu 'l-Walīd al-Ṭayyālisī and Abū Dā'ūd al-Ṭayyālisī, 227; Ḥajjāj al-Anmāṭī, 227. Ma'lā b. Asad was a teacher, 228, Adam al-'Asqalānī a scribe (*warrāq*), 'Abdallāh b. Ṣāliḥ secretary to Layth, 228.
[92] Ibid. 219.

laying claim to special rights of guarding, interpreting, and producing legal texts was not merely a literary phenomenon; for the texts they guarded specified how people were to act and implied wide social authority. The capacity of the law to change and develop when it was frozen into words on paper (or papyrus, or vellum) was not necessarily pre-empted, but the mode of change was clearly different from what it had been when the law was consensually worked out through discussion or when written texts had only an ancillary role. The developing professionalization of the juristic classes was intimately related to their dexterity in controlling written materials and committed them to a hermeneutic discipline which alone could validate and perpetuate their claim to authority.

V

The emergence of a distinguishable social class, the *fuqahā'*, was a phenomenon intimately linked to, and perhaps marginally later than the emergence and individuation of a corresponding academic discipline, *fiqh*. Demarcation of disciplines within the Islamic cultural tradition was in the end a finely discriminating tool which had social as well as academic implications. The Andalusian *Ta'rīkh al-'ulamā'*, depicting the life of Ibn Waḍḍāḥ, states that he journeyed twice to the East, first in quest of the ascetic sciences (*zuhd* and *'ibāda*), secondly in quest of hadith.[93] That separation of types of knowledge and, by implication, of personnel reflects educational practices in the time of the biographer and need not be historically compelling for Ibn Waḍḍāḥ's lifetime. The North African *Ṭabaqāt* informs us that Saḥnūn met Ibn al-Qāsim, Ashhab, and others in the field of *fiqh*, in the field of hadith Sufyān b. 'Uyayna, Ibn Wahb, and others.[94] That of course is an inference from the nature and contents of the *Mudawwana* and reflects the trend towards academic specialization that characterizes a subsequent period. The authority statements in the *Mudawwana* (= hadith) are not so different from dialogue material (= *fiqh*) as to warrant assumptions about clearly demarcated disciplines (cf. above, Ch. 1).

[93] Ibn al-Faraḍī, *Ta'rīkh*, ii. 17 (no. 1136).
[94] Abu 'l-'Arab, *Ṭabaqāt*, 102.

The development of the terms *fiqh* and *faqīh* from the general connotations of 'understanding' to the specific connotations of juristic understanding is well known[95] and was not yet fully accomplished in the ordinary literary Arabic of the early third century. When Jāḥiẓ stated that 'Amr b. 'Ubayd, Hishām b. Hassān and many *fuqahā'* sat with Faḍl b. 'Īsā, he was using the word *fuqahā'* to imply general wisdom and discursive skills, not specifically juristic skills. Even in juristic biographies, where juristic connotations are necessarily implied, the term *fiqh* has a double aspect, implying a skill (older usage) and a system. Saḥnūn said of Bahlūl b. Rāshid that he was an upright man but did not have as much *fiqh* (= juristic understanding) as others—*lam yakun 'inda-hu min al-fiqh mā 'inda ghayri-hi*.[96] But Abū Yaḥyā Ḥammād b. Yaḥyā was the first to bring to Qayrawan the *fiqh* (i.e. system) of 'Abd al-Malik b. Mājishūn.[97]

A typology of early Islamic literature, though frequently attempted, remains elusive, in part because of formal and substantive overlaps (and in part because of problems in dating and historical development). John Wansbrough, for whom typology is a major analytic device, on several occasions has attempted to define categories which will both catch and appropriately distinguish the literature he studies. One of his most general approaches suggests five kinds of linguistic material that represent early Arabic literature: poetry, Qur'ān, hadith, *ayyām*, and papyri. His typology of exegetical literature (haggadic, halakhic, etc.) might also be adapted and reused for general literary description; as might his typology of confessional types (primitivist, scripturalist, ritualist, etc.).[98] I have attempted a refinement of Wansbrough's exegetical types towards five instrumental and five ideological structures: orthography, lexis, syntax, rhetoric, and allegory; prophetic history, theology, eschatology, law, and *taṣawwuf*. All of these, it might be argued, exist in the Islamic tradition both as (more or less) independent academic disciplines and as exegetical modes.[99] The drawing of lines is not arbitrary and must vary according to the intentions of the analyst or according to the degree of focus on form as opposed to content. Nor is the task a

[95] *EI*(ii), s.v. 'Fiqh'.
[96] Abu 'l-'Arab, *Ṭabaqāt*, 103.8.
[97] Ibid. 118.
[98] John Wansbrough, *Studies*, 90 and 119; Wansbrough, *Milieu*, 55.
[99] Norman Calder, 'Tafsir'.

new one; it was already significantly advanced in the time of Ibn Qutayba. In his documentation of the transmission of Arabic culture (represented in the biographical accounts of the *tābi'ūn* and the *aṣḥāb al-ḥadīth* in his *Kitāb al-Ma'ārif*) he shows the requisite analytic approach. Dāwūd al-Ṭā'ī, to cite one example, developed skills in hadith, *fiqh*, *naḥw*, *ayyām al-nās*, and *ta'abbud*.[100] If the last four of those can be translated as law, grammar, history, and asceticism, the problem that remains in completing the list illustrates precisely the form v. content dichotomy.

Whatever the difficulties, it is at least clear that the differentiation and delineation of academic disciplines, at a conceptual level, was well advanced in the middle decades of the third century. That these emerged out of an initially more homogeneous cultural matrix is perhaps the most likely supposition. (Wansbrough has argued persuasively for the separate development of law and scripture, the latter, at least in its canonical form, later than the former, and product of popular liturgical and preaching activity.[101] Separate development of literary forms, reflecting divisions of class as well as *Sitz im Leben*, is not incompatible with a common cultural matrix.) There are grounds for thinking that *fiqh* was the first major discipline to acquire a separate identity and to generate specialists who constituted a distinct social class. This development may be detected in the different approaches to law by Jāḥiẓ and Ibn Qutayba. In the large *adab* works of the former (the *Bayān* and the *Ḥayawān*) jurists and juristic argument are firmly embedded within the body of material that is deemed to constitute general culture. In the works of the latter, a generation later, there is suspicion and distaste for precisely this discipline, which is now clearly a separate discipline. Expressly articulated in the *Mukhtalif al-ḥadīth*, the distaste is also evident in the organization of biographical material in the *Ma'ārif*. There, the three sequent sections on Successors (*tābi'ūn*), jurists (*ahl al-ra'y*), and transmitters (*aṣḥāb al-ḥadīth*)[102] are so organized as to mark the deviation of the jurists from the tradition. Transmission was from the Successors to the transmitters; the jurists, dominated by *ra'y*, failed to take up and pass on the cultural baton.

[100] Ibn Qutayba, *Ma'ārif*, 224.
[101] Wansbrough, *Studies*, 170 ff. and *Milieu*, 78–80.
[102] Ibn Qutayba, *Ma'ārif*, 186 ff., 216 ff., 219 ff.

Pace Ibn Qutayba, *fiqh* was not so far separate from the general stream of Arabic culture as to be immune to the developmental processes to which the latter was subject. The ambition of *adab* to contain and express the whole of Arabic culture makes it a convenient context in which to demonstrate what those processes were. Four overarching issues, developing sequentially throughout the third century and into the fourth, affected the expression of all aspects of Arabic Muslim culture. They are:

1. the recognition of a tension between transmission and reflection, partially resolved by
2. acknowledgement of Prophetic authority as relevant to all areas of cultural life; this in turn required
3. the elaboration of a theory of integral oral transmission. The whole was guaranteed and justified by
4. subsumption of cultural disciplines to the notion of scriptural (Quranic) sanction. (The Islamic literary tradition of *tafsir* can be described as the systematic comparison of the sacred text with independent disciplines: orthography, lexis, syntax, etc.[103] The effect is not simply to draw out the meaning or meanings of Quranic locutions, but also—and possibly more significantly—to demonstrate Quranic sanction for the disciplines.)

The tension between the notions of transmission (integral) and reflection (creative) was articulated on more than one occasion by Muḥammad b. al-Ḥārith al-Khushanī, editor of the North African *Ṭabaqāt*. He heard a certain shaykh who proposed (*dhakara*) the superiority of *fiqh* (reflection) over much transmission and gathering of reports—*dhakara faḍl al-tafaqquh 'ala kithrat al-riwāya wa-jam' al-akhbār*.[104] He also records that when Ṣimādiḥī, who was acknowledged to be skilled in gathering transmitted material (*riwāya*), came across a real dispute he never knew what to do till he sought a fatwa or asked an authority—*istaftā wa-sa'ala*.[105] Aḥmad b. Muḥammad used to ask Yaḥyā b. 'Umar questions (*masā'il*) which he would then repeat on a second occasion and get precisely the same answer with no differences in wording or changes in ruling. Al-Khushanī commented that this showed stagnation in the reflective process, lack of range in thinking, and an [unhappy] restriction to words memorized—

[103] Calder, 'Tafsir'.
[104] Abu 'l-'Arab, *Ṭabaqāt*, 106–7.
[105] Ibid.

rukūd al-naẓar wa-qillat al-ijāla li-'l-fikr wa- . . . 'l-iqtiṣār 'alā 'l-maqāl al-maḥfuẓ.[106] The tension thus articulated was in fact never resolved and is already present in the earliest layers of juristic writing. Finally embodied in a standard series of technical terms—*fiqh, ra'y, naẓar* versus *ḥifẓ, riwāya, ḥadīth*—it was at first a disturbing, and consequently a productive, tension. A kind of resolution was found in the backward search for authority which culminated in the figure of the Prophet and in the notion of Prophetic exemplum. That precipitated in time a (more or less) fixed canon of authoritative literature (the collections of Bukhārī, Muslim, *et al.*), having the status of revelation and potentially open to hermeneutic analysis. The tension, then, was between a 'literal' and a more or less avowedly interpretative approach to revealed texts. Given the 200-year gap between the Prophet's death and the commitment to Prophetic authority, it will be obvious why the jurists (and others) had to insist on and document a period of integral oral transmission in the history of Arabic culture. This is not an issue which affected only juristic or even broadly theological matters: the whole of Arabic culture was affected in varying degrees by these concerns, precisely in the middle decades of the third century.

Consider for example some differences between Jāḥiẓ's *Kitāb al-Bayān* and Ibn Qutayba's *'Uyūn al-akhbār*. Both works are made up of discrete segments juxtaposed, and grouped by reference to broad thematic headings. In the former, the segments are introduced by a large and varied terminology of oral transmission. Amongst the authorities cited are the Prophet and the Companions, who figure, without formal promotion, simply as members of a larger galaxy of Arabic heroes. Citations are rarely provided with *isnād*s of any length, and when these do occur they appear to be random and to bear no message. By contrast, in Ibn Qutayba's work, the term *ḥadīth* and its derivatives are significantly promoted to bear the primary burden of expressing and defining the body of inherited material. Prophetic dicta are consistently marked as high-ranking both by provision of a lengthy *isnād* and by promotion to initial position in a chapter (*bāb*). Related high-ranking material deriving its status from propinquity to the Prophet, for example, Companion material, is subject to the

[106] Ibid. 134.

same markers of rank and, in the introduction to *bāb*s, is likely to appear in a conventional hierarchical order. The principles are in fact the same as those used for the sequential ordering of material in the *Muwaṭṭa'* and in Khaṣṣāf's *Akhām al-waqf*,[107] only more loosely applied as befits an art-form in which heterogeneity is a formal virtue. On a larger consideration of Ibn Qutayba's work, it will be seen that it reflects consistent elevation of the term *ḥadīth* to denote Arabic transmitted culture (the *'Uyun* and the biographical parts of the *Ma'ārif*), a special interest in Prophetic hadith (the *Mukhtalif al-ḥadīth*), a concomitant interest in the Bedouin background to Arabic and Prophetic culture (*Al-Shi'r wa-'l-shu'arā'*), and an interest in Quranic language (the *Ta'wīl mushkil al-Qur'ān*).[108] His literary production encapsulates the cultural priorities of a century. It is just possible to suggest that the whole of this literary achievement can be related to the movement known as the Shu'ūbiyya, that is to acute cultural and literary competition within the communities of the Islamic Empire in the middle decades of the third century.[109]

In the *'Uyūn*, the terminology of oral transmission is common (*qāla*, *ḥaddatha-nī*, etc.) even, for example, where Jāḥiẓ is quoted, when one might suspect and can frequently identify a written source.[110] There are, however, many instances where written sources are freely referred to, either anonymously (*kataba ba'ḍ al-kuttāb*)[111] or otherwise (*wa-fī Adab Ibn al-Muqaffa'*,[112] *qara'-tu fī 'l-Tāj*,[113] etc.). The material that is acknowledged to be derived from written sources is more often than not explicitly 'foreign': a Persian work concerning Ardeshir,[114] the Persian work known as the *Mirror* (*ā'īn*),[115] a book from India,[116] the *Kalīla wa-Dimna*,[117] a Greek book (*kitāb min kutub al-Rūm*),[118] or indeed the Gospels or the Torah. Ibn Qutayba's evident eclecticism on the one hand and the deliberated variety of juxtapositions on the other militates against a precise articulation of the tension that underlies this

[107] Ch. 2, Sect. II, Ch. 3, Sect. II, Ch. 6, Sect. XI.
[108] For which, see Wansbrough, *Studies*, 219 and 222–4.
[109] See Goldziher, *Studies*, i. 137–63; H. A. R. Gibb, 'The social significance of the Shuubiyya'.
[110] See 'Abdallāh b. Muslim Ibn Qutayba, *'Uyūn*, ii. 41, which is derived from 'Amr b. Baḥr al-Jāḥiẓ, *Bukhalā'*, 91–2, with minor variations, reflecting the free approach of copyists.
[111] Ibn Qutayba, *'Uyīn*, i. 84; and *passim*.
[112] Ibid. 76.
[113] Ibid. 155.
[114] Ibid. 60.
[115] Ibid. 239.
[116] Ibid. 85, 104, *et al.*
[117] Ibid. 394–5.
[118] Ibid. 248.

demarcation. None the less there is clearly some degree of competition between a predominantly oral tradition which is Arabic and Muslim and a predominantly written tradition which is Indian, Persian, Greek, Christian, or Jewish. One aspect of this tension, cutting across the norms of the genre, finds formal articulation in so far as Ibn Qutayba systematically prefers to begin each new *bāb* with one or several orally transmitted items, introduced by *ḥaddatha-nī*, guarded by lengthy *isnād*s, and hierarchically organized so as to mark (roughly) the conventional ranking of the Prophet and his Companions.

Now, the difference between orally transmitted knowledge (Arabic, Muslim, and ideally Prophetic) and written knowledge (Greek, Indian, Persian, etc.) does not necessarily reflect a difference in Ibn Qutayba's use of sources. The oral tradition was also by this time derived from books. Conceptually however the distinction is of the utmost importance. Ibn Qutayba conceived of the Arab Muslim community as distinguished from others by its possession of a body of knowledge (culture) which had been orally transmitted through generations and was now preserved for posterity in, for example, the works of Jāḥiẓ and, evidently, in those of Ibn Qutayba himself. This promotion of an Arabic body of wisdom, conventionally assessed as the product of a lengthy period of oral transmission, and capable of being attributed specifically to the Prophet or generally to a Bedouin ethos, may be recognized as a part of the anti-Shu'ūbī atmosphere which characterized the middle decades of the third century.

The evident weakness of the Arab Muslim community, in relation to neighbouring cultures, had been, initially, the absence of any acknowledged canon of literary excellence. The remedying of that weakness was in time triumphantly achieved. The condition of that triumph is reflected in the complex claims made for the specifically Arabic and Muslim tradition: it was Bedouin in its origins, integrally transmitted through generations, divinely sanctioned and hierarchically determined by the Arabic Prophet, and symbolically justified by the overarching authority of an Arabic divine Book.

That vision, it might be argued, determined much of the literary and imaginative achievement of Islamic society for a thousand years. Ibn Qutayba was not the first to articulate its outlines, but he was one of its most assiduous, persuasive, and wide-ranging

exponents. The difference between the vision and historical reality lies in the tension between transmission and creativity. Those who participated in cultural activity (oral) in the 'Arab' cities of the Near East created from the diffused and inextricable components of Ancient Near Eastern cultures a new Arabic and Muslim culture, which is unique. Jāḥiẓ and Ibn Qutayba (neither of Arab origin, both Arab in culture) were in different ways disturbed by the creative aspect of that activity. For them, Arabic culture was predominantly transmitted, not created. When Ibn Qutayba detected apparently Arabic disciplines that were markedly inventive (*fiqh*), he tried to bring them back to transmission by confronting them with the highest-ranking elements of the transmitted tradition, Prophetic hadith (the *Mukhtalif al-ḥadīth*). Both writers knew that the transmitters of Arabic culture were largely non-Arab, and so, paradoxically, admitted that the preservation of indigenous Arabic culture depended upon the integral and faithful transmission of the *mawālī*. Implicit wherever there is documentation of the origins of those who transmitted Arabic culture (for approximately 50 per cent of those who figure as *al-tābiʿūn wa-man baʿda-hum* in Ibn Qutayba's *Maʿārif* there are statements implying non-Arab origins) this occasionally found explicit articulation. From Jāḥiẓ's Epistle to Fatḥ b. Khāqān, 'On the virtues of the Turks': the *mawālī* have transmitted much of the *sunna* . . . in many of its aspects because they are themselves Arab, in claim, in *ʿāqila*,[119] and in inheritance . . .; hence they say *mawlā al-qawm min-hum*, the *mawlā* of a tribe is a member of the tribe.[120] That the *mawālī* are Arabs is a claim easily conceded; the historian of early Arabic culture will be unwilling to grant that, in a community defined by its common allegiance to the Arabic language and to the Islamic faith, racial origins made any significant difference. The problem of distinguishing Arab, meaning descended from the inhabitants of the Arabian Peninsula, and Arab, meaning an Arabic speaking inhabitant of the Fertile Crescent, might be a matter of theoretical importance to third-century writers, but the notion of *walā'* (affiliation) made it unreal and, soon, irrelevant.

[119] For this term, see Ch. 8, Sect. II.

[120] 'Amr b. Baḥr al-Jāḥiẓ, *Fī manāqib al-Turk*, 4.14–15; cf. 19.8. This citation must stand in isolation, merely suggestive of the value of this *risāla* for the history of the Shuʿūbiyya.

The processes, then, which affected the development of juristic literature, causing that transformation from the broadly discursive type dominated by *ra'y*, to the hermeneutic type dominated by appeal to Prophetic precedent, were not limited to the juristic sphere. An important factor affecting the development of Islamic jurisprudence is simply that the jurists belonged to Arab-Muslim society; and that society, in the course of the third century, became committed to a pattern of cultural expression which evoked a Bedouin past, an Arab Prophet, a divine Book, and integral transmission of oral culture to the Arabic-speaking cities of the Fertile Crescent and North Africa. All forms of Arabic culture that were not avowedly foreign showed at least some characteristics that reflect this pattern of ideas; all participated thereby in a remarkable formal homogeneity, of which the most striking feature is perhaps the ubiquitous *isnād*.

VI

The factors, both social and intellectual, which governed the emergence and the development of *fiqh* literature throughout the third century should probably be recognized as widespread. The organic growth of school texts, under loose institutional control, and subject to successive redactions, for example, is not a feature solely of juristic works. The great compendium of Arabic grammatical studies, the *Kitāb* of Sībawayhī (d. between 166 and 194—*sic*), may be thought to show evidence of a similar history. Likewise, at least one of the two theological works attributed to Ashʿarī (d. 324), the *Kitāb al-Ibāna*, witnesses a structural disorder that may reflect a long process of organic growth, accretion, redaction, etc.[121] Such processes (evident in these examples for works attributed to the late second and early fourth centuries), presupposing a world of notebook scholarship and school redactions, result in systematic pseudepigraphy. The term redaction, hardly one that has acquired a precise scholarly significance, suggests perhaps no more than processes usually anonymous and markedly different from the controlled authorial activity of Jāḥiẓ and Ibn Qutayba. But the works even of these writers betray social origins and ideological commitments which are identical with

[121] Cf. R. J. McCarthy, *Theology*, 231–2.

those of the juristic tradition. It is difficult to conceive that the characteristic forms of the educational miscellany could have arisen except in a culture where oral literature and notebook literacy were in some degree of creative competition. Between loose redactions on the one hand and authorial control on the other, lies the world of organizing editorship. The *Tafsīr* of Ṭabarī (the *Jāmiʿ al-Bayān*) shows some features of organic growth (the untidy accumulation of hadith material bundled under Quranic lemmas and rarely subject to even that basic redactional process which brings Prophetic material to initial position) and some features of authorial control (the structured arguments and interpretations which provide an intellectual frame for the hadith). It is perhaps a text, initially a product of organic growth, finally so much controlled by its editor as to warrant classification as an authored book.

The acknowledgement of organic texts, pseudepigraphy, and long-term redactional activity as features of some third-century material must affect assessment even of material which has not (yet) been shown to be organic. A case of much relevance to the arguments put forward in this book is that of the great collections of hadith. Apparently the product of the devoted and orderly activity of a single person, works like the *Ṣaḥīḥ*s of Bukhārī and Muslim should probably be recognized as emerging into final form at least one generation later than the dates recorded for the deaths of the putative authors.[122] The recent publication of the hadith collection of ʿAbd al-Razzāq al-Sanʿānī (d. 211) has appeared to some modern scholars to permit of new insights into early history. However, I should be unwilling to concede its early date until the form, the content, and the organization of its hadith are compared systematically with similar material in early juristic texts and in the standard (apparently later) collections. Harald Motzki has used this work as the basis for a history of Islamic (Makkan) *fiqh* in the second century. Conceding little or nothing to the instability or creativity of oral or notebook traditions, unconcerned with organic texts or pseudepigraphy, and overly sanguine about the independence of the biographical traditions, his work does not quite

[122] *A fortiori* the *rijāl* works associated with these collections. Bukhārī's *Al-Taʾrīkh al-kabīr* is probably a post facto description of the *Saḥīḥ*, not a set of criteria governing the collection of its materials.

constitute the convincing recovery of history that he would claim.[123]

VII

Jacob Neusner, in 1971, in the context of a lengthy discussion of 'parallelomania', remarked that 'studies of literary convention in late antiquity, particularly in varieties of Semitic literature, are at an early stage'.[124] He wished there to argue against the too easy scholarly assumption that cultural parallels indicate continuity, direct borrowing, or indeed any kind of borrowing. The caveat has been reiterated frequently since that time[125] but has not always prevented even the most careful scholars from articulating, occasionally, doubtful theories about genetic relationships between parallel components of two cultures. Neusner and his students have, of course, in the last twenty years considerably increased our knowledge of Jewish and in particular Rabbinic literature. This facilitates comparison, but also constitutes a temptation towards making the Rabbinic Jews not only a point of comparison, but somehow a point of influence or origin, for all (later) Near Eastern phenomena that constitute a parallel to the Rabbinic experience.

Many of the basic components of the cultural world within which the literary discipline of *fiqh* emerged can be rediscovered in a Rabbinic context: a formalized system for the transmission and reception of knowledge; a focus on the terminology of 'sitting' to debate, discuss, and teach; a varied stress on memory and reflection as principles potentially in tension; a general appeal to authorities in the past; a significant role for private notebooks; the emergence of canons as a result of, variously, organic growth, redaction, editing, authorial control; widespread pseudepigraphy, etc. The realization of these components is, of course, variable. They should probably be recognized, in relation to community identity, as neutral. In whole or in part, they figure also in the history of Roman law, of Greek rhetorical and philosophical studies, in the teaching of crafts in the Hellenistic world, and in the early history of the Christian Church.[126] That the formal world of

[123] See Harald Motzki, *Die Anfänge der islamischen Jurisprudenz*.
[124] Jacob Neusner, *Aphrahat and Judaism*, 188.
[125] e.g. Wansbrough, *Milieu*, 51–4.
[126] For a general overview of the role and the implications of orality in ancient

Arabic literature, as it emerged in the third century, should exhibit most of the traditional features of Near Eastern literary life can hardly occasion surprise and does not immediately raise questions about the particular—as opposed to the general—origins of Arabic and Muslim culture.

Arabic literary culture is not usefully described as a product of Hijazi invaders, subject to sequential influences; it is a product of city life in the Fertile Crescent, achieving significant written form only after the year 200, by which time the Peninsular component (not in any case a new element in the long history of Bedouin incursions that marks Near Eastern history) was integrated within a complex new self-defining cultural matrix, whose single most important symbol is surely its language. That the 'Arabs' brought their language with them from the Peninsula is also not, in spite of the literature that asserts it, the most compelling historical formulation. Arabic too is a product of city life in the Fertile Crescent, posterior to and consequence of Arab acquisition of power. The contents of its literature, when it emerged, in all the abundance and variety of surviving witness, suggests that few aspects of pre-Islamic Near Eastern culture did not impinge upon the cultural life of the Arab cities. Outside of a small quantity of specifically and literally translated material, there lies, between the pre-Islamic and the post-Islamic realization of Near Eastern culture, a period of diffusion and dissemination, dominated by creative and re-creative oral activity. That period—of choices, integration, development, creation—must make it difficult to assert, and in many cases impossible to prove, that this or that item of Muslim culture depends upon a similar item which happens to be recorded in a different and earlier Near Eastern Community.[127] The common responses of Muslim and other Near Eastern communities to a physical environment, traditional social patterns, a diffused cultural heritage, and shared language will adequately

education, Alexander, 'The living voice'; for Rabbinic schools, David M. Goodblatt, *Rabbinic instruction*; for Rabbinic texts, Jacob Neusner, *Purities* (*inter alia*); for the Christians (and for references to the Greek rhetorical and philosophical traditions), B. Gerhardsson, *Memory and manuscript*; for Roman law, F. Schulz, *Roman legal science*: for a comparison of hermeneutic techniques, P. S. Alexander, 'Quid Athenis et Hierosolymis'. It is not irrelevant to note that some similar features emerged in philosophical and juristic educational circles in medieval France: R. W. Southern, 'Paris and Chartres'.

[127] See further, Ch. 8, Sect. III, below.

account for similarities and parallels. Long term creative and reflective structure-building, and varied intellectual and imaginative play over myths and concepts will account for the unique character of the various communities. (See further Ch. 8, Sects. III and IV and Ch. 9, Sect. III.)

8

THE ORIGIN OF NORMS

I

Joseph Schacht's analysis of early Muslim jurisprudence led him to the conclusion that the 'raw material' of juristic thought was the practice of the Muslim community. In describing that practice he found it convenient to distinguish between popular and administrative features, but he did not imply that juristic norms were identical with social norms, for the jurists variously endorsed, modified, or rejected what they observed. He could find no principle of difference between the various local schools, and no principle of order governing the attitudes of a particular school, going so far as to characterize their responses as 'purely fortuitous'.[1] The responses of local jurists became the idealized and structured norms of a school tradition which Schacht designated the 'living tradition' (*sunna* in pre-classical usage), distinguishing it thereby from classical usage which relates tradition to Prophetic dicta.[2]

Practice is indeed one of the major factors affecting the discussions of early Muslim law. Direct reference to it is frequent. From the *Mudawwana*: this is the *sunna* that I have found people following—*hiya al-sunna 'alay-hā adraktu al-nās*;[3] it is the practice of the people—*wa-huwa min amr al-nās*;[4] *wa-hādhā mā 'alay-hi al-nās*,[5] etc. Similar locutions are a well-known feature of the *Muwaṭṭa'*.[6] In the Ḥanafī works, such reference is less common, but indeed present: *hakadhā amr al-nās, hakadhā 'amal al-nās*.[7] In a problematic case relating to the results of an oath, Shaybānī announces that he prefers such and such a view because oaths

[1] Schacht, *Origins*, 213; and see all of pp. 190–213.
[2] Ibid. 58–81.
[3] Saḥnun, *Mudawwana*, i. 63.
[4] Ibid. 22.
[5] Ibid. 39.
[6] Goldziher, *Studies*, ii. 198–9; Schacht, *Origins*, 61–9.
[7] Shaybānī, *Aṣl*, i. 72, 76.

amongst the people are so dealt with—*astaḥsinu dhālika li-anna aymān al-nās 'alay-hi*.[8] There was also, of course, some opposition to practice, but when this is articulated it merely confirms that the jurists were reacting to what people did.

Even when explicit reference is absent, any general reading of early juristic works will reveal many passages where the images of external social and political reality are so relatively free from normative or reflective or virtuoso patterning that they permit—at varying distances—a glimpse of social practice. Consider, for example, the detailed analysis of tax law in Chapter 6 of this work. No one, I think, would wish to relate the diverse normative claims of the *Kitāb al-Kharāj* to some kind of theoretical borrowing from other legal systems. It was the developed legal conventions of third-century Iraq and the established traditions of tax-collecting that gave rise to its arguments.

To a general theory of origins based on practice, Schacht added a number of concessions to foreign influences (predominantly Roman or Jewish).[9] Though perhaps not worked out in all possible detail, his theory as a whole is both flexible and convincing. More problematic, at least to the present writer, is Schacht's sense of dates. He locates the origins of *fiqh* in the beginning of the second century, where I would locate them, on the basis of the chronology presented in this work, in the beginning of the third century. (It is a methodological imperative that only after analysing the texts in relation to their own time should they be used as sources for earlier history; and the caveats governing that exercise are very limiting indeed.) The most significant failure of Schacht, however, is that he gives little systematic expression to the notion that normative and virtuoso patterning can become ends in themselves, can become (in the history of Islamic law did frequently become) primary generators of change and development in legal theory.

I do not then wish to suggest that there are any cases at all where what is described in a law-book is the ordinary practice of the people. The practices of the community are filtered through at least one and possibly several systematizing minds. In some areas of the law, logical reflection and free speculation are major factors affecting structure and detail. In other areas, what is at issue may be a matter of practical social control, and the struggle evident in

[8] Ibid. 487.
[9] Schacht, *Origins*, see index under 'foreign influences'.

II

One institution of Islamic law for which Bedouin origins have been claimed is that known as the *ʿāqila*.[12] This term designates a social group whose sole function, in the juristic literature, is to provide compensation on behalf of its members in cases of non-deliberate injury or killing. The term for compensation is *diya*. Frequently translated into English as blood money, with connotations of tribal vengeance, this term functions in legal discussion predominantly without these connotations. *Diya* is a payment (usually financial) falling due in case of accidental (or quasi-deliberate) injury or killing. In cases of deliberate injury or killing the perpetrator is subject to *qiṣāṣ*, a term indicating retributive justice according to the principle of *lex talionis*. In such cases the penalty may be commuted, subject to negotiation between the perpetrator and the injured party or his heirs, and replaced by a negotiated (not a fixed) sum, to be paid out of the perpetrator's own property. (This, confusingly, is also called *diya*.) The penalty for non-deliberate injury, fixed and graded according to the injured part or parts of the body, the *diya*, is paid not by the perpetrator but by his *ʿāqila*. The *ʿāqila* is thus a community or segment of community committed to the provision of co-operative aid in cases of non-deliberate injury. There is no *prima facie* reason why these basic

from their neighbours, but not quite freely. Some elements of foreign culture were incompatible with the principles of patterning on which they were constructing their universe; others were compatible. Zaehner suggests that the Jewish abomination of creeping things may have been taken over from Zoroastrianism. Whatever the historical evidence for the adoption of a foreign element into Judaism, we shall see that there was in the patterning of their culture a pre-formed compatibility between the particular abomination and the general principles on which that universe was constructed.

Secondly, from Charles M. Radding, on the intellectual history of medieval jurisprudence in *Medieval jurisprudence*, 13:

Too often left out has been the history of the mental processes by which thinkers worked from the problems posed by their disciplines to the solutions they came to propose. Yet thinkers do not, if they are more than hacks, transmit tradition unaltered or invent ideas to fit the desires of their patrons or audiences [or borrow ideas from neighbouring cultures!]. Thinkers exist in a dialectical relationship with their traditions: shaped by what they learn, to be sure, but also, by the effort of their own cognitive processes, reconstructing that tradition. The drama of cultural and intellectual history lies in the working out of the tension posed by this dialectic, and the historian who loses sight of this interaction has missed the most interesting part of the story.

[12] Schacht, *Origins*, 207; R. Brunschvig, ad '*ʿāqila*' in *EI*(ii).

conceptions (that injured parties deserve compensation, that those who lacked intention to injure should not be required to pay in full, that compensation should be according to fixed rates, and that it should be paid co-operatively by a specified community or segment of community) should be related to Bedouin practice.

The intentions and the workings of this complex of laws may be further analysed. When non-deliberate killing occurred within the Muslim communities, the established *diya* was 1,000 gold dinars or 10,000 silver dirhams. This sum was to be paid over a period of three years through the shared participation of all adult male members of an *ʿāqila*.[13] The intention of thus spreading the burden (explicitly articulated) was that no person should be unduly distressed by the financial obligation. The Ḥanafī tradition specified that no person should pay more than 3 or 4 dirhams *in toto* (so in the *Aṣl*; a minority of later thinkers suggested it might be 3 or 4 dirhams in a single year). The Mālikī tradition specified that each should pay according to his ability, the rich more than the poor.[14] The descriptive terminology which surrounds the concept makes appropriate reference to solidarity and mutual help. The *ʿāqila* are *ahl nuṣra wāḥida*, *ahl yad wāḥida*. They help one another—*yatanāṣarūna*. They are a group committed to mutual support—*rifdan li-baʿḍi-him min baʿḍi-him wa-ʿawnan li-baʿḍi-him min baʿḍi-him*,[15] etc. These citations are from the Ḥanafī *Aṣl*; the facts are the same in the Mālikī tradition.[16]

It will be evident that the *ʿāqila* required in the event of a death would involve, according to the Ḥanafīs (and this is of course a matter of theory), the participation of 2,500 adult males. The precise figure need not be taken too seriously but one must note that this is not a family affair: the social group is large and, within a city, must be something like a quarter or even a series of quarters. Compensation payments (*diya*) for injuries less than death might involve fewer years and fewer people (a smaller *ʿāqila*). When, in the case of a death, the *ʿāqila* was unable so to spread the burden as to achieve the maximum payment of three to four dirhams by individuals, then the nearest tribal group related by lineage

[13] Shaybānī, *Aṣl*, iv. 660–1. Saḥnūn, *Mudawwana*, xvi. 195–6.

[14] Shaybānī, *Aṣl*, iv. 663–4. Cf. ʿAbdallāh b. Mahmūd al-Mawṣilī, *Al-Ikhtiyār*, v. 60, for 3–4 dirhams *in toto*; and Aḥmad b. Muhammad al-Qudūrī, *al-Mukhtaṣar*, in Haddādī, ii. 189, for 3–4 dirhams per year. Saḥnūn, *Mudawwana*, xvi. 198.

[15] Shaybānī, *Aṣl*, iv. 661–2.

[16] See further, Wael B. Hallaq, 'The use and abuse of evidence'.

the text will be to create a working system out of the relative messiness of reality; even then the temptation of juristic elegance will not be entirely avoided.

The immediate source of any articulation of a legal system is a prior articulation of the same legal system. Independently of social reality, a created intellectual structure, whether considered in its parts or as a whole, will generate problems (logical, terminological, analogical) which demand solution at a purely theoretical level. That solutions can be sustained at a purely theoretical level seems unlikely, for there can have been few jurists whose interest in structure was exclusive of an interest in practice, or vice versa. It is therefore in the dynamic interplay between schema and reality, academic patterning and social practice, that the ongoing creative reality of Islamic law is found.

Even given that broad generalization, the desire for a simple solution is to be resisted. Social control, pious conviction, reflective logic, virtuoso display, intellectual curiosity: at least all of those had a share in the shaping of the law. And beyond that, we cannot be sure how much of the community was affected by the law that has been preserved, or which social groups or classes deemed themselves bound by it, or even whether all of the legal topics of the period have in fact been preserved.

None the less the idea of creative interplay between structure and practice, schema and reality, may be proposed as both a necessary and, within limits, a sufficient model for describing the emergence and development of Islamic law. The stress throughout the formative and into the classical period is probably on schema at the expense of reality. (The post-classical period, by contrast, will be characterized by numerous permitted disruptions of the schema, consequent on social and political change.) In the pre-literary period, for which we have no direct evidence, it is probable that the opposite was the case: legal systems that depend primarily or exclusively on oral tradition are by no means free of systematic and structural concerns, but the fortunate shortness of human memory ensures rapid and indefeasible adaptation to social change.[10]

Alternatives to this theory of dynamic interplay between schema

[10] See, for an illuminating analysis of oral law systems from an anthropologist's viewpoint, Max Gluckman, *Barotse Jurisprudence*, *The judicial process*, and *Politics, law and ritual*.

and reality (perhaps only a modification of Schacht—and one which is not intended a priori to exclude the possibility of foreign influences) as a theory of origins (for it is intended to exclude all theses which postulate for Islam a single geographical or temporal point of origin) take the form primarily of claims about genetic descent or large-scale borrowing. (An aberrant suggestion that the origins of Muslim law lie in speculative exegetical comment on the Qur'an will be dealt with below.) At least some forms of such claims must be rejected on general historical considerations. To assert, for example, of a particular institution revealed by the early law-books to be current in the Muslim communities of the early third century that it is the genetic descendant of a particular pre-Islamic Bedouin practice is almost certainly without interest. The exigencies of more than 150 years of city life, and more than 150 years of juristic speculation on city life, are quite evidently the more proximate origins of a given institution. The focused, creative, and adaptive interest of generations cannot be simply discounted.

Likewise with respect to borrowing: a community which has or is in the process of developing a corporate identity will be incapable of identifying, never mind borrowing, specific features of foreign cultures, unless its own structures are in some way receptive to those foreign features. The development of structures through which to frame questions and problems necessarily precedes the capacity to borrow—and will always complicate the question whether a borrowing actually took place, for a capacity to frame a question implies a capacity to create an answer. None of this is intended as a means to deny that Muslim culture was influenced by Ancient Near-Eastern culture. Muslim culture is evidently a continuation of Near-Eastern culture. It is, however, a means of insisting that what emerges is new and will not be adequately described or explained by identifying bits and pieces and relating them to foreign bits and pieces with vague assertions of borrowing and/or genetic descent. What defines the Muslim community is the generation of structures which hold and give meaning to their component elements.[11]

[11] I cite two passages, which illustrate the kind of approach I would wish to endorse. First from Mary Douglas, discussing here 'The Abominations of Leviticus' in *Purity and danger*, 49:

Of course no culture is created out of nothing. The Israelites absorbed freely

(*nasab*) and registered in the *dīwān* was to be joined to the original *ʿāqila*.[17]

The meaning of tribal group (*qabīla*) and lineage (*nasab*) here has nothing to do with Bedouin tribes and migrant groups; and very little to do with real genealogies. Both the Ḥanafī and the Mālikī texts have their primary reference to city life. They specifically exclude the Bedouin from the system they are describing. We should understand that the organization of quarters within Muslim cities was normally correlated with tribal nomenclature. By the early third century that nomenclature had little to do with genetic origins or Arab (Peninsular) lineage, being rather the product of generations of assimilation, through various formal and informal types of affiliation. Reference to 'tribes' within cities need not be confusing as long as it is remembered that the referent may be civic communities, long settled and of mixed origins, sharing a neighbourhood, and having a common loyalty expressed through tribal names (and perhaps a preferred fund of myth and story nostalgically related to a Bedouin ethos—a city-dweller's myth, not Bedouin reality). On numerous occasions the *Aṣl* reiterates that family relationships do not necessarily correlate with *ʿāqila* organizations. It is civic units, registered in the *dīwān*, and organized through the *dīwān*, which are at issue.[18]

The juristic texts permit us to learn that the Bedouin also had *ʿāqila* systems. These were certainly subject to principles of organization different from those in the city. The Ḥanafīs have some standardizing suggestions that the Bedouin tribes should be subject to the same rates and judicial decrees as the city-dwellers, within their own system of *ʿāqila*s;[19] these were probably tribal (*ʿashīra*), but included confederates and allies (*ʿadīd*, *ḥalīf*).[20] In North Africa, city organization did not extend to the Bedouin, who had their own *ʿāqila*s and their own rates (measured in camels not cash).[21] Both Mālikīs and Ḥanafīs insist that relationships of

[17] Shaybānī, *Aṣl*, iv. 664. Though payments are not specifically quantified in the Mālikī tradition, they too recognize that in the case of an *ʿāqila* lacking the ability to pay the *diya*, then the nearest tribal group—*aqrab al-qabāʾil*—should be joined to the original group; Saḥnūn, *Mudawwana*, xv. 198.

[18] Both Mālikī and Ḥanafī sources assume that the *dīwān* is responsible for the administration of lineage groups within cities; Saḥnūn, *Mudawwana*, xvi. 197–9; Shaybānī, *Aṣl*, iv. 661–2 for registered civic groups—the *dīwān*—excluding family relationships, and 665 for the Bedouin system.

[19] Shaybānī, *Aṣl*, iv. 665.

[20] Ibid. 661–2.

[21] Saḥnūn, *Mudawwana*, xvi. 197–9.

blood and family do not affect the separate organization of city-dwellers and Bedouin; Bedouin are not to act for city-dwellers, and vice versa, even in the case of brothers.

Likewise it is evident that the Dhimmis had *ʿāqila* systems. The *Aṣl* refers to their established systems (*la-hum ʿawāqil maʿrūfa*).[22] The *Mudawwana* confirms that Christians and Zoroastrians constituted *ʿāqila*s either within their tax-groups or their villages (often, perhaps, the same thing).[23] Shāfiʿī, too, assumes that the Dhimmis will have *ʿāqila*s, though he shows a normative preference for their being based on *nasab* and agnatic relationships (*ʿaṣaba*).[24]

New members of the Muslim community were integrated into *ʿāqila*s. Freedmen adopted the tribal names of their patrons and became a part of their *ʿāqila*. In Iraq a free man, desiring to join the Muslim community, could, after conversion, if he so desired, enter into a contract of *muwālāt* which provided him with a tribal name and an *ʿāqila*. Non-Muslims sometimes entered into such contractual relationships with one another. New converts to Islam, if they converted without a *muwālāt* contract, either converted with their group and so brought their *ʿāqila* with them into Islam, or were deemed to be affiliated to the Muslim community as a whole, which would constitute their *ʿāqila*. Just what the last ruling implied in practice need not concern us here; it is likely that all converts (perhaps excluding the lowest social classes) would find some social grouping through which to share a larger solidarity. Only one aspect of *ʿāqila* solidarity is reflected in juristic texts, the obligation and the benefit of compensation payments in case of non-deliberate injury.[25]

[22] Saybānī, *Aṣl*, iv. 667–8.

[23] Saḥnūn, *Mudawwana*, xvi. 197–8.

[24] Shāfiʿī, *Umm*, vi. 117.7–11/106.9–10.

[25] This spare outline of the law must stand, pending an opportunity for greater detail. For *walā'* (freedmen), see Shaybānī, *Aṣl*, iv. 143 ff., or any standard law book ad *walā'*; for the contract of *muwālāt*, ibid. 182–96; cf. also 245. The institution of *walā'* and, to a lesser degree, *muwālāt*, are discussed in Patricia Crone, *Roman, provincial and Islamic law*; criticized in Hallaq, 'The use and abuse of evidence'. Two notable weaknesses in Crone's analysis must be alluded to: (1) she fails to appreciate the significance of the *ʿāqila*, apparently believing that the manumitter is 'saddled with the responsibility for the payment of blood money' [on behalf of the freedman] (p. 90), which is simply not true. Conversely, (2) she finds that the freedman is at a significant disadvantage in view of the manumitter's claim on his inheritance. But this claim is residual and in many cases would not operate. Certainly, if the freedman had no heirs, the claim might be absolute. But, if he had a large family, or if he arranged for transfer of wealth prior to his death, it would

The social reality behind the juristic rules is at least this, that there was no room in Near-Eastern society of this period for the nuclear family or the isolated individual. People lived in, and owed allegiance to, groups, which, in the case of Muslims, were traditionally demarcated by reference to tribal lineages. Whatever other functions these groups served, they certainly provided mutual support in case of non-deliberate injury. Whether in a rough and ready way or in the systematic way envisaged by juristic texts need not concern us for the moment. It is quite evident that the *'āqila*s offered substantial communal benefits and existed with a sufficient degree of formality to achieve a degree of institutional organization both in North Africa, and, more so as we shall see, in Iraq.

Now, as an experiment in historical reasoning one might propose either that the Muslims derived the *'āqila* from an earlier tribal system, instituted by the Arab conquerors (so Schacht and Brunshvig); or that they adopted its various features from their sedentary non-Muslim neighbours, who quite clearly also possessed some such system. Framed thus, there are obvious reasons for preferring the latter option: first, because the experience of traditional city-dwellers and sedentary peoples was more likely to serve the needs of the city-dwelling Muslims (and the city-dwelling Muslims were not the descendants of Bedouin, but, by the time of our texts, of inextricably mixed origins); secondly, because the textual expression of juristic rules in this area defines a stable, working, normative system, capable of bureaucratic organization, aspiring to, but not necessarily achieving, control of contemporary Bedouin systems. If the Bedouin recognized community groupings, which acknowledged communal responsibility for non-deliberate injury, with fixed rates of payment, over fixed periods of time, then this might well be due to the influence of the relatively civilized and/or organized cities. There seems no effective way of deciding on questions thus framed in respect of particular origins, borrowing, and influence. Clearly all communities in the region at this time needed some system for dealing with problems of non-deliberate injury and killing, so as to pre-empt the capacity of such events to cause discord and violence. By a natural process, local communities in cities and villages, having some degree of

not operate. The inheritance claims set up by a contract of *muwālāt* were even more vestigial.

communal identity and solidarity, and sharing perhaps some kind of communal administration, acknowledged their willingness to deal with these matters as a community and devised means for doing so. The directions of influence were no doubt many and complex. In the case of the Muslim communities of Iraq and North Africa, we happen to have a textual reflection of the systems developed. That they had borrowed their systems from neighbouring communities, or that they had inherited them from a specifically Bedouin origin, seem markedly less satisfactory statements of the historical situation than that they had developed these systems in response to social and historical needs along with, and in parallel to, neighbouring communities.

In order to sustain his thesis of Bedouin origins, Brunschvig is forced to compromise the chronology of the juristic texts. The Ḥanafī texts are deemed to be innovatory. These innovations are followed 'as an experiment' by 'some early Mālikīs'. The original and primitive features of the law are preserved in the Shāfi'ī system and in later Mālikī writings.[26] Thus the chronologically early texts testify to a late stage of development and the late texts to the original and primitive. Better surely to take the texts in the right order. The early Ḥanafī and Mālikī materials, articulating a distinctly bureaucratic and city-based approach, represent (something like) the system as it was in the early third century. The Shāfi'ī material is significantly later, product of much normative thinking, and displays some characteristic features of Bedouinization.[27] The later Mālikīs are influenced by Shāfi'ī developments.

For the purposes of the present argument, it is both unnecessary and undesirable to derive from the juristic texts all that they might offer towards a description of social reality in the period of their production, interesting and challenging though that experiment might be. Several features of the Ḥanafī discussion, however, are worth a mention. Like much early Ḥanafī material, it seems to be the result of a bureaucratic initiative. This is reflected first in the insistence, several times repeated, that all claims for *diya* payments should be taken before a judge, and that payments should not begin till after a judicial decree to that effect. Secondly,

[26] Ad *'āqila* in *EI*(ii).

[27] See Patricia Crone, 'Jahili and Jewish law', 154 and 198–201. Cf. above, Ch. 7, Sect. V.

curiously, and uniquely to Iraq, the payments are not to be made by individuals but are to be deducted, by the *dīwān*, from the *aʿṭiyya* (annual stipends) or from the *arzāq* (monthly stipends). Both of these policies reflect an effort by the local government to gain control over the *ʿāqila*s and *diya* payments.[28] The context is military: the inhabitants of the city who are in receipt of stipends must be primarily those who are available for military service (perhaps not exclusively so). If groups who are in receipt of government stipends incur *ʿāqila* obligations, the requisite sums will not be paid out by individuals but held back by the *dīwān*, and presumably delivered by the *dīwān* to those who, having previously acquired a judicial decree to that effect, are its legitimate recipients.

The puzzle here is not that there should be some such initiative, but that the local references throughout the discussion should be Kufa and Basra, rather than, say, Baghdad. Even at the time of Shaybānī (and I should be reluctant to concede that any component of the *Aṣl* could be that early) the military significance of Kufa and Basra had declined beyond the point where it would seem sensible to elaborate rules, relating to those cities, which specifically dealt with military communities. Baghdad on the other hand, like Samarra later, was composed primarily of city units and quarters designed to accommodate the caliph's troops along with their families and other hangers-on; and I would accordingly guess that the real reference is to that city. Rules are formulated in relation to Kufa and Basra, but the bureaucratic intention is to see them carried out in Baghdad. Kufa and Basra have become the paradigms and the precedents for life in Baghdad. That geographical dislocation is paralleled in the *Mudawwana* which, though it undoubtedly expresses rules relevant to Qayrawan, expresses them as if they had derived from and were relevant to Madina. Recognition and acknowledgement of this kind of dislocation is a prerequisite to discovering what history (social reality) lies behind the law and what law lies behind history—how much of the military organization of historical 'Kufa' reflects the bureaucratic demands of the government in Baghdad.

[28] Shaybānī, *Aṣl*, iv. 663–5, and throughout the chapter.

III

Academic studies of the origins of Islamic law have come to focus on the Roman and the Jewish systems as the most significant (though not the only) outside providers of juristic detail. Those who have argued for Roman influence have been effectively analysed and criticized by Patricia Crone in her *Roman, provincial and Islamic law*.[29] Unfortunately, she undertakes, for her own part, a contrastive study of *walā'* (a term designating the relationship between a patron and his freedman) in the Islamic, Roman, Arabian, and Roman provincial systems—with a view to establishing which system influenced Islam. The difficulty of the exercise is nicely exemplified in the response of Wael Hallaq, who, focusing on detail not principle, demonstrates that she has failed either to prove that Islamic law might not be based on Bedouin practice or that it must be based on provincial law.[30] Little more could be expected. Arguments of this kind do not lead to definitive conclusions (which is not a reason to abandon the comparative study of legal systems, but a reason for caution in asserting borrowings and influence).

Crone's conclusions—at a sufficiently high level of generalization—are not without force: all Near-Eastern systems might be described as participating in a common juristic koine. (The disadvantages of this term have been noted elsewhere.)[31] This koine is 'usually of Greek or ancient Near-Eastern origin' (which one could hardly deny, and with which one could hardly be content). But 'the Sharīʿa is provincial law recast with Jewish concepts at its backbone and numerous Jewish (and other foreign) elements in its substantive provisions'.[32] This is certainly problematic. If Jewish law is a part of the koine it must be expected to share with Islam some, and may share many, concepts and provisions without provoking any assumptions about origins or adoptions. It is in fact unclear whether Crone intends Jewish law to be a part of the koine. If the statement 'the Sharīʿa is provincial law' means that Muslim law (a complex of developing systems) is Near-Eastern law and belongs to the family of Near-Eastern laws,

[29] Crone, *Roman, provincial and Islamic law*, 1–17.
[30] Hallaq, 'The use and abuse of evidence', 79–91.
[31] Wansbrough, *Studies*, 87.
[32] Crone, *Roman, provincial and Islamic law*, 92–3.

then the first phrase is unproblematic, but where does the second part of that sentence come from?

Crone's convictions about the Jewish presence in Islamic law were first stated in a book written with Michael Cook.[33] There, this view was based on casual reference to Schacht and more particularly to A. J. Wensinck's 'Die Entstehung der muslimischen Reinheitsgesetzgebung'. This is yet another listing of juristic details that do not have the significance claimed for them. Purity systems have emerged in diverse social groups at various stages in their development.[34] They are geographically widespread and wherever they emerge they reveal common features. They are concerned with what comes out of the body, with parturition, menses, sexual fluids, urination, and defecation. They are likely to be disturbed by corpses and by decomposition. They usually recognize that impurity is imparted through liquids not solids. Where animals are incorporated in the system, predatory animals are likely to be impure. Where predatory animals are impure, the dog and the cat, if they are domestic animals, are going to present category problems. These can be solved, for example by shifting the dog into a category of its own, either as paradigmatic friend to man (Zoroastrian) or intensified example of impurity.[35] With respect to these and other basic features, all ancient Near-Eastern systems are similar not only to each other but to systems well beyond the confines of the Near East.

With respect to the two major Jewish systems—the biblical and the Rabbinic—even the most casual comparison between them and the Islamic system will reveal that the latter is altogether a smaller and less complicated business. Wensinck's (pre-emptive) conclusion, therefore, is that the Islamic system is an amelioration of the Rabbinic. In the Rabbinic system, things and people rendered impure can transfer that impurity at various removes. In the Islamic system even a menstruating woman does not impart impurity to other people or to things. This is amelioration. The Muslims wonder whether human corpses impart impurity: Jewish influence. They answer negatively: amelioration. The Islamic rules

[33] P. Crone and Michael Cook, *Hagarism*, 30–2, 37–8, and 180 n. 11.

[34] Douglas, *Purity and danger*, for a rapid and accessible survey of purity systems and their significance(s).

[35] In India as well as in the Middle East; see Wright, *The disposal of impurity*, 105, n. 48.

on the carrion of animals are quite in harmony with the Jewish rules and the two communities share a common sense of the impurity of dogs and pigs. Amongst the things which impart impurity is human excrement; and the Muslims, following the Jews, specify a lighter impurity in the case of babies.[36]

All of this is quite worthless. Any system which recognizes the polluting effects of urine, excrement, and vomit will spot the fact that babies are a problem, and will not need the *Tosefta* to help them formulate a question relating to this issue. Purity systems develop in response to systematic logical questioning. The basic premises given, reflection alone will generate problems and solutions. Carrion is impure. Human corpses are instances of carrion. Are they to be assimilated for juristic purposes or is a human body to be distinguished from that of other animals? The motives behind the question are clear. The Jewish system solves the problem by making the human corpse a particularly extreme and effective source of impurity. The Muslim system removes the human corpse from the category of the impure. These are characteristic and logical responses to problems of this kind. Neither in the formulation of the question nor in the generation of a solution did the Muslims require Jewish influence. The presence of pigs in the Muslim system may be secondary (above, Ch. 4, Sects. III and IV); the immediate influence is of course the Qur'ān, the ultimate influence need not be (only) the Jews. Pigs and dogs had been recognized as particularly impure as early as the Hittites and this had probably become a general Near-Eastern prejudice (outside the Zoroastrian community).[37] Wensinck is particularly struck by the fact that in Judaism and in Islam the carcasses of fish and locusts do not impart impurity to water. This, he claims, shows as good as surely that the younger system is dependent on the older. It is, however, equally possible that the peculiar qualities of fish and locusts (which may be eaten without ritual slaughter—no blood-system) was recognized throughout several or all Near-Eastern communities. Wensinck's selection of the word *Entstehung*, rather than some word indicating influence, is particularly unfortunate, for it is indeed true that two similar and contiguous systems might well have influenced one another; the

[36] A. J. Wensinck, 'Die Entstehung', 62–4.

[37] Wright, *The disposal of impurity*, 105, n. 47.

fish and the locusts might be an example, though to establish the point with any degree of certainty could well be impossible.

In the end, the most remarkable feature of the Muslim system of purity in relation to the Jewish is its capacity to resist influence. Not human corpses, nor red heifers, nor leprosy, nor leprous houses, nor tents, nor earthenware vessels, nor secondary or tertiary contamination, nor a host of other things that bother the Rabbis enter into the main stream of Islamic thought.[38] And the main focus of the Islamic system—purity for purposes of prayer—does not reflect the main focus of the Jewish system—purity for purposes of eating. The claim that the Muslim system is an amelioration of the Rabbinic system will not stand. The reverse of this formulation is more likely to be true. The Rabbinic system is a complex and rarefied elaboration of a common Near-Eastern set of beliefs about purity (complicated by its hermeneutical relationship to the biblical laws). The Muslim system is probably very near to that common or basic system; and has proved on the whole rather resistant to efforts at making it more complex.

Subsequent to the claims of *Hagarism*, both Cook and Crone have separately contributed major studies to this theme. Crone's effort (in relation to the oath known as *qasāma*) purports to demonstrate biblical influence on the Ḥanafīs and Rabbinical influence on the Mālikīs.[39] In order to achieve the first of those conclusions, she creates an ingenious link between Deut. 21: 1–9 and the Ḥanafī law of *qasāma*, requires a Pentateuchal period in the history of the Arabs (stretching into the Umayyad period), Rabbinical Jews who lent the Arabs a copy of their Pentateuch, and, generally, a degree of faith in the possibility of historical reconstruction on the basis of refractory literary material emerging much later than the facts to be documented than I would willingly concede. The Rabbinical influence on the Mālikīs is not less based on partial and selective similarities. Cook's magnificent conspectus of 'Early Muslim dietary law' comes to a miserably uncertain conclusion. The Islamic system, compared to the Levitical system, might be a 'worn coin' (amelioration again). On the other hand it might be a different coin entirely.[40] This is honest and is about as much as need be said.

[38] For the host of things, see Neusner's twenty-two volume *Purities*.
[39] Crone, 'Jahili and Jewish law'.
[40] Michael Cook, 'Early Islamic dietary law', 269–70.

Of course Muslim law shares many features with Jewish law, with Roman and provincial law, with some aspects of Bedouin practice, and indeed with Christian law (it could hardly be claimed that it was from the Jews that the Muslims 'borrowed' the notion of a month of fasting). No one would wish to deny that, in some sense, the origins of Islamic law lie in Near-Eastern culture. Within that culture, Roman, Hellenistic, Jewish, Christian, Semitic, and Persian elements were widely, and had been for centuries, diffused. The media of diffusion varied: amongst them, popular story-telling, secular education, religious polemic, administrative and business practice. But precisely these media were not funnels, permitting the integral passage of a particular item from insular culture to insular culture. The contrast is marked when we consider just what conditions were required for integral transfer of a cultural item to take place. The transfer of Greek philosophy to Arabic civilization is a case in point. An established discipline, with an accepted canon of basic texts, was transferred integrally into Arabic, through precise literary translation and with knowledge of its ultimate origins and its (Syriac) translators and intermediaries. Even under these circumstances, a certain amount of dislocation of the heritage took place.

Whatever transfers took place from Ancient Near-Eastern communities to Islam in the legal sphere, the medium was oral not written; practical not theoretical, dialectical and creative, not merely receptive. There is no question of an integral system being transferred, of books or texts or codes being specifically translated for this purpose, not even a modestly large (and systematic) agenda of legal items that can be unequivocally related to a single earlier community.

The pre-Islamic communities of the Middle East included more varieties of Judaism and of Christianity than we can now identify, together with vestigial or intrusive Semitic and pagan cults, Zoroastrian, and Persian movements. Religious communities were largely autonomous, doctrinally creative, and polemically engaged. The motifs of inter-faith polemic need not correspond to the motifs of (internal) doctrinal development.[41] Cross-cultural influence included business and leisure contacts, possibly a secular

[41] Jacob Neusner, *Judaism, Christianity and Zoroastrianism* for a general survey of three religious groups; *Aphrahat and Judaism* for inter-faith polemic and its failure to reflect internal doctrinal development.

(community neutral) education system based on a Hellenistic tradition, and religious rivalry. At any point in time the definition of community identity depended on shared allegiance to a number of cultural structures (juristic, mythic, theological, polemical, etc.) which were never in static equilibrium. Through time the mosaic of competing communities resolved itself into three major divisions—the Christian, the Rabbinic Jewish, and the Muslim. In spite of the literature, indigenous and scholarly, which attempts to find for the last of these a single—temporal and geographic—point of origin (the Hijaz, the seventh century), an alternative model of community development is available and insistent. It postulates a widespread movement of self-realization by geographically diverse communities, who, benefiting from the decay of Imperial power (Byzantine and Persian) and the consequent emergence of Arab political hegemony, gradually developed a set of cultural artefacts and structures which defined an identity. The whole set of cultural artefacts is, of course, indefinitely large, but that any particular component of Muslim culture would be similar to parallel components of other cultures—which were developing at the same time and in the same cultural and political matrix—does not occasion surprise and need not prompt a search for specific origins and borrowings. The origins of Muslim culture lie in the experience of the Muslim communities of the Middle East and in uncountable systematic responses to that experience. Given the general diffusion of Judaeo-Christian ideas throughout the pre-Islamic Middle East, some of the broader concepts of community identity were perhaps inescapable, for example justification of community by reference to the notions of Prophet and Book; but these were the common prerogatives of several flourishing communities. The emergence of Arabic written literature at *c.*200 provides evidence for only the last stages in a long process of community definition.

IV

For some aspects of the mediated culture that became Muslim culture, the question of origins is not quite so recalcitrant. Amongst the popular story-cycles that circulated, orally and in written forms, in early Muslim communities was a Prophetic cycle which included all the major Old Testament and New Testament legends. The origins of these are perfectly clear and, for particular

motifs, might be related quite specifically to, for example, the Rabbinic and not to any other religious group. It does not follow that the Muslims borrowed narrative items from Rabbinical Jews. The diffusion of story through Near-Eastern culture was non-sectarian and controlled less by theological than by narrative and dramatic demands. In addition to a Prophetic cycle, there were other cycles including stories of Greek (the Alexander legend), of Indian (the Bidpai fables), and of tribal Arabic origin. In the case of the first two of these, as also in the case of the Prophetic tales, the history of diffusion is particularly complex because written texts (which were in time, in whole or in part, translated into literary Arabic), at least potentially, restricted the free development of motifs in an oral environment.

The transfer of Prophetic material into Arabic made it equally available to the various communities of the Near East. The long history of retelling must have involved a double process of first removing community-specific items which impeded diffusion and then, within communities, of adapting the stories to serve particular community purposes. The history of a single narrative unit and its gradual reformulation to reflect and to justify a specifically Muslim environment I have documented elsewhere. The task need not be repeated here.[42]

The transfer of narrative items from one matrix of community identity to another is a process which may have influenced the development of Muslim law. In a series of meticulously argued and cautiously expressed papers, G. R. Hawting has suggested, while disclaiming anything more than a very general conception of process or chronology, that certain features of Jewish sanctuary tradition have become (imperfectly) embedded within juristic and historical accounts of the Muslim sanctuary.[43] That something of this sort has occurred seems undeniable; though indeed not all the peculiar and intrusive elements within the Islamic structures can

[42] Norman Calder, 'From midrash to scripture'. See also the larger history of the Abraham legend in Arabic, in Reuven Firestone, *Journeys in holy lands*. As an instance of the removal of community-specific material from a narrative, compare the biblical and other Jewish versions of what happened after the sacrifice of Isaac (always involving a blessing of some kind for the people of Israel) with the Arabic version (predominantly involving a neutral blessing for all monotheists, but, in a more community-specific version naming the Muslims as those to be saved); Firestone, 132–5.

[43] See G. R. Hawting, 'The origins of the Muslim sanctuary at Mecca'; 'The disappearance and rediscovery'; '"We were not ordered with entering it"'.

be related to specifically Jewish sources. One of the interesting features of the apparently Jewish intrusions, however, is that they are not juristic in origin. It is haggadic material, biblical and Midrashic narrative, which throws up all the features specifically noted by Hawting throughout his studies[44] as Jewish. Now, the transfer of narrative motifs which originally related to the sanctuary in Jerusalem to the sanctuary at Makka is a familiar feature of Muslim versions of many sanctuary stories.[45] It mirrors not only the demands of a Muslim audience but also perhaps a deliberate propaganda initiative. I am therefore tempted to see the Jewish features of the Muslim sanctuary and of Muslim sanctuary law as product of a common narrative tradition, developed within the community for specific religio-political purposes. They do not indicate the direct influence of one religious group on another.

There are, then, external influences on the structure of Muslim law. In this case they are recognized because they are intrusive. The source of these elements, however, though external to the law, are internal to the Muslim community. The mediation and acceptance of Prophetic tales and sanctuary myths preceded their impingement on the law. The stoning penalty for adultery may constitute a further example of a legal rule deriving not initially from juristic thinking, but rather from a narrative that had become part of community myth. Most persuasive is John Wansbrough's suggestion that the origins of the law here lie in 'the haggadic topoi traditionally employed to illustrate the test of true prophethood', i.e. the story had become a part of sectarian polemic before it was transferred to the law.[46]

The motifs of inter-community polemic need not be identical with the motifs and structures of intra-community doctrinal development (though harmonization may take place over time). In his studies of Qur'ān and prophetic biography, Wansbrough has argued that the content of these materials is a result of polemical

[44] See Hawting, 'Origins', 46–7; 'The disappearance and rediscovery', 47–8, 52. Some features of the literary sanctuary have been recognized by Yehuda Nevo as more suited to archaeological sanctuaries recently excavated in the Negev. He thinks it is these that have dominated some literary descriptions, creating (as noted by Hawting) problems and inconcinnities within Muslim literary recreations of their sanctuary. See Yehuda D. Nevo and Judith Koren, 'Muslim descriptions'.

[45] The sacrifice of Isaac is one, but much of the story of Abraham is adapted to a Makkan setting: Calder, 'From Midrash to scripture'; Firestone, *Journeys in holy lands*, 61–103.

[46] Wansbrough, *Studies*, 198; cf. 193–6. See also John Burton, *Sources*, ch. 7.

activity. That argument is persuasive precisely for these materials. The same is not evidently true of the law. The structures of the law are a product not of externally directed polemical activity but of internally oriented reflection, structure-building, etc. Where disruptions and intrusions may be detected in legal structures, they are due to influences from other structures which have already been acknowledged as part of Muslim communal identity. Muslim juristic systems were primarily in competition with one another: the only explicit acknowledgement of external influence in early Muslim juristic literature consists in references to other schools.[47] That competition came to be articulated as argument about authority not about rules. The final result was that Muslim legal systems achieved unity in an ideological sense (common submission to the notions of Prophetic and scriptural authority), while preserving a diversity of norms and separate school identities. But all schools were then equally patient of influence, usually secondary and intrusive, from Prophetic narrative and from Quranic norms.

V

Emerging as a series of competing systems (more than can now be identified), Islamic law discovered its norms through the discursive and consensual experience of local community members. This was a dynamic process, a dialectical one, and one which may safely be assumed to have come into existence long before written texts. Over 150 years, the diffusion of ideas and of rules was controlled by practical (and perhaps impractical) thinkers who, shaped no doubt by the system they inherited, also reconstructed it through creative consensual thought. The play of thought over inherited schema and social reality remains the most pertinent origin for a majority of specific rules and structures in Islamic law.

The discovery of unity amongst competing systems depended on the modulation of debate from concern with rules to concern with

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

the authority that lay behind the rules. Articulated first, and most casually, with the terminology of *ra'y*, the justification of rules depended eventually upon precedent, first juristic (Mālik, Abū Ḥanīfa, etc.), then Companion, and finally Prophetic. One result of this was that Prophetic stories whose origins were independent of particular juristic systems had at least the potential to interfere with the structure of the law. Consider the hadith about the sevenfold washing of a dish that had been lapped at by a dog. This does not correspond to the older doctrine of either the Mālikis or the Ḥanafīs, but both schools, without abandoning their own general tradition, accepted the hadith to a degree and accommodated themselves to it. Even the Shāfi'ī system, which ideologically was most inclined to allow Prophetic hadith their full potential force, did not make this hadith the analogical basis for the law, but rather accommodated it and its implications within a system which was, broadly, that of the Mālikīs. Prophetic narrative then, whether its origins were legal and eccentric or non-legal, e.g. polemical, might become a disruptive influence on the law, where not controlled by hermeneutical devices. In practice most problems were resolvable, by virtue of the sheer quantity of Prophetic hadith that directly served, or could be made to serve, the purposes of the law. (See further Ch. 9.)

The final stage in the articulation of an ideal system of authority, an overarching structure of unity that embraced and permitted the actual diversity of legal system, is represented in the notion of scriptural sanction. Chronologically the last stage,[48] this became, ideologically, the first principle of Islamic legal justification. Quranic norms are perhaps in origin the liturgical reflex of local practice; they are not always internally consistent and they are not always in agreement with those legal systems which happened to be successful. The particular problems of accommodating Quranic norms within the developing Muslim hermeneutic system have been sufficiently dealt with elsewhere.[49] Here it is only necessary

[48] The relatively late date of halakhic exegesis is conceded by Wansbrough, *Studies*, 170 ff.; as also the difficulties of attribution in early works (172, ad Muqātil) and of approach (ethical versus juristic, 173). The first systematic attempt to derive law from Qur'ān is probably to be found in the *Tafsīr* of Jaṣṣāṣ (d. 370). Theoretical arguments preparing for this achievement are found in Muḥammad b. Idrīs al-Shāfi'ī's *Risāla*, for which see Ch. 9, Section V.

[49] Wansbrough, *Studies*, 170–202; Burton, *Sources*, *passim*; and for an older but still valuable survey, Ignaz Goldziher, *The Ẓāhirīs*.

to acknowledge that the Qur'ān was an influence on the law, usually secondary and intrusive. This was already noted by Schacht and has been on balance confirmed by recent scholarship.[50]

A contrary view has been articulated on occasion by John Burton, who, in a series of articles, and most recently in his *The sources of Islamic law*, has implied or assumed or stated that the origins of *fiqh* lie (perhaps only in part) in exegetical discussion about the Qur'ān. Thus, with reference to three topics in Mālik's *Muwaṭṭa'*, he infers that

> The Ḳur'ān texts lay at the very heart of his discussions, and the manner in which they were severally treated suggests the centrality of the Kur'ān in the intellectual activity of the Muslims. The intervening century and a half had, in other words, been an age of the exegesis of the Ḳur'ān. From the minutest analysis of the revealed texts had flowed a stream of hadiths and views which were then taken by the Muslims as starting-point for the construction of the law.[51]

It is dubious whether Quranic texts in fact lie 'at the heart' of Mālik's discussions; certain that they very often play no part in those discussions. Analysing the same work, Wansbrough has (correctly) described reference to scripture as 'minimal' and 'an almost superfluous embellishment'.[52] In any case, Burton knows that he is guessing. When texts emerge that constitute real evidence for the nature of *fiqh*, they demonstrate, even to Burton's satisfaction, that the Qur'an is not the immediate source of law and that the problem facing the jurists was precisely to find arguments by which scriptural origins for the law could be—in the face of almost insurmountable difficulties[53]—asserted. That exegetical comment on the Qur'an *must have been* the origins of juristic speculation is unproven and unprovable, and not a reasonable inference from the nature of early juristic literature, where Quranic reference is rare and never exegetically worked out (save in some of the arguments of Shāfi'ī's *Umm*).

[50] Schacht, *Origins*, 224–7; Wansbrough, *Studies*, 43–52, 170–200; Wansbrough, *Milieu*, 70–81; G. R. Hawting, 'The role of Qur'ān and *ḥadīth*', and '*Ẓihār* and *īlā*'.

[51] Burton, *Sources*, p. viii; cf. 30, 77, *et al.*

[52] Wansbrough, *Studies*, 171–2; Wansbrough, *Milieu*, 75.

[53] Burton, *Sources*, ch. 2; cf. the review by A. Rippin, *BSOAS* 44.2 (1991), 362–5.

VI

Governmental decrees, royal edicts, and palace codes have in some legal systems become the bases for the development of systematic juristic thought.[54] In others, notably in the early Common-Law system of England, judicial precedents have served a similar purpose. It is instructive, therefore, to note that none of these plays any significant part in the development of Islamic law. What was initially preserved was preponderantly the dicta not of judges but of jurists. And these, we have seen, were initially an informal and non-professional class of local dignitaries whose authority depended on their consensual participation in juristic discussion, and not upon their role in society. The processes of professionalization and bureaucratic incorporation did not change that; Islamic law remained, at least theoretically, indifferent to the decrees of governors and to the decisions of judges. No matter how practically effective these might be, they remained subject to the judgement of the law and were in no sense at all acknowledged to be sources of the law. This development reflects the social reality of early Muslim societies which were largely self-regulating, wherein governors and judges, if they were to be effective, participated in the discovery of, and acted in accord with, local norms. In so far as they did so, their names are a part of the galaxy of authorities which guard the early statements of juristic rules. In so far as they failed to do so, they may appear as villains.

Patricia Crone, who has promoted, generally with reference to an earlier period than I would recognize as yet accessible to scholarly decision, and in the context of a highly personal historical theory, the notions of Roman provincial and of Jewish origins for Islamic law, has also promoted the idea of caliphal creation.[55] The sources used by Crone (together with Martin Hinds) to make this argument do not include any law-books.[56] The hadith-collection of ʿAbd al-Razzāq figures largely, so do the Umayyad poets and a number of biographical works relating to

[54] The Lombard legal system discussed by Charles M. Radding in *Medieval jurisprudence* is one example.

[55] P. Crone and Martin Hinds, *God's caliph*, 43–57. See also the review by N. Calder, in *JSS* 32 (1987), 375–8.

[56] They do include a reference to Schacht (*God's caliph*, 45, n. 18—specifying a curious page number to start from) whose assertions about the influence of the government are limited; see *Origins*, 198.

governors and qadis. The authors of *God's caliph* conclude that 'there is no simple way of explaining how the Umayyad caliphs came ever to be invoked [i.e. to appear in juristic exempla] unless we accept that legal authority once resided in the caliphal office itself.'[57] Now, in law-books, caliphs play only an insignificant role amongst many others who function as preservers and presenters of the law. Their presence and the (more significant) presence of local governors and administrative agents in law-books, and in for example the hadith-narratives of ʿAbd al-Razzāq, may be accounted for on the general grounds that they were influential members of the community and shared—at least potentially—with other influential members of the community the responsibility for guarding, preserving, reflecting on, and articulating the law. The incidence of caliphal exempla in the Madinan tradition (Mālikī law) is hardly overwhelming, but certainly noticeable. This is due to the fact that at least two Umayyad caliphs (ʿUmar b. ʿAbd al-ʿAzīz and Marwān) went through a training as local governor in Madina, and others grew up there. It is as a result of their participation in the social process there and not as a result of their position as caliph that they entered the body of juristic myth.

None the less some caliphal decisions did enter the law where they were thought to be in accord with it (Ch. 7, Sect. IV, above) while some elements of caliphal practice entered the law only to be criticized. That governors and their agents were in some areas preponderatingly influential is not to be doubted. Schacht's identification of three areas where administrative practice may be recognized as the starting-point of the law (fiscal law, law of war, and penal law)[58] is no more than a first thought on this matter and is probably subject both to expansion and to qualification. (It is not to be ruled out, for example, that government policy and government initiatives influenced ritual—the pilgrimage, perhaps—and it is at least possible that *zakāt* grew up as that which constitutes its primary definition, a local tax, in favour of the local poor, independent of governmental administration.) Abu Yūsuf's *Kitāb al-Kharāj* represents a governmental exploitation of juristic argument for governmental ends; significantly, it is not presented as a government policy, but as a discussion of established practice.

[57] Crone and Hinds, *God's caliph*, 51.

[58] Schacht, *Origins*, 198.

Early Muslim juristic literature reflects the organic development of juristic thought as a result of reflection on, and discussion of, first the real problems of society and then the conceptual problems of juristic discourse. As the jurists became more specialized, more competent, more literate, more professional, they were subject to a significant twofold and divergent pressure. On the one hand, the intrinsic delight of the juristic task drew them away from reality towards imaginary cases, ever curiouser and curiouser, and towards logical structures ever neater and more schematized. In effect the system itself, irrespective of its relation to reality, became the object of attention. On the other hand, the need to make the law work in an inevitably imperfect human society required gross realism, tough consciences, and compromise—above all compromise with government. At the same time, the competition between juristic traditions (originally local traditions), the emergence of written canons, the need for Prophetic and for scriptural (Quranic) authority, and the transformation of the law into an educational highway led to other changes in social perception and in literary presentation of the law. Most of the attendant processes will require discussion only in a history of the classical period of juristic thought; one requires further comment within the confines of this book. With the promotion of Prophetic exempla to function as source of the law, the jurists were committed to a hermeneutical task. Their development of an appropriate methodology requires documentation.

9

THE DEVELOPMENT OF HERMENEUTIC SKILLS

I

In juristic literature of the third century, exempla exhibiting the characteristic form *isnād* + *matn* first function as illustrative of the law. Later, by the simple device of promoting such exempla to initial position in an expository text, they are made to seem source of the law and further comment takes on a hermeneutic aspect. Discovering and mastering the extended intellectual skills whereby the law in its entirety could be presented as deduced from exempla, ideally Prophetic, became one of the great intellectual adventures of the Muslim jurists in the second half of the third century and onwards. It was not, however, the jurists who first developed these skills; it was the *aṣḥāb al-ḥadīth*. For they first made the, initially astonishing, claim that the law could be deduced (in its totality) from hadith, and so provoked the accusation that they were in fact, thereby, involved in error, lies, and contradiction.[1] Ibn Qutayba, writing on behalf of the *aṣḥāb al-ḥadīth*, conceded that many hadith had been invented, but claimed also that these could be recognized and eliminated.[2] Further conceding that there was sometimes an appearance of contradiction in hadith he undertook to demonstrate that this was a matter of appearance only.

His book *Ta'wīl mukhtalif al-ḥadīth* consists of an introduction in which he identifies his opponents—the *aṣḥāb al-kalām* and the *aṣḥāb al-ra'y*, and his allies—the *aṣḥāb al-ḥadīth*. This is followed by the main part of the book, an extensive catalogue of selected hadith and Quranic fragments which exhibit apparent contradiction.

[1] Ibn Qutayba, *Mukhtalif al-ḥadīth*, 86. [2] Ibid. 74–5, 86.

These problem cases are presented in no particular order. They cover matters of prophetic history and theology as well as legal matters. As a master of *adab*, Ibn Qutayba was perhaps undisturbed by the abrupt transitions and inconsequential juxtapositions, and disinclined towards systematic theoretical thought. His solutions are *ad hoc*; his skills are those of a sensitive littérateur rather than a jurist or theologian; his theoretical framework is large but not evidently scientific. When compared with the systematic theoretical exposition of Shāfi'ī's *Risāla* (a book that must be redated to *c.*300: see below) the rudimentary nature of his categories and terminology becomes evident.

Ibn Qutayba has a basic terminology for the description of hadith: they may be invented (*mawḍū'*); they may be weak or strange (*ḍa'īf, gharīb*), sound or otherwise (*saḥīḥ*, *saqīm*).[3] He has little more sophisticated than that, not even the category of isolated hadith (*khabar wāḥid*), which was distinguished and explored in Shāfi'ī's *Risāla*. Though he possesses the conceptual equivalent of *tawātur* (*tatābu' al-riwāyāt 'an al-thiqāt min wujūh kathīra*), he does not know the term[4] (nor does the *Risāla*). A fundamental hermeneutic category adduced and explored in the *Risāla* is that known by the terms *'āmm* and *khāṣṣ*, the general and the particular. Though there are numerous instances where this terminology would be appropriate, I have found no instances at all where it is used by Ibn Qutayba. The concept and technical term for abrogation (*naskh*) and its value as a hermeneutic device is known: it can be applied to Qur'ān and hadith. It is also acknowledged that the *sunna* of the Prophet may abrogate the Qur'ān—*al-sunna nāsikha li-'l-qur'ān*.[5] Some later writers disliked the forthrightness of this expression, though none denied the reality behind it. Ibn Ḥanbal is said to have preferred the statement that the *sunna* may explain and clarify (*tafsīr, tabyīn*) the Qur'ān; but the dispute was about words not process.[6] Exploitation of the *'āmm* : *khāṣṣ* distinction (and other distinctions) rendered it possible for the Shāfi'ī school as represented by the *Risāla* to deny that the *sunna* could abrogate the Qur'ān. In other

[3] Ibn Qutayba, *Mukhtalif al-ḥadīth*, 76.

[4] Ibid. 205; it looks in any case like an *ad hoc* achievement rather than a fundamental distinction.

[5] Ibid. 74, 194 ff.

[6] See Abū 'Umar Yūsuf Ibn 'Abd al-Barr, *Jāmi' bayān al-'ilm*, 188–92.

respects the *Risāla* contains a sophisticated and nuanced discussion of *naskh*, representing a scholastic subtlety which transcends the basic *ad hoc* devices of Ibn Qutayba's work.[7]

Obscurity and abbreviation in the Qur'ān, according to Ibn Qutayba, must be resolved by reference to the *sunna—al-kitāb ya'tī bi-'l-jumal yakshifu-hā al-ḥadīth wa-'khtiṣār tadulla 'alay-hi al-sunna*.[8] This thought and the use of the term *jumal* prefigures the classical distinction between *mujmal* and *mubayyan* (obscure and clear), but this too is not yet what it was to become—part of a systematic repertory of hermeneutic devices. The distinction between *jumal al-farā'iḍ* (i.e. highly general statements present in the Qur'ān) and their elaboration (*tabyīn*) through hadith is a part of the hermeneutic theory of the *Risāla*[9] and has there a significantly more structured role than in Ibn Qutayba's work.

Non-literal usage is affirmed by Ibn Qutayba to be a custom of the Arabs which must be recognized in religious texts. The plain meaning of a text, for example, may be intended to constitute a warning or to instil fear (*li-'l-tarhīb wa-'l-taḥdhīr*) and should not be taken at face value. Hence a Prophetic injunction to kill the wine drinker on his fourth offence is removed.[10] A particularly recalcitrant text may be subject to judicious amendment, without any technical justification.[11] Metaphoric usage is recognized and explained, sometimes without recourse to a technical terminology.[12] On the other hand the Arabic language is known to permit of implication, allusion, and simile (*īmā'*, *ishāra*, *tashbīh*) and the reader must be sensitive to these in Prophetic discourse.[13] Ibn Qutayba knows the verb *kannā* and the noun *kināya*, implying metaphor, but uses them sparingly, not systematically, and not always at points where they would appear appropriate. The *Risāla*, by contrast, shows no (overt) interest in the category of the non-literal.

Though Ibn Qutayba's intelligence, cunning and resourcefulness are everywhere evident, as also his broad sensitivity to literary problems, he clearly does not have access to a systematic hermeneutic framework such as is provided in the *Risāla*. In all

[7] Shāfi'ī, *Risāla*, 106 ff. (= paras. 312 ff.); and see also the analyses of John Burton, in *The collection*, 52–63 and *Sources, passim*.

[8] Ibn Qutayba, *Mukhtalif al-ḥadīth*, 87.

[9] Shāfi'ī, *Risāla*, 176 ff. (= paras. 486 ff.).

[10] Ibn Qutayba, *Mukhtalif al-ḥadīth*, 96.

[11] Ibid. 99.

[12] Ibid. 152, ad *mawtā*.

[13] Ibid. 163.

categories except one, the *Risāla* is a more sophisticated work and it should accordingly be recognized as representing a later stage of development. The single category which is signalled in Ibn Qutayba and not developed in the *Risāla* is that of the non-literal, covering allusion, simile, and metaphor. There are several possible reasons for this. First, this category was less necessary in a work that was devoted exclusively to legal matters, and so unconcerned with theological arguments. Secondly, whereas Ibn Qutayba rejected the term *qiyās* and all that in his time it stood for, the *Risāla* accepts it and gives it a clear function in relation to the analysis and understanding of hadith. A number of non-literal usages might be explained by reference to *qiyās* arguments of various types. Thirdly, the major developments of technique discussed under the headings *'āmm : khāṣṣ*, *jumal : tabyīn*, and *nāsikh : mansūkh* permitted numerous and complex resolutions and so perhaps did away with the need for extensive (formal) appeal to the non-literal. There may also have been some suspicion of appeals to non-literal usage because of its real or apparent arbitrariness. (However, under the heading *ḥaqīqa : majāz*, it became a standard part of later hermeneutic theory.)

Perhaps the most significant single factor indicating that Shāfi'ī's *Risāla* had not yet, at the time when Ibn Qutayba wrote, come into existence is the latter's ignorance of the dominant message of that work. The painstaking distinction between two types of knowledge, which constitutes almost half the argumentation of that book, is certainly also its most important message,[14] and it is unknown to Ibn Qutayba. He knows the fundamentals of a theory of *ijtihād*, a word indicating the meritorious effort made by a jurist to achieve an answer to a juristic problem, and implying the possibility of erroneous solutions which are none the less rewarded. This theory he defends, incongruously, with reference to the Gospel parable of the workers in the vineyard.[15] He is clearly unaware of the more sophisticated defence made available in the *Risāla*.

The basic principles, then, of a theory of hermeneutics are present in Ibn Qutayba but not their systematic development. The accumulation of the problems that came to constitute his work probably took place over a period of time; the discovery of solutions was casual and *ad hoc*. Much has clearly been derived

[14] Norman Calder, '*Ikhtilāf* and *ijmā*''.
[15] Ibn Qutayba, *Mukhtalif al-ḥadīth*, 146–8.

from Ibn Qutayba's contemporaries and predecessors in the field of hadith criticism, who had no doubt discussed many of the problems and proposed some kind of solution. Much too is the product of the special skills of Ibn Qutayba whose encyclopaedic knowledge, linguistic expertise, and general literary erudition made him a uniquely competent figure. As in so many other fields his achievement was recognized and his books copied—not least by the jurists, who, already engaged in the search for authority, borrowed his weapons, adapted them to their own purposes, and laid claim to his loyalties.

II

The development of hermeneutic technique amongst the jurists was initially a natural process, a result of the emergence of written texts, so much less flexible than memory and oral tradition. Engagement in inter-school debate ensured that the jurists became aware of the clash of authoritative exempla and began to devise methods for dealing with it. Their skills developed no doubt in tandem with the general literary skills of the community within which they worked. But the particular attacks of the *aṣḥāb al-ḥadīth* and, above all, the personal achievement of Ibn Qutayba provoked more systematic and pointed responses. Here is Ibn Qutayba asserting and illustrating the deficiencies of the *aṣḥāb al-ra'y*. He is citing Isḥāq b. Ibrāhīm b. Rāhawayh, the He-said figure.

> He used to say . . . They [the *aṣḥāb al-ra'y*] claim that if a man sleeps while sitting upright, sleeping deeply while in that position, he is not subject to renewal of *wuḍū'*. And yet they are agreed that any person who faints is subject to cancellation of his state of purity [and consequently has to renew his *wuḍū'*].
>
> But there is no distinction between the two cases. Except that there is no textual basis for the person who has fainted from which one can argue to cancellation of his *wuḍū'*. But with respect to sleep, there are several hadith. Amongst them are the Prophet's words, The eye is [like] the thong on the sphincter; if the eye sleeps the thong is opened (*infataḥ al-wikā'*). Also, He who sleeps, let him perform *wuḍū'*.
>
> He said, They declare that *wuḍū'* is necessary in the case of recumbency, if one is overcome by sleep. But they declare it unnecessary for one who sleeps deeply in a kneeling or prostrating position—*rāki'an aw sajidan*. He said, However these two positions are more likely than

recumbency to occasion cancellation of purity. So they neither follow a report (*athar*), nor cling systematically to *qiyās*.[16]

The *aṣḥāb al-ra'y* here are the Ḥanafīs. They had evolved the rule that in general sleep cancels *wuḍū'*. But sleep in a standing, prostrating, or sitting position (*qā'iman*, *rāki'an*, *sājidan*, *qā'idan*) does not cancel *wuḍū'*.[17] Ibn Rāhawayh, in a rather confused manner, objects. He claims that the Ḥanafīs are distinguishing invalidly between similar cases, namely that of the fainting person and the sitting sleeper; and they are disregarding the plain meaning of the Prophetic hadith, which state in a general sense that sleep entails *wuḍū'*. In a second statement, Ibn Rāhawayh again affirms that with regard to recumbency and prostration the Ḥanafīs are making an invalid distinction. He concludes that the Ḥanafīs neither follow established report, i.e. the Prophetic hadith, nor *qiyās* which, according to Ibn Rāhawayh, should have led them to unify the rules on heavy sleep irrespective of position. (This quote from Ibn Rāhawayh is probably an example of notebook scholarship. It does not demonstrate overall control of the subject-matter; it achieves its ends through clumsy juncture and repetition.)

This kind of criticism was easy to deal with—the Ḥanafīs had only to discover Prophetic hadith which stated that *wuḍū'* was not incumbent on one who slept while standing, sitting, or prostrating. They found such hadith, eventually in profusion, and many examples have entered the major hadith collections. It is highly probable that the initial assertion of the Ḥanafīs had been that light or fitful sleep did not occasion cancellation of *wuḍū'*; only in the course of debate did they become literalist and assert that sleep, even deep sleep, in a sitting, standing, or prostrating position did not cancel *wuḍū'*.

Finding new hadith was one way of dealing with the attacks of the *aṣḥāb al-ḥadīth*. Nothing could be more redundant than Ibn Rāhawayh's strictures. A more general mastery of hermeneutic skills was acquired either in the process of debate or by the systematic study and imitation of Ibn Qutayba. The influence of Ibn Qutayba's *Ta'wīl mukhtalif al-ḥadīth* is seen in the *Bayān mushkil al-āthār* of the Ḥanafī jurist Abu Ja'far Aḥmad b. Muḥammad al-Ṭaḥāwī (d. 321). This work is the same in format

[16] Ibn Qutayba, *Mukhtalif al-ḥadīth*, 53–4.

[17] Shaybānī, *Aṣl*, i. 57–8.

and similar in content to Ibn Qutayba's work. It consists of a catalogue of problem cases in which two or more apparently contradictory hadith or fragments from the Qur'ān are brought together with a view to harmonization and denial of contradiction. Like the work of Ibn Qutayba, it covers historical and theological as well as legal problems; many of the same problems are discussed in both works. The material has been accumulated without any consideration of order or systematization.[18] The approach remains casual and *ad hoc*. There are, however, a small number of technical advances which mark the passage of time and the acquisition of experience. Ṭaḥāwī knows the *'āmm : khāṣṣ* distinction and uses it in a fairly systematic manner. His repertory of technical terms is slightly wider. (It is still difficult to imagine that he knew the *Risāla* of Shāfi'ī.) In addition to this, Taḥāwī's work shows a significant increase in complexity and a great deal of defensive argument designed to justify Ḥanafī law.

The positions adopted in this work sometimes differ quite remarkably from positions adopted in other works attributed to Ṭaḥāwī, notably his *Sharḥ ma'ānī al-āthār* (for which, see Sect. IV, below). This fact can, of course, be explained: according to one biographical authority the *Ma'ānī al-āthār* is the first and the *Bayān mushkil al-āthār* the last of his works.[19] But this is post facto justification. In fact, structure and argumentation in both works is casual and open-ended, segmentation clear and abrupt, growth of argument through interpolation and addition evident; it is preferable to consider both works as school texts, accumulating over time, and subject perhaps to redactional supervision by Ṭaḥāwī. That the texts belong to the early decades of the fourth century seems reasonable; Ṭaḥāwī died in 321. They may have continued to develop after his death, but the emergence of Shāfi'ī's *Risāla* on the one hand, and the establishment of standard hadith collections on the other, must have made them seem amateurish, and thereby brought an end to this kind of compendium.

The difference between Ibn Qutayba and Ṭaḥāwī deserves brief illustration. One of the problems dealt with by Ibn Qutayba is the

[18] Much later, this deficiency was remedied in two successive redactions, a *Mukhtaṣar* and a *Mu'taṣar min al-Mukhtaṣar*, which brought the legal material under the conventional chapter-headings of *fiqh*. See Bibliography, ad Abū 'l-Maḥāsin Yūsuf b. Mūsā.

[19] See the biographical introduction to Ṭaḥāwī, *Ma'ānī al-āthār*.

apparent conflict between two hadith, in one of which the Prophet is portrayed as kissing his wife during the fast, while in the other he declares it forbidden to kiss while fasting. This contradiction is resolved by pointing to the exceptional status of the Prophet. It is forbidden for an ordinary man to kiss his wife during the fast, but the Prophet, being immune from sin—*ma'ṣūm*, can do so without being subject to temptation: it is like a father kissing his son, or two brothers embracing. Ibn Qutayba extends this idea to cover also the Prophet's sleep. Whereas men are normally subject to impurity in sleep and required to renew their *wuḍū'* after it, the Prophet is not. This is based on the words of the Prophet, My eyes sleep but my heart does not.

This account is simple and decisive. It is also problematic; systematic exploitation of the assumption that the Prophet enjoys unique status could destroy the whole fabric of the law in its hermeneutic aspect.

The problem of sleep and its entailing cancellation of *wuḍū'* is taken up by Ṭaḥāwī. His argument, more complex and more detailed than that of Ibn Qutayba, reveals a more acute awareness of the need to distinguish between Prophetic action which does and Prophetic action which does not constitute a universal precedent; and it is extended to include a defence of the Ḥanafī rules. His material is deployed over two chapters, the first focusing on the distinction between the Prophet and other members of his community, the second exploring the question what kind of sleep cancels *wuḍū'*. (In spite of the ordering, it is evident that much of the second chapter came into existence prior to the first, since the whole of its problem is in fact solved by the hadith which introduces the first chapter.)[20]

The first chapter, then, introduces a Prophetic hadith strikingly apt to the Ḥanafī viewpoint. Ibn 'Abbās saw the Prophet pray the dawn prayer then sleep either in a sitting or a bowing position (*sājidun aw jālisun*); he even snored. Later the Prophet got up to pray and Ibn 'Abbās reminded him that he had been asleep. The Prophet replied, *Wuḍū'* is only necessary for one who sleeps in a recumbent position (*muḍṭaji'an*), for that involves relaxation of the muscles (*istirkhā' al-mafāṣil*). Ṭaḥāwī's commentary stresses two points: *wuḍū'* is only necessary for one lying down and the *'illa*

[20] Aḥmad b. Muḥammad al-Ṭaḥāwī, *Mushkil al-āthār*, iv. 351–4 and 354–60.

or reason for this is relaxation of the muscles. However, in another hadith, also from Ibn 'Abbās, the Prophet is seen to lie down, sleep deeply, snore, and subsequently get up to pray without *wuḍū'*. This, according to Ṭaḥāwī, must be taken as representing the Prophet's singular status. The obvious objection is formulated: how does one distinguish these contradictory precedents? Ṭaḥāwī plays on the fact that the first of these hadith sees the Prophet explicitly inform Ibn 'Abbās of the rule in its general form. The second, deemed to be later, though possibly in the course of the same day, reveals to Ibn 'Abbās that the Prophet is not in this matter of the same status as the rest of his community. Thus the two hadith comprehend the whole of the law on this question. It is necessary further to consider the causal factor (*ma'nan*) which distinguishes the Prophet from the rest of his community. This is revealed in the hadith in which the Prophet says, My eyes sleep, but not my heart. Because of this, says Ṭaḥāwī, we understand that the relaxation of the muscles normally attendant on sleep does not take place in the Prophet.

This passage does not use the terms *'āmm* and *khāṣṣ* though it might have done. It shows an interesting development of the notion of causal factor reflected in the clearly synonymous terms *'illa* and *ma'nā*. (The latter took on a much more specific technical connotation in Shāfi'ī's *Risāla*,[21] though in the end it was the former which dominated technical discussion of analogical thought.)

In his second chapter devoted to the problem of sleep, Ṭaḥāwī turns initially to the two hadith which had been the basis of Ibn Rāhawayh's critique of the Ḥanafī position. These are (1) The eye is the thong on the sphincter, so he who sleeps, let him perform *wuḍū'*, and (2) He who sleeps let him perform *wuḍū'*. Ṭaḥāwī, as a Ḥanafī, has to neutralize the general import of these hadith, which seem to imply a general and unqualified need for *wuḍū'* after sleep. His first step in that direction is to produce a variant of the original thong-and-sphincter hadith. Mu'āwiya b. Abī Sufyān had heard the Prophet say, The eyes are the thong on the sphincter, so if the eyes sleep the thong is *loosened* (*istaṭlaqa al-wikā'*). That apparently insignificant change in terminology prepares the way for the argument that there is a causal factor (*'illa*, *ma'nā*, *sabab*)

[21] Shāfi'ī, *Risāla*, 512, paras. 140 ff.

which distinguishes sleep in general from the particular sleep that makes *wuḍū'* necessary.

Ṭaḥāwī elaborates the argument for some time before concluding with a sequence of eleven Companion hadith which specify that dozing or light sleep or sleep in a sitting position do not cancel *wuḍū'*. The form of these hadith constitutes a precise defence of Ḥanafī law—for example, from 'Umar, If one sleeps sitting one does not perform *wuḍū'*, but if one sleeps lying down, one does. Such formulae were also (and clearly later) found to have been uttered in an equally decisive manner by the Prophet himself (and one of the Prophetic formulae has become the introduction to the first of Ṭaḥāwī's two chapters).

Ṭaḥāwī comments that these Companions distinguished a special kind of sleep—*khāṣṣ min al-nawm*—which alone cancelled *wuḍū'*. This is the sleep which the Prophet particularized—*khaṣṣa-hu*—by saying that it caused relaxation of the muscles. Sleep in a standing or sitting position, or in a position of prostration, does not share the causal factors—here *asbāb*—which make sleep in a recumbent position a cancellation of *wuḍū'*.

This single illustration must serve to make the point that the discovery of a technical terminology of hermeneutics by the Muslim community was a product of practical need and experience. Here we see an *ad hoc* argument culminating in the assertion that one type of sleep is 'special', *khāṣṣ*. It is difficult to claim that the term, as used here, is an established technical one; it is a conclusion derived rather than a principle applied. But the seeds of a technical system are here and were to be elaborated in works like that attributed to Shāfi'ī. Likewise the terms *'illa*, *ma'na*, and *sabab*, all used here as synonyms and without any obvious technical framework, were later to be distinguished and integrated within highly technical hermeneutic structures.

In asserting that the development of technical skills was organic, practical, experiential, a response to social and intellectual needs, it is not my intention to imply that the Muslims just made them up without reference to any past, or any non-Muslim cultural experience. Rather, the cultural experience of the Ancient Near East had become the cultural experience of Arabic speakers. The Muslims shared with Arabic-speaking Jews and Christians access to a literary world, oral as well as written, which was of great antiquity and complexity; many components of this literary world

were neutral as to sectarian loyalty. When the Muslim community was subject, at an intellectual or literary level, to strains—which were themselves in part the common strains and stresses of Near Eastern monotheism—they responded, as the other communities had responded, by building out of the culture they inhabited, their own particular structures (*khāṣṣ*), which were reflections of a general culture (*'āmm*). They did not borrow their structures, they had first to feel the need, and then created in a new context the structures that served their purposes and reflected their mythology, with all the particularity and difference that the new context required.

III

Shāfi'ī's *Risāla* shows an astonishing technical foregrounding of the hermeneutic device known as *'āmm : khāṣṣ*. This is both the first major topic addressed in that work and one of the lengthier. Within the Jewish hermeneutic tradition, the text known as the Thirteen Middot of Rabbi Ishmael shows a similar concern with this basic device: eight out of thirteen principles refer to the general and the particular.[22] Did the Jewish tradition influence the Muslim? It may have done; the two communities spoke the same language, lived in the same cultural milieu, shared many cultural and intellectual problems, and had both come into possession of a canonical scripture (Qur'ān and Torah) and an extension of revelation in the form of Prophetic dicta (hadith and oral Torah); like the Jews, and later, the Muslims became committed to a hermeneutic defence of their identity as a community. Clearly there was a possibility that the Muslims would be influenced by the Jewish tradition, and might even, knowingly and consciously, raid the technical armoury of that community in search of useful weapons. At a slightly different level of influence and borrowing, it may be thought that the Muslims, because they debated with the Jews on legal as on theological matters, imperceptibly acquired skills which had previously only belonged to the older community.

Without wishing firmly to deny either of these possibilities—which are indeed possibilities—I would suggest that they are not the best models for understanding the emergence of hermeneutic

[22] Babylonian Talmud, Berakhot, Wilna edn., 47b–48a; also in Sifra, Introduction and in Siddurim.

skills in the Muslim community. There are a number of counter-indications. First, there is little evidence in Muslim texts of systematic debating encounter between Muslim and Jewish jurists; the paucity of reference may be taken to reflect a real paucity of occurrence. Secondly, once it is recognized that the *Risāla* is not a product of Shāfi'ī's lifetime, the emergence of hermeneutic skills in the Muslim community reveals itself rather as a long slow organic process of discovery and systematization. It is significant that the earliest hermeneutic arguments (I mean those of Ibn Qutayba) are articulated by a littérateur and not by a jurist. This suggests that the basics of a hermeneutic theory were a part of the general literary culture which was carried by the Arabic language. Thirdly, the theoretical bases of the Jewish hermeneutic system have long been recognized as indeed a particular manifestation of a general intellectual skill, diffused in the Middle East, naturalized in Middle-Eastern culture, and having its origins (or some origins) in Middle-Eastern Hellenism.[23] The Muslim hermeneutic system and the Jewish are, each, separately, a unique and distinct product of a distinct community. If they share certain features, it is because they share a cultural continuum, and because all systems of this type must discover and rely on some aspects of language and interpretation which are universal.

Finally, the precise details and arguments of the three major Jewish statements of hermeneutic principle[24] are simply not systematically repeated in any of the early Muslim sources. The Jewish references to *khal/prat* (general and particular) are fully integrated into a world view which is Jewish, characterized by Biblical, Midrashic, and Rabbinic reference. Conversely, the earliest systematic account of the *'amm : khāṣṣ* device in Islam, namely that of the *Risāla*, is locked into a Muslim structure of thought and shows no signs of alien influence. It not only looks like a product of Muslim thought, but systematic consideration of (earlier) hermeneutic efforts (Ibn Qutayba, Ṭaḥāwī) shows that it is indeed a consistent and logical product of experience and

[23] See David Daube, 'Rabbinic methods of interpretation' and 'Alexandrian methods of interpretation'; S. Lieberman, *Hellenism*, 47–82; Alexander, 'Quid Athenis et Hierosolymis?'

[24] In addition to the Thirteen Middot of Rabbi Ishmael, there are the Seven Middot of Hillel (Tosefta Sanhedrin 7:11 and Sifra), and the Thirty-two Middot of Rabbi Eliezer ben Jose (Babylonian Talmud, Berakhot, Wilna edn., 48b–49a). Cf. Philip Alexander, 'The Rabbinic hermeneutical rules'.

development within the Muslim community. It is notorious that the meaning of technical terms need not have much to do with what they signify. A full analysis of *'āmm/khāṣṣ* arguments in Muslim *fiqh*, and of *khal/prat* arguments in the Jewish tradition has hardly been essayed by scholars[25] but a casual survey of (parts of) the two traditions does not suggest either that the broad structures or the constitutive elements show a non-trivial degree of similarity. The Muslim system, like the Jewish system, should be understood as a unique intellectual achievement, completely explicable as a product of the intellectual history of the Muslims in the third century.

IV

Ṭaḥāwī's *Sharḥ ma'ānī al-āthār* is in some respects a very similar work to his *Mushkil al-āthār*. It is a work of hermeneutics. The prime focus of attention is Prophetic hadith. These are deployed in so far as they seem to exhibit contradiction either with one another or with the structure of the law as understood by Ṭaḥāwī. The arguments he adduces are intended to resolve contradiction and to demonstrate that the principles of Ḥanafī law can be established by reference to Prophetic hadith and, conversely, that, whatever the appearances to the contrary, there are no reliable Prophetic hadith that contradict Ḥanafī law. The techniques he uses do not suggest that there is much temporal or developmental distance between this work and the *Mushkil al-āthār*. The partisan nature of argument is never in doubt; chapters or lengthy segments of argument are likely to end with the claim that the meaning or meanings derived from the reports that have been analysed are consistent with the opinions of Abū Ḥanīfa and/or Abū Yūsuf and/or Muḥammad al-Shaybānī. The work is much larger than the *Mushkil*. It deploys a far larger number of Prophetic and other hadith. The material is organized systematically according to the normal organization of *fiqh* discussions. I would guess the work to be later than the *Mushkil*, though it is not a matter of importance. The material is probably organic in its origins, but very much under the control of the final redactor, who may well have been Ṭaḥāwī.

[25] But cf. Alexander Samely, 'Between scripture', ex. 3, for a *khal/prat* argument.

The partisan nature of the work leads not simply to *ad hoc* arguments but to arbitrary and irresponsible manipulation of Prophetic and Companion dicta. This is nowhere easier to exemplify than in arguments based on *isnād*-criticism, of which there are several hundreds in this book. The orderly principles of the science of *'ilm al-rijāl* were clearly not known to Ṭaḥāwī, and, indeed, were probably not worked out till some time after his death. (This fact should be noted by those who might wish to claim that Bukhari's collection of hadith and his biographical works had been completed prior to the date normally adduced for his death, namely 256; cf. Ch. 7, Sect. VI.) Analysis of *isnād*s is an excessively tedious business, but it derives an added importance for academics working on the early history of Islam in view of the continuing lingering respect for the Common-Link theory. First elaborated by Schacht,[26] this theory is based on the observation that for many hadith it can be established that their *isnād*s display something like the pattern shown in Fig. 1. It is variously argued that this phenomenon either might, or can, or must be interpreted as meaning that B invented the hadith in question.

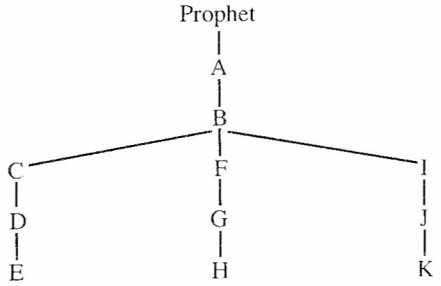

Fig. 1.

In fact, the phenomenon is demonstrably a product of a quite different scenario. When a hadith (*matn*—the text) came into existence which was accepted by several different factions or groups within Islam they tended each to 'capture' the original hadith and provide it with an *isnād* reflecting their group. Since nearly all groups recognized the common heroes of the age of the

[26] Schacht, *Origins*, 163–75.

Prophet, it tends to be at about the level of Successor that *isnād*s start converging. This is true even when the hadith emerge and acquire *isnād*s well into the third and fourth centuries. More particularly, it can be shown that when there is competition between groups, they engage in a mutual process of *isnād*-criticism, which, again because they share a common respect for the generation of the Companions and the Successors, tends to focus on ousting a hadith by destroying the third or fourth link. Group X asserts that the law is such and such on the basis of a hadith with the following *isnād*: Prophet–A–B–C–D–E. Group Y knows that the law is not such and such and so is determined to criticize this hadith. It cannot criticize the Prophet, the Companion or, perhaps, the Successor. It points out that C has a bad memory. Group A, perceiving the weakness of the link B–C, strengthen their position by discovering a new *isnād* exhibiting the link B–J, where J is known to have an excellent memory. Group B, convinced this cannot be right, discovers an *isnād* with the link B–K, where K is a notorious heretic. Or, worse, they discover the link B–K–J, where well-meaning J has been fooled by notorious K. Initially, and possibly for some time, Group A will keep repairing the bad link, until they give up and try an entirely different *isnād*. The to-and-fro of *isnad* criticism focuses on weak links which are characteristically the third or fourth links in an *isnād*. This leads to the common-link phenomenon, which reflects nothing whatsoever about the origins of the *matn* of a hadith; it reflects *isnād* criticism and competition in or after the second half of the third century.

Here is a real example from Ṭaḥāwī. It relates to *mass al-dhakar*,[27] a problem, it will be recalled, on which the Mālikīs and the Ḥanafīs took simple opposing positions. The Mālikī position was based on the hadith from Busra which, in the *Muwaṭṭa'* of Yaḥyā, had the following *isnād*: Mālik–'Abdallāh b. Abī Bakr–Muḥammad b. 'Amr–'Urwa b. al-Zubayr–Marwān b. al-Ḥakam–Busra bint Ṣafwān–Prophet. In the following analysis, I give Ṭaḥāwī's argument in schematic form.

1.1. Hadith: Abū Bakra–Ḥusayn b. Mahdī–'Abd al-Razzāq–Ma'mar–Zuhrī–'Urwa–Marwān–Busra–Prophet.

[27] Ṭaḥāwī, *Ma'ānī al-āthār*, i. 43–8.

hadith with, he claims, impeccable *isnād*s all advocating the opposite point of view. The only thing to notice here aside from the arbitrary invention and impugning of *isnād*s (and the invention in order to impugn) is the way that the focus of dispute is on weak links. All of the quoted *isnād*s down to Paragraph 8.0 accept 'Urwa as the permanent transmitter of this bundle of hadith. Thereafter the advocates of this point tried different early authorities. The new *isnād*s also developed weak links. Some *isnād*s show attempts to repair the weak link 'Urwa–Busra by substituting a more acceptable figure for Busra. Set out in tree diagrams, these various *isnād*s would probably indicate a dominant common link in 'Urwa and/or a key figure in Zuhrī, etc.

The Common-Link Theory is not quite an aberration of scholarship, for it has some uses; see above, Chapter 2, Section VI. But the presence of 'Urwa in all these *isnād*s does not prove that he invented or propagated this hadith. He is a common link because the link after him became a focus of dispute. The dispute took place in the second half of the third century. It was during this period that all of these *isnād*s were discovered (or invented). The common-link phenomenon as a feature of hadith literature relates to a method of *isnād* criticism current amongst jurists and others in the second half of the third century. The materials of this particular dispute were gathered and stored within Ḥanafī circles until a redactor (or redactors) took them in hand and gave them their present form. This storing of materials and redaction took place, we must assume, in Egypt, where Ṭaḥāwī spent his scholarly life. The materials thus reflect local debate in Egypt between Ḥanafīs and Mālikīs. At the level of *isnād* criticism it must have been a singularly sterile and unexciting debate (unless we recognize in this game of invention a disarming sense of irony). It remains unexciting and uninteresting in its twentieth-century manifestations.[29]

And yet it was also in Egypt, and presumably at about this time, that Shāfi'ī circles were elaborating the arguments that finally took

[29] The limitations of the Common-Link theory were to a degree appreciated by Schacht, *Origins*, 166 ff. Michael Cook and Patricia Crone have more reservations (but not in my opinion enough), *Early Muslim dogma*, 107 ff. and *Roman, provincial and Islamic law*, 27–31. Juynboll thinks that common links 'are entitled to our most painstaking scrutiny', *Muslim tradition*, 216, and see all of 206–17. The impetus he has given to the theory is probably responsible in part for its continued use; see e.g. Powers, 'On bequests', 193–7.

shape and became the *Risāla* of Shāfi'ī, one of the finest intellectual achievements of early Muslim jurists in the field of exegetical theory, and by far the most influential.

V

Shāfi'ī's *Risāla* has provoked considerable comment[30] and a complete English translation. It is a (fairly) well-organized work in which a number of hermeneutic arguments and devices are discussed and exemplified in a detailed and orderly manner. Its argument that obedience to the Prophet is necessary and commanded in the Qur'ān is well known.[31] The major devices signalled are: *'āmm : khāṣṣ*; *nāsikh : mansūkh*; *jumal : tabyīn*. At the logical centre of the work is a distinction between two types of knowledge, one that permits and one that does not permit of certainty. This is followed by discussion of the two major sources of uncertainty, namely *khabar wāḥid* and *qiyās/ijtihād* (together with some lesser matters including *ijmā'*).[32] In an earlier work I have demonstrated the logical cohesion of the section which begins with the statement, Knowledge is of two types.[33] It is a mark of the failure of the book to present itself adequately that its hard-working English translator moved the first chapter of this section to a different (and much less suitable) situation; and moved a number of other chapters as well.[34] In fact the book has considerably more cohesion than is there conceded. In my earlier study I remarked on 'the subtlety of intellectual endeavour, the constant repetition [and] the consistency of effort which are all demonstrable behind the scholastic dryness of the text'.[35] I am still conscious of this work as a remarkable intellectual achievement

[30] Schacht, *Origins*, see index s.v. Shāfi'ī; Burton, *The Collection*, 21–30, 52–63, and see index; Calder, '*Ikhtilāf* and *ijmā'*'.

[31] Schacht, *Origins*, *passim*; Burton, *The Collection*, 21–30, 52–63, and see index.

[32] *Ijmā'* for Shāfi'ī as a separate topic (i.e. when it does not mean agreement on the meaning or significance of revelation) signifies agreement of the people at large *on a matter not dealt with in revelation*. That there was anything at all not covered by revelation was a belief abandoned by most later jurists. The notion of *ijmā' al-nās*—on something not covered by revelation—became a useless category. Cf. Calder, '*Ikhtilāf* and *ijmā'*', 72 and 73–7.

[33] Calder, '*Ikhtilāf* and *ijmā'*'.

[34] Majid Khadduri, *Islamic jurisprudence*, 52–3.

[35] Calder, '*Ikhtilāf* and *ijmā'*', 71.

1.2. When 'Urwa heard Marwān's comment, derived from Busra, he paid no attention to her hadith—*lam yarfa' bi-ḥadīthi-hā ra'san*.
1.3. So Marwān sent a police officer to her, who returned, confirming that the Prophet had commanded *wuḍū'* after touching the penis.
2.0. Ṭaḥāwī's comment:
2.1. The phrase *lam yarfa' bi-ḥadīthi-hā ra'san* is to be taken as a declaration of weakness (*taḍ'īf*) by 'Urwa against Busra.
2.2. This is confirmed by Rabī'a who was amusingly and wickedly rude about Busra in this context.
2.3. Also by Ibn Zayd who confirms that the tradition is not thus and adds to the general impugnment of Busra.

Ṭaḥāwī's version of the *isnād* of this hadith (1.1) is technically respectable. Ma'mar [b. Rashīd] and Zuhrī are usually associated with Madina and they transmitted to the respected Yemeni scholar 'Abd al-Razzāq, etc. The *matn*, however, has acquired a Ḥanafī twist. In its Mālikī form—the original form, against which this one was developed—'Urwa was seen to accept the report from Busra. Here 'Urwa is seen to have rejected Busra's view. It will be noted that both sides have accepted that 'Urwa is reliable. Ṭaḥāwī might have stopped here, but this game depended on overkill.

3.0. In any case Zuhrī never heard this hadith from 'Urwa; it is a product of forgery (*tadlīs*). For the same hadith is reported thus:
3.1. Yūnus–Shu'ayb b. Layth–Layth–Ibn Shihāb [al-Zuhrī][28]–'Abdallāh b. Abī Bakr b. Muḥammad–'Urwa–Marwān–Busra–Prophet.
3.2. It follows that Zuhrī did not hear it from 'Urwa directly. And the presence of 'Abdallāh b. Abī Bakr considerably lowers its grade. They, the Mālikīs, admit that the presence of 'Abdallāh b. Abī Bakr makes a mockery of an *isnād*.

Here, Ṭaḥāwī abandons the hadith entirely, even the version that is useful to the Ḥanafīs, and points to an *isnād* with a weak link. This is only the first of numerous such *isnād*s.

4.0. Another version has it that the intermediary between 'Urwa and Zuhrī is, not 'Abdallāh b. Abī Bakr, but Abū Bakr b. Muḥammad, as follows:
4.1. Sulaymān b. Shu'ayb–Bishr b. Bakr–Awza'ī–Ibn Shihāb [al-Zuhrī]–Abū Bakr b. Muḥammad–'Urwa–Busra–Prophet.

[28] For the difficulties in nomenclature and identity of Ibn Shihāb/Zuhrī, see G. H. A. Juynboll, *Muslim tradition*, 146–58.

The point being laboured here is that the good link Zuhrī–'Urwa is broken; even if the hadith was passed to Zuhrī, it was through an unreliable authority.

5.0. Some say that the link after 'Urwa is his son, Hishām b. 'Urwa, who cannot be impugned. For example:
5.1. Ibn Abī 'Umar–'Ubayd Allāh b. Muḥammad al-Tīmī–Ḥammād b. Salama–Hishām b. 'Urwa–'Urwa–Marwān–Busra–Prophet.
5.2–5.5. Four other *isnād*s all displaying the link Hishām–'Urwa–Marwān–Busra–Prophet.
5.6. Reply: Hishām too did not take it from his father, but heard it from Abu Bakr and then reported it from his father by forgery (*tadlīs*), as proved by:
5.7. Sulaymān b. Shu'ayb–Khasīb–Humām–Hishām b. 'Urwa–Abu Bakr b. Muḥammad–'Urwa–Marwān, etc.

Here we see a total of five *isnād*s in which a bad link is replaced with a good link: 'Urwa passed it straight to his son, Hishām. Zuhrī has been abandoned. Ṭaḥāwī's reply to this could hardly be more arbitrary: he simply interpolates the joker, Abū Bakr b. Muḥammad, between Hishām and his father. He implies that this is enough to devalue all the good links.

6.0. Some say it is reported from 'Urwa by others than Zuhrī and Hishām as in:
6.1. Muḥammad b. Ḥajjāj and Rabī' the Mu'adhdhin–Asad–Ibn Lahī'a–Abū 'l-Aswad–'Urwa–Busra–Prophet.
6.2. Reply: Who would ever rely on Ibn Lahī'a?

Here and in the following several examples it seems to me that all pretence at seriousness is lost. *Isnād*s are multiplied and dismissed in a casual, arbitrary, and indifferent fashion.

7.0. What about: Abū Bakra–Abū Dāwūd–Hishām–Yaḥyā b. Abī Kathīr–a man–'Urwa–'Ā'isha–Prophet?
7.1. Reply: How can you argue this?
8.0. What about: 'Alī b. Ma'bad–Ya'qūb b. Ibrāhīm–Ibrāhīm b. Sa'd–Ibn Isḥāq–Muḥammad b. Muslim–'Urwa–Zayd b. Khālid–Prophet?
8.1. And: Ibn Abī Dāwūd–'Ayyāsh al-Raqqām–'Abd al-A'lā–Ibn Isḥāq, etc.?
8.2. Reply: How can you set up Ibn Isḥāq against those who oppose him on this matter?

Regretfully, Ṭaḥāwī has ten more *isnād*s in each one of which he finds some fault or another. He also has six splendid Prophetic

though I am more inclined now to see in the repetition (and consequent redundancies) and in the apparent failures of organization that bothered the English translator signs of organic growth and redaction. The book deserves a more careful literary description than has so far been attempted but that need not be carried out here. The arguments I set out in Chapters 4 and 5 will adequately account for my present scepticism about the attribution of the work to Shāfi'ī; and the arguments of this Chapter will perhaps suffice to show how much more comfortably the work fits into a proposed dating of *c.*300 than into any earlier period.

The specifics of the theory presented in the *Risāla* and the many refinements that were developed in the classical period have received to date adequate academic description.[36] That aspect of his argumentation which to my mind is the most important and the most liberating in terms of its influence on the literary tradition of *fiqh*, however, deserves repetition. The acknowledgement and justification of *ikhtilāf*, based on the distinction between two types of knowledge, established a kind of flexibility and tolerance (already perhaps implicit in some earlier juristic literature) in so far as the notion of variation was now built into the system and its negative implications neutralized. The motives for this achievement are multivalent but not obscure. The arguments respond to and neutralize the divisions within the geographically and ideologically various ancient schools; they constitute a principle of transcendent unity whereby all participants in debate could recognize in themselves a unified and catholic body. By the same token, the contemporary scholars might associate themselves with traditions, or traditional figures of the Islamic past, going back to and including all of the Companions and Successors, irrespective of recorded deviation or divergence in juristic conclusions. It is the acknowledgement of permitted divergence that creates unity within a community. If this realization was a gradual achievement on the part of all the Muslim jurists, it remains none the less true that its first orderly articulation comes in this *Risāla*, product of the Shāfi'ī school and, probably, in its present form, of *c.*300.

The theory had another happy effect, at least from the point of

[36] See Burton, *The Collection* and *Sources*, *passim*; Majid Khadduri, *Islamic jurisprudence*; also the general accounts of Muslim hermeneutics in Goldziher, *The Ẓāhirīs* and Wansbrough, *Studies* (170–202); also the several works of Wael B. Ḥallaq (*inter alia* 'Considerations', 'The development of logical structure').

view of the jurists as a class. It articulated a gulf between those who know, who have the right to debate, and to differ, and those who do not know (*muqallid*s), who are a subordinate class, dependent for their knowledge of the law on those who know.[37]

A third feature of these perceptions, and of equal importance, is that they liberated the juristic tradition into aesthetic and intellectual play; and so permitted that remarkable development of juristic literature that is classical[38] *fiqh*. Precisely because man cannot achieve the stasis of certainty, he is committed (through God's deliberate withholding of secure knowledge) to eternal debate, debate, that is, on the significance of revelation. It is hardly to be expected that all thinkers will rejoice equally in the uncertainties of the law (some embraced as others feared it) and the boundaries of uncertainty are a part of the debate. One useful and effective account of the matter, which may illustrate the point, is provided, fairly late in the tradition, by the Ḥanbalī scholar Ibn Qudāma (d. 620), in his *Rawḍat al-nāẓir wa-jannat al-munāẓir*. He focuses in a significant passage on the question whether all *mujtahid*s, with their divergent views, are correct.[39] They are not; nor can any one of them ever achieve certainty that the view he has adopted is the single correct view that corresponds to God's will. The search for that single correct view, however, must not be abandoned: and so the scholars of the Muslim community are committed, for all time, to the play of hermeneutic argument. There can be no 'rolling up of the carpet of debate'.[40] And carpets of debate are precisely what, for a thousand years, the Muslim jurists have woven, always (more or less) functional, but also of a patterned beauty that appeals as insistently to the intellect as a Persian carpet does to the eye. It is in its preparation for that achievement that Shāfi'ī's *Risāla* achieves its greatest importance.

[37] See Calder, '*Ikhtilāf* and *ijmā'*', 71; also Norman Calder, 'Doubt and prerogative' for the workings of these arguments in a Shī'ī context.

[38] I use the word here to cover all of the developments in the post-formative period up to and including the nineteenth century, being not at all convinced that scholarship has yet distinguished any meaningful lines of cleavage, temporal or typological, within the bulk of *fiqh* literature.

[39] 'Abdallāh b. Aḥmad Ibn Qudāma, *Rawḍat al-nāẓir*, 324–34.

[40] Ibid. 332.

10

TRANSITIONS

Over three chapters I have argued that in literary form, normative content, and hermeneutic theory, Islamic jurisprudence is an organic product of Arabic-speaking Muslim society in the third century. It reflects the social and intellectual tensions of that society and cannot be explained in terms of mechanical borrowing or alien influence, nor in terms of continuity with, for example, a Bedouin past: that would be to ignore the social complexity of Muslim society, its long history of city life, and the dominant presence there of non-Bedouin. It is probable that non-Muslim elements in the cosmopolitan world of the 'Abbāsid Empire experienced similar tensions. (All of the communities of the Middle East participated in the political, social, and intellectual consequences of Arab political hegemony.) In such a milieu, borrowing, influence, and continuity are all present; but fresh creative thinking articulated through complex, indeterminate, but indigenous social and intellectual structures would seem the only way effectively to explain such developments as are rendered visible by the literary residue of the period. The characteristics of the period, both literary and social, in so far as they impinge particularly on the production of juristic works, have perhaps been sufficiently indicated. It remains to ask at what date the features of this developmental phase so changed as to mark the initiation of a new historical phase. The question is of course primarily analytic: it serves the need of the historian to establish types, create divisions, and mark boundaries. But, like most exercises in periodization, the argument I offer here includes the suggestion that the participants in the process were not entirely unaware that something had been left behind.

The conventional division between the formative and 'classical' periods of Islamic jurisprudence focuses on the fourth century as the period of transition.[1] This is clearly a correct perception

[1] See e.g. Chafik Chehata, *Études de droit musulman*, i. 17; also Ya'akov Meron, 'The development of legal thought'. Joseph Schacht is markedly early in his assessment of the transition, and, I would say, does not characterize it well, *Origins*, 329, and *Introduction*, 69–71.

(though whether accompanied as yet by a reasonable and precise characterization of the two periods may be doubted). Avoiding reliance on dates, I would propose that a useful symbol of the ending of one phase and the beginning of another may be found in the production of *Mukhtaṣar*s. This term covers a type of juristic work which in the post-formative periods had diverse forms and functions. The earliest examples, however, are quite clearly simply attempts to summarize the known law, within a given tradition. In these respects alone, they are significant: they mark a need to gather and summarize the past with a view to building on it and they also signal a satisfaction with school loyalties and consequent pluralism, which is perhaps different from the more combative atmosphere of earlier texts. In two other respects they have still greater symbolic value.

First, they are authored texts. They represent the effort by particular named individuals to bring the inherited tradition, with all its diversity of oral and written sources, to order. None would doubt that the responsibility for that ordering belongs to the individual in question, who, in undertaking the task, is making some sort of claim to a personal literary achievement. The characteristic texts of the formative period are not like this: no matter how real or strong the authorial or redactional presence, it represents itself as merely the medium for the school tradition. Pseudepigraphy and the absence of claims to personal authority are the norm. The transition is as important as the emergence of the individual skilled artist of the Renaissance, in contrast to the anonymous skilled craftsmen of medieval art, and as difficult to pin down. The *Mukhtaṣar* of the Ḥanafī jurist Qudūrī (d. 428) is no longer a work of the formative period. The earlier *Mukhtaṣar*s of Ṭaḥāwī (d. 321) and Marwazī (d. 334) represent, however, precisely the relevant transitionary features. They are ambivalent and uncertain about the interpretative and literary role of the author. Marwazī is sometimes a skilled and creative summarizer of the books he inherited; at other times he falls back on a despairing recapitulation of sources which successfully resist his efforts at structural control. In both cases the achievement was sufficient to constitute an instructive model and to generate a

BIBLIOGRAPHY

Al-ʿAbbādī, Abū ʿĀsim Muḥammad b. Aḥmad, *Kitab Ṭabaqāt al-fuqahā' al-Shāfi'iyya*, ed. Gösta Vitestam (Leiden, 1964).

ʿAbd al-Razzāq b. Hammām al-Ṣanʿānī, *Al-Muṣannaf*, ed. Ḥabīb al-Raḥmān al-Aʿzamī (Beirut, 1390/1970 *et seq.*).

Abū 'l-ʿArab, Muḥammad b. Aḥmad al-Tamīmī, *Kitāb Ṭabaqāt 'ulamā' Ifrīqiyya* (redacted and extended by Muḥammad b. al-Ḥārith b. Asad al-Khushanī), ed. Mohammed Ben Cheneb under the title *Classes des savants de l'Ifriqiyya* (Algiers, 1332/1914).

Abū 'l-Maḥāsin, Yūsuf b. Mūsā al-Ḥanafī, *Al-Mu'taṣar min al-Mukhtaṣar min Mushkil al-āthār* (2 vols.; Hyderabad, 1362).

Abū Yūsuf, Yaʿqūb b. Ibrāhīm, *Kitāb al-Kharāj*: (i) Bulaq, 1302; (ii) Cairo (Salafiyya Press; 6th reprint, 1397); (iii) contained in Al-Raḥbī, *Miftāḥ al-ritāj*; (iv) ed. Iḥsān ʿAbbās (London, 1405/1985).

Alexander, L., 'The living voice', in D. J. A. Clines *et al.* (eds.), *The Bible in three dimensions* (Journal for the Study of the Old Testament, Supplement series, 87; Sheffield, 1990).

Alexander, P. S., 'The Rabbinic hermeneutical rules and the problem of the definition of midrash', *Proceedings of the Irish Biblical Association*, 8 (1984).

—— 'Quid Athenis et Hierosolymis? Rabbinic midrash and hermeneutics in the Graeco-Roman world', in P. R. Davis and R. T. White (eds.), *A Tribute to Geza Vermes* (Sheffield, 1990).

Arberry, A. J., *The Chester Beatty Library: a handlist of the Arabic manuscripts* (Dublin, 1956).

Ash'arī, ʿAlī b. Ismāʿīl Abū 'l-Ḥasan, *Kitāb al-Luma'*, in R. J. McCarthy, *The Theology of Ash'ari* (Beirut, 1952).

—— *Kitāb al-Ibāna 'an uṣūl al-diyāna*, in Abū Ḥanīfa *et al.*, *Al-Rasā'il al-sab'a fī 'l-'aqā'id* (Hyderabad, 1365/1948).

Azmi, M. M., *Studies in early* hadith *literature* (Beirut, 1968).

Al-Baghdādī, Abū Bakr Aḥmad b. ʿAlī al-Khaṭīb, *Ta'rīkh Baghdād* (14 vols.; Cairo, 1349/1931).

Al-Bājī, Abū 'l-Walīd Sulaymān b. Khalf, *Al-Muntaqā sharḥ al-Muwaṭṭa'* (7 vols.; Tanja, n.d.).

Al-Balādhurī, Abū 'l-ʿAbbās Aḥmad b. Yaḥyā, *Futūḥ al-buldān*, ed. M. J. de Goeje (Leiden, 1866).

Bayhaqī, Abū Bakr Aḥmad b. Ḥusayn, *Manāqib al-Imām al-Shāfi'ī*, ed. Aḥmad Ṣaqr (2 vols.; Cairo, 1970–1).

Burton, John, *The Collection of the Qur'an* (Cambridge, 1977).

—— *The sources of Islamic law: Islamic theories of abrogation* (Edinburgh, 1990).

Calder, Norman, '*Ikhtilāf* and *ijmā'* in Shāfi'ī's *Risāla*', *Studia Islamica*, 58 (1983).

—— 'The significance of the term *imām* in early Islamic jurisprudence', *Zeitschrift für Geschichte der arabisch-islamischen Wissenschaften*, 1 (1984).

—— '*Ḥinth*, *birr*, *tabarrur*, *taḥannuth*: an inquiry into the Arabic vocabulary of vows', *BSOAS* 51.2 (1988).

—— 'From midrash to scripture: the sacrifice of Abraham in early Islamic tradition', *Le Museon*, 101.3–4 (1988).

—— 'Doubt and prerogative: the emergence of an Imāmī Shīʿī theory of *ijtihād*', *Studia Islamica*, 70 (1989).

—— 'The *ummī* in early Islamic juristic literature', *Der Islam*, 67.1 (1990).

—— 'Tafsir from Tabari to Ibn Kathir: problems in the description of a genre', in G. R. Hawting (ed.), *Approaches to the Qur'an* (London, 1993).

Chehata, Chafik, *Études de droit musulman* (2 vols.; Paris, 1971).

Cook, Michael, 'The origins of *kalām*', *BSOAS* 43 (1980).

—— *Early Muslim dogma: a source-critical study* (Cambridge, 1981).

—— 'Early Islamic dietary law', *Jerusalem Studies in Arabic and Islam*, 7 (1986).

Coulson, N. J. 'Doctrine and practice in Islamic law', *BSOAS* 18 (1956).

—— *A history of Islamic law* (Islamic Surveys, 2; Edinburgh, 1964).

Crone, Patricia, 'Jahili and Jewish law: the *qasāma*', *Jerusalem Studies in Arabic and Islam*, 4 (1984).

—— *Roman, provincial and Islamic law: the origins of the Islamic patronate* (Cambridge, 1987).

Crone, P. and Michael Cook, *Hagarism: the making of the Islamic world* (Cambridge, 1977).

Crone, P. and Martin Hinds, *God's caliph: religious authority in the first centuries of Islam* (Cambridge, 1986).

Daube, David, 'Codes and codas' in D. Daube, *Studies in biblical law* (Cambridge, 1947).

—— 'Rabbinic methods of interpretation and Hellenistic rhetoric', *HUCA* 22 (1949).

—— 'Alexandrian methods of interpretation and the Rabbis', in *Festschrift H. Lewald* (Basel, 1953).

—— *Forms of Roman legislation* (Oxford, 1956).

Dennet, Daniel C., *Conversion and the poll-tax in early Islam* (Harvard Historical Monographs 22; Cambridge, Mass., 1950).

Dennis of Tell Mahre, *Chronicon anonymum Pseudo-Dionysianum*, French tr. Robert Hespel (Corpus Scriptorum Christianorum Orientalium, vol. 507; Louvain, 1989).

Al-Dhahabī, Abū 'Abdallāh Muḥammad b. Aḥmad, *Manāqib al-Imām Abī Ḥanīfa* (also contains *Manāqib al-Imām Abī Yūsuf* and *Manāqib al-Imām Muḥammad ibn al-Ḥasan al-Shaybānī*), eds. Afghānī and Kawtharī (Cairo, n.d.).

Douglas, Mary, *Purity and danger* (London, 1978).

Dozy, R., *Spanish Islam: a history of the Muslims in Spain* (English tr.; London, 1913).

Firestone, Reuven, *Journeys in holy lands: the evolution of the Abraham-Ishmael legends in Islamic exegesis* (New York, 1990).

Gerhardsson, B., *Memory and manuscript: oral tradition and written transmission in Rabbinic Judaism and early Christianity* (Copenhagen, 1964).

Gibb, H. A. R., 'The social significance of the Shuubiya' in H. A. R. Gibb, *Studies in the civilisation of Islam* (London, 1962).

Gluckman, Max, *The judicial process amongst the Barotse of Northern Rhodesia* (Manchester, 1955).

—— *The ideas in Barotse jurisprudence* (Manchester, 1972).

—— *Politics, law and ritual in tribal society* (Oxford, 1982).

Goldziher, Ignaz, *Muslim studies*, tr. and ed. S. M. Stern and C. P. Barber (2 vols.; London, 1967 and New York, 1971).

—— *The Ẓāhirīs: their doctrine and their history*, tr. and ed. Wolfgang Behn (Leiden, 1971).

Goodblatt, David M., *Rabbinic instruction in Sasanian Babylonia* (Studies in Judaism in late Antiquity; Leiden, 1975).

Al-Ḥaddādī, Abū Bakr b. 'Alī, *Al-Jawhara al-nayyira 'alā Mukhtaṣar al-Qudūrī* (2 vols.; Istanbul, 1978). (A reprint of 1316).

Hallaq, Wael B., 'Considerations on the function and character of Sunni legal theory', *JAOS* 104.4 (1984).

—— 'The development of logical structure in Sunni legal theory', *Der Islam*, 64 (1987).

—— 'The use and abuse of evidence: the question of provincial and Roman influences on Islamic law', *JAOS* 110.1 (1990).

Hawting, G. R., 'The disappearance and rediscovery of Zamzam and the "well of Ka'ba"', *BSOAS* 43.1 (1980).

—— 'The origins of the Muslim sanctuary at Mecca', in G. H. A. Juynboll (ed.), *Studies on the first century of Islamic society* (Carbondale and Edwardsville, Ill., 1982).

—— '"We were not ordered with entering it but only with circumambulating it." *Ḥadīth* and *fiqh* on entering the Ka'ba', *BSOAS* 47.2 (1984).

—— 'The role of Qur'an and *ḥadīth* in the legal controversy about the rights of a divorced woman during her "waiting period" (*'idda*)', *BSOAS* 52.3 (1989).

—— '*Ẓihār* and *īlā'*: two oaths of sexual abstention in Islam' (forthcoming).

Healey, John, 'Syriac sources and the Umayyad period', in M. Adnan Bakhit and Robert Schick (eds.), *The fourth international conference on the history of Bilad al-Sham: during the Umayyad period* (2 vols.; Amman, 1989).

Hilāl b. Yaḥyā, known as Hilāl al-Ra'y, *K. Aḥkām al waqf* (Hyderabad, 1355).

Houdas, D. M., 'Sahnoun: un jurisconsulte musulman du III^{e} siècle de l'hégire', in *Centenaire de l'école des langues orientales vivantes* (Paris, 1895).

Ibn 'Abd al-Barr, Abū 'Umar Yūsuf, *Al-Istidhkār li-madhāhib fuqahā' al-amṣār wa-'ulamā' al-aqṭār*, ed. 'Alī al-Najdī Nasīf (Cairo, 1390/1971).

—— *Jāmi' bayān al-'ilm wa-faḍli-hi* (Beirut, 1398/1978).

Ibn Abī Ḥātim, Abū Muḥammad 'Abd al-Raḥmān, *Kitāb al-Jarḥ wa-'l-ta'dīl* (4 vols.; Hyderabad, 1371/1952).

—— *Ādāb al-Shāfi'ī wa-manāqibu-hu*, ed. 'Abd al-Ghanī 'Abd al-Khāliq (Cairo, 1372/1953).

Ibn al-Faraḍī, Abū 'l-Walīd 'Abdallāh b. Muḥammad, *Ta'rīkh al-'ulamā' wa'l-ruwāt li-'l-'ilm bi-'l-Andalus* (2 vols.; Cairo, 1373/1954).

Ibn al-Nadīm, Abū 'l-Faraj Muḥammad b. Abī Ya'qūb, *Kitāb al-Fihrist*, ed. Riḍā Tajaddud (Tehran, 1391/1971). Translated into English as *The Fihrist of al-Nadīm* by B. Dodge (New York, 1970).

Ibn Nujaym, Zayn al-Dīn, *Al-Baḥr al-rā'iq sharḥ Kanz al-daqā'iq* (Cairo, 1310–11).

Ibn Qudāma, 'Abdallāh b. Aḥmad al-Maqdīsī, *Rawḍat al-nāẓir wa-jannat al-munāẓir* (Beirut, 1401/1981).

Ibn Qutayba, Abū Muḥammad 'Abdallāh b. Muslim al-Dīnāwarī, *Kitāb al-Shi'r wa-'l-shu'arā'*, ed. M. J. de Goeje (Leiden, 1904).

—— *Kitāb al-Ma'ārif*, ed. M. I. A. al-Ṣāwī (Beirut, 1390/1970).

—— *Ta'wīl mukhtalif al-ḥadīth*, ed. M. Z. al-Najjār (Beirut, 1393/1972).

—— *'Uyūn al-akhbār*, ed. Yūsuf 'Alī Ṭawīl (2 vols.; Beirut, 1406/1986).

Ibn Rushd, Muḥammad b. Aḥmad Abū 'l-Walīd, *Al Bayan wa 'l tahṣil*, ed. Muḥammad Ḥajjī (Beirut, 1404/1984).

Ibn Wahb, 'Abdallāh, *Jāmi'*, contained in J. David Weil, *Le Jami' d'Ibn Wahb* (Publications de l'Institut Français d'Archeologie Orientale, Textes Arabes, vols. 3 and 4; Cairo, 1939, 1941–8).

Ibn Ziyād, *Muwaṭṭa' al-Imām Mālik*, ed. Muḥammad al-Shadhili al-Nayfar (Beirut, 1401/1981).

'Iyāḍ b. Mūsā, al-Qāḍī, *Tartīb al-madarik wa-taqrib al-masālik li-ma'rifat a'lām madhhab Mālik* (5 vols.; Beirut, 1387–8/1967–8).

'Iyāḍ b. Mūsā, al-Qāḍī, *Al-Ilmā' ilā ma'rifat uṣūl al-riwāya wa taqyīd al-samā'*, ed. Aḥmad Ṣaqr (Cairo, 1389/1970).
Jackson, Bernard, *Theft in early Jewish law* (Oxford, 1972).
Jāḥiẓ, Abū 'Uthmān 'Amr b. Baḥr, *Al-Bayān wa-'l-tabyīn*, ed. 'Abd al-Salam Muḥammad Hārūn (4 vols.; Cairo, 1367/1948).
—— *Risāla ilā al-Fatḥ b. Khāqān fī manāqib al-Turk wa-'āmmat jund al-khilāfa*, in Jāḥiz, ed. G. Van Vloten, *Tria Opuscula* (Leiden, 1968).
—— *Kitāb al-Bukhalā'* (Beirut, 1399/1979).
Johansen, Baber, *The Islamic law on land tax and rent: the peasants' loss of property rights as interpreted in the Hanafite legal literature of the Mamluk and Ottoman periods* (London, 1988).
Juynboll, G. H. A., *Muslim tradition: studies in chronology, provenance and authorship of early hadith* (Cambridge, 1983).
Kennedy, Hugh, *The Prophet and the age of the caliphates* (London, 1986).
Khadduri, Majid, *Islamic jurisprudence: Shāfi'ī's* Risāla *translated with an introduction, notes and appendices* (Baltimore, 1961).
Al-Khaṣṣāf, Abū Bakr Aḥmad b. 'Amr, *Kitāb Aḥkām al-waqf* (Cairo, 1322/1940).
—— *Kitāb al-Nafaqāt* (with a commentary by Ḥusām al-Dīn 'Umar b. 'Abd al-'Azīz Ibn Māza), ed. A.-W. al-Afghānī (Beirut, 1404/1984).
Al-Laknawī, Abū 'l-Ḥasanāt Muḥammad 'Abd al-Ḥayy, *Al-Fawā'iḍ al-bahiyya fī tarājim al-Ḥanafiyya* (Beirut, n.d.) (A reprint of 1324).
Lévi-Provençal, E., *Histoire de l'Espagne Musulmane* (3 vols.; Paris and Leiden, 1950).
Lieberman, S., *Hellenism in Jewish Palestine* (New York, 1950).
Løkegaard, F., *Islamic taxation in the classic period* (Copenhagen, 1950; repr. in F. Løkegaard, *Islamic taxation: two studies*, New York, 1973).
McCarthy, R. J., *The Theology of Ash'arī* (Beirut, 1952).
Mālik Ibn Anas, Abū 'Abdallah, *Al-Muwaṭṭa'*. (References in the text are by book and chapter headings.)
Al-Marwazī, Abū 'l-Faḍl Muḥammad b. Muḥammad, *Al-Mukhtaṣar*, contained in Muḥammad b. Abī Sahl al-Sarakhsī, *Al-Mabsūṭ* (Beirut, 1406/1986).
Al-Mas'ūdī, Abū 'l-Ḥasan 'Alī b. al-Ḥusayn, *Murūj al-dhahab wa-ma'ādin al-jawhar*, ed. M. Muḥyī al-Dīn 'Abd al-Ḥamīd (4 vols.; Cairo, 1384/1964).
Al-Mawṣilī, 'Abdallāh b. Maḥmūd, *Al-Ikhtiyār li-ta'līl al-Mukhtār* (Istanbul, 1370/1951).
Meron, Ya'akov, 'The development of legal thought in Hanafi texts', *Studia Islamica*, 30 (1969).
Motzki, Harald, *Die Anfänge der islamischen Jurisprudenz: ihre Entwicklung in Mekka bis zur mitte des 2./8. Jahrhunderts* (Abhandlungen für die Kunde des Morgenlandes, 50,2; Stuttgart, 1991).
Al-Muzanī, Abū Ibrāhīm Ismā'īl b. Yaḥyā, *Al-Mukhtaṣar*, contained in Muḥammad b. Idrīs al-Shāfi'ī, *Kitāb al-Umm*, vol. 9 (Beirut, n.d.; also in Bulaq edn., in margins).
Neusner, Jacob, *Aphrahat and Judaism* (Leiden, 1971).
—— *Eliezer ben Hyrcanus: the tradition and the man* (2 vols.; Leiden, 1973).
—— *A history of the Mishnaic law of purities* (22 vols.; Studies in Judaism in Late Antiquity 6; Leiden, 1977).
—— *Judaism, Christianity and Zoroastrianism in Talmudic Babylonia* (New York, 1986).
Nevo, Yehuda D. and Judith Koren, 'The origins of the Muslim descriptions of the Jahili Meccan sanctuary', *JNES* 49.1 (1990).
Powers, David S., 'On bequests in early Islam', *JNES* 48.3 (1989).
Al-Qudūrī, Aḥmad b. Muḥammad, *Al-Mukhtaṣar* or *Al-Matn*, in Al-Ḥaddādī, *Al-Jawhara al-Nayyira 'alā Mukhtaṣar al-Qudūrī* (2 vols.; Istanbul, 1978).
Al-Qurashī, Abū Muḥammad 'Abd al-Qādir b. Abī 'l-Wafā', *Al-Jawāhir al-muḍiyya fī ṭabaqāt al-Ḥanafiyya* (2 vols.; Hyderabad, 1332).
Radding, Charles M., *The origins of Medieval jurisprudence: Pavia and Bologna 850–1150* (New Haven, Conn., 1988).
Al-Raḥbī, 'Abd al-'Azīz b. Muḥammad, *Fiqh al-mulūk wa-miftāḥ al-ritāj al-murṣad 'alā khizānat kitāb al-kharāj*, ed. A. 'U. Kabīsī (2 vols.; Baghdad, 1393/1973).
Saḥnūn, 'Abd al-Salam b. Sa'īd, *Al-Mudawwana al-kubrā* (16 vols.; Cairo, 1323–4).
Samely, Alexander, 'Between scripture and its re-wording', *JJS* 42 (1991).
Al-Sarakhsī, Muḥammad b. Abī Sahl Abū Bakr, *Al-Mabsūṭ* (30 vols.; Beirut, 1406/1986). (A reprint of Cairo, 1331).
Schacht, Joseph, *The origins of Muhammadan jurisprudence* (Oxford, 1950).
—— 'On Shāfi'ī's life and personality', in *Studia Orientalia J. Pedersen dicata* (Denmark, 1953).
—— *An introduction to Islamic law* (Oxford, 1964).
—— *Das kitâb al-maḥâriğ fil-hiyal des Muhammad b. al-Hasan aš-Šaibânî* (Beiträge zur semistischen Philologie und Linguistik, 8; Hildesheim, 1968). (A reprint of Leipzig, 1930.)
Schäfer, Peter, 'Research into Rabbinic literature: an attempt to define the status quaestionis', *JJS* 37 (1986).
Schulz, F., *History of Roman legal science* (Oxford, 1946).
Sezgin, Fuat, *Geschichte des arabischen Schrifttums* (Leiden, 1967 *et seq.*).

Al-Shāfi'ī, Muḥammad b. Idrīs, *Kitāb al-Umm*: (i) in 8 vols. (Beirut, n.d.); (ii) in 7 vols., Bulaq, 1321–5 (repr. in Cairo, 1388).
—— *Al-Risāla*, ed. A. M. Shākir (Cairo, 1388/1969). (English translation, see under M. Khadduri).
Al-Shaybānī, Muḥammad b. al-Ḥasan, *Kitāb al-Jāmi' al-ṣaghīr*, in margins of Abū Yūsuf, *Kitāb al-Kharāj*, Bulaq.
—— *Kitāb al-Buyū' wa-'l-salam*, ed. Chafik Chehata (Cairo, 1954).
—— *Kitāb al-Ḥujja 'alā ahl al-Madīna*, ed. M. H. al-Kaylānī al-Qādirī (4 vols.; Hyderabad, 1385–90/1965–71).
—— *Kitāb al-Aṣl*, ed. Abū 'l-Wafā' al-Afghānī (Hyderabad, 1386/1966 *et seq.*).
—— *Muwaṭṭa' al-Imām Mālik*, ed. 'Abd al-Wahhāb 'Abd al-Laṭīf (Cairo, 1399/1979).
Southern, R. W., 'The schools of Paris and the school of Chartres', in Robert L. Benson and Giles Constable (eds.), *Renaissance and renewal in the twelfth century* (Cambridge, Mass., 1982).
Al-Subkī, Tāj al-Dīn Abū Naṣr 'Abd al-Wahhāb b. 'Alī, *Ṭabaqāt al-Shāfi'iyya al-kubrā*, eds. M. M. al-Ṭanāhī and A-Q. M. al-Ḥiluw (10 vols.; Cairo, 1383–96/1964–76).
Al-Ṭabarī, Abū Ja'far Muḥammad b. Jarīr, *Ta'rīkh al-rusul wa-'l-mulūk* (*Annales*), (Series III), eds. M. J. de Goeje *et al.* (Leiden, 1879–1901).
—— *Jāmi' al-bayān 'an ta'wīl āy al-Qur'ān* (Cairo, 1373/1954).
Al-Ṭaḥāwī, Aḥmad b. Muḥammad Abū Ja'far, *Sharḥ ma'ānī al-āthār* (2 vols.; Delhi, 1328/1929).
—— *Mushkil al-āthār* (4 vols.; Hyderabad, 1333). (See under Abū 'l Maḥāsin for the *Mu'taṣar min al-Mukhtaṣar min Mushkil al-āthār*).
—— *Kitāb Ikhtilāf al-fuqahā'*, Vol. 1, ed. M. S. H. Ma'ṣūmī (Islamabad, 1971).
Talbi, M., 'Kairouan et le Malikisme espagnol', in *Études d'orientalisme Lévi-Provençal*, Vol. 1 (1962), 317–37.
Wansbrough, John, *Quranic Studies: sources and methods of scriptural interpretation* (London Oriental Series, 31; Oxford, 1977).
—— *The sectarian milieu* (London Oriental Series, 34; Oxford, 1978).
Wensinck, A. J., 'Die Entstehung der muslimischen Reinheitsgesetzgebung', *Der Islam*, 5 (1914).
Wright, David, P., *The disposal of impurity: elimination rites in the Bible and in Hittite and Mesopotamian literature* (Society of biblical literature, Dissertation series, 101; Atlanta, Ga., 1987).

INDEX

'Abbās, Iḥsān 107
'Abd al-Malik 138, 140–1, 182
Abū Ḥanīfa 39, 105–6
Abū 'l-'Arab, Muḥammad b. Aḥmad 165
Abū Sulayman al-Jūzjānī 43
Abū Yūsuf 39, 105–6
adab 165–6, 170–1, 188–93
analogy, analogical argument, *qiyās* 6–9, 53, 79, 81–3, 90–1, 100
'āqila 202–7
a-ra'ayta, *see ra'y*
K. al-Aṣl, *see* Shaybānī
athar 12–17, 40–4, 53–4, 56, 125, 167–8
  see also hadith
authority statements (exempla), see *athar*

al-Balādhuri 118, 121, 150–1
Baqī b. Makhlad 36–7
al-Bayhaqī 88–90, 101, 104
books and their development 162–3, 171–81, 193–5
Brunschvig, R. 206–7
Bukhārī 189, 194
al-Bulqīnī,Siraj al-Din 83
Burton, J. 219, 218 n., 242 n.
Buṣra, the hadith of 55, 60–1, 98–9, 237–40
al-Buwayṭī 68–9, 86

canonization 163–4
casuistic writing 5–6, 45–9
cat as source of pollution, the 3, 24–6, 45, 72, 91
category creation 6–8, 45–9
Common-Link theory, the 236–41
Cook, M. 210, 212, 240 n.
Crone, P. 209–12, 220–1, 205 n., 207 n., 240 n.

Dennis of Tell Mahre 140
diya 202–7
dog as source of pollution, the 2–3, 7–9, 14–17, 30–4, 71–3, 75, 78–82, 91

Edessa 137–41

fly as source of pollution, the 91, 92–5
formulaic diction 26–7, 45–7, 52–3, 146

Goldziher, I. 20 n., 21 n., 56 n., 190 n., 198 n., 218 n., 242 n.

hadith, Prophetic 8, 12, 12–14, 21–4, 24–34, 55–6, 84–5, 90–2, 92–5, 98–100, 146–7, 218, 223–7, 227–8, 228–33, 235–41
Hawting, G. R. 215–16
Hilāl al-Ra'y 50–1, 146, 162

Ibn 'Abd al-Barr 37–8, 246
Ibn al-Faraḍī 165
Ibn Qutayba 68, 165, 177–9, 184–5, 187, 189–91, 223–7, 227–8
Ibn Waḍḍāḥ 37, 176, 185
Ibn Wahb 12–14, 172–3
Ijāza 172–3
ijtihād 226, 241–3
ikhtilāf 40, 40–4, 49, 51–2, 76, 86–7, 94–5, 125–6, 139
K. Ikhtilāf Mālik wa-'l-Shāfi'ī 87
K. Ikhtilāf Abī Ḥanīfa wa-Ibn Abī Laylā 86, 106
influences on Islamic law: Bedouin culture 202–7; Bedouinization 207; bureaucratic initatives 207–8; caliphal decrees 220–2; popular narrative 214–17; practice 198–200; the Qur'an 218–19; Roman and Jewish law 199, 209–14
isnād, defined 4
Isḥāq b. Rāhawayh 68, 227–8

Jāḥiẓ 165, 170–1, 176–7, 187, 189–91
jizya (poll-tax) 107, 116–18, 142–4, 157
jurists, their social classes 164–5, 181–5

Kabīsī, A. U. 107
kharāj 107; see *K. al-Kharāj*
K. al-Kharāj: the Arabian Peninsula 136, 154–5; basic divisions of land 110–15; Basra and Khurasan 136–7; date of composition 144–50; *iqtāʿ* 130–6; the Jazira 137–41; *kharāj* lands in the Sawad 116–24; Najrān 141–4; organization of chapters 115–16, 151–3; the *qatāʾiʿ* 124–30; its text and editions 106–7
al-Khaṣṣāf 50–1, 146–7, 159–60, 162
al-Khushanī, Muḥammad b. al-Ḥārith 165

Lévi-Provençal, E. 36, 20 n.
Løkegaard, F. 121

Maʿlā b. Manṣūr al-Rāzī 43
K. al-Mabsūt, alternative title for *K. al-Aṣl*
Mālik b. Anas 20, 167, 172, 173, 174, 183; the *Muwaṭṭaʾ* 17, 20–38, 163, 172, 219
al-Marwazī, Muḥammad b. Muḥammad 51–2, 245
mass al-dhakar 54, 54–5, 55–6, 96–8, 99–100, 237–40
mawālī 148–9, 192
Motzki, H. 194–5
K. al-Mudawwana, *see* Saḥnūn
al-Muhtadī 147–50, 157
mukhtaṣars 244–7
Mukhtaṣar of Muzanī, the *see* Muzanī
muqāsama 119–24
Muslim 189, 194
K. al-Mustakhraja min al-asmiʿa 175–6
Muzanī 69, 86; the *Mukhtaṣar* 86–103; compared with Rabīʿ 90–2, 95–6, 96–104
al-Muwaṭṭaʾ 172; *see also*, Mālik, al-Shaybānī

Neusner, J. 195, 1 n., 212 n., 213 n.

oral transmission, oral literature 161; in *adab* 170–1; in Antiquity 161–2, 195–7; integral transmission and creative reflection 188–9; the oral process, as reflected in juristic literature 166–70; and the Shuʿūbī movement 189–93; *see also* books
periodization of juristic literature 244–7
pig as source of pollution, the 71–3, 75, 78–82, 91

qirāʾa, see *ijāza*
qiyās, defined at 9; *see* analogy
Qur'an 188, 190; *see also* influences

Rabbinic culture 195–6, 209–14, 233–5
al-Rabīʿ b. Sulayman al-Muradī 68–9, 82–3, 86; *see also* Muzanī
raʾy (*arā*, *yarā*, *a-raʾayta*) 9, 12, 45–7, 52–3, 53–4, 189, 193, 218; the *aṣḥāb al-raʾy* 187–8, 223, 227–8

ṣadaqa 107; see also *ʿushr*, *zakāt*
Saḥnūn 1, 163, 169–70, 174, 182–3; the *Mudawwana* 1–19, 21, 24–8, 29–30, 52–3, 172, 175–6, 185
samāʿ 171–6
Schacht, J. 19, 21, 24, 31, 67, 82, 84, 198–9, 236, 9 n., 19 n., 20 n., 28 n., 53 n., 68 n., 106 n., 202 n., 220 n., 221 n., 241 n.
al-Shāfiʿī 67–9; contrasted with Abū Yūsuf 156; the *K. al-Umm* 69–85; in the *Mukhtaṣar* of Muzanī 86–104; the *Risāla* 224–7, 229, 231, 233, 241–3
al-Shaybānī 4, 39; the *K. al-Ḥujja* 56–7, 58–66; the *K. al-Aṣl* or the *Mabsūṭ* 4–6, 39–53; the *Muwaṭṭaʾ* of Shaybānī 55–7, 63–6, 106
Shuʿūbī movement, the 188–93
sleep as a cause of pollution 97–8, 101–4, 230, 230–3
suʾr 2, 2–4, 4–17, 45–9; *see also* water

K. Ṭabaqāt ʿulamāʾ Ifrīqiya, *see* Abū ʾl-ʿArab
al-Ṭabarī 147–50, 194
al-Ṭaḥāwī 66, 84, 228; the *Bayān mushkil al-āthār* 228–33; the *Mukhtaṣar* 245–6; the *Sharḥ maʿānī al-āthār* 235–41

Taʾrīkh al-ʿulamāʾ . . . bi-ʾl-Andalus, *see* Ibn al-Faraḍī
transmission and creativity in tension 188–93; *see also* oral transmission
transmission of culture in Antiquity, the 161–2, 195–7, 200–1, 209–14; *see also* oral transmission

umm 83; *see also* Shāfiʿī, *K. al-Umm*
ʿushr 107, 125–6, 127–30, 131, 136, 144, 154–5; see also *K. al-Kharāj*

Wansbrough, J. 23, 186–7, 216, 219, 190 n., 209 n., 218 n., 242 n.
water, its susceptibility to impurity: in the *Mukhtaṣar* of Muzanī 90–1; in the *Umm* 69–73; 74–82; see also *suʾr*
waẓīfa (*tawẓīf*) 119–24
wuḍūʾ 2, 2–4, 4–17, 24–30, 30–4, 96–8

Yaḥyā b. Yaḥyā al-Maṣmūdī 17, 20–1, 34–8

zakāt 107; see also *ṣadaqa*, *ʿushr*

CALDER Studies in Early Muslim Jurisprudence