

The Development of Systematic Thought in Early Mālikī
Jurisprudence, 8th-9th Centuries A.D.

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Abstract

By the eleventh century, the conduct of jurisprudence in the Mālikī school of law – one of four that would survive in Sunni Islam – was predicated on a legal system that comprised a particular set of sources: mainly, the positive legal rules posited by Mālik b. Anas (d. 179/795) and a few of his subsequent adherents, and *ḥadīth* and Qur'an. The structure of the legal system was one in which these sources were conceived to cohere analogically. By analogy, they could be correlated to each other and thereby systematically rationalized, and new rules to govern new cases generated from, and added to, them. This study recovers the antecedents of that system and describes the main stages of the process by which Mālikī jurisprudence acquired the systematic character of its classical form. It provides a re-assessment of Mālik's own jurisprudence and of the role of precedent and *ḥadīth* in the Medinese tradition, arguing that the origins of systematic thought in the Mālikī tradition are to be sought in Mālik's retrospective rationalizations by analogy of rules pronounced nonetheless from arbitrary considerations. I distinguish the mode of analogy that Mālik employed to this effect (*taṣhbīh*) from that which his Iraqi contemporaries and the later classical schools employed ostensibly to derive rules from sources *ab initio* (*qiyās*). Mālik, I contend, in fact opposed *qiyās* because it threatened to undermine the sufficiency of juristic discretion by imposing systematic constraints on the personal reasoning of authoritative arbiters. I show how subsequently the *Mudawwanah*, a work compiled by Mālik's ninth-century followers in the Islamic West, promoted the formation of a legal system by subjecting Mālik's teaching and his students' ramifications of it to a Ḥanafite design by which they became susceptible of analysis along analogical lines. The system implicit in the *Mudawwanah* is structurally but not yet materially classical. It remained for the Western Mālikīyah, through their encounters in the East with Shāfi'ite legal theory in the later tenth century, to absorb into the fabric of their system, which so far comprised only the positive rules of the tradition itself, the revealed sources from which, by *qiyās*, al-Shāfi'ī (d. 204/820) in the early ninth century had insisted the law be derived. As background to this theory of systematization, I also address *inter alia* the following questions, which bear in one way or another on our appreciation of Mālik's jurisprudence and/or the extent to which we may suppose it to be accessible in the recensions of the *Muwaṭṭa'*: the transmission of the vulgate in ninth-century Andalus; the reception of Mālik's doctrine in Iraq (as perceived through the *Muwaṭṭa'* of al-Shaybānī – in particular, the editorial principles that informed its composition – and the *Ḥujjah 'alá ahl al-Madīnah*); other recensions and the possibilities for a chronology of *Muwaṭṭa'āt*; representation of Mālik's doctrine in the *Ikhtilāf Mālik wa-al-Shāfi'ī*; the way in which Mālik transmitted the *Muwaṭṭa'* as an explanation of variation between its recensions.

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0 Introductory

0.1 On Systems and Rationality

A system is a configuration of more or less discrete elements that interact with one another – and, in the case of an open system, react to external input – to generate output. Since interaction is an expression of relation (the elements in and of themselves being strictly otiose and impotent to generate outcomes), the behaviour of these elements and the output contingent on their behaviour are dependent on the relations that obtain between them. In the ideal-typical case, both are perfectly calculable and predictable. There are as many possible systems as there are sets of elements and ways of structuring them: insofar as two systems diverge materially or structurally, they are to be considered distinct; insofar as they have elements or structures in common, considered analogous. On this broad definition, the quiddities of a given system – what make it a complex entity of one kind and not another – correspond to two variables: first, the material elements, or building blocks, from which it is constructed (its material component); second, the relations that obtain between those elements (its structural component).¹

¹ Legal systems are open systems. In the case of the legal systems of classical Islam, their external input consists in questions concerning rights and duties that attend actual or hypothetical situations arising in their environment. To these questions the existing elements of the system are induced to respond with solutions (their output). As an archetypal example of a closed system, we might take an algebraic system. The material component of the system in that case consists in integers; its relational component in a set of operations defined on the set of integers. The latter may be combined with members of the set to produce results, whether atomistic (other integers) or composite (e.g., by the operation of addition, an instance of the algebraic structure known as a ‘group’). In the case of certain logical systems, the former component consists in propositions; the latter, firstly, in a set of relations (represented as ‘connectives’)

By the early eleventh century, the beginning of the period I call ‘classical’, a particular set of systems – systems that regulate rights and duties – had finally crystallized under the auspices of the four surviving schools of law in Sunni Islam: Mālikī, Ḥanafī, Shāfi’ī, and Ḥanbalī, each named for a famous jurist of the later eighth or early ninth century. The conduct of jurisprudence in each of these schools was predicated on a conception of their respective systems as consisting materially in, firstly, an established corpus of positive legal rules – rules that either were thought to go back to the eponym of the school in question (its ‘patron saint’), or had grown up subsequently around devotion to his doctrine – and, secondly, a canon of revealed evidence, comprising mainly Qur’an and Prophetic *ḥadīth*, in which these, and other rules as yet unpronounced, were considered immanent. (Thus, at any rate, was the system implicit in actual practice. In the ideal conception of the system promulgated by the exponents of *uṣūl al-fiqh*, normative legal theorists, its material component comprised only the revealed evidence.²) While the revealed sources constituted a

which allow for these elements to combine and form more complex propositions; secondly, in a set of axioms; and, thirdly, certain rules of inference. The results of interaction between the material elements on the terms of the structural component are sometimes called theorems. Systems theory – a central concern of which is the definition of a system – has applications in wide-ranging fields, from biology to engineering to sociology. In the sociology of law, the work of Niklas Luhmann in particular has been influential. V. especially Chapters 2, 3, and 4 of his *Sociological Theory of Law*, which, in part, is an attempt to track the historical development of legal systems in terms of systems theory.

² V. *infra* fn. 5. It should be noted that for the most part in this study we will be concerned, as here, primarily with the principles and modes of thought that actually governed the practice of jurists (as accessible indirectly from the evidence of their practice), and only tangentially with the ideal normative principles that the exponents of *uṣūl al-fiqh* perceived ought to govern it (as accessible directly from the evidence of their theorizing). Frequently, our discussion will take on a theoretical complexion, but on such occasions (with a few exceptions) the theory being sketched should be understood to be one that seeks to describe and explain practice – generally our own theory – rather than one that prescribes it, such as those the native theorists sought to inculcate. The materials I treat as the basis of this theory of practice consist in principles that may be inferred from the evidence of practice, and it is axiomatic of this study that they be

universal canon whose authority was acknowledged by all schools of law, the stock of rules credited as authoritative by a given jurist depended on the school to which he adhered.³ It follows from my definition of a system, therefore, that properly speaking there was not just one legal system in classical Islam, but at least as many systems as there were schools.

Structurally, however, these legal systems were, broadly speaking, remarkably similar. The elements that made up their respective material components – Qur'an, *ḥadīth*, and established legal rules – were conceived as existing in a state of mutual analogical relation (that is, as related according to the likeness of their content). Moreover, the network of relations in which they cohered was thought to extend beyond the boundaries of the systems themselves into their environment – as it were, into the real world. This was the metaphysical premise corollary to the principal mechanism by which these systems were able to convert input into output – namely, inference by analogy (*qiyās*). A circumstance that arose in the real world, or in the mind of a jurist, (input) would be made to engage with the system, an analogue identified from among its material elements, and a rule to govern how one should act in that

treated as such irrespective of whether they were expressly accorded normative recognition by the practitioners themselves. For the early development of Islamic legal theory (ninth to eleventh centuries), I refer the reader to David Vishanoff's excellent recent study, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law*.

³ The statement that the authority of the revealed sources was universally recognized should be qualified by reference to fn. 5. A revealed source was generally treated as authoritative only on the condition that it confirmed, or at least did not contradict, the positive rules already decided. If a *ḥadīth* and a rule were found to be in apparent contradiction, it was usually possible to save the rule by arguing that the *ḥadīth* had been abrogated by another, by artificially harmonizing the two, or by showing its *isnād* to be defective or weak relative to that of another. It would be more precise, therefore, to say that there was unanimity with respect to their *potential* authority.

circumstance (output) inferred from the analogue. For example, if the question arose whether the sale of unprocessed wheat grain on the condition that the seller grind it into flour was permissible, an existing rule that prohibited the sale of sesame seed on the condition that the seller press it for oil might be identified as the analogue in that case on the ground that both transactions appeared to be an instance of “the sale of risk” (*bay’ al-gharar*), the end result of processing the goods being uncertain at the time of the sale in each case. The output generated by this interaction would consist in a rule prohibiting the former sale, a rule that would then be subsumed into the pre-existing system and serve as the potential basis of a future analogical inference.^{4 5}

⁴ In the terms of systems theory, the legal systems of classical Islam are, therefore, semi-autopoietic; that is, they are autopoietic inasmuch as they generate outcomes that belong to and sustain themselves, but are allopoietic inasmuch as these outcomes are not fully endogenous but rely necessarily on external input.

⁵ My intention in the foregoing is to sketch the working of these systems in broad outline. It should not be supposed that the practical implementation of the procedure I describe was a routine matter, or its results generally predictable. In a given case, there were a number of possible analogues, sometimes contradictory (or apparently so, but susceptible of harmonization). A complex set of competing considerations bore on the choice between them: for example, which aspect of the new case was relevant to determining its analogue (what its *'illah* was); the relative authority of the source that furnished the analogue (if a Qur’anic dictum, then what its relation was to a *ḥadīth* that may be understood to abrogate or modify it; if a *ḥadīth*, whether its *isnād* was sound or defective; if a positive rule, whether it was with the eponym of the school or a later adherent that it was known to originate; and so on); whether the likeness of the new case with its potential analogue was general or specific, implicit or explicit &c. However, the overriding consideration (one that should not have been a consideration at all according to the theorists) had to do with loyalty to the school tradition. The effect of loyalty to a *madhhab* on its legal system was not only material inasmuch as it guaranteed the preservation of rules already propagated by the school as legal sources, but also structural inasmuch as it meant that a jurist would tend to prioritize them as sources in the derivation of new rules (and not, say, *ḥadīth*). Most of all, the output generated by a system depended on analogical inference from that part of it that comprised rules already asserted by the school. By contrast, legal theory insisted that a new rule be deduced from the revealed evidence alone and, moreover, be deduced anew every time a question arose. Practitioners certainly responded to the demands of theory, and went to great lengths to correlate their rules with the revealed sources, but procedurally this was a secondary undertaking. The primacy of the *madhhab* manifested itself above all in the production of commentaries on the seminal works of the tradition to which a jurist adhered. On the evidence of the author’s prologue to one such commentary, the *Majmū’* of the *Shāfi’ī* jurist Yaḥyá b. *Sharaf al-Nawawī* (d. 676/1277),

Although the formative period of Islamic jurisprudence cannot be said to have culminated in a single legal system around which all schools of law were united, the systems it produced were certainly more alike than they might have been, and indeed than their precursors in the eighth and ninth centuries had been. What they had in common, as we have seen, was more structural than material. The schools of law each employed the same method – inference or extension by analogy – to derive new positive rules, but one school differed from another insofar as the set of materials to which it applied it diverged from the materials to which the other applied it. (That still today different answers will be given by different schools to the same legal question we owe to this same disparity – a disparity of sources –, not to any disagreement between them with respect to the way in which those answers relate to their sources.) On a theoretical plane, they had far more in common: there was near consensus with respect to both *how* the law ought to be derived, and *what* it ought to be derived from. Moreover, each school imagined its past in much the same way: it imagined that the corpus of positive rules that had come to form the principal basis of its jurisprudence had been derived *ab initio* according to the theoretical norms that now prevailed; that is, by analogical inference from the revealed sources. This made the gap between theory and practice much narrower in the perspective of the school than in the historical perspective uncommitted to its dogma. If the existing rules of a tradition had been considered

Norman Calder describes what this activity entailed: “One read and mastered the books of the [Shāfi‘ī] tradition in order to discover the *madhhab*, and one manipulated the diverse hermeneutical techniques that had been developed in the literary genre of *uṣūl* (and in related genres, e.g. of hadith criticism) in order to explain and justify the *madhhab*.” (Calder, ‘Al-Nawawī’s Typology of Muftīs’, at 139.) V. also Weiss, ‘The *Madhhab* in Islamic Legal Theory’, *passim*, whose title is indicative.

rooted not in revelation, but, say, in the arbitrary opinion and personal authority of an eighth-century expert (which, as the present study largely confirms, was true of the Mālikī tradition), it would have seemed to a jurist of the eleventh century a more serious violation of prevailing normative principle than in fact it did to treat them as sources in their own right. Since the texts of a tradition were thought to constitute a virtual translation of the texts of revelation, the jurists whose teaching they recorded possessed of greater perspicacity as exegetes of revelation than any of their latter-day students, it appeared that loyalty to a *madhhab* was itself an expression of loyalty to revelation. The situation that prevailed among the schools of law in the eleventh century was, therefore, one of relative unity. Notwithstanding their material differences, their respective systems were alike in two important respects: firstly, their structure and, therefore, the mechanisms by which they generated output, and, secondly, in what the authority of their material elements, sources, was thought to consist. At both these sites of commonality, the fundamental notion is that of an objective legal source; that is, a source whose content and authority is independent of the personal sympathies of the jurist who utilizes it as such. In the first case, the sources at issue are the positive rules posited in the texts of the school tradition; it was largely from these that new rules were generated by inference. In the second case, the sources are the revealed texts; it was from these, via the interpretative acumen of a venerable jurist, that the rules already posited by the school derived their authority. It will be seen that, in the history of Muslim jurisprudence, a system comprising objective sources was not always an obvious desideratum.

This study describes the earliest stages of the process by which jurisprudence in the Mālikī tradition came to acquire the systematic character of its classical form. This process was one of incremental systematization. The extent to which I consider a form of jurisprudence systematic will correspond to the extent to which it articulates a system in accordance with the definition I proposed earlier. Additionally, however, the term ‘systematic’ as I intend it connotes a notion of rationality that closely approximates Max Weber’s in his sociology of law. In the broadest sweep, across all fields of human endeavour, “conceptual rationalization” – “the kind of rationalization the systematic thinker performs on the image of the world: an increasing theoretical mastery of reality by means of increasingly precise and abstract concepts”⁶ – is for Weber a historical drive towards a world in which “one can, in principle, master all things by calculation”.⁷ Things become calculable *pari passu* as they are subsumed into a rational system; the measure of the rationality of that system – the system of which they thereby become constitutive – is the extent to which the behaviour of its elements is calculable. Thus, modern capitalism, a mode of organizing economic life, is a rational system by virtue of its dependency on processes of production that are both calculable in their own right and respond predictably to other elements of the system like supply and demand. In the case of law specifically, the ideal-typical rational system is a “gapless” system of abstract, general rules that through logical deduction can be made to yield a decision for every concrete set of circumstances. In the ideally rational case, legal decisions – arrived at

⁶ Weber, M., ‘The Social Psychology of the World Religions’ in *From Max Weber*, ed. Gerth, H. and Mills, C.W. [London: Routledge, 1948], 267-301, at 293-94.

⁷ Kim, Sung Ho, "Max Weber", *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2012/entries/weber/>>.

through the application of general rules to the concrete facts of a particular case – are perfectly predictable. Western European civil law, which developed out of a re-discovered and rejuvenated Roman law, comes nearest to this rational ideal in Weber’s historical scheme. Adjudication by means of oracles, ordeals, or other “means which cannot be controlled by the intellect” stands near the opposite extreme. “Kadi justice”, too, approaches the irrational ideal, consisting in the issue of legal decisions deriving not from the application of general rules to particular facts, but from the kadi’s “sense of equity in a given case.”⁸ ⁹ For Weber, then, a system is rational to the extent that its outcomes are objectively calculable and predictable, which is to say, replicable by iterations of an intellectual process.

I do not follow Weber in treating rationality as a contingent attribute of systems:

I take it that calculability and susceptibility of intellectual control are necessary and

⁸ Brubaker, *The Limits of Rationality*, 17. Cf. Schacht’s frequently characterizing in his *Origins* legal rules of the eighth century based on a jurist’s personal sense of equity as arbitrary and unsystematic. Elsewhere, speaking of a later period, he states that although “Islamic law is a ‘sacred law’, it is by no means essentially irrational; it was created not by an irrational process of continuous revelation but by a rational method of interpretation, and the religious standards and moral rules which were introduced into the legal subject-matter provided the framework for its structural order.” (*An Introduction to Islamic Law*, 4) In Schacht’s scheme, the law propagated arbitrarily by Muslims from the early eighth century only becomes properly Islamic once suffused with the norms of their religious tradition from the late eighth or early ninth.

⁹ Regarding legal norms, Weber posits a further distinction within the rational/irrational dichotomy. They are “substantive” on Weber’s terms when they issue from general principles belonging to an ideology external to the law itself (when the law is basically a vehicle for that ideology); they are “formal” to the extent that they rely on general principles as opposed to particular “reasons relevant in the decision of concrete cases” and to the extent that these general principles are not of a substantive character. The same applies to the mode of applying legal norms in particular cases. Thus, while “kadi justice” is substantive and irrational because its decisions are dependent on a personal sense of equity (more idiom than ideology) and are unpredictable, certain theocratic systems are substantive yet rational because they yield decisions based on a religious ideology that are predictable. European civil law is both rational and formal. (Brubaker, *The Limits of Rationality*, 16-20; Marsh, “Weber’s Mis-understanding of Traditional Chinese law”, 282-84.) I find this distinction problematic, and especially so in relation to Islamic law, and do not pursue it for the purposes of this study.

inalienable features of a system. In the ideal-typical case, the relations that obtain between the material elements of a system are precisely determinate, and consequently their behaviour and its outcomes perfectly calculable. While the processes and the output of a complex entity such as I have called a system may be more or less calculable, it partakes of the character of a system only to the extent that they are so. Thus, adjudication by ordeals, an 'irrational system' in Weber's scheme, may only be said to represent a system because its processes are indeed calculable to some degree: despite the relative unpredictability of its outcomes, its formalism does at least ensure a limitation of possible outcomes. Since calculability is already embedded in my notion of a system, it follows that Weber's rationality is as well.

In psycho-sociological terms, I regard the formation of systems as a response to a fundamental impulse to rationalize and force into coherence facts that *a priori* are discrete and disordered: systems are an expression of "the kind of rationalization the systematic thinker performs on the image of the world". In the Mālikī legal tradition, I argue that the emergence of systematic consciousness is signalled by Mālik's retrospective rationalizations of legal rules pronounced arbitrarily according to the likeness of their content; they represent attempts to confer calculability and retrospective predictability on materials that are not themselves generated by objective processes of calculation and prediction (at point of their rationalization, they represent for Mālik "the image of the world", in Weber's metaphor). These materials, legal rules, are not the *outcomes* of a system, and so are not themselves indicative of – indeed, they disconfirm – the prior existence of a system, but they are formative of a system that emerges *as* they become calculable. The later adherents of Mālik's doctrine in the West

would continue to rationalize as Mālik had done the rules he pronounced arbitrarily, but simultaneously they would absorb them into the fabric of a (nascent) system proper, capable of generating output. Systems, then, relate to Weber's rationality inasmuch as they conduce to it, and are symptomatic of a "historical drive" towards it.

It should be noted that, notwithstanding this universality of rationalization as a historical process, a given rule may only be said to be rational to the extent that it is retrospectively predictable on the terms of a *particular* system. Thus, an output rule that prohibits the sale of unprocessed wheat grain on the condition that the seller grind it into flour might only be considered rational if, firstly, the system that gives rise to it comprises existing materials that prohibit analogous instances of "the sale of risk" and, secondly, analogical coherence is in fact a feature of the system.¹⁰ If the elements of the system do not cohere analogically (as in the case of the system advocated by the Zāhirī tradition), but may only generate an output rule on the basis of a direct and literal correspondence between the input case and an existing element, we should not in the absence of such a source be able to predict an output rule at all (or rather, we should predict the absence of a rule). The same rule would therefore be irrational in that case. If a jurist issues a decision contradicting the *ḥadīth* he accumulates on the case in question (as Mālik does repeatedly), his decision should not be considered irrational for its contradiction of *ḥadīth* alone if it appeared that, notwithstanding his accumulation of the *ḥadīth*, the system on which the rule is predicated does not comprise *ḥadīth*. Rationality, then, is an attribute that attaches to a rule only in relation to a *particular*

¹⁰ These are necessary but not yet sufficient criteria. One must also suppose that the 'illah is to be identified with the element of risk in the sale.

system. The system in relation to which its rationality is to be defined I identify with that which is implicit in the reasoning of the jurist who pronounced it (mostly this will be a question of inference from his legal reasoning in general, since systems are formed, and at any rate only become evident, through iterations of process). The extent to which his reasoning is systematic will equate to the extent to which the system it implies approaches the ideal type I posited earlier. If the jurist's reasoning implies no system at all – if his decisions do not depend on any form of calculable interaction between input cases and objective sources – the rule will be considered irrational by definition.

Are we constrained, then, to measure rationality only in relative terms against particular expressions of the historical drive towards it, against particular systems? Or can we transcend this relativism and measure its progress in universal terms against multiple, successive systems, some of which conduce to greater rationality than others? Weber's historical model envisages an inexorable increase in rationality over time. On the premise I have argued for, that systems are what confer rationality, the hypothesis it commends is that systems will tend to increase over time in their capacity to rationalize; that is, they will increase both quantitatively with respect to what they make calculable (expanding materially as they do so) and qualitatively with respect to the precision with which they make it calculable (becoming structurally more cohesive as they do so).

It is obvious from the notion of a system as a response to the impulse to rationalize a particular image of the world – a certain spectrum of 'facts' deemed relevant to the task of generating a certain kind of output (consisting for Muslim jurists of the classical period, *qua* jurists, in actual and hypothetical cases astride a range of

authoritative sources) – that, inasmuch as this image expands and contracts over time in the minds of successive generations of systematic thinkers, the development of systematic thought, and therefore of rationality, cannot be charted historically without reference to the environmental pressures (socio-intellectual, social, economic, and so on) that caused it to fluctuate over time. Facts in the world evolve, as moreover do the factors that motivate rationalization and determine its scope (which facts come to be rationalized in relation to which). As they evolve, so existing systems evolve to accommodate the image of the world thus transfigured, giving rise to new systems comprising new materials and structures. It was by no means inevitable that the image of the world the classical jurists sought to rationalize through iterations of certain systematic processes should have been configured as it was. For Mālik, the image of the world that bore on the pronouncement of new rules consisted in a set of ethical concerns that could not but reflect in general terms the ethos of his time and place, but which ultimately were arbitrary and personal. It was not obvious to Mālik that the set of facts relevant to pronouncing the law ought to comprise even existing rules, let alone *ḥadīth* as well. Subsequently, the idea did take hold among his Western adherents in the early ninth century that rules ought to be rational in relation to each other, but it was not for another century and a half that the Mālikī tradition, as it conceded the rationality of rules in relation to Prophetic *ḥadīth* as a necessary criterion of their validity, embraced a legal system that came close to encompassing the image of the world that informed jurisprudence thereafter. The trajectory I sketch for the Mālikī school – one in which systems expand incrementally in scope – is therefore one that confirms (insofar as a study so narrowly focussed as this might confirm it) Weber’s perception of an increase

in rationality over time. However, it is not clear whether any one of these systems might *in itself* be said to have been more rational than another, as opposed to merely more conducive to rationality. While the capacity of a given system to confer rationality is (in conjunction with its structure) a function of what it comprises, the fact that it comprises what it does and not some other range of facts may itself be the result of irrational constraints. Thus, the transition from arbitrary jurisprudence to a legal system that comprised the rules already propagated by Mālik represents a response to the need of a certain group of jurists for a venerable authority around devotion to whose doctrine their activities might coalesce. In the absence of this sociological imperative, arbitrary jurisprudence (although it would surely have led to an increasingly fragmented legal landscape) may well have continued to suffice. Similarly, the transition in the later tenth century from a jurisprudence based largely on rules alone to one based on both rules and *ḥadīth* came about only as a response to the dominance in the East of Shāfi'ite legal theory, which the Western Mālikīyah, who had not developed a legal theory of their own, imported and superimposed on their own legal tradition. Paradoxically, then, although they confer rationality by definition, systems may at a meta-level be irrational in themselves.¹¹

¹¹ On the other hand, al-Shāfi'ī's attempt to eliminate Companion *ḥadīth* from the canon of authoritative sources, which envisions a contraction of 'the image of the world' (in breach of Weber's model), may indeed be analyzed in systematic terms: as a response to the perceived impossibility of rationalizing Companion *ḥadīth* in relation to Prophetic and the realization that for the sake of coherence one must give way to the other. (In his early period, which is attested notably by *Al-Radd 'alá Muḥammad b. al-Ḥasan* [*Al-Umm*, 9: 85-169], al-Shāfi'ī resorts almost as often as his Iraqi adversaries to Companion *ḥadīth* in justification of his arguments. It is likely, then, that his insistence in the *Risālah* on Prophetic *ḥadīth* to the exclusion of Companion (in line with the traditional dating of that text) dates only to his Egyptian period [ca. 814/198-820/204]).

Joseph Schacht's characterization of the formation of Islamic jurisprudence in terms of a trajectory from unsystematic to systematic legal reasoning represents a prominent but neglected strand of his seminal account of its origins.¹² At a fundamental level, many of his most influential contributions to the field may be anchored in that trajectory. On Schacht's paradigm, the arbitrary discretion of individual legal experts, largely constrained only by local practice and ethical sense, gradually gave way in the course of the later eighth and early ninth centuries to 'systematic' appeal to the legal sources recognized in classical Islam, mainly the Qur'ān and Prophetic *ḥadīth*. He perceived that the primary agents of the process that culminated in a systematic jurisprudence were, firstly, polemics between rival groups of scholars, which made it imperative for jurists to cite sources in support of the rules they propagated and which thereby increased the supply of *ḥadīth* reports; secondly, a theory of legal sources successfully promulgated by al-Shāfi'i (d. 204/820) in the early ninth century which brought the range of authoritative sources to within classical limits; and, thirdly, reasoning by analogy, a fundamental systematizing force that coerced legal rules into consistency with each other and with the aforesaid sources. (Analogical reasoning had been a feature of Muslim jurisprudence from its earliest stages, according to Schacht, but it was only with al-Shāfi'i's legal theory that it attained the status of a normative principle in the specific

¹² *The Origins of Muhammadan Jurisprudence*, 1950. Although Joseph Schacht nowhere expressly relates his use of the term "systematic" – ubiquitous in his *Origins* – to Weber's rationality (or otherwise offers a definition of it), he attempted to apply Weber's models and categories to the *fiqh* in an article that appeared in *Der Islam* in 1935 ('Zur soziologische Betrachtung des islamischen Rechts'). For Weber's influence on Schacht, v. also Johansen, *Contingency in a Sacred Law*, 46f., esp. 55-56.

sense of analogical *inference* of positive rules from *ḥadīth* and Qur'an.) This study will confirm Schacht's trajectory in its broadest outline; that is, it will confirm its starting point and its end point for the Islamic legal tradition in general. However, it will suggest certain important modifications for the Mālikī tradition in particular which profoundly disrupt that trajectory. The development of systematic reasoning was not so even across all traditions as Schacht supposed. A failing of Schacht's approach is his reliance on works in the Shāfi'i corpus *Al-Umm* to tell us about developments in other traditions. The result is a tendency to see the turn of the ninth century – or, the advent of Shāfi'i legal theory – as the pivotal moment in Islamic jurisprudence at large. I argue here that al-Shāfi'i's theoretical arguments did not resonate in the Mālikī tradition for another two centuries; moreover, that jurisprudence in Medina in the later eighth century remained insulated from the circumstances that provoked them.

More recently, there has emerged a strain of scholarship in the West that, in direct opposition to Schacht's paradigm, has sought to show that Mālikī jurisprudence was systematic from the outset. Historically, the leading proponents of the view that it was systematic were jurists in the classical Mālikī tradition like Ibn 'Abd al-Barr (d. 463/1070), Ibn Ruḥd al-Jadd (d. 520/1126), Abū Bakr Ibn al-'Arabī (d. 543/1148), al-Qarāfi (d. 684/1285), and al-Shāṭibī (d. 790/1288). On the dubious presumption that theirs is a reliable perspective, Umar Abd-Allāh and Yasin Dutton (though not entirely independently) have re-read the *Muwaṭṭa'* and *Mudawwanah* through the lens of the works of their medieval antecedents and have argued for a view of Mālik's legal opinions as based on a diligent evaluation of sources in a precisely calibrated hierarchy (mainly, Medinese practice and degrees of consensus in Medina). While this is certainly an

interesting exercise inasmuch as one should wish to know how Mālikī scholars of the twelfth and thirteenth centuries explained the rules propagated by Mālik according to the norms of their own time, it does represent not a credible historical approach to reconstructing legal thought in the eighth and ninth centuries.¹³ I shall refer to their arguments in the course of this study where relevant.

¹³ V. my forthcoming review of Umar F. Abd-Allah Wymann-Langraf's, *Mālik and Medina: Islamic Legal Reasoning in the Formative Period*, in 'Journal of Qur'anic Studies'.

0.2 Outline and Summary

This study comprises two main parts. The first (§§1.1-1.4) is concerned with the development of analogical reasoning in the early Mālikī tradition as a mechanism of systematization. I show that while Mālik opposed *qiyās* as a means of generating new legal rules by analogical inference from existing materials, he regularly employed another mode of analogical reasoning, *tashbīh*, to confer rationality retrospectively on rules already pronounced from other considerations. Mālik's rejection of *qiyās* bespeaks opposition to the notion that the rationality of a rule in relation to other rules and *ḥadīth* was a necessary condition of its validity; it was foreign to juristic practice in Medina, and was associated with Iraq, where *qiyās* had proved an especially effective tool of argument, allowing for the refutation of opponents' positions on grounds of their irrationality. The principal division among jurists of the later eighth century is usually thought to have been that between *ahl al-ḥadīth* (advocates of *ḥadīth*-based law) and *ahl al-ra'y* (often, 'rationalists', proponents of reliance on individual reason, though the meaning of the term is controversial). I argue that Mālik's opposition to *ra'y* is better explained by his resistance to systematic rigour than by his presumed antipathy to arbitrary reasoning (§1.1). Moreover, I suggest that the failure of the Mālikī tradition to develop a legal theory of its own, even to engage with the prevailing current of legal theory, had much to do with its failure to recognize even in principle the notion of an objective source, which for those traditions that had embraced *qiyās* was signified by the term *aṣl* (§1.2-1.3). Part 1 concludes with, and consists largely in, a close analysis of

all legal questions (*masā'il*) in the *Mudawwanah* of Saḥnūn (d. 240/854) where *qiyās* is expressly mentioned (§1.4). I find that in Saḥnūn's transmissions from Mālik's student Ibn al-Qāsim (d. 191/806-7), which form the bulk of the *Mudawwanah*, and from Ashhab (d. 204/819), another of his students, the attitude towards it is unremittingly polemical; like his teacher, Ibn al-Qāsim disdained *qiyās* because he perceived it to be antithetical to the exercise of personal discretion, which in the Medinese tradition was considered the prerogative of individual legal experts. (In Part 2 [§2.4], I consider how these experts came to be qualified as such.) Despite its continued resistance to it in the early ninth century, the Mālikī school in the Islamic West would finally embrace *qiyās* in the eleventh century as it absorbed the legal hermeneutics of the Shāfi'ī tradition from the East. I argue that the *Mudawwanah*, which in conjunction with its later commentaries continued to be used as its principal teaching text, was instrumental in facilitating the school's eventual embrace of *qiyās*. While it preserves in its transmissions of earlier material the hostility of Mālik and his students toward analogical rigour, the redactional scheme that governs its presentation of that material is paradoxically analogical. I propose that this scheme is an artefact of the Ḥanafī tradition imported into the Mālikī by Saḥnūn via his mentor, Asad b. al-Furāt (d. 213/828), himself a Ḥanafī who had studied in Iraq under al-Shaybānī (d. 189/804). The superimposition of an analogical structure on material that is resistant to being structured analogically creates certain tensions in the text that have important implications for our appreciation of its development. I conclude that the Mālikī-Ḥanafī syncretism that shaped the *Mudawwanah* facilitated the later assimilation of *qiyās* into Mālikism inasmuch as it

rendered the material supplied by Mālik's students readily susceptible of analysis along analogical lines and promoted the formation of a legal system structured accordingly.

The initial purpose of the second part of this study is to determine the extent to which the nature of Mālik's legal thought is accessible through the *Muwaṭṭa'āt*. While in Part 1 I find no evidence to suggest that the *Mudawwanah* does not faithfully reproduce positions of Mālik, what access it affords to the reasoning behind those rules is largely limited to the inferences of his students. For direct access to Mālik's jurisprudence, we should desire to have recourse to a work of his own composition. However, the very notion of 'composition' is problematic for Mālik's time, and the concept of a fixed text (as opposed to one whose nature is intrinsic to and inseparable from the forms in which it is reproduced) is an anachronism. The only 'work' ascribed to Mālik himself, *Al-Muwaṭṭa'*, survives solely in the recensions of his students, and their contents diverge considerably. Since any account of Mālik's legal thought will necessarily be based on inference from those recensions, it must first be established whether they furnish a credible basis for its reconstruction. In particular, the status of the vulgate of the *Muwaṭṭa'*, the recension attributed to Yaḥyá b. Yaḥyá al-Layṭhī (d. 234/848), has been called into question. Norman Calder has argued that not only was it not a product of Mālik's lifetime, it was not yet a product of Yaḥyá's: we owe its essential complexion, which he takes to be one of orientation towards *ḥadīth* (in contrast to the *Mudawwanah's* focus on *ra'y*), to a party of Andalusian traditionalists (advocates of *ḥadīth*-based law) in the later ninth century who, having won the support of the State in that endeavour, re-worked and added to its existing content in a manner that suppressed

its original focus on the personal opinion (*ra'y*) of Mālik. §2.1 consists in a three-part assessment of the history of its transmission in Andalus and of the socio-political pressures that may have affected its form and content. For the period after Yaḥyá until the early tenth century, I test Calder's claim by drawing, firstly, on biographical evidence that attests to the status in Andalus of the traditionalists *vis-à-vis* the state-sponsored judicial establishment which based its jurisprudence on Mālik's opinions (§2.1.1), and, secondly, on recently published evidence – a list of proposed 'corrections' to Yaḥyá's *Muwaṭṭa'* ascribed to one of its principal transmitters, Ibn Waḍḍāḥ (d. 287/900) – that attests to its form and content at mid-century (§2.1.2). I conclude, firstly, that only at the beginning of the tenth century (after the period to which Calder dates the final closure of the text) had the traditionalists, who until then had been persecuted by Mālikī judiciary, succeeded in reaching a rapprochement with their adversaries such that, if indeed they had proposed to reform its principal source-text, the establishment might have acquiesced to their proposals (§2.1.1). Secondly, I conclude from the evidence of his corrections that Yaḥyá's recension had already stabilized in the lifetime of Ibn Waḍḍāḥ both at the level of chapters (*abwāb*) and of the *ḥadīth* they comprised. Although it had yet to stabilize at the level of books (*kutub*) comprising those chapters, the text as we know it, save a probably substantial number of minor differences, should in all other respects be considered representative of that which Ibn Waḍḍāḥ and others received from Yaḥyá (§2.1.2). Moving back in time (as I do, broadly speaking, throughout this study), I consider whether Yaḥyá's involvement in the history of the recension that circulated under his name might have been formative of its content (§2.1.3). The biographical evidence attests to Yaḥyá's disagreement with positions of Mālik at several

points, yet we find at the majority of corresponding places in his recension both *ḥadīth* and Mālik's opinions reproduced as we find them in other *Muwaṭṭa'āt*. If, as Calder proposed, Yaḥyá's version had evolved to reflect the particular biases of the legal apparatus of the State (over which he evidently exercised considerable influence), we should expect such material to have been excised or re-worked. With this, we arrive at the probability that what Ibn Waḍḍāḥ and others transmitted in Yaḥyá's name – *riwāyahs* of the *Muwaṭṭa'* that were still distinguished, where they were known to have differed, in eleventh-century commentaries on that work – was representative not only of what they had received from him, but of what Yaḥyá himself had received from Mālik. If not, then, to the interventions of Yaḥyá or its later transmitters, to what do we owe the disparities between this and other *Muwaṭṭa'āt*?

In §2.2, I pull back to consider other versions of the *Muwaṭṭa'*. Firstly, I explore the possibility that differences between the recensions may be explained in terms of variation over time in Mālik's own narrations of the *Muwaṭṭa'* (§2.2.1). This is the explanation of medieval commentators, as well as of modern scholars like Umar Abd-Allāh and Yasin Dutton. In particular, that the recension of Abū Muṣ'ab (d. 242/856), who, according to the biographical evidence, was one of the last to receive the *Muwaṭṭa'* from Mālik, incorporates considerably more *ḥadīth* than any other surviving recension is frequently accounted for by the assumption that Mālik continually added *ḥadīth* to the 'work' – a presumed urtext – over his lifetime. I find no evidence to support this view. Indeed, I find in one case that his version incorporates a statement of *ra'y* from Mālik which directly contradicts the opinion that other recensions ascribe to him and which argues for a position that would seem from the *Ikhtilāf Mālik wa-al-Shāfi'i*, a

polemical treatise of the Shāfiʿī tradition, to have been the *earlier* of the two. While this does indeed confirm that what Mālik taught varied over time (as does the *Mudawwanah*), it also suggests that the traditional chronology is erroneous and that Abū Muṣʿab was in fact one of the first to receive the *Muwaṭṭaʿ* from him. At any rate, it does not seem we might hope to reconstruct the chronology of *Muwaṭṭaʿāt* by merely collating biographical data. (The model of transmission I propose subsequently for the *Muwaṭṭaʿ* [§2.3] allows us to reconcile the biographical dating with the textual evidence, and to explain variation between the recensions more generally.) Secondly, in §2.2.2, I consider the contemporary reception of Mālik’s doctrine in Iraq through the lens of the *Muwaṭṭaʿ* of al-Shaybānī and the *Ḥujjah ‘alā ahl al-Madīnah*, and, in particular, what we might glean from those texts concerning Mālik’s position *vis-à-vis* his fellow Medinese. I argue that the nature of al-Shaybānī’s *Muwaṭṭaʿ* has been roundly misconstrued; that it is neither a ‘recension’ of Mālik’s *Muwaṭṭaʿ* that aspires to reproduce comprehensively the contents of some urtext of Mālik’s (I propose ‘analects’ as a better term), nor a polemical work whose object is to refute positions of Mālik where they were known to have differed from those of the nascent Ḥanafī school. Instead, it represents an exercise in buttressing native positions by the citation of *ḥadīth* that were known through the medium of some version of Mālik’s *Muwaṭṭaʿ* (possibly al-Shaybānī’s own) to be in circulation in Medina. I show that materials are selected for inclusion in the text on the basis of their conformity to Ḥanafī positions. (*Pace* Calder, the absence of a *ḥadīth* from *Muwaṭṭaʿ al-Shaybānī* should not be taken as evidence that it was not yet in circulation, unless it might have been cited in favour of a Ḥanafī position.) Its focus is not on Mālik, but on the Medinese at large. Mālik is valued primarily as a transmitter of *ḥadīth*, and

his personal opinion is generally registered only where it agrees with the native doctrine or some aspect of it. This confirms Schacht's perception that jurists of the later eighth century were not yet divided along the lines of personal allegiance familiar from the ninth but along regional lines. That al-Shaybānī's circle was concerned primarily with the Medinese in general, and only secondarily with Mālik himself, I find to be confirmed by the *Hujjah* ('The Proof against the Medinese'). I show that previous readings of this polemical tract have proceeded from a misconception, namely, that it treats the Medinese as synonymous with Mālik, his doctrine as representative of theirs. Mālik, in fact, is thought to be just one of the Medinese. He is certainly their pre-eminent expert, but his opinion is often opposed to their doctrine and practice. The picture that emerges from the *Hujjah* is, therefore, one that undermines the postulate that Mālik's jurisprudence was based on scrupulous adherence to local practice, rather than arbitrary reason.

In §2.2.3, I assess the evidence of how the persons associated with its recensions received the *Muwaṭṭa'* from Mālik. I argue that the manner in which they did so provides the best explanation of differences between the various *Muwaṭṭa'āt* and is crucial to our understanding of the nature of what we are accustomed to hypothesize was the archetype behind them, the *Muwaṭṭa'* of Mālik. The biographical sources and the traditionalist literature on specifically the transmission of *'ilm* attest that Mālik's favoured mode of transmission was *qirā'ah* or *'arḍ*, which consisted in a student's reading out to a teacher from his written notes, or from memory, for the purposes of verification. In some cases, the student would read back what he had heard personally from the teacher on a previous occasion or earlier in the same session (*majlis*). In the

case of the *Muwaṭṭaʿ*, however, there is clear evidence that many of those who transmitted the work in Mālik's name merely read out to him what they had assembled of his teaching from other sources. (The conventional requirement that they be cited as sources could be circumvented by having Mālik authorize what they read out.) The transmitters of the *Muwaṭṭaʿ* were thereby able to exercise a very high degree of editorial control: they could choose what to incorporate and where to incorporate it (they are perhaps better described, then, as 'compilers' than 'redactors', the works they compiled better as 'compilations' than 'recensions'). Even as a hypothetical construct, 'the *Muwaṭṭaʿ*' of Mālik' is misleading to modern ears for it suggests a single archetype of which the versions familiar to us are to be construed as more or less representative. In all likelihood, Mālik himself envisaged no such archetype: 'the text' was not only fluid, its fluidity was intrinsic to its conception. It was an *oeuvre mouvante*.¹⁴ As divergent as they were, the forms in which it came to be manifest have each an equal claim to authenticity.

I conclude the second part of this study with a re-assessment of the nature of Mālik's jurisprudence, and, in particular, of the relation of *ḥadīth* to positive doctrine and of *ḥadīth* collection to juristic authority in the Medinese tradition (§2.4). The starting point of this re-assessment is the observation of a feature common to all the

¹⁴ The phrase is Paul Zumthor's, who used the term *mouvance* to describe the inherent textual mobility of anonymous (or near-anonymous) works of medieval French poetry, arguing that the modern editorial emphasis on reconstructing an urtext implied an anachronistic conception of the medieval 'work', which might pass through an indefinite series of textual states without detriment to its identity. V. Zumthor, Paul. *Essai de poétique médiévale* (Collection Poétique [Paris: Seuil, 1972]), chapter 2; also, Millett, Bella. 'Mouvance and the Medieval Author', in *Late-Medieval Religious Texts and their Transmission: Essays in Honour of A. I. Doyle*, ed. A. J. Minnis, York Manuscripts Conferences; Proceedings Series, 3 (Cambridge: Brewer, 1994), 9-20.

Muwaṭṭa'āt, namely, their combining statements of Mālik's *ra'y* with *ḥadīth* that contradict it. I document a number of cases in which the *Muwaṭṭa'āt* (corroborated by the *Ikhtilāf Mālik wa-al-Shāfi'ī*) furnish *ḥadīth* that, without exception, directly contradict the statements of Mālik's *ra'y* that follow them. From this, it follows not only that *ḥadīth* did not weigh decisively for Mālik, but he perceived there to be no conflict of interest in relating reports that were antithetical to his doctrine. In general, the rate of agreement between *ḥadīth* and positive doctrine in the *Muwaṭṭa'āt* seems to be no higher than would suggest that the agreement is incidental to a conservative milieu in which there is a normally narrow latitude for deviation from the average. If Mālik sometimes cites *ḥadīth* that conform to his doctrine, it is not because they are aligned in principle, but because a certain rate of agreement is inevitable. However, that Mālik evidently does not base his doctrine on *ḥadīth* makes a puzzle of why he is concerned to relate *ḥadīth* at all. I propose that jurists in the Medinese tradition were motivated to accumulate *ḥadīth* by the authority that knowledge of precedent was thought to confer on them, and that the exercise of this authority consisted in pronouncing the law arbitrarily, according personal discretion.

In Part 3, I argue that the structural development of the Mālikī legal system (which I consider in Part 1) went hand-in-hand with its material development (whose earliest phase I consider in Part 2). As the range of materials that the tradition considered authoritative expanded, so the structure of its legal system evolved to accommodate them, increasing in its capacity to rationalize as it did so. *Taṣhbīh*, which for Mālik was a means of rationalizing existing rules retrospectively in relation to other existing rules, became in the hands of his Western followers a means of rationalizing

new rules *ab initio* with – virtually, of deriving them from – existing rules. Subsequently, in the tenth century, as *ḥadīth* were added to the canon of authoritative sources alongside the rules of the eponym and the rules that had already been derived from them, *tashbīh* grew almost imperceptibly into *qiyās*. We can track this trajectory in relation to the shifting application of terms that denote various kinds of analogue in the early Mālikī literature. The term *shibh* or *mithl* (‘parallel case’), which in Mālik’s *tashbīh* had connoted ‘likeness’ rather than ‘origin’, was translated (irregularly) by the compilers of the *Mudawwanah* under the influence of Ḥanafism by the term *aṣl*, a term of *qiyās* which in its original meaning referred to an ‘original case’ from which a ‘derived case’ (*far’*) might be inferred. Still, however, the referents of the latter term continued in the *Mudawwanah* (so presumably in Eastern Mālikism generally) to be almost exclusively positive rules. By the end of the tenth century, as the Mālikīyah yielded to the influence of Shāfi’ism, the term *aṣl* came also to encompass sources that stood outside of the tradition like *ḥadīth* and Qur’an. With this, the assimilation of *qiyās* and of *ḥadīth* into the Mālikī legal system reached completion.

1 Early Mālikī Opposition to *Qiyās* and the Structural Reformation of Mālik's Doctrine in the *Mudawwanah*

Despite general recognition that there exists no statement that purportedly originates with Mālik himself in which the term or its cognates occurs,¹⁵ historians of Islamic law continue to assume that he employed *qiyās* as a means of deriving positive legal rules.¹⁶ I argue in what follows that Mālik himself, eponym of the Mālikī school of law, and still the early ninth-century transmitters of his doctrine in Egypt, likely rejected *qiyās* and the severe systematic discipline to which it was perceived to subject positive doctrine. I contend that *qiyās*, together with its underlying precept, the theoretical principle that systematic consistency was a necessary condition of valid legal rules, was native to Iraq, where it had developed as a tool of argument in polemics between rival groups of jurists, and was entirely foreign to the Medinese tradition to which Mālik belonged. As a social conservative, Mālik scorned it because he perceived it to be antithetical to actual practice, which paid scant regard to such consistency; as a jurist who issued opinions arbitrarily, he eschewed it for the stringency it threatened to impose on his discretion, which was guided solely by an ethical sensibility that, although also Medinese to the extent that it naturally reflected the general ethos of his milieu, was ultimately personal. Though it was in Egypt that *qiyās* found its mature expression and was elevated virtually

¹⁵ Schacht, *Origins*, 116-17; Abd-Allāh, *Ph.D.*, 209.

¹⁶ E.g., Abd-Allāh, *Ph.D.*, 234-45; Dutton, *Origins*, 68, 78, 81, 84, *et alibi*; Brockopp, *Early Mālikī Law*, 159. Aware that he himself does not use the term, Schacht is careful not to impute to Mālik the use of *qiyās* by name, but on the whole he considers Mālik's analogical reasoning to belong to the same category as that which al-Shāfi'ī and the Iraqīs call *qiyās*, albeit more primitive and systematically less developed (*v. Origins*, 311-14).

to its classical status in the later works of al-Shāfiī (d. 204/820), who had imported it from Iraq, Mālikī antipathy towards it may have endured there longer than in the Islamic West. Mālikī jurisprudence in Egypt seems to have remained insulated from – or perhaps actively resisted assimilation of – Iraqi-cum-Shāfiīite hermeneutics for at least several decades into the ninth century.¹⁷ Meanwhile, the effect of Asad b. Furāt’s (d. 213/828) influence on his student Saḥnūn (d. 240/854) was that Mālikī jurisprudence in the West, through the medium of the *Mudawwanah*, would bear the impress of his exposure to Iraqi method as a student of al-Shaybānī (d. 189/805) and Abū Yūsuf (d. 182/798). (Asad seems to have been principally a conduit of Ḥanafism, though tradition maintains that he also composed a work, containing transmissions from Ibn al-Qāsim, that Saḥnūn used as the foundation of his *Mudawwanah*.) The syncretic approach inaugurated by Saḥnūn under the influence of Asad – Mālikī in terms of positive rules, but Ḥanafite in its formal presentation of those rules and its systematic ambition – paved the way for the eventual assimilation of *qiyās* into Mālikī hermeneutics in the West. I argue that the *Mudawwanah* represents an attempt to force Mālik’s doctrine – or his students’ expressions of it – into artificial conformity with a systematic scheme that can only imperfectly accommodate its substantive content. The transmissions of Saḥnūn – whose

¹⁷ To reflect cross-influences between the nascent schools of law, I observe in this study a distinction between the terms Shāfiīite and Shāfiī, Ḥanafite and Ḥanafī &c. Shāfiīite will describe, for instance, legal theory or method that partakes of the character of the theory or method of al-Shāfiī, or of that associated with the school that bears his name, without necessarily implying – unlike the term Shāfiī – that its progenitors or practitioners define themselves by devotion to the doctrine of al-Shāfiī. For example, it will be seen that Mālikī legal theory – that is, the theory espoused by those loyal to Mālik’s doctrine – was Shāfiīite in the sense that it derived from that of the Shāfiī school. Similarly, the redactional scheme Saḥnūn imposed on the Mālikī materials supplied to him by Ibn al-Qāsim and other students of Mālik was Ḥanafite, but not Ḥanafī as it would have been if Saḥnūn himself had been committed to the doctrines of the Ḥanafī circle.

systematic line of questioning may have to some extent provoked it – preserve the disdain for *qiyās* of Mālik’s Egyptian student Ibn al-Qāsim (d. 191/806-7), but the result bespeaks an uneasy truce: on the one hand, Ibn al-Qāsim’s attitude was inimical to Saḥnūn’s ambitions insofar as he endeavoured to subject Mālik’s doctrine to a systematic treatment whose main principle was analogical; on the other hand, it may have served Saḥnūn’s interests to sustain Ibn al-Qāsim’s repudiation of *qiyās* with respect to certain rulings as a means of pre-empting the derision of hostile parties. The native practitioners of Iraqī reasoning – among them, the Kūfan schools who seem to have been the main rivals of the Mālikīyah under Aghlabid rule – would surely have been quick to blame him for what they regarded as the deficiencies of Mālik’s doctrine that resulted from its failure to meet their systematic standard. One approach was to deny that it aspired to meet that standard and to assert that it was predicated on another instead: the discretion (*istiḥsān*) of the eponym, which would yield to common sense where *qiyās* would insist on austere rationality, impervious to considerations of equity and fairness. However, for Saḥnūn to have gone so far as earlier Mālikīyah, like Ibn al-Qāsim, in rejecting *qiyās* outright would have subverted his purpose. As a hypothesis, of which the *Mudawwanah* is suggestive, I propose that the position he adopted was one of compromise: to persist in the pursuit of systematic consistency, but to accept that, where the mechanisms of analogy could not be made to retrospectively rationalize Mālik’s doctrine, it would yield to the overriding authority of the discretion of the eponym. The distinction between *qiyās* and *tashbīh*, which I argue to be a related but distinct mode of analogy utilized in both the *Mudawwanah* and *Muwaṭṭa’*, seems to articulate that compromise. Unlike *qiyās*, it will be seen that *tashbīh* is concerned not

with the derivation of rules from what others than Mālik perceived to be sources of law (mainly, *ḥadīth*, Qur'ān, and other rules already established), nor even with their posterior systematization or rationalization in relation to those sources, but with the systematization or rationalization of the rules alone in relation to each other – rules (it will be seen in Part 2) that ultimately derive their validity from the personal authority of Mālik, who pronounced them arbitrarily. To erase the appearance of systematic inconsistency in Mālik's doctrine was the task of later exegetes. The difficulties of this task were ameliorated by the increasing sophistication of techniques of *qiyās* and by the ingenuity with which they applied them. Their success in that endeavour is attested by the success of the classical fiction that Mālik himself had endorsed *qiyās* and used it to generate new legal rules from the very beginning.

The perception that Mālik fully embraced *qiyās* as a mechanism for deriving legal rules is probably owed, firstly, to uncritical reliance on classical sources,¹⁸ which, owing to its having been subsequently subsumed into Mālikī hermeneutics, misrepresented Mālik's own attitude towards it, and, secondly, to a conflation of terms whereby *tashbīh* is assumed to be equivalent to *qiyās*. Although Schacht keenly observed that the Medinese do not use the term *qiyās* to describe their analogical reasoning, he apparently attached no significance to this observation, or was at a loss to explain it, and assumed that the systematic reasoning of the Medinese was merely a “more primitive”

¹⁸ E.g., Abd-Allāh (*Ph.D.*, 234-245) resorts to the works of later Mālikīyah such as Ibn Ruṣḥd al-Jadd (d. 520/1126), Abū Bakr Ibn al-'Arabī (d. 543/1148), al-Qarāfī (d. 684/1285), and al-Shāṭibī (d. 790/1288) to tell us about “Mālik's conception of *qiyās*”. Abd-Allāh also draws frequently on Muḥammad Abū Zahrah's *Mālik*, which provides little in the way of a scholarly apparatus, but, as far as one can make out, seems to rely heavily on works of the same period.

form of that practised in Iraq.¹⁹ In due course, I will qualify this view and show that in an important sense it was in fact radically different. In the two generations after Mālik, as the law was ramified by adherents of his teaching, the practical difference between *tashbīh* and *qiyās* came increasingly to be one of extent (the extent to which analogical consistency would yield to other considerations), but it was presumably in recognition of the significance of this extent that through the late eighth and early ninth centuries the terms were still kept distinct.

1.1 Implications of Mālik's Rejection of *Qiyās*

It was Ignaz Goldziher who first stressed the inadequacy of the old assumption that Iraqi jurisprudence was distinguishable from Mālik's by its tendency to *ra'y*.²⁰ I propose that the explanation of Mālik's hostility towards Iraqi jurisprudence is to be sought specifically in his attitude to *qiyās*. The association of *qiyās* with Iraq was such that al-Shāfi'i labelled its jurists *ahl al-qiyās*.²¹ In modern scholarship, Iraqi *ra'y* has shown itself to be conspicuously resistant to precise characterization; in fact, the impulse to define the phenomenon in a way that augments its uniqueness should probably be resisted inasmuch as certain of the distinct elements that coalesce in its field of reference hardly distinguish it from the conduct of jurisprudence in other regional centres like Medina.

¹⁹ Schacht, *Origins*, 116-17, 275, 311-14.

²⁰ "It is thought that Mālik had condemned [the] justification [of Iraqi *ra'y*] and that this was typical of his Hijāzī school in contrast to the 'Irāqī trend. Consideration of Mālik's basic work, however, would not bear this out." (Goldziher, *Muslim Studies*, 2: 201-2; v. also, Schacht, *Origins*, 21, 27, 114f.)

²¹ Schacht, *Origins*, 109.

For example, it is evident from both the *Muwaṭṭaʿ* and *Mudawwanah* that Mālik relied heavily on personal preference, usually announced by the phrase *astahsinu-h* or the like. What Mālik preferred and why he preferred it varies. Later exegetes of Mālik’s reasoning sought to show that his *istiḥsān* (a technical term for juridical preference absent as such from the *Muwaṭṭaʿ*, of some importance in the *Risālah*, and now well attested in the *Mudawwanah*) was not unbridled.²² The desire to rationalize Mālik’s legal thought – to show that its outcomes were objectively calculable – led to the assertion that it had been regularly circumscribed by such theoretical principles as *sadd al-dharāʿiʿ* (the ‘obstruction’ of legal means to unlawful ends) and *al-maṣāliḥ al-mursalah* (consideration of public interests, ‘*mursal*’ because they are not to be found expressly asserted in the presumed sources of law, but are traced back [cf. *aḥādīth mursalah*] to what some later exponents of *uṣūl al-fiqh* declared to be the unstated intention of the *sharīʿah*, namely, to safeguard the welfare of mankind).²³ But even these retrospective constructs do little to distinguish his method from the *raʿy* of common definition, namely, the exercise of discretion, or “[subjective] legal opinion”,²⁴ within the constraints of “common sense”²⁵ or “rational, pragmatic and practical considerations”

²² For examples of later rationalization of Mālik’s *istiḥsān*, v. Abd-Allāh, *Ph.D.*, 250-53.

²³ For examples of cases in which the later Mālikī tradition held that Mālik had applied these principles, v. Abd-Allāh, *Ph.D.*, 262-267, 268-275. V. also Khadduri, M. “Maṣlaḥah”, and Paret, R. “Istiḥsān and Istiṣlāh” in EI². Khadduri adopts a sensible distinction between *maṣlaḥah* as a concept and as a principle or source of law. While the notion of public welfare or utility (*khayr, nafʿ*) may well have informed the decision of the caliph ʿUmar to place the land of southern Iraq (Al-Sawād) in state ownership rather than divide it among those who participated in its conquest, such *ad hoc* instances of resort to the notion, though later cited as precedents, did not establish *maṣlaḥah* as a legal principle. Al-Shāṭibī mentions al-Juwaynī (d. 478/1085) as the first to call attention to it as such.

²⁴ Jeanette Wakin/ A. Zysow, ‘Raʿy’, in EI².

²⁵ Melchert, *Formation*, 1. Common sense and precedent, as sources of law, are not mutually exclusive categories: where Mālik’s discretion operates on conflicting precedents, the basis of his choosing to follow one and not the other, otherwise arbitrary, is frequently common sense.

("rationalism")²⁶. In fact, the Zāhirī Ibn Ḥazm (d. 456/1064), whatever his polemical motivation, seems not to have been far wrong in asserting *istiḥsān* equivalent to *ra'y*,²⁷ terms that al-Shāfi'ī, indeed, uses indiscriminately.²⁸ But accepting that Mālik's jurisprudence had much in common with Iraqi *ra'y* makes a puzzle of his animosity towards it. How are we to account for it?

It might be supposed that Mālik opposed Iraqi *ra'y* for its arbitrariness. If, on the one hand, by arbitrary we mean that he rejected it for not being sufficiently grounded in *ḥadīth*, the suspicion is founded on an anachronism. It is true that its principal adversaries by the end of the eighth century,²⁹ the *ahl al-ḥadīth*, impugned *ra'y* on such grounds, arbitrariness in their perspective being synonymous with failure to base law on scripture. However, it seems to have been only later, with the growing ascendancy of their thesis and their polemics against those who resisted it, that its later negative sense (arbitrary opinion) supervened its positive sense (reasoned opinion), still dominant in Mālik's time. The *Muwaṭṭa'* and *Mudawwanah* furnish ample evidence that Mālik suffered no greater compunction for pronouncing law on arbitrary grounds than the Iraqis. Moreover, the old dichotomy between *ra'y* and Iraq on the one hand and *ḥadīth* and the Hijaz on the other has now been discredited on other grounds; it seems clear that the identification of the Hijaz with *ḥadīth* dates only from the later ninth century,

²⁶ Hallaq, *Origins and Evolution*, 74-75. Hallaq stresses that *ra'y* was no philosophical rationalism, rather, "rationalism in Islamic jurisprudence merely signifies a perception of an attitude toward legal issues that is dictated by rational, pragmatic and practical considerations."

²⁷ Ibn Ḥazm, *Al-Iḥkām fī uṣūl al-aḥkām*, ed. Shākir, Cairo: 1347, 6:16, *apud* Wakin/ Zysow, 'Ra'y', in EI².

²⁸ Schacht, *Origins*, 118, 121.

²⁹ See Melchert, *Formation*, 1 – 7, locating the split between *aṣḥāb al-ḥadīth* and *aṣḥāb al-ra'y* only at the end of the eighth century.

emerging perhaps from an attempt by moderate Basran traditionalism, devoted to Mālik, to align itself with Medina.³⁰ If, on the other hand, by arbitrary we mean capricious,³¹ we should expect to detect greater variation on the side of Iraqi opinion than Medinese, whereas in fact we see the reverse. The spectrum of Medinese opinion attested in the recensions of the *Muwaṭṭaʿ* is more diverse than the spectrum of Iraqi opinion attested in, say, the *Āthārs* attributed to Abū Yūsuf (d. 182/798) and al-*Shaybānī*. It cannot, then, have been for the mutability of its results that Mālik disapproved the Iraqi style of jurisprudence. To the contrary, it seems to have been its lack of flexibility that he deplored; in particular, its failure to yield to common sense, actual practice, and material considerations.

That some could claim Mālik for traditionalism a century after his death presupposes that his association with *raʿy*, its antithesis, was at least ambiguous enough not to preclude or vitiate the claim. How the ambiguity of Mālik's status could survive the evident importance of many of the characteristic elements of *raʿy* in his own jurisprudence is partly explained by his opposition to Iraqi *raʿy*, which by then had become axiomatic of *raʿy* in general (though it seems to have been specifically against

³⁰ The invention of a Kufan background for Ḥanafism may have been a response to this geographical claim. See Melchert, *How Hanafism*, 341 – 42, and *passim*.

³¹ The concept of arbitrariness requires some unpacking. In principle, a decision is arbitrary if it is discretionary, not circumscribed by criteria external to an arbiter's whim. But it is also a matter of degree, a decision less arbitrary the greater the remove of these criteria from the arbiter's subjective idiom. Traditionalism of the sort endorsed by Aḥmad b. Ḥanbal (d. 241/855), where the law had better remain unpronounced than be pronounced on one's own account, therefore locates itself at the far end of that spectrum, exhorting that law be based exclusively on criteria removed from the arbiter's sphere of influence. (The ambition, of course, is somewhat confounded by the inevitable arbitrariness of their interpretation). Rationalists, on the other hand, can also claim to espouse a method that mitigates arbitrariness, but theirs is a claim that rests on the independence of a system, assured only so long as an arbiter does not deviate from its purportedly objective logic.

Kufan *ra'y* that his Basran followers wished to oppose Medinese *ḥadīth*³²). In his famous epistle to Layth b. Sa'd (d. 175/791), Mālik berated the Iraqis for their upholding positions that conflicted with the consensus of his milieu;³³ privately, however, he must also have opposed them because they adopted solutions with which he disagreed on merely arbitrary grounds (common sense, material considerations). Frequently, the *Muwaṭṭa'āt* will record a Medinese precedent that Mālik's own *ra'y* contradicts but which agrees with a position of al-Shaybānī. Moreover, it will be seen that Mālik's doctrine was itself not infrequently at odds with the prevailing practice of Medina.³⁴ The alleged tendency of Iraqi jurisprudence to produce solutions that had no basis in Medinese precedent or consensus does not, then, sufficiently account for Mālik's opposition to it. At the level of method, recognition of *ra'y* as a "composite term" encompassing "various methods of legal reasoning"³⁵ is an advance on vague characterisations such as 'rationalism' for it shifts the debate on to identifying which of its elements were embraced, and which rejected, by some otherwise 'rationalist' jurists who spurned association with it. Analysis of the *Mudawwanah* will show that, for Iraqi *ra'y*, the element most inimical to Mālik's was *qiyās*.

That Mālik's disdain for *qiyās* conflicted with later orthodoxy brought it about that, generally, it was not remembered in later biography. Traces of it survive, however. For instance, Mālik was said to have told his disciples: "If [Abū Ḥanīfah] came to these

³² Melchert, 'How Hanafism', 321.

³³ *Apud* al-Fasawī, *Al-Ma'rifah wa-al-tārīkh*, 1: 696; al-Qāḍī 'Iyāḍ, *Tartīb al-madārik*, 1: 41. (*anna-ka tuftī al-nās bi-ashyā' mukhālifah li-mā 'alay-hi jamā'at al-nās 'inda-nā wa-bi-balad'-nā al-lādhī naḥnu fī-h*).

³⁴ *V. infra* §§2.2.1, 2.2.2, 2.4.

³⁵ Hallaq, *Origins*, 34, listing *qiyās*, *istiḥsān*, *sadd al-dhārā'i*, and *al-maṣāliḥ al-mursalah* as examples of these methods.

columns of yours and tried to persuade you by *qiyās* that they were wood, you would think they were wood.”³⁶ The Egyptian Mālikī Muḥammad b. ‘Abd Allāh b. ‘Abd al-Ḥakam (d. 268-69/881-83), who is said to have composed polemical works against both the Ḥanafīyah and Shāfi’īyah,³⁷ put into circulation a report depicting an exchange between al-Shaybānī and al-Shāfi’ī:

I heard al-Shāfi’ī say: Muḥammad b. al-Ḥasan [al-Shaybānī] asked me: “Which of the two is the more knowledgeable in Qur’an, our master or yours (*ṣāhib^u-nā aw ṣāhib^u-kum*)?” He meant Abū Ḥanīfah and Mālik b. Anas. I said: “In all fairness?” He said: “Yes.” I said: “I adjure you by God, who is more knowledgeable in Qur’an, our master or yours?” He said: “Your master.” He meant Mālik. I said: “Who is more knowledgeable with respect to the *sunnah* [of the Prophet], our master or yours?” He said: “By God, your master.” [I] said: “I adjure you by God, who is more knowledgeable with respect to the sayings of the Companions and the Successors, our master or yours?” He said: “Your master.” At last, I said: “There remains only *qiyās* [to consider], and there is no *qiyās* except from these things. He who does not know the *uṣūl*, from what will he derive by *qiyās*?”³⁸

The main target of this polemic is the Ḥanafīyah. It serves to elevate Mālik at the expense of Abū Ḥanīfah. But it also serves to remind the followers of al-Shāfi’ī, by recruiting their imam in Mālik’s defence, that, before he succeeded in attracting a circle of adherents in his own right, he too had been a follower of Mālik’s. The purpose of the report is to glorify Mālik, and the criteria by which it evaluates his expertise are approximately those of Shāfi’īte legal theory.³⁹ That it can only fulfill this purpose by implicitly conceding the relative deficiency of his *qiyās* is a reliable indication that still in the later ninth century,

³⁶ Ibn ‘Abd al-Barr, *Al-Intiqā’*, 269.

³⁷ Ibn Farḥūn, *Al-Dībāj*, 2: 164.

³⁸ Ibn Abī Ḥātim al-Rāzī (d. 327/938), *Kitāb al-Jarḥ wa-al-ta’dīl*, 1 (*Taqdimat al-jarḥ wa-al-ta’dīl*): 12-13.

³⁹ Other versions omit the criterion of knowledge of reports of the Successors, thus reflecting more closely Shāfi’īte theory. For references, v. fnn. 41, 42.

even in debate with their adversaries, the Mālikīyah themselves could not but acknowledge it. There are several variants of this report. In one, which is framed rather as a debate concerning which of the two was the better dialectician (*mutakallim*), al-Shāfiʿī expressly concedes Abū Ḥanīfah’s superiority in *qiyās*.⁴⁰ Other variants probably reflect embarrassment among later Mālikīyah at the report’s implication of the deficiency of Mālik’s *qiyās*. They seek to suppress or minimise it by supplementing al-Shāfiʿī’s closing remark with various vague or cryptic platitudes: “We claim for our master what you cannot claim for yours”, or “*Qiyās* did not elude our master (*lam yadhhab ‘alay-h*), but he was wary and cautious, and desired to follow the example of those who preceded him”,⁴¹ or, simply, “He had fear of [God], the Mighty and Majestic”⁴².

The discovery that the Mālikīyah came to embrace *qiyās* only at a relatively late stage also goes some way to explaining the relatively late emergence of Mālikī *uṣūl* works – Abū al-Faraj al-Layṭhī (d. 331/943) is the earliest Mālikī unequivocally credited with a work on legal theory⁴³ – and Mohammad Fadel’s observation that, when they do emerge, they seem to “owe more to al-Shāfiʿī than they do to Mālik b. Anas.”⁴⁴ In the case of *uṣūl al-fiqh*, allegiance to a particular school appears not to have manifested

⁴⁰ Ibn ‘Abd al-Barr, *Al-Intiqā’*, 56-57. Knowledge of the revealed sources is envisaged as prerequisite for dialectic instead of *qiyās*. At the conclusion of the report, al-Shāfiʿī asserts rather: “He who is more knowledgeable with respect to the Book of God and the sunnah of its apostle is superior in *kalām*.”

⁴¹ Al-Qāḍī ‘Iyāḍ, *Tartīb al-madārik*, 1:82-83; 150-51.

⁴² Dutton, *Original Islam*, 36, translating a work by the Andalusian Mālikī al-Rāʿī (d. 853/1449).

⁴³ Vishanoff, *The Formation of Islamic Hermeneutics*, 227, citing Stewart, *Islamic Legal Orthodoxy*, 33.

⁴⁴ Mohammad Fadel, “‘*Istiḥsān* is nine-tenths of the law’”, 162. V. also Vishanoff, *Formation*, 225-232.

itself in a distinct approach, such that in the thirteenth century, Mālikīyah could compose epitomes of, and commentaries on, Shāfi'ī *uṣūl* works, and vice versa.⁴⁵ Acceptance of *qiyās* and, in particular, full recognition of the concept of *uṣūl* (and its counterpart, *furū'*), which was the fundamental tool of *qiyās*, was a precondition of engagement in the field of *uṣūl al-fiqh*, by which metonym legal theory at large came to be known, probably by the tenth century.⁴⁶ Had the *aṣl* not proved to be so fertile a means of producing, and defending, Shāfi'ī and Ḥanafī doctrine in the two centuries after the *Risālah*, or the Mālikīyah succeeded in advancing an alternative method not dependent on *qiyās*, legal theory might have become known by some different appellation or, at least, the term *uṣūl al-fiqh* not been made to designate all legal theory. Likewise, that positive law (*furū'*) came to be named for a term of *qiyās* (*far'*) testifies to the ultimate triumph of that approach, first recognisable in the evidence from the later eighth century, notably in the putative debates between al-Shāfi'ī and al-Shāybānī represented in *Al-Radd 'alá Muḥammad b. al-Ḥasan*, a work of al-Shāfi'ī's early period (*qadīm*).⁴⁷ The Mālikīyah were cut off from *uṣūl al-fiqh* by their initial refusal to accord full weight to its central principle.

⁴⁵ The *Sharḥ tanqīḥ al-fuṣūl fī ikhtisār al-maḥṣūl fī al-uṣūl* of Qarāfī (d. 684/1285) is a commentary on his own epitome of the *uṣūl* work of the Shāfi'ī Fakhr al-Dīn al-Rāzī (d. 606/1209), *Al-Maḥṣūl fī 'ilm uṣūl al-fiqh*. For their part, Shāfi'īyah wrote commentaries on the *Mukhtaṣar* of Ibn al-Ḥātib (d. 646/1249), a Mālikī. V. Fadel, “‘Istiḥsān is nine-tenths of the law’: The Puzzling Relationship of *Uṣūl* to *Furū'* in the Mālikī *Madhhab*,” 163, fn. 6. There was, however, never a dogmatic imperative in any school of law requiring jurists to adhere exclusively to the doctrine or method of their own *madhhab* under threat of forfeiting their claim to allegiance to it. (V. Weiss, ‘The *Madhhab* in Islamic Legal Theory’, *passim*)

⁴⁶ See below, §1.3.

⁴⁷ *Al-Umm*, 9: 85-169.

1.2 Mis-representation of Mālik’s Analogical Reasoning in Later Mālikī Literature: An example

Although the *Mudawwanah* attributes to Ibn al-Qāsim the use of the term *aṣl*, which for its practitioners designates the key concept of *qiyās*, that of a source of positive law, it is clear that Ibn al-Qāsim still did not regard analogy, called by any name, as a generative mechanism of law. His engagement with analogy is much like Mālik’s, extending only to ascertaining the analogical status of a rule in relation to another, a rule that holds irrespective of that status or any inconsistency it betrays. It is likely, in fact, that the term *aṣl* in the *Mudawwanah* represents a Ḥanafite translation of its native Mālikī counterparts, *shibh* and *mithl*, which are terms of *tashbīh* and denote a “similar case” rather than an “original case” from which a rule has been derived. When it was that *qiyās* became fully assimilated into Mālikī hermeneutics in the West lies somewhat beyond the chronological reach of this study, possibly by as much as a century and a half. Brockopp’s observation that Ibn ‘Abd al-Ḥakam (d. Old Cairo, 214/829) displays a lack of “interest in defending his legal arguments according to the ‘roots of jurisprudence’”, *qiyās* among them,⁴⁸ suggests that even in Egypt the effect of the theoretical concepts advanced by al-Shāfi‘ī, whose principal effect was the erosion of the sufficiency of juridical preference on which Mālik’s jurisprudence had been largely dependent, was not immediate. However, it cannot have been long before the Egyptian Mālikīyah yielded to Shāfi‘ite legal theory. We have seen how in the generation after Ibn ‘Abd al-Ḥakam they would seek to glorify their imam according to its precepts.

⁴⁸ Brockopp, *Early Islamic Jurisprudence in Egypt*, 172.

Christopher Melchert has argued on the basis of biographical evidence that the Western Mālikīyah “continued to use *ra’y* in its original, positive sense far longer than jurists of the East, more exposed to traditionalist criticism.”⁴⁹ Similarly, it is likely that, through the *Mudawwanah*, they preserved Mālik’s antipathy towards *qiyās* far longer than their Eastern counterparts, more exposed to the effect of al-Shāfi’ī’s new hermeneutics. The attitude to *qiyās* in the *Mudawwanah*, which survives in the transmissions of Mālik’s students, remains largely hostile. At the same time, however, the *Mudawwanah* was instrumental in promoting the retrospective explanation and extrapolation of Mālik’s doctrine along analogical lines. While the materials provided by Mālik’s students are themselves resistant to the rigours of analogical consistency, they are forced into conformity with a redactional scheme whose main principle is analogical. I will argue that, under the influence of Ḥanafism, statements and questions of Saḥnūn in the text are in fact predicated on an enthusiasm for analogy but the material supplied by Ibn al-Qāsim and Aḥḥab disappoints his systematic ambitions (§1.4).

Our earliest published *uṣūl* work by a Mālikī is the *Muqaddimah fī al-uṣūl* of Ibn al-Qaṣṣār (Abū al-Ḥasan ‘Alī, d. 397/1007), student of al-Abḥarī (Abū Bakr, d. 375/986), with whom the formation of the Mālikī school in Iraq reached completion.⁵⁰ He seems to have made legal theory a part of its curriculum.⁵¹ By the time of Ibn al-Qaṣṣār, who “imagined the task of legal interpretation in much the same manner as al-Shāfi’ī”, there was no question that *qiyās* – alongside Quran, Prophetic *sunnah*, and consensus – was a

⁴⁹ Melchert, *Formation*, 165.

⁵⁰ Melchert, *Formation*, 176-77.

⁵¹ This is Vishanoff’s inference from the fact that many of his students were notable legal theorists. Moreover, “he helped train every known Iraqi Mālikī legal theorist of the following generation”. (Vishanoff, *Formation*, 227.)

main source of law.⁵² It was the *madhhab* of Mālik.⁵³ Abū Bakr al-Bāqillānī (d. 403/1014), unexceptionally, enjoins *qiyās* in some circumstances,⁵⁴ disallows it in others.⁵⁵ Slightly later, al-Bājī (d. 474/1081), who had studied under Shāfiī jurists in Baghdad, includes *qiyās* in the second tier of his classification of the proofs of revelation,⁵⁶ surely by then an uncontroversial ranking. In a treatise on the knowledge (*‘ilm*) and its transmission, Ibn ‘Abd al-Barr (d. 463/1070) devotes considerable energy to demonstrating that jurists had used *qiyās* since the time of the Prophet.⁵⁷ In his *Istidhkār*, a commentary on the *Muwatta’*, he often employs *qiyās* to rationalize Mālik’s doctrine, occasionally to explain disagreement with it. For instance, Mālik holds that if a man acquires, and invests, a sum of money that is less than the minimum (*niṣāb*) to which the poor-tax (*zakāt*) applies, he is liable, after a year, to pay the tax on the *whole*

⁵² Vishanoff, *Formation*, 229-30.

⁵³ Ibn al-Qaṣṣār, *Al-Muqaddimah fī al-uṣūl*, 51-52.

⁵⁴ Al-Bāqillānī, *al-Taqrīb wa-al-irshād al-ṣaghīr*, e.g., 3: 182, 195 (enjoining the specification of the general by *qiyās*). Some claimed he was Shāfiī in *fiqh*, probably on account of his Ash‘arism. (See references in editor’s introduction, 1:43.)

⁵⁵ *Op. cit.*, e.g., 3: 200 (rejecting the use of *qiyās* to supersede a general rule).

⁵⁶ M. Fadel, “‘*Istihṣān* is nine-tenths of the law’”, 163, quoting Al-Bājī, *Iḥkām al-fuṣūl fī aḥkām al-uṣūl*. To the first tier belong Qur’ān, *sunnah*, and *ijmā’*.

⁵⁷ Ibn ‘Abd al-Barr, *Jāmi’ bayān al-‘ilm wa-faḍl-h (Bāb Mukhtaṣar fī ithbāt al-muqāyasah fī al-fiqh)*, 3: 91f. Besides accumulating *ḥadīth* and established rules of the tradition to demonstrate the use of *qiyās* by various early authorities, he attributes the following statement to the Shāfiī jurist al-Muzanī (d. 264/878): “From the time of the Apostle until the present day, the jurists have employed analogies (*maqāyīs*) in jurisprudence with respect to all the rulings that pertain to their religion... They have been in agreement that the like of what is true (*naẓīr al-ḥaqq*) is true, and the like of what is false is false, so no one is permitted to deny the validity of *qiyās*, for it consists [merely] in establishing the likeness of things and in assimilating [other things (i.e. positive rules)] to them (*al-tashbīh bi-al-umūr wa-al-tamthīl ‘alay-hā*).” (*Op. cit.*, 3: 92.) In response, it is sufficient to observe that if, in fact, *qiyās* had enjoyed universal acceptance, there should have been no need to construct an argument in its favour. Ibn ‘Abd al-Barr himself says only that the jurists who recognize *qiyās* are the majority (*al-jumhūr*). He would surely have been familiar with arguments against *qiyās* for he is said to have once displayed Zāhirī tendencies, in which he resembled his friend, the famous Zāhirī jurist Ibn Ḥazm (d. 456/1064). V. Ch. Pellat, ‘Ibn ‘Abd al-Barr’, EI².

of the sum which accrues, if by then it has increased to a sum equal to or greater than the minimum.⁵⁸ This, according to Ibn ‘Abd al-Barr, is rejected by subsequent Mālikīyah.⁵⁹ The principles involved here, asserted by Mālik, are, first, that the poor-tax is only to be levied on wealth or property that exceeds the minimum threshold (in the case of gold or silver currency, 20 dinars or 200 dirhams), and, second, that the poor-tax is only to be levied on wealth or property one year subsequent to its initial acquisition.⁶⁰ Contradiction arises only if we posit a further principle, namely, that one year must elapse from the time at which *the minimum* is acquired, a principle to which Mālik evidently does not assent.⁶¹ However, both Mālikīyah and other parties⁶² consider his ruling on profit on investment (*ribḥ al-māl*) to be at variance with his decisions on gains that do not accrue from investment, such as the rule that if a man possesses a taxable quantity of gold and silver, and subsequently acquires further property independently of that possession, the later acquisition is not accounted with the original sum when he comes to pay tax on it, and is exempt from tax for a year. Its apparent incongruity is explained in terms of *qiyās*: the original case (*aṣl*) on which Mālik had based his

⁵⁸ *Muwaṭṭa’ Yahyá*, 1: 337-38.

⁵⁹ The current edition has: *lam yutābi’-hu ‘alay-hi ḡhayr aṣḡābi-h* (‘none besides his adherents followed him in this’); but *ḡhayr* is erroneous, as confirmed by the surrounding context and by Zurqānī, *Sharḥ al-Zurqānī*, 1: 145, quoting the same passage. (Ibn ‘Abd al-Barr, *Al-Istidhkār*, 9: 45.)

⁶⁰ *Muwaṭṭa’ Yahyá*, 1: 335-36. The first principle is upheld as the *sunnah* of Medinese consensus (*al-sunnah al-latī lā ikḡtilāf fī-hā ‘inda-nā*); the second is justified by the putative practice of Abū Bakr and Ibn ‘Umar.

⁶¹ He states that the reason the investor should not wait another year before paying the tax is that the minimum has accrued on the original investment in the course of the preceding year. (*Muwaṭṭa’ Yahyá*, 1: 337-38.)

⁶² Ibn ‘Abd al-Barr quotes Abū ‘Ubayd al-Qāsim b. Sallām (d. 224/839), mostly reckoned a Shāfi‘ī but sometimes a Ḥanafī, as saying: “We know of no one besides Mālik who held this. No one distinguishes between profit from investment and other gains (*fawā’id*).” While maintaining his own disagreement with Mālik’s position, Ibn ‘Abd al-Barr disputes this, claiming al-Awzā‘ī, Abū Thawr, and others agreed with Mālik. (Ibn ‘Abd al-Barr, *Al-Istidhkār*, 9: 43-45.)

derivation of the rule was different from that on which he had based his derivation of the other rules:

If the *aṣl* [of the rule that the year is counted from the time of the original acquisition] is not the minimum tax threshold (*niṣāb*), it is derived by analogy from (*qiyās^{an} ‘alá*) [the rule concerning] the offspring of livestock which are assessed against their owner’s tax allowance even when a year has not elapsed since their birth. It is as though [Mālik] held that the *aṣl* of [the rule concerning] profit from investment differed from [that of] all other gains. He makes it dependent – and God knows best – on analogical derivation (*qiyās*) from [the rule concerning] the offspring of livestock, and the power (*qūwah*) of that *aṣl* in his view.⁶³

That Mālik endorsed its exceptional status, and considered the rule on profit from investment to be analogous to the rule governing the taxation of the young of livestock, is borne out by comparison with the *Muwaṭṭa’*; however, the characterisation of the reasoning behind his adoption of the rule is an artificial retrojection. Mālik did not in fact derive one rule from the other on the basis of the analogousness of one situation to another governed by a prior rule – he did not, in other words, employ *qiyās* –, rather, in his account, their analogousness is a secondary consideration, posterior to the rules themselves, and observed merely to confer the appearance of rationality on the new rule by situating it in the context of a would-be system:

Mālik said, in the case of a man who had sheep and goats on which the poor-tax was not payable, but which, by producing young, reached a taxable number a single day before the tax collector (*al-muṣaddiq*) came to them: “If the sheep and goats, along with their offspring, reach a taxable quantity, the man must pay the tax on them. This is because the offspring of the sheep are a part of [the flock].⁶⁴ This [situation] differs from [the one in which] he has acquired them by purchase, gift (*hibah*), or inheritance. Its analogue (*mithl*) is the item of merchandise (*al-‘ard*) whose value does not reach the taxable amount and whose owner

⁶³ Ibn ‘Abd al-Barr, *Al-Istidhkā*r, 9: 44-45.

⁶⁴ See next fn.

subsequently sells it, and, by the profit that accrues, it reaches the taxable amount. Tax is then deducted from both his profit and the [original] capital. If his profit had been an [unrelated] acquisition (*fā'idah*), or an inheritance, tax would only have been due on it once a year had elapsed from the day he acquired or inherited it.”

Mālik said: “The young of sheep and goats are a part of [the flock], in the same way that profit from wealth is a part of [that wealth].⁶⁵ [The latter case], however, differs in one respect, namely, that when a man has a taxable amount of gold and silver, and then acquires a [further amount of] wealth, he leaves aside the wealth he has acquired and does not pay tax on it when he pays the tax on his original wealth, but waits until a year has elapsed over what he has acquired from the day he acquired it. If[, on the other hand,] a man has sheep and goats, or cattle, or camels – each of them in a taxable quantity –, and then acquires [another] camel, cow, sheep or goat, he pays the tax on it at the time he pays the tax on the others of its kind, if he already has a taxable amount of livestock of that particular kind.”

Mālik said: “This is the best of what I have heard about all of this.”⁶⁶

Mālik’s primary justification of the rule concerning the poor-tax on livestock, announced by the phrase “this is because”, consists in a mereological ontology whereby that which accrues from an original constituent is considered to be subsumed into the whole: the offspring of livestock pertain to the flock. What follows is a retrospective rationalization by *tashbīh* on the basis of the ontology: just as newborn are treated as part of the herd for the purposes of poor-tax, so profit that accrues from the sale of property is accounted part of the original capital. It is not merely the structure of the discussion (in which the rule is given first, the ontological justification next, and then the systematic rationalization) that gives rise to the impression that the rationalization is retrospective, but Mālik’s readiness to acknowledge, by distinguishing them in a related case (para. 2), that there are limits to which cattle are analogous to fungible wealth. If

⁶⁵ Alternatively: “The young of sheep and goats *derive from* them in the same way that profit from wealth *derives from* it” (*fa-ghidhā’ al-ghanm min-hā ka-mā ribh al-māl min-h*)

⁶⁶ *Muwaṭṭa’ Yahyá*, 1: 357-58.

Mālik had thought the analogousness of a rule to bear decisively on its validity, we should not expect to see irrationality conceded so readily.⁶⁷

Ibn ‘Abd al-Barr goes on to complain that

Mālik “determined [his position] by analogy on the basis of (*qāsa-hū ‘alá*) that which does not resemble it in respect of either its *aṣl* or [the] *far’* [of its *aṣl*]. Moreover, it is *qiyās* of an *aṣl* on the basis of [another] *aṣl*, and *uṣūl* are not made to go back to one another; rather, [it is] the *far’* of an *aṣl* [that] is made to go back to it.”⁶⁸

By the *aṣl* of Mālik’s position (*qawl*), he means rather what he supposes should be its *aṣl*, namely, the minimum tax threshold (*niṣāb*); by the *far’* of that *aṣl*, he means the rule on taxing profit on investment. He alleges that what Mālik actually uses as the *aṣl* of his ruling – the rule on taxing the young of livestock – resembles neither. His reasoning, he says, also contravenes the rules of *qiyās*, inasmuch as it involves deriving the *aṣl* of one rule from that of another: the rule on taxing the young of livestock is made the basis of the rule on taxing profit on investment, but it itself is – or should be – derived from the rule that states the minimum tax threshold. Now fully self-assured in its use of *qiyās*, Ibn ‘Abd al-Barr’s exegesis of Mālik’s thought, and of why subsequent followers rejected the rule it produced, has little to do with its primitive expression. The role it accords to the analogical status of the rule – an artefact of later assimilation of a mechanism that

⁶⁷ In Mālik’s comment “this is the best of what I have heard about all of this”, one might incline to see a secondary justification, namely, that the rules he propounds represent at least a section of Medinese opinion. Mālik had heard other opinions, but this was what personally he preferred. The sense of the phrase *qāla huwá aḥsan mā sami’tu* differs from that of *istaḥsana-h* only inasmuch as it indicates that Mālik’s preference was not without precedent. It still announces his personal preference. That jurists should have been constrained to issue opinions that fell within the spectrum of existing opinion is precisely, of course, what one expects in a conservative milieu. I argue below (v. §2.4) that Mālik’s citation of precedent should not be taken as evidence that he regarded it as a formal source of law.

⁶⁸ Ibn ‘Abd al-Barr, *Al-Istidhkāḥ*, 9: 45.

remained foreign to the nascent personal school until at least the late ninth century – is no longer one of posterior rationalization, rather it has become its first cause.⁶⁹

⁶⁹ For this question in the *Mudawwanah*, v. 1: 302-3. It should be said that, while jurists did not hesitate to say that Mālik had arrived at a position by *qiyās*, legal theorists like Ibn al-Qaṣṣār and al-Bājī, according to Vishanoff, often acknowledge that the hermeneutical principles they claim of Mālik are their own inferences. This did not prevent, however, “the outlines of Mālik’s hermeneutic” from being “reconstructed after the image of the then-dominant law-oriented paradigm”, which established itself only after Mālik’s time. The resulting reconstruction “must be understood... as a reflection of developments among Mālikī theorists, not as an accurate reconstruction of Mālik’s own thought.” (Vishanoff, *Formation*, 225-26.)

1.3 Excursus: *Uṣūl*, *farʿ*, and *uṣūl al-fiqh*

The term *aṣl* was of such importance in the history of Islamic law that it eventually gave its name metonymically to the theory behind the discipline of deriving it, *uṣūl al-fiqh*, and its counterpart, *farʿ*, to the end results of that pursuit, *furūʿ al-fiqh*, doctrines, or law positive. *Uṣūl al-fiqh* and *furūʿ al-fiqh* would become at once the names of literary genres, of the disciplines that produced those genres, and of the materials on which the conduct of those disciplines was predicated. In the latter sense, whose relation to the former senses will be shown here to be historically contingent, the terms *aṣl* and *farʿ* correspond to English ‘original case’ and ‘derived case’ denoting respectively the source on which *qiyās* is allowed to operate and the result of such an operation. By ‘parallel case’, corresponding to *mithl*, *mathal*, *shibh*, and *mushabbah*, I mean an original case that is asserted to be similar to another case, potentially, though by no means necessarily, derivable from it by *qiyās* on the strength of that similarity.⁷⁰ For al-Shāfiʿī, valid juristic disagreement arises primarily in determining which of several parallel cases should be made the original case of an analogical operation: “*qiyās* is of two kinds: the first is where the thing (i.e., the matter under consideration) is contained in the meaning of the *aṣl* – so *qiyās* in respect of it does not vary; [the second is] where the thing has

⁷⁰ The collocation of *aṣl*, *farʿ*, and *mathal* is Quranic: “Hast thou not seen how God has struck a similitude (*mathal^{an}*)? A good word (*kalimat^{an} ṭayyibat^{an}*) is as a good tree – its roots (*aṣl^u-hā*) are firm and its branches (*far^u-hā*) are in heaven” (Q. 14: 24). Cf. the ḥadīth to which Ibn al-Qaṣṣār (d. 397/1007) alludes in demonstration of the Companions’ having practised *qiyās*: “[Zayd b. Thābit] said: I had a fierce dispute with ‘Umar about grandfathers and brothers. He began to object and said: ‘How can my son’s son be my son when I am not his father?’ So I struck him a similitude (*mathal^{an}*) about that: A tree puts forth from its root (*aṣl^u-hā*) a branch (*farʿ*), and from this branch two shoots...” (*Al-Muqaddimah fī al-uṣūl*, 51)

parallels (*ashbāh*) in the *uṣūl*, in which case it is made coordinate with (*yulḥaḡu bi-*) the parallel that fits it best and most resembles it – and the practitioners of *qiyās* might disagree in respect of this.”⁷¹

Hallaq’s inference of a dearth of interest in the legal method propounded in al-Shāfi’ī’s *Risālah* through the ninth century⁷² rests mainly on a failure to recognise this sense of the term *aṣl*, which leads him to misinterpret the term *uṣūl (al-fiqh)* in the evidence he cites (mainly book titles ascribed to the period) and therefore to entirely overlook the extent to which legal theory, not just positive law, is predicated there.⁷³ In the most general, historically abstracted, sense of the term, *uṣūl al-fiqh* are the fundamentals (*uṣūl*) from which jurisprudence (*fiqh*) aspires to derive the law. But the forms they took varied over time. From the later eighth century, to which our earliest attestations belong, they could be Qur’anic dicta,⁷⁴ or authoritative reports of earlier practice.⁷⁵ But they were not always reified in word; they could also reside in abstract institutions or legal concepts,⁷⁶ or in the concept of a thing.⁷⁷ As a term of *qiyās*, *aṣl* implies that the authority of its referent is analytically independent, fundamental in the

⁷¹ *Risālah*, 479.

⁷² “Shafi’ī’s *Risālah* and the theory that it embodied had very little, if any, effect during most of the 9th century” (Hallaq, *Was al-Shafi’i the Master Architect of Islamic Jurisprudence?*, 588, and *passim*.)

⁷³ Hallaq, *Was al-Shafi’i*, esp. 588-9.

⁷⁴ Al-Shaybānī, *Aṣl*, 1: 324.

⁷⁵ For example, *Radd*, 89, confirming Melchert, *George Makdisi and Wael b. Hallaq*, 313.

⁷⁶ For example, Qudūrī asserts that the *aṣl* of all kinds of payment of the bloodwit is *kaffārah* (expiation). Camels and cash payment are merely *furū’* of that *aṣl*, a view also ascribed to Jaṣṣāṣ (d. 370/981). The *aṣl* of cash payment in particular is the compensation for destruction of property. (*Tajrīd*, 11: 5711)

⁷⁷ For example, al-Shāfi’ī in his *jadīd* holds that camels were the only *aṣl* of the bloodwit according to the Prophet’s *sunnah* (*Umm*, 7: 284; *Ḥāwī*, 12: 227) while in his *qadīm* implies that dirhams and dinars have equivalent status (*Ḥāwī*, 12: 226-7, 228; cf. *Mabṣūṭ*, 26: 76; *Radd*, 91). The view that a bird capable of flight is the *aṣl* of the rule against the slaughter of pigeons in the Ḥaram is questionably imputed to Mālik in the *Mudawwanah*. (*V. infra* 105.)

sense of not being derived: so when al-Shāfi‘ī asserts that dirhams and dinars, like the different varieties of livestock on which *zakāt* is levied, are each an *aṣl* unto itself (*aṣl fī nafsi-h*), he means that neither is susceptible of analogy with the other, that a ruling stipulating a price in dirhams is not to be derived from one that stipulates the price in dinars.⁷⁸ To a great extent, the forms that jurists were personally inclined to admit under its rubric must have depended on the position they took with regard to what constituted the raw materials for the law’s extraction and inference. So, while al-Shaybānī could regard a report of ‘Umar as the *aṣl* of a ruling (*ḥukm*),⁷⁹ such a view would be incommensurate with the narrower definition of authority that al-Shāfi‘ī eventually propounded in his *jadīd*. In the *Umm*, where a scriptural precedent is meant by the *aṣl* of a ruling, it is always, so far as I have found, a Prophetic *ḥadīth*.⁸⁰

The extension of the meaning of the term in subsequent centuries seems to reflect *taqlīd*. Where once they were the primary source materials from which *mujtahids* strove to derive the law, *uṣūl* came next to encompass the authoritative texts of a school of law – or, more narrowly, the canonical texts of its eponym – to which a later jurist needed recourse to ensure that he deduced the law in proper conformity with received

⁷⁸ *Radd*, 91.

⁷⁹ *Radd*, 9: 89. The report is the *aṣl* of his ruling that 10,000 dirhams is the price of the bloodwit. Here, in his *qadīm*, while declaring the *aṣl* of the bloodwit to be “camels in the *sunnah* of the Prophet”, al-Shāfi‘ī says that he “follow[s]... the decree of ‘Umar” when it comes to the price that, alternatively, is due in specie. (*Radd*, 9: 91) As noted by Māwardī (*Ḥāwī*, 12: 227), he effectively, therefore, posits three *uṣūl* – camels, dirhams, and dinars – only the first of which is Prophetic. In his *jadīd*, only the first of these survives. (*Umm*, 7: 284)

⁸⁰ For example, al-Shāfi‘ī denies that the expiry of the proper time for performing the *maḡhrib* prayer is to be decided by analogy with that of the *ṣubḥ* prayer; rather, its *aṣl* is the *ḥadīth* of Jibrīl from the Prophet. (*Umm*, 2: 163-4)

doctrine, or extended it by inference (*takhrīj*) from its intrinsic structures.⁸¹ Accordingly, the term *furū'* came to comprise not only the rules derived from *uṣūl* (in the earlier sense), but doctrines at large – what adherents to a master's teaching found in, or extrapolated from, his transmitted corpus. Jurists could now speak of deriving the law from books (*farra'a 'alá kutub*)⁸², just as they had once spoken of deriving it from *ḥadīth* (*farra'a 'alá aḥādīth*)⁸³, for instance. Both terms, however, retained their primitive meanings, survivals of the discipline that depended on them in that sense as fundamental hermeneutical concepts, what later became known as *uṣūl al-fiqh*. It remains to be shown when this transition took place. To judge by the evidence of book titles ascribed to the period in later sources, it may have happened sometime in the later ninth century. It seems to be what the *Shāfi'i* biographer Subkī (d. 771/1370), who had examined the contents of an early third/tenth-century title, *Jumal al-uṣūl al-dāllah 'alá al-furū'*, thought its author, Abū Rajā' al-Uswānī (d. 335/947),⁸⁴ had meant by it:

By *uṣūl*, [al-Uswānī] means the *nuṣūṣ* of al-*Shāfi'i*, in my reckoning. He mentions that he epitomised [his book] from the books of al-*Shāfi'i*, and, in it, he has excelled in abridging (*talkhīṣ*) the *nuṣūṣ*, and sometimes voiced objections (*i'taraḍa*) or expressed doubt (*naẓẓara*), as he has in the chapter on bequests:

⁸¹ In reference to an example from the *Mukhtaṣar* of al-Muzanī (d. 264/877), El Shamsy notes that “in effect, *takhrīj* on the basis of the corpus of al-*Shāfi'i*'s work involves the same method of reasoning as does *qiyās* with regard to the sacred sources of the Qur'an and the Sunna.” Although the earliest references to the term *takhrīj* are somewhat later than his generation (El Shamsy cites the *Shāfi'i* jurist Ibn al-Qāṣṣ (d. 335/946)), al-Muzanī can already be seen to regard the law, where not explicitly stated, as inherent in, and therefore in principle discoverable from, the meaning of his teacher's replies (*ma'ānī jawābāt al-Shāfi'i*). (v. El Shamsy, *Rethinking Taqlīd in the Early Shāfi'i School*, 12; cf. Hallaq, *Takhrīj and the Construction of Juristic Authority*, 320 (fn. 5), 323-25)

⁸² E.g., Ibn Surayj (d. 306/918) is said to have “*farra'a 'alá kutub Muḥammad b. al-Ḥasan*.” (Abū al-Ḥasan al-*Shayrajī* al-Faraḍī (fl. late 4th/10th c.?) *apud* *Shīrāzī*, *Ṭabaqāt al-fuqahā'*, 109)

⁸³ E.g., *Umm*, 2: 284; 3: 475.

⁸⁴ 'Ibn Abī Maryam': Hallaq has 'Ibn Maryam al-Asw[ā]nī'. I interpret '*fī al-fiqh*', as in '... '*alá al-furū' fī al-fiqh*', as belonging to Subkī's commentary, not the title. (Hallaq, *Was al-Shafi'i*, 589)

“If [a testator] bequeaths a *ba’ir* (a term denoting both a male and female camel) or a *jamal* (exclusively a male camel) to [a legatee], then [the legatee] is not to be given a *nāqah* (a female camel)’ – this is doubtful (*wa-fī-hi naẓar*).”

If he means to express doubt in relation to the [term] *ba’ir*, then the companions (*viz* subsequent *Shāfi’īyah*) have expressed the same; they regard the *naṣṣ* to be dubious or confused (*istashkalū*) on the grounds that the [sense of the term] *ba’ir* does not [there] comprise [that of] the [term] *nāqah*, and they have corrected [it] (*ṣahḥahū*) so that it should comprise it. If [on the other hand] he means [to express doubt] in relation to the [term] *jamal* as well – as would appear from his unrestricted application [of the term] (*ka-mā huwa zāhir iṭlāqī-h*) –, then this is strange, for the companions know well what is properly signified (*al-manṣūṣ*), inasfar as the [sense of the term] *jamal* does not comprise [that of] the *nāqah*, and *vice versa*.⁸⁵

In his translation of the first part of this passage, Hallaq glosses ‘*nuṣūṣ*’ as ‘doctrines’.⁸⁶ It suits his purpose to do so – he hopes to show that titles such as this, quoted in later sources, belong to works of positive law, not legal theory –, but I would think it unlikely that the term *uṣūl* ever came to mean doctrines *per se*; rather, doctrines (*furū’*) continued to be what derived from *uṣūl*. What Subkī, writing in the fourteenth century, meant by *nuṣūṣ* seems, in the light of the subsequent section (which Hallaq does not quote), to be closer to ‘primary texts’ – the canonical works of al-*Shāfi’ī*, which gave imperfect expression to his doctrine, made over into the new ‘*uṣūl*’ of the age of *taqlīd*.⁸⁷ Correction (*taṣḥīḥ*) of semantic confusion arising from an ambiguity (*shakl*) of

⁸⁵ Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfi’īyah al-kubrā*, 3: 70-1.

⁸⁶ “What is meant by *uṣūl* [in the title] are the doctrines (*nuṣūṣ*) of al-*Shāfi’ī*.... The author mentions that the work represents an abridgement of the doctrines.... In it, the author would occasionally object to these doctrines, *as he did in the chapter on bequests*” (italics and ellipses Hallaq’s) (Hallaq, *Was al-Shafi’i*, 589)

⁸⁷ Proposing a sensible distinction between independent *ijtihād* (pre-*Shāfi’ī*) and *ijtihād* within the constraints of loyalty to a *madhhab* (post-*Shāfi’ī*), Calder has offered a refinement of the binary opposition between *taqlīd* and *ijtihād* which underpinned Schacht’s assertion that ‘the gate of *ijtihād*’ closed around the start of the third/tenth century when the principle of school affiliation first took hold, thereby harmonising it, to some extent, with Hallaq’s view that the gate has never closed. (Calder, *Al-Nawawī’s Typology*, *passim*.) Though they themselves

terms is more the aspiration of the exegete of texts than of those who would seek to rectify or supplant doctrine, as intentionally expressed in texts, out of disagreement. In the *Umm*, al-Shāfiʿī had declared: “Should [the testator] say, ‘Give him a *baʿīr* or *thawr* (bull) from my property’, they (*viz* the executors) should not give him a female camel (*nāqah*) or cow.”⁸⁸ The ambiguity lay in the fact that, for subsequent Shāfiʿīyah, the term *baʿīr* could encompass both males and females while, for al-Shāfiʿī, its referent could evidently only be male. That al-Shāfiʿī had intended exclusively a male camel is plain from context, which lists the terms of various male and female animals alternately, but anonymous subsequent adherents would move to neutralize the literal absurdity of the *aṣl* by explicitly declaring that executors may transfer a camel of either sex, where a *baʿīr* is so stipulated.⁸⁹ Al-Shāfiʿī’s intention, his actual doctrine, was unambiguous, and needed no correction, but his very words were not: evidently, therefore, his successors regarded their *uṣūl*, in the new sense, as residing not so much in the former as in the latter. Although al-Shāfiʿī’s positive doctrine may in the vast majority of cases be synonymous with the literal meaning of his canonical works, the glossing of *uṣūl* as ‘positive doctrines’ (also risking a conflation with *furūʿ*) is misleading, for it obscures both the association of the later meaning with the earlier, and the analogousness of the way

probably rejected it in name, lawyers before al-Shāfiʿī also depended on *taqlīd*, a practice to which he himself was unequivocally opposed. (El Shamsy, *Rethinking Taqlīd*, 2-9.) In acknowledgement of Calder’s distinction, we might call this, somewhat oxymoronically, ‘independent *taqlīd*’, since it was not, of course, loyalty to a *madhhab* that motivated it.

⁸⁸ The current edition of the *Umm*, representing here (as frequently elsewhere) a different manuscript tradition from the one reflected in al-Muzanī’s commentary, adds “since the noun *baʿīr* and *thawr*, in the singular, do not apply to [the *nāqah* or the cow].” (*Umm*, 5: 192) This breaks the regular diction of the paragraph and looks like a later interpolation. The version al-Muzanī reproduces – based, he says, not on audition, but on a manuscript in al-Shāfiʿī’s hand – omits it. The ambiguity is not discussed in his commentary. (*Mukhtaṣar al-Muzanī*, 193-94)

⁸⁹ *Al-Ḥāwī*, 8: 628

in which later jurists utilised canonical texts to how they had brought their hermeneutics to bear on more primitive materials. Their theoretical aspect is thereby effaced.

When it was that the metonym *uṣūl al-fiqh* stabilized as the conventional designation of the discipline of legal hermeneutics is unimportant for present purposes.⁹⁰ What is significant is that its founding concept, the *aṣl*, and its correlative, the *far'*, can be seen, in al-Shāfi''s *qadīm*, al-Shaybānī's *Aṣl*, and even the *Mudawwanah*, to have been in continuous use from at least the later eighth century and through the ninth. Hallaq sees evidence of a total lack of engagement not only with the *Risālah*, but with the theory embodied in it, in his perception that the ninth century was devoid of works that might be categorised as works of *uṣūl al-fiqh*. Even at the start of the tenth century, works such as *Jumal al-uṣūl al-dāllah 'alá al-furū'* treated not, he supposes, legal theory as might be expected, but positive law. This is partly true, but, for two reasons, we cannot infer from this a lack of engagement with the legal hermeneutics adumbrated in the *Risālah* (engagement with the *Risālah* itself is a different matter). The first is that, as we have seen, although the term *uṣūl* as used in the evidence he cites may refer not to the discipline of legal hermeneutics or its basic stuff⁹¹ but to the primary texts of the eponym of the school to which subsequent jurists affiliated themselves, its usage there – in the present example, its conventional collocation with *furū'* in particular – presupposes the very theoretical consciousness from which, according to Hallaq, the

⁹⁰ Hallaq's evidence suggests that '*Uṣūl al-fiqh*' had become standard by the early tenth century. (Hallaq, *Was al-Shafi'i?*, 595.)

⁹¹ It is not clear whether Hallaq himself recognises that the term *uṣūl* may in fact refer to the 'stuff' of legal theory (i.e. *ḥadīth*, Qur'an, and other materials on which hermeneutical principles were made to operate); he seems only to acknowledge *uṣūl al-fiqh* as a literary genre and as the discipline that gave rise to that genre. (Hallaq, *Was al-Shafi'i?*, *passim*)

ninth century was entirely insulated. The second reason is that the propounding of doctrine hardly precludes engagement with the principles of its derivation. Indeed, the “hermeneutical structures described in *uṣūl* [works] have their most obvious (primary?) use in works of *furūʿ* where they function to explain, defend and justify the inherited structure of the law (the *madhhab*) or, polemically, to impugn the claims of other schools, or, discursively, to explain and assess *ikhtilāf* within the tradition.”⁹² Calder was speaking of a later period, but we have seen from the evidence presented earlier in this study that, in the formative era too, works arranged by legal topic (apparently Hallaq’s sole criterion for a work of positive law⁹³) are heavily imbued with the language and concepts of legal theory.

The *aṣl* is just one of these concepts, but in an important sense it is the most fundamental advanced in the *Risālah*. It is the concept of a premise whose truth is independently known and from which valid conclusions (doctrines) can be derived if the rules of a certain type of deduction, *qiyās*, are followed. Without it, the theoretical structure articulated in the *Risālah* is strictly vacuous, for the truth of the doctrines produced by *qiyās* – what it maintains is the only acceptable means of prosecuting *ijtihād* – is contingent on the truth of the premises, the *uṣūl*, on which it is allowed to operate. Furthermore, it was the need to define these *uṣūl* which produced what is usually claimed as al-Shāfiʿī’s historically most significant achievement, namely, a theory

⁹² Calder, *Al-Nawawī’s Typology*, 158.

⁹³ Hallaq, *Was Shafi’i?*, 588.

of authority according to which they should be restricted to Qur'an and Prophetic *sunnah*, thereby limiting the valid juristic disagreement to which we alluded earlier.⁹⁴

⁹⁴ For an example of the exegetical expression of Mālik's doctrine in the *Mudawwanah* in terms of *uṣūl*, v. *infra* 105.

1.4 Attitudes to *Qiyās* in the *Mudawwanah* and the Analogization of Mālik's Doctrine

In its vocabulary, the *Mudawwanah* presupposes a developed legal theory, which must tend to corroborate its being dated to a time later than that of the materials of the *Muwaṭṭa'* (though not necessarily that of their final ordering), which know no such vocabulary.⁹⁵ References to *qiyās* by name are, relative to its length, admittedly few in the *Mudawwanah*, but the *Muwaṭṭa'* contains none. In the following, I show that, in statements of Ibn al-Qāsim in the former work, the attitude to *qiyās*, especially where it threatens to produce solutions that conflict with practice (*sunnah*, *'amal*, *al-ma'rūf*) and juristic discretion (*istiḥsān*), is uncompromisingly averse. Though the *Muwaṭṭa'* does not know *qiyās* by name, one often cited report suggests that, even in Mālik's time, the unyielding consistency that rigorous application of *qiyās* was perceived to produce was associated with Iraq and rejected by certain Medinese.⁹⁶ It is likely, therefore, that the

⁹⁵ Besides *qiyās*, *istiḥsān* is notable for its absence in the *Muwaṭṭa'* and for its great frequency in the *Mudawwanah*. Schacht, who first noted this disparity, concluded that in a passage in which Ibn al-Qāsim "gives it as a part of Mālik's words he has put it into the mouth of his master." He supposed (correctly) that, although Mālik's reasoning was often representative of what would later be known as *istiḥsān*, he did not call it thus. (*Origins*, 118) Ibn al-Qāsim's infidelity probably amounted to misrepresenting Mālik's words, but not to misrepresenting his meaning. As a term of hermeneutics, *aṣl* is also absent from the *Muwaṭṭa'*, but occurs occasionally in the *Mudawwanah*. Its use is once spuriously ascribed to Mālik in a statement of Ibn al-Qāsim's (1: 450-51). Similarly, this reflects later exegesis of Mālik's reasoning in the light of a higher theoretical consciousness.

⁹⁶ *Muwaṭṭa' Yaḥyá*, 2: 430. The report records an exchange between Rabī'ah b. Abī 'Abd al-Raḥmān (d. 130 or 136/ 748 or 753) and the Medinese jurist Sa'īd b. al-Musayyab (d. ca. 94/ 712-3) in which the former questions the latter's allocation of twenty camels as blood money for a woman's loss of four fingers but of thirty camels for her loss of only three. Having enquired disdainfully of Rabī'ah whether he is an Iraqi, he declares that it is the tradition (*al-sunnah*). The ruling follows from the Medinese principle that the blood money of a woman is the same as that of a man until the point at which its value reaches one third of the blood money for a man's life (one hundred camels), and then becomes half of his. Ahmed El Shamsy cites the report to illustrate the Medinese attitude to Iraqi *ra'y*, and writes: "The 'Iraqi' way, then, was to subject the tradition to rigorous reasoning, seeking consistency both within the body of transmitted

attitude in the *Mudawwanah* to the type of legal reasoning known therein as *qiyās* is not merely an artefact of Ibn al-Qāsim’s transmission of Mālik’s doctrine, but rather goes back to the Medina of the latter’s own time. However, the extent of the antagonism, now exacerbated by inter-school polemics (and, in the specific case of the *Mudawwanah*, by the presence of Saḥnūn in the text), is probably new. Except in two cases – one in which the term occurs in a question of Saḥnūn,⁹⁷ another in which its use is ascribed to Aṣḥhab⁹⁸ – we find that all references to *qiyās* by name belong to statements of Ibn al-Qāsim, expressing, explaining, or extrapolating his teacher’s doctrine. Its use is never ascribed to Mālik himself. This should also dispose us to doubt (though not yet reject) the proposition that, where statements are attributed to Mālik himself in the *Mudawwanah*, they should regularly be interpreted as merely embodying that which Ibn al-Qāsim, or Saḥnūn, desired him to have said.⁹⁹

Although Mālik probably rejected *qiyās*, the *Mudawwanah*, like the *Muwaṭṭa’*, makes abundant use of simile (*tashbīh*, *tamthīl*). Accordingly, I draw a distinction between the first (which I sometimes translate as ‘analogical derivation’) as consisting

tradition and among decisions covering new cases.” (El Shamsy, *PhD.*, 24-25) I agree with El Shamsy’s characterization as far as it goes. However, it fails to recognize that the target of the report is more precisely *qiyās*, and that *qiyās* was what generated the kind of “consistency” the Medinese resisted. Al-Shāfi’ī understands *qiyās* to be what requires the opposing rule, which the Iraqis uphold – that the woman’s blood money, for all her wounds, is half that of the man’s. (*Umm*, 9:104) Schacht, who also cites the report and considers it “certainly spurious”, states that in fact Mālik’s own doctrine followed analogy, fixing the compensation for the fingers of a woman at ten camels each. He gives no reference, however, and I find no indication to this effect in the *Muwaṭṭa’*. (*Origins*, 117) The highly conventional nature of the exchange (in which the reaction of Rabī’ah ‘al-Ra’y’ to Sa’īd’s disregard for consistency is precisely what we would expect from someone who had come to acquire that epithet) should mean that the question of its historicity need not detain us.

⁹⁷ V. *infra* 110.

⁹⁸ V. *infra* 67.

⁹⁹ But v. *supra* fn. 82.

in the inference of the law on the grounds of certain relevant similarity between an original (*aṣl*) and an allegedly parallel case (*shibh*), and the second as consisting in the explication, or rationalization, of a ruling by positing its resemblance to another. In practice, however, the difference between the effect of *qiyās* and the effect of *tashbih* is not so acute as the difference between, on the one hand, deriving and justifying the law and, on the other, explicating it, for the latter usually implies a limited justification: to say that Rule B resembles Rule A, whose validity is independently known, is to say that, other things being equal, Rule B is rational. Nevertheless, the distinction is important because *tashbih* is a far weaker mechanism than *qiyās*; unlike the latter, what it cannot produce is a statement to the effect that Rule B should be the way it is *just because* Rule A is so.¹⁰⁰ While, in al-Shāfi‘ī’s legal theory, one may discover true law by proper application of *qiyās*, the only acceptable means of prosecuting *ijtihād*,¹⁰¹ the effect of *tashbih* is to provide, at the outside, supplementary justification to the extent that it rationalizes and makes a rule intelligible. For al-Shāfi‘ī, *qiyās* is primarily generative (of new rules) while, for Mālik, *tashbih* is merely corroborative (of rules that are otherwise valid – valid, primarily, because imbued with Mālik’s personal authority,

¹⁰⁰ The difference between *qiyās* and *tashbih* can be more clearly observed in the difference between their corresponding verbal forms. While the former yields *qāsa-hū ‘alá (or bi-) al-shay’*, which means ‘he derived it as an analogous conclusion from the thing’ (denominatively from *qiyās* as a technical term), the latter cannot be rendered in a way that implies derivation. *Shabbaha-hū bi-al-shay’* means only that he likened it to, or compared it with, the thing.

¹⁰¹ “[*Qiyās* and *ijtihād*] are two names for the same thing.” (*Risālah*, 477; see also, *op. cit.*, 505) The literal meaning of this statement, implying that al-Shāfi‘ī thought the two terms synonymous, is not to be pushed too far. The *Risālah* does not employ them interchangeably. Rather, he means that the proper conduct of *ijtihād* is coterminous with *qiyās*. (pace Melchert, *Formation*, 17, which also notes that *contra* al-Shāfi‘ī, others advocated the former while condemning the latter. The disagreement concerned how one should properly exercise *ijtihād*, not what the word meant.)

and, secondarily, because precedented). If *qiyās* consisted in a two-stage process in which, firstly, a jurist compared existing materials to establish their points of likeness, and, secondly, he contrived new rules on the basis of their likeness,¹⁰² then *tashbīh* may be said to have consisted in the first stage of that process alone. Maintaining this distinction has the advantage of explaining why, in Mālik's scheme, *tashbīh* is superseded by *istihsān*, while in al-Shāfi'i's, *istihsān* can *only* be exercised within the constraints of *qiyās*: it is its relative weakness that reverses the hierarchy.¹⁰³ In al-Shāfi'i's usage, however, *tashbīh* and *qiyās* are sometimes synonymous.¹⁰⁴

¹⁰² Thus we might interpret a two-part definition of *qiyās* ascribed to al-Muzanī: *al-tashbīh bi-al-umūr wa-al-tamthīl 'alay-hā*. V. *supra* fn. 57.

¹⁰³ For al-Shāfi'i, it is expertise in *qiyās* that uniquely qualifies religious scholars (*ahl al-'ilm*), as opposed to intelligent laymen (*ahl al-'uqūl*), to exercise *istihsān*: "Do you permit a man to say: 'I exercise my discretion (*astahsinu*)', [and to do so] by means other than *qiyās*?' [Al-Shāfi'i] said: 'I hold – and God knows best – that this is not permissible to anyone. The scholars – no one else – may make pronouncements, because, referring to a report (*khābar*) which they follow, they do so, in respect of that which the report does *not* concern, by analogy (*qiyās*) with the report. Were it permissible to forsake analogy, men of reason other than the religious scholars might pronounce on matters about which no report exists [solely] on the strength of preferences that occur to them (*bi-mā yaḥḍuru-hum min al-istihsān*); and yet making pronouncements on the basis of neither a report nor an analogy is inadmissible according to what I have mentioned of the Book of God and the Prophet's *sunnah*, and is also inadmissible according to [the doctrine of] analogy." (*Risālah*, 504 – 5; see also *op. cit.*, 25) One may wonder whether al-Shāfi'i, by indicating that a jurist may express a preference but only within the boundaries of *qiyās*, does not so much reject *istihsān* (as is commonly thought) as re-define it. If by *istihsān* al-Shāfi'i meant the variety practised by Mālik, the attempt at harmonisation is entirely specious, for, as I demonstrate below, the purpose of *istihsān* for Mālik consisted precisely in overriding the analogical consistency imposed by *qiyās*.

¹⁰⁴ "*Ijtihād* is only to be exercised in pursuit of an object [such as the position of the Sacred Mosque in determining the direction of prayer (497 – 503)], and this object must only [be determined] on the basis of secure knowledge (*'ayn qā'im*) – to be sought by evidence through which one endeavours to attain it – or by *tashbīh* on the basis of secure knowledge." (*Risālah*, 503 – 4) (Note that the term *'ayn* ('certain knowledge') is perhaps a pun, since it may also denote the *qiblah*, discussion of which precedes (500 – 3). In what perhaps deserves to be known as al-Shāfi'i's 'Simile of the *Qiblah*', a Muslim's exertions in seeking the true direction of prayer (*ijtihād* in the earlier general sense (Sense A)) are likened to the scholar's exertions in seeking the true law (*ijtihād* in the later technical sense (Sense B)): as the Muslim applies his powers of reason to an array of celestial and terrestrial phenomena that guide him (e.g., the sun and moon, the seas and mountains), so the scholar applies his faculties, within the proper limits of *qiyās*, to the evidence of the Qur'an and the Prophet's example. Throughout the *Risālah*, al-Shāfi'i continually

Reliance on al-Shāfi‘ī, as well as their superficial similarity, may have led Schacht to under-estimate the significance of the difference between *tashbīh* and *qiyās*. Two or three generations after Mālik, its importance in some circles was evidently still such that, as means of *ijtihād*, the traditionist al-Bukhārī (d. 256/870) could approve the former but disapprove the latter.¹⁰⁵ In terms of the material sources he holds may be subjected to it, al-Bukhārī’s view of the proper conduct of *tashbīh* is very different from Mālik’s; in structural terms, however, his conception is the same. A chapter title in his *Ṣaḥīḥ* reads: “One who compares (*shabbaha*) a known *aṣl* (*aṣl^{an} ma’lūm^{an}*) with a clarified *aṣl* (*aṣl mubayyan*) and the Prophet has clarified the ruling of both (*ḥukm^a-humā*) so that one who asks (*al-sā’il*) may understand”.¹⁰⁶ Readers expecting *tashbīh* to be configured along the lines of *qiyās* will be surprised that both the “clarified *aṣl*” and the “known *aṣl*” – which, structurally, seem to correspond to the original case (*aṣl*) and derived case (*far’*) of an operation by *qiyās* – have independent justification: the endorsement of the Prophet. With *qiyās*, only the original case has independent justification – Prophetic or

reverts to this simile as a justification of *ijtihād* (Sense B) (e.g., 22 – 25, 34 – 35, 487 – 489, 497 – 8, 500 – 3). It allows him to claim for it a Qur’anic basis: the Qur’an imposes the obligation of prayer toward the *qiblah* (Q. 2: 142-45), an obligation that often cannot be fulfilled without *ijtihād* (Sense A), therefore the Qur’an endorses *ijtihād* (Sense B). The inference (from Sense A to Sense B) looks dubious unless we accept that al-Shāfi‘ī’s premise is one of metaphysical realism, positing that legal ‘facts’, or norms, are categorically contiguous with empirical facts and discoverable along the same lines.)

¹⁰⁵ For al-Bukhārī, however, *tashbīh* and *tamthīl* were evidently not synonymous. While he approves the former as a technique of *ijtihād*, he disapproves the latter and *qiyās* alike. V. Lucas, ‘The Legal Principles of Muḥammad b. Ismā‘īl al-Bukhārī’, 296-97.

¹⁰⁶ al-Bukhārī, *Al-Jāmi‘ al-ṣaḥīḥ, Kitāb al-i’tisām, Bāb 12, apud* Lucas, ‘Legal Principles’, 296, fn. 29, 304. Lucas’s gloss of *aṣl^{an} ma’lūm^{an}*, “a [new] case that is known [to exist]” – suggesting that while the legal case is known, the ruling in that case is not and needs deriving (like the *far’* of *qiyās*) from the *aṣl mubayyan* – is affected by his interpreting *tashbīh* according to the framework of *qiyās*. The two are more different than is apparent in his account (esp. 303-10). It is clear from what follows – “and the Prophet clarified the ruling of *both* cases” – that neither the case nor the ruling is new.

Qur'anic or otherwise, depending on how eclectically the sources of law are imagined. While the version of *tashbīh* practised by Mālik disagrees with the one endorsed by al-Bukhārī insofar as it countenances justification from sources other than the Prophet (*sunnah* more generally, the personal discretion of a jurist, for example), it agrees with it insofar as it implies that the validity of Rule B cannot derive solely from its resemblance to Rule A, whose validity is independently known. Rule B must be justified independently of its relation to A. For both al-Bukhārī and Mālik, their analogousness is a posterior matter. Also striking is the difference in terminology: for al-Bukhārī, the thing to which the clarified *aṣl* stands in analogical relation is not a *far'* as it is in the case of *qiyās*, but another *aṣl*. This reflects the same idea: that, in the sense of inferring an entirely new rule from an existing rule, there is no derivation by *tashbīh*. If neither the Qur'an nor the *sunnah* of the Prophet furnishes a command, one should say 'I do not know', as the Prophet himself was said to have done when asked a question no revelation had addressed.¹⁰⁷ The law consists only of a network of *uṣūl*; there are no *furū'*, in al-Shāfi'i's sense. None of these *uṣūl* is more primary than another, but some of them may be rational for their resemblance to others in the network. Others may, in that sense, be irrational, but be no less valid. This is much the same as Mālik's conception of the structure of the law, except that in his scheme, *sunnah* more generally, and personal discretion, may make up for 'not knowing' in al-Bukhārī's sense. (The term *aṣl*, however, is anachronistic in relation to Mālik.¹⁰⁸) Like Mālik's later adherents, when it could no longer be owned without embarrassment that the antecedents venerated by their

¹⁰⁷ Lucas, 'Legal Principles', 303.

¹⁰⁸ *V. supra* fn. 82.

tradition had disparaged *qiyās*, those who wrote commentaries on al-Bukhārī's work in classical times would endeavour to show that he had, in fact, endorsed it (*qiyās* of the right kind, based on Qur'an, Prophetic *sunnah*, or consensus). *Taṣhbīh*, they said, had always been synonymous with it.¹⁰⁹

What is meant by '*qāla Mālik*' in the *Mudawwanah* requires a certain indulgence in the reader. On the one hand, it seems unlikely that the phrase should be rigorously intended to create a sustained impression of verbatim transmission. Frequent shifts in person and the mixing of direct and reported speech within the same ostensible 'quotation' are not what one would expect from redaction that strove to imply careful handling of Mālik's words. The phrase '*qawl Mālik*', especially, seems very often to signify 'Mālik's doctrine' rather than any fixed expression of it.¹¹⁰ In the *Tahdhīb* of al-Barādhī (d. ca. 438/1047), expressly an abridgement of the *Mudawwanah* and *Mukhtaliṭah* rather than a commentary,¹¹¹ the phrase '*qāla Ibn al-Qāsim*' introduces not quotation of what we find attributed to Ibn al-Qāsim in the *Mudawwanah*, but typically paraphrase, the original question-answer units of Saḥnūn-Ibn al-Qāsim truncated into a single statement which

¹⁰⁹ Lucas, 'Legal Principles', 306-7.

¹¹⁰ Its use is comparable to that of '*qawl al-Shāfi'ī*' in the *Mukhtaṣar* of al-Muzanī, which generally introduces al-Shāfi'ī's doctrine in the author's own formulation, in contrast to '*qāla al-Shāfi'ī*', which frequently announces a more or less faithful rendering of what we find in the extant *Umm*.

¹¹¹ V. the author's introduction, al-Barādhī, *Tahdhīb*, 1: 167-68. The colophon gives 372/983 as the year in which the work was completed. The author's *isnād* indicates that the materials on which his abridgement is based were transmitted to him from Saḥnūn by Abū Bakr b. Abī 'Uqbah (d. 369/980) through the former's student Jabalah b. Hammūd (d. 299/912), a famous ascetic. As for the *Mudawwanah* and *Mukhtaliṭah*, Muranyi's view is that they are distinct works, similar in content but different in structure, the latter a collection of *masā'il* going back to Saḥnūn. (Muranyi, *Die Rechtsbücher des Qairawāners Saḥnūn b. Sa'īd*, Chap. 1.)

it precedes.¹¹² To judge by quotations in the *Nawādir* of Ibn Abī Zayd (d. 386/996),¹¹³

which often presuppose the received text of the *Mudawwanah* but do not scrupulously

¹¹² See below fn. 114 for an example.

¹¹³ The *Nawādir* is neither a commentary on, nor an abridgement of, the *Mudawwanah*. Despite its express purpose – to synthesize what is extraneous to the *Mudawwanah* (v. *infra*) –, it does, however, quote from it indirectly, mainly in paraphrase, from other works. One such work is a *kitāb Muḥammad* (often thus identified in the text), corresponding, I propose, to one of the books of Saḥnūn’s son Muḥammad (d. 256/870) which are cited as primary sources in the author’s introduction (v. *infra*). Although the *isnāds* attached to them bypass Saḥnūn himself, its transmissions from Ibn al-Qāsim are recognizably those of the *Mudawwanah* for they preserve *in situ* the statements of other authorities like Aṣḥhab, which are the interpolations of its compiler. (V., e.g., 5: 375.) However, the recension from which Muḥammad extracted them seems to have been different from the one on which the current edition is based. (V. fn. 120.) Typically, Muḥammad’s comments follow quotations of the *Mudawwanah* in his paraphrase, just as al-Muzanī’s comments, in his more successful *mukhtaṣar*, follow quotations of the *Umm* in his paraphrase. It looks, therefore, much like an abridgement of the *Mudawwanah* – surely one of the earliest – and, to the extent that al-Muzanī’s *Mukhtaṣar* is such, also a commentary. It may correspond to that named elsewhere in the text as the *Kitāb al-Sharḥ* (Muranyi, *Materialien zur mālikitischen Rechtsliteratur*, 77).

The *Nawādir* is a compilation of materials from earlier works, many of which are either no longer extant, remain to be discovered, or survive only in fragments. An important exception is the *‘Utbīyah*, which is substantially reproduced in *Al-Bayān wa-al-Taḥṣīl* of Ibn Ruṣḥd (Muḥammad b. Aḥmad, d. 520/1126). Others – the Minor and Major *Mukhtaṣars* of Ibn ‘Abd al-Ḥakam (‘Abd Allāh, d. 214/829), studied by Brockopp in mss. (“The Minor Compendium of Ibn ‘Abd al-Ḥakam”; *Early Mālikī Law*) – have only recently been brought to our attention and their relation to the Mālikī canon of later centuries is still obscure. Scholarship on the *Nawādir* itself, the first complete edition of which was published in 1999 (an edn. of the chapter on *jihād* preceded: von Bredow, *Der heilige Krieg (Ġihād)* [1994]), has hardly advanced beyond identifying these works (Muranyi, *Materialien*, 70 – 112 [1984]). They are listed in Ibn Abī Zayd’s introduction (which actually appears under the rubric of the first chapter) as follows: (1) “the book of Muḥammad b. Ibrāhīm Ibn al-Mawwāz” (d. 269/882-83) (= *Al-Mawwāzīyah*?); (2) “*Al-Kitāb al-Mustakhraj min al-Asmī‘ah*, extracted/derived by al-‘Utbī (*istikhrāj al-‘Utbī*)” (the Cordovan, Abū ‘Abd Allāh Muḥammad al-‘Utbī, d. 255/869, student of Saḥnūn and Aṣḥab) (= *Al-‘Utbīyah* [as, indeed, it is commonly identified in the main text], or *Al-Mustakhrajaḥ*); (3) “the books named ‘*Al-Wāḍiḥah*’, to which is added ‘*Al-Samā*’, ascribed to Ibn Ḥabīb” (‘Abd al-Malik, d. Cordoba, 238/853); (4) “the books named ‘*Al-Majmū‘ah*’ ascribed to Ibn ‘Abdūs” (Muḥammad b. Ibrāhīm, of Qayrawān, d. 260/874); (5) “the law books (*al-kutub al-fiqhīyah*) compiled by Muḥammad b. Saḥnūn” (of Qayrawān, son of the *Mudawwanah*’s compiler, d. 256/870); and (6) “the *Mukhtaṣar* of Ibn ‘Abd al-Ḥakam” (*Nawādir*, 1: 10, 14). To these six, Muranyi adds four others from citations in the text (*Materialien*, 83 – 85).

Though it remains for future research to tell us how closely the work measures up to its self-description, Ibn Abī Zayd’s introduction to the *Nawādir* gives us an idea of his conception of its place in the Mālikī canon and of its relation to the *Mudawwanah*. It is addressed – or, projected as being so – to the work’s unidentified commissioner, who, complaining of the proliferation of legal anthologies (*dawāwīn*), has requested that, from other source-books (*ghayrī-hā min al-ummaḥāt*), he collect rare and exceptional cases (*al-nawādir*) and cases that

transmit its wording, paraphrase was also what the authors of the earliest commentaries on the *Mudawwanah*, no longer extant in their original form, intended by the phrase. (Alternatively, the paraphrase is the work of Ibn Abī Zayd, who rendered into new form what his antecedents had quoted more accurately. Most likely, however, the text is the result of a gradual process, one generation’s formulation refining that of the previous, and so on.) ‘*Qāla Mālik*’ in the *Mudawwanah* itself may reflect no greater pretensions to formal accuracy than ‘*qāla Ibn al-Qāsim*’ in the works of its devotees. On the other hand, instances of close correspondence between quotations of Mālik – ostensibly an integral feature of Ibn al-Qāsim’s replies to Saḥnūn – and the *Muwaṭṭaʿa*’ suggest that what is intended is not invariably Mālik’s doctrine in his student’s paraphrase.¹¹⁴ As a

are additional to those contained in the *Mudawwanah* itself (*al-ziyādat ‘alā mā fī al-Mudawwanah*). He is also charged with elucidating difficulty and disagreement (*sharḥ mushkil... wa-ikhtilāf*), with abridging the wording in pursuit of the meaning (*ikhtisār min al-lafẓ fī ṭalab al-mānā*), and with eliminating repetition. The ambition is that the result “be a book that brings together what is dispersed throughout these anthologies (*viz* 1-5 above [6 is mentioned later]) – useful information (*fawāʿid*), lesser-known legal questions (*gharāʾib al-masāʾil*), and meanings additional to what is in the *Mudawwanah* – and that, together with the *Mudawwanah* and its abridgement (*mukhtaṣar-hā*), it may suffice whomever combines the two.” (1: 5, 11) It is intended, therefore, to synthesize an increasingly profuse and unmanageable body of texts, containing doctrine that supplements that of the principal source-book, as well as much repetition. The identity of the abridgement to which he refers is uncertain. It may be the *Mukhtaṣar al-Mudawwanah* attributed to Ibn Abī Zayd himself (EI², s.v. ‘Ibn Abī Zayd al-Ḳayrawānī’, possibly the work of the same title attributed to his father [GAS, 3: 152]), which might explain why he does not say whose *mukhtaṣar* it is, when surely there was as yet no definitive abridgement recognizable from that title alone.

¹¹⁴ Systematic comparison of quotations of the *Muwaṭṭaʿa*’ in the *Mudawwanah* with its known recensions should advance our understanding of the latter’s redaction. I have noticed instances of fairly close correspondence with the Yaḥyá recension (e.g., *Mudawwanah*, 3: 222-23, ll. 26-27, ll. 1-2, cf. *Muwaṭṭaʿa*’, 2: 201-2, nn. 1958-1960; *Mudawwanah*, 3: 284, ll. 13-16, cf. *Muwaṭṭaʿa*’ Yaḥyá, 2: 143, n. 1815; *Mudawwanah*, 4: 222, ll. 5-7, cf. *Muwaṭṭaʿa*’ Yaḥyá, 2: 253, nn. 2083-84), but Yaḥyá’s is not the most obvious candidate for the basis of quotations in the *Mudawwanah*. Saḥnūn is more likely to have been acquainted with that of ‘Alī b. Ziyād (d. 183/799), a fragment of whose recension survives and has been published (‘Alī b. Ziyād al-Tūnisī, *Qit‘ah min Muwaṭṭaʿa Ibn Ziyād*, ed. Muḥammad al-Shadhilī al-Nayfar (Tunis, 1978, and Beirut, 1980)). A recension of Ibn al-Qāsim himself is identified in MS (GAS, 1: 460). If it emerges that Ibn Ziyād’s and not Ibn al-Qāsim’s is the basis of quotations in the *Mudawwanah*, the textual layer they constitute

hermeneutical tool for the reading of the *Mudawwanah*, the concept of a spectrum ranging from ‘thin’ to ‘thick’ interpretation of Mālik’s doctrine – the text migrating sometimes imperceptibly from one end to the other – seems apposite. At the thinnest end, we would place verbatim quotation of Mālik, merging into expressions of what Mālik said where the form of the words is changed but their essential meaning preserved, merging into re-formulations of his words where the meaning is altered inadvertently, merging into plain exegesis, and, finally, at the thickest end, into the extension of Mālik’s doctrine on the basis of the meaning that is perceived to inhere in its existing parts. Where it is that Saḥnūn’s ordering of the material from Ibn al-Qāsim, and his questions to him, should be located on that spectrum is a question my analysis will enable us to answer with some precision. In general, I assume that the text does not purport to retrieve the *ipsissima verba* of a historical interrogation of Mālik by his student Ibn al-Qāsim (d. 191/806-7), but rather presents the jist of Mālik’s teaching in the latter’s paraphrase, edited by Saḥnūn (d. 240/854), the text’s primary, but possibly not final, redactor.¹¹⁵ A comprehensive examination of the effect of this process of

would seem not to have originated with Ibn al-Qāsim himself, rather incorporated by Saḥnūn (or some later North African).

¹¹⁵ For Saḥnūn’s primary sources, see Muranyi, *Die Rechtsbücher des Qairawāners Saḥnūn b. Sa’īd*, Chap. 1. In addition to the materials he transmits from Mālik’s student Ibn al-Qāsim, Muranyi supposes Saḥnūn supplies other early materials (as well as his own commentary), but rejects the notion that transmissions from Ibn al-Qāsim by Asad b. Furāt (d. 213/ 828), student of both Mālik and Ibn al-Qāsim, feature significantly in the *Mudawwanah*’s composition (5 – 11). For its transmission through the third and fourth Islamic centuries in North Africa and Spain, see *op. cit.*, Chaps. 2 and 3, suggesting carefulness and accuracy of transmission. On the other hand, the order of materials in the *Mudawwanah* can be no earlier than the later third/ninth century when they separated out from those of the *Mukḥṭaliṭah* (122), and the printed edition is based on Moroccan manuscripts, reflecting probably what had stabilized by the late fifth/eleventh century and inferred to be unrepresentative of the text’s broader manuscript tradition on the basis of their marginalia being uncharacteristically few (141). The outstanding implication of Muranyi’s study, however, is that the text is substantially authentic in the sense that its

transmission and redaction on the fidelity of its content to Mālik's actual doctrine is beyond the scope of this study. However, it should be said that the question whether its authors and/or redactors misrepresent Mālik's doctrine is best parsed as two separate hypotheses: first, that they advance positions in Mālik's name which conflict with those he himself professed, and, second, that they elaborate the law beyond the point at which he ceased to express it. Since, by the absence of other materials satisfactorily early, we are constrained to test both hypotheses by comparison of the *Mudawwanah* with the *Muwaṭṭa'*,¹¹⁶ and the latter does not allow for inference of a complete account of Mālik's doctrine, it is doubtful that the second hypothesis can be adequately verified. However, the internal evidence of the text, especially Ibn al-Qāsim's frequent denials that he had heard Mālik pronounce on a question,¹¹⁷ subverts the impression that the phrase '*qāla Mālik*' regularly introduces merely what Ibn al-Qāsim believed Mālik would surely have said had a question been posed to him. Moreover, Ibn al-Qāsim's readiness to admit to a position being his own rather than Mālik's,¹¹⁸ or to its being an extension of Mālik's,¹¹⁹ must speak against the suggestion that he merely seeks authority for his own doctrine by falsely ascribing it to his teacher. Furthermore, there are instances where, following instead another Medinese authority or asserting his own, he adopts a

constituent materials really do go back to the turn of the second/eighth century, albeit that the order in which they have reached us is owed to later redaction.

¹¹⁶ Where they record Mālik's doctrine (in al-Shāfi'i's transmission), the works preserved in the *Umm*, especially the *Ikhtilāf Mālik wa-al-Shāfi'i*, may also furnish materials by which to undertake such a comparison. They have not as yet been utilized for this purpose.

¹¹⁷ E.g., 3: 196; "I said: 'Do you remember hearing this from Mālik?' (alternatively, 'Did you commit this to memory from Mālik?' [*a-tahfaẓ-hū 'an Mālik*]) He said: 'No.'" (4: 212)

¹¹⁸ E.g., "I did not hear this from Mālik, rather it is my opinion (*ra'y*).'" (4: 222)

¹¹⁹ E.g., Ex. 6, 1.2, 2.3.

position in contravention of one of Mālik's,¹²⁰ suggesting that, even by the time of the text's final redaction, the relationship between allegiance to a school of law and adherence to the known teachings of a common master had not yet hardened to the degree that it could no longer tolerate departure from the latter's doctrine or the authority of other luminaries was excluded.¹²¹

That the *Mudawwanah* contains far fewer references to *qiyās* by name than, say, the *Umm* can be tested by the narrowest sondage. Its relative poverty in that regard calls for explanation. So, too, does the observation that, when the term is in fact mentioned, it almost always implies a polemical context. If its concern were merely to reason towards the law in a fashion its authors deem valid, there should be no need to repudiate other means of deriving it, whereas references to *qiyās* are almost always to it *not* being admissible, or to a rule *not* being derived by it (Exs. 1 – 8). The evidence in the *Mudawwanah* for a peculiarly Mālikī attitude towards *qiyās* is cumulative, and the following survey of instances is intended to be exhaustive. It contains no single express

¹²⁰ E.g., "In my view, there is nothing wrong in it, but Mālik hated it." (3: 39); Ex. 8, 4.2, cf. 2.2; see also Calder, *Studies*, 12.

¹²¹ One such luminary is of course Ibn al-Qāsim himself, who emerges not only as exegete *par excellence* of Mālik's doctrine, but as the one most qualified to ramify the law on its basis. He is no innovator of the law, however, and his efforts to extend Mālik's doctrine to cover new cases derive their legitimacy from the analogousness of the solutions he proposes to those the master himself pronounced. (We will see that this is the main reason why Ibn al-Qāsim's negative attitude towards *qiyās*, inherited from Mālik, is superseded by the need to adopt it in practice. Expressions of the latter's doctrine effectively become the *uṣūl* from which the law is to be extrapolated.) As for the presumed hardening of the relationship between school allegiance and conformity to a master's doctrine, my impression is that, for the Mālikī school, it still needs to be shown that there was not in fact a 'softening' over the centuries after the *Mudawwanah*, which, relative to works by later Mālikīyah (e.g. the *Istidhkārah* of Ibn 'Abd al-Barr), presents far fewer instances of disagreement with Mālik's doctrine.

disavowal of its effect in all cases, but the instances in which it receives mention must, in sum, tend to suggest a strong antipathy to it.

Ex. 1

Ibn al-Qāsim states that “the *sunnah* from the Prophet is susceptible of neither *qiyās* nor speculation (*naẓar*).”¹²²

Ex. 2

1.1. I said: “What do you suppose if someone marries a thrice-divorced woman, has sexual intercourse with her, and spends the night with her, and then dies the following day, and the woman states that he had sexual intercourse with her? – Is it lawful for the former husband to marry her and give her a dowry according to Mālik or not?”

1.2. He said: “I think the woman is obedient in that regard. If he wishes to marry her, he knows best, and there is no impediment [to his doing so]. Whether a day or more than a day [has elapsed], if a man has had intercourse [with her], the woman’s word is accepted if the husband has died and [her former husband] knows from him no denial of his having had intercourse with her. Mālik preferred (*istaḥsana*) what I have told you.

1.3. “If he denies that he had intercourse with her but she says that he did, this does not make her lawful (read: makes her unlawful) to her [former] husband unless the two of them (i.e. she and the most recent husband) agree on the intercourse.

1.4. “But this [situation] does not resemble (*yushbih*) [the one in] your case, because, here, the husband denied the intercourse, while, in your case, he did not deny it for as long as he was alive. The preference Mālik expressed in that regard was not dependent on *qiyās*, and if Mālik had not expressed it, I would have admired another [than the one he had expressed] more (*wa-allādhī istaḥsana min dhālika Mālik laysá bi-ḥaml al-qiyās wa-law-lā anna Mālik^{an} qāla-hū la-kāna qḥayr^u-hū a’jab ilayya*), and my opinion accords with what I have told you previously (i.e. at 1.2).”¹²³

Ex. 3

1.1. I said: “What do you suppose if I (B) were to purchase a silver ewer (*ibrīq*) from someone (A) for dinars or dirhams, and the dinars or dirhams were claimed [by a third party (C) who had established a legal right to them and sought their restitution] (*fa-ustuḥiqqat*)? – would the sale between us

¹²² *Mudawwanah*, 2: 215.

¹²³ *Mudawwanah*, 2: 231.

be null according to Mālik and would you pronounce it to be *ṣarf* (i.e. the exchange of gold and silver)?”

1.2. He said: “Yes, I regard it as *ṣarf*, and the sale between you would be null.”

1.3. He said: “Mālik used to dislike these things that are fashioned of silver and gold like ewers. Mālik disliked oil phials (*madāhin*) of silver and gold, and censers (*majāmir*) of silver and gold – I heard that from him – and drinking-vessels (*aqdāh*), bridles (*lujam*), and knives (*sakākīn*) ornamented with silver, even if [the silver in these objects] is a subordinate part (*taba^{an}*)¹²⁴ [of the value of what the objects contain besides silver], and I do not think they should be purchased.”¹²⁵

2.1. I said: “If I exchanged dirhams with him for dinars, and those very same dirhams (*al-darāhim bi-‘aynī-hā*) were claimed [by a third party], do you suppose the exchange (*ṣarf*) would be null or not?”

2.2. He said: “I think the exchange is null.”

3. Aṣḥhab (d. 204/819) used to say: If [the dirhams claimed by the third party] are specific dirhams (*darāhim bi-‘aynī-hā*, i.e. ‘non-fungible’ dirhams) which he (A) has offered him (B) (*arā-hā iyyā-hu*: lit. ‘shown him’), [the *ṣarf*] is null. If he (A) did not offer them (*viz* the self-same dirhams) to

¹²⁴ *Mudawwanah*, 4: 212, which I consider to be the earlier version (see fn. 115), has *tubā’* in place of *taba^{an}*, which latter reading is corroborated by al-Barādhī, *Tahdhīb*, 3: 110, quoting the passage that corresponds to 1.3 above. The dictionaries do not record the noun *taba’* in the technical sense intended here. It denotes a constituent part that is subordinate or secondary (in size, quantity, or value) to the sum of the remaining parts of the whole. It does not, as might be inferred from the locution *tābi’ la-hū* in modern Arabic, denote more generally a thing that pertains to another thing (though the earliest citation below is consistent with this sense). Its plural is presumably *atbā’*, which is the plural of *taba’* in its common sense (‘a thing that follows [something]’), but I have not encountered it. The term seems contextually circumscribed to the extent that, at least in the Mālikī literature, attestations are found only in contexts thematically parallel with the above: for instance, *Muwaṭṭa’ Yahyá*, 2: 245-46, n. 2069 (*idhā kāna al-bayād taba^{an} li-al-aṣl wa-kāna al-aṣl a’zam min dhālika wa-akṭhar^u-hū fa-lā ba’s bi-musāqātī-hī ... idhā kāna al-shay’ min dhālika al-wariq aw al-dhahab taba^{an} li-mā huwa fī-hi jāza bay^u-hū... [likening the rule explained below in fn. 113 to the rule that a plot of land that is partially uncultivated may be share-cropped only if the uncultivated part amounts to no more than a third of the whole]); *Mudawwanah*, 3: 22-24 (e.g., *ja’ala [Mālik al-fiḍḍah] taba^{an} li-al-sayf*); al-Barādhī, *Tahdhīb*, 3: 109-10 (e.g., *idhā kāna mā fī-hi min al-fiḍḍah taba^{an} ka-al-thulth fa-adná...); Ibn Ḥabīb (d. 238/845), Al-Wāḍiḥah, apud Ibn Abī Zayd, Al-Nawādir, 5: 390-91 (e.g., in kānat fiḍḍat^u-hū taba^{an} li-thaman al-jamī’...).**

¹²⁵ Mālik permits the immediate (but not the delayed) exchange for dirhams or dinars of *maṣāḥif*, swords, rings, and necklaces containing gold or silver so long as the value of the gold or silver they contain represents no more than a third of the total value of the object. In the case of rings and necklaces, it is the value of the stones with which they are set that is assessed against that of the precious metal. (*Muwaṭṭa’ Yahyá*, 2: 161-62, n. 1855; 2: 245-46, n. 2069; *Mudawwanah*, 3: 22-24; al-Barādhī, *Tahdhīb*, 3: 109; Ibn Abī Zayd, *Al-Nawādir*, 5: 390-91, quoting *Al-Wāḍiḥah* of Ibn Ḥabīb [a work, like the *Mudawwanah*, reportedly based on the teaching of Ibn al-Qāsim] and a work of Ibn al-Mawwāz.) Mālik’s concession does not extend to the articles mentioned at 1.3 (v. also, al-Barādhī, *Tahdhīb*, 3: 110; Ibn Abī Zayd, *Al-Nawādir*, 5: 391).

him (B), and he has sold him dirhams from among those he had immediately to hand (*'inda-hū*) (i.e., arbitrary dirhams), he (A) must give what he has immediately to hand (to B) to complete his exchange (*ṣarfī-hī*) out of what remains in his purse or his safe (*tābūt*) so long as they have not separated.”¹²⁶

¹²⁶ I interpret Ashhab's position to be that the contract between A and B is valid, and must be completed, provided the dirhams A has agreed to exchange with B for dinars are not the very same dirhams to which C has legal title, and A and B have not yet separated (Sentence 2). If the dirhams are, in fact, the very same dirhams A offered to B, the contract is null (Sentence 1); but it is ambiguous whether, in that case, it is null if C's action to take possession of the dirhams precedes the expiry of the contractual session, null only if it occurs after the separation of the parties (the clause “so long as they have not separated” most likely restricts only the meaning of the sentence that immediately precedes it, Sentence 2), or null in both these cases. Ashhab's view at Sentence 1 is therefore consistent with Ibn al-Qāsim's at 2.1-2.2, and might be said to disagree with 4.1-4.2 only if it is read as applying to claims that are made during the contractual session as well as to those that arise afterwards. The dirhams referred to at 4.1-4.2 (like the dirhams and dinars at 2.1-2.2) are specific – the implied subject of the verb *ustuḥiqqat*, now obscured by the interpolation of 3 (v. fn. 115), is '*al-darāhim bi-'aynī-hā*' at 2.1. It asserts that the contract between A and B, even if the dirhams being traded are specifically those claimed by C, may survive C's action to claim the dirhams so long as they have not separated (the transaction may still be completed by A's delivering other dirhams to B), but is invalidated by C's claim if separation has already occurred. The scope of Ashhab's Sentence 2 is to be distinguished from that of Ibn al-Qāsim's 1.1-1.2, 2.1-2.2, and 4.1-4.2, inasmuch it encompasses the status of the *ṣarf* in case the dirhams are different from those claimed, a matter Ibn al-Qāsim does not address.

My reading is corroborated by al-Barādhī's version, which presupposes the accreted text (Q):

2.1-2.2^A. [Ibn al-Qāsim said:] “And he who exchanges a dinar for dirhams and the dirhams are claimed, the *ṣarf* is null.”

3^A. And Ashhab said: “[The *ṣarf*] is not null unless [the dirhams] are specified dirhams (*darāhim mu'ayyanah*). If they are not specified [dirhams] which he (A) has offered him (B), and he has sold him dirhams which he had immediately to hand (*'inda-hū*) from his purse or his safe (*tābūt*), he (A) owes their equivalent (*mithlī-hā*) (to B) so long as they have not separated.”

4.1-4.2^A. Ibn al-Qāsim said: “And if, when [the dirhams] were claimed at the same time as they were exchanged, he (A) had said to him (B), ‘take their equivalent instead of [them]’, before they separated, it would be permissible. If a long time had passed or they had separated, it would not be permissible. (al-Barādhī, *Tahdhīb*, 3: 110-11.)

If the opinions ascribed here to Ashhab and Ibn al-Qāsim may be said to disagree at all, they may only be said to do so in respect of the status of the *ṣarf* of contractually specified dirhams if they are claimed by a third party before the separation of buyer and seller, the former requiring that the *ṣarf* be cancelled, the latter allowing that it proceed. Equally, however, they can be harmonized by a minimum of exegetical art. Despite this, in statements transmitted from the authors of commentaries on the *Mudawwanah* from the later tenth century onward, Ashhab and Ibn al-Qāsim were remembered as having disagreed, and not always in ways that suggest

4.1. I said: “If [the self-same dirhams] were claimed at the same time as he made the exchange with him, and their owner (C) said to him (B), ‘take their equivalent instead of them’, would this be sound?”¹²⁷

knowledge of the *Mudawwanah* in the form in which we have it. The nature of their alleged disagreement was itself controversial. Al-Dasūqī (d. 1230/1815), assuming that conflicting interpretations of the *Mudawwanah* are to blame, identifies three views:

(i) Ibn Yūnus (d. 451/1059) and Ibn Rushd (Muḥammad b. Aḥmad, d. 520/1126) held that their disagreement concerned the validity of the exchange if the dirhams are claimed after the parties have separated (inconsistent with 3 and 4.1-4.2, unless we assume Aṣḥhab maintained the exchange to be valid if the dirhams are claimed *after* the separation of parties, but invalid if claimed before, which is perverse); they agreed on its validity if they are claimed during the contractual session whether the dirhams are specific dirhams or not (consistent with 3 and 4.1-4.2; inconsistent with 3 only if we assume 3 applies to pre-separation claims as well).

(ii) Saḥnūn’s son, Muḥammad, (d. 256/870) held, on the contrary, that they agreed on the status of the sale in case the dirhams are claimed after their separation – it was null whether or not the dirhams were specific (consistent with 2-4); their disagreement concerned rather its status if they were claimed when the parties were still present – Aṣḥhab maintained it was null if the dirhams were specific, valid if they were not (consistent with 3, as I read it), Ibn al-Qāsim that it was valid regardless of their specificity (consistent with 4, and not inconsistent with 2, so long as we read it as restricted to cases where the dirhams are claimed *after* the contractual session, thereby harmonizing it with 4; however, neither 2 nor 4 addresses the case of non-specific dirhams, unlike al-Barādhī’s 2^A and 4^A).

(iii) Al-Lakhmī (d. 478/1085) “harmonized” the two dicta: Aṣḥhab’s stipulation that the exchange may proceed applies specifically in case the dirhams are claimed in the presence of the parties (consistent with 3, Sentence 2); Ibn al-Qāsim’s assertion that the exchange is null applies in case the parties have separated (consistent with 2 and 4). (Al-Dasūqī, *Al-Ḥāshiyah* [a commentary on the *Sharḥ al-Kabīr* of Aḥmad al-Dardīr (d. 1201/1786), a commentary on the *Mukhtaṣar* of Khalīl b. Ishāq (d. 776/1374)], 3: 57-58.)

The position of the *madhhab* in later orthodoxy accords with that of Ibn al-Qāsim in the interpretation attributed to Saḥnūn’s son Muḥammad. It is consistent with the position attributed to him in the text of the *Mudawwanah*, but goes beyond it insofar as it regulates the status of the contract not only in the case of specified dirhams, but in the case of unspecified dirhams as well: its status is the same irrespective of whether or not the dirhams claimed by C are the same as those A specified in his offer to B: If C claims the dirhams before the separation of the parties, the exchange must proceed; if after their separation, the exchange is null. (Al-Dasūqī, *Al-Ḥāshiyah*, 3: 58.) The extension of the ruling on contractually specified dirhams to unspecified dirhams is at odds with the concept of *istiḥqāq* in the *Mudawwanah* generally (and in other early sources), where in all cases it is understood to consist in seeking restitution of *non-fungible* property held in adverse possession.

¹²⁷ In its vacillation between pronouns (-*hu* and -*hā*), the text at 4.1 shows signs of corruption – an interesting effect of the interpolation of Aṣḥhab’s statement at 3 (for which see below). In

4.2. He said: “If that took place on the spot, at the same time as he made the exchange with him, I see no wrong in it, but if it took a long time and the two of them (A and B) had separated, the exchange would be null.”

5.1. I said: “What do you suppose if I (B) were to purchase a pair of anklets (*khalkhālayn*) from someone (A) for dirhams or dinars, and [a third party who has a legal title to them (C)] claims [the anklets] (*fa-istaḥaqqā-humā*) from my possession after the seller and I have separated, and the one who claims the anklets says: ‘I permit the sale and will prosecute for my due (*wa-atba’/wa-attib’*) the one who took the price.’”

5.2. He said: “This is unsound, because it is *ṣarf*, so it is not right that he (B) be given (as it were) the anklets when he (C) has not received payment.”

6.1. I said: “And [what do you suppose] if the buyer of the anklets and the one who had sold them had yet to separate by the time [a third party] claimed them and said: ‘I permit the sale and take the dinars?’”

6.2. He said: “That is permissible: if the claimant permits the sale when the anklets are present and the owner of the dinars (C) takes the dinars instead of him (A).”

7.1. I said: “And if the buyer of the anklets had already sent them home?”

7.2. He said: “That is not permissible (i.e. that C take the dinars instead of A).”

8.1. I said: “Does one not consider in this matter the separation of the seller from the buyer after he has purchased the anklets, if someone claims [the anklets] while the anklets are present and permits the sale, and the buyer or the seller of the anklets says to [the claimant], ‘I shall pay [you] the price when you permit the sale,’ and this (i.e. A’s or B’s payment to C and C’s authorizing the sale) happens at the same time?”

8.2. He said: “Yes, that is permissible. In this matter, one only considers the presence of the anklets and the payment of the cash at the same time as the claimant’s permitting the sale. If that is the case, it is permissible; if it is not, it is not [permissible].”

the following, the struck-through text represents the version at *Mudawwanah* 3: 25 (Q), a corruption of the earlier version (P), at 4: 212, from which it derives; the text in parentheses, which replaces it, represents P: *fa-in ustuhīqqat sā‘at ṣārafa-hū [ṣāraftu-hū] ṣāhib^u-hū [—] fa-qāla la-hū ṣāhib^u-hū [ṣāhib^u-hā] khudh makān^a-hā mithl^a-hā*. In Q, the first person in P (*ṣāraftu-hū*, “I exchanged with him”, agreeing with 2.1) is redacted to the third (*ṣārafa-hū*, agreeing with 3), and the feminine singular possessive pronoun (in *ṣāhib^u-hā*, referring to the dirhams at 2.1) redacted to the masculine (in *ṣāhib^u-hū*, referring to “what he has with him” in 3). These changes, reflecting re-working of a written text (whether by copying from *ṣahīfah* to *ṣahīfah*, or through audition of a written text), are the result of an attempt to bring the pre-existing text into agreement with the interpolated statement of Aṣḥab. The attempt is prematurely abandoned, however, and Q, the accreted text, soon drifts back to the feminine forms of P (*makān^a-hā mithl^a-hā*, referring again to the dirhams at 2.1). For the sake of coherence, I have based my interpretation on P.

9. Aṣḥhab said the like of what [Ibn al-Qāsim] said. He¹²⁸ said: “It is *istiḥsān*. The *qiyās* in respect of [the sale] is that it is corrupt (*mafsūkh*) because, when he (A) sold you the anklets, their owner (C) had the right of option (*khiyār*) over them, so the sale was concluded on the basis of a right of option. So the *qiyās* in respect of it is that it is corrupt, but I prefer (*astahsin*) that it be valid because it is one of those things that the people cannot avoid (*mi-mmā lā yajid^u al-nās min-hu budd^{an}*) and the two of you did not act on the basis of that [premise] (i.e. that C owned a right of option): the seller sold what he thought was permissible for him [to sell] and you bought what you thought was permissible for you to buy, so that is permitted, there being nothing wrong in it.”

This group of legal questions lies at the intersection of two usually discrete areas of legal concern, namely, transactions that involve the exchange of gold for silver (coins and other objects) and *vice versa* (*ṣarf*), and the claiming and restitution of property in adverse possession (*istiḥqāq*). *Ṣarf* transactions are distinguished from other forms of sale in being considered usurious unless delivery of both goods and payment is completed before the separation of the parties.¹²⁹ In relation to the claiming of goods that have previously been exchanged in a *ṣarf* transaction, this is the cause of peculiar difficulty. Paragraphs 4.1 – 8.2, whose underlying logic is at first obscure, are an attempt to work out of these difficulties systematically. At 5.1-5.2, we find the argument that it is unlawful for C, who has legal title to the anklets A has sold to B, to permit B, who hitherto possessed them adversely, to retain the anklets and prosecute A, who is no longer present, for the price instead. It may be inferred that the rationale for this

¹²⁸ This is most likely to be the *qawl* of Aṣḥhab, not Ibn al-Qāsim. Para. 9 is absent from P, which concludes with what corresponds with the end of 8, adding: “I said: ‘Do you remember hearing this from Mālik?’ (alternatively, ‘Did you commit this to memory from Mālik?’ [*a-tahfāz^u-hū ‘an Mālik*]) He said: ‘No.’” The principal difference between P and Q is that the latter (on which the translation above is based) incorporates two statements of Aṣḥhab. The ambiguity is reproduced in the *Nawādir* (5: 375), but in the *Tahdhīb* of al-Barādhī, the whole of 9 is interpreted in the author’s abridgement as Aṣḥhab’s *qawl* (3: 112).

¹²⁹ *Mudawwanah*, 3: 3ff; *Muwatṭa’ Yahyá*, 2: 162-64. See also fn. 113.

pronouncement is that C's doing so would contravene the rule against delay. In establishing a right of ownership in the anklets and, consequently, a right to dispose of them, the question is whether C acquires the competence to create, in effect, a new contract of sale with B, as if usurping A, the original seller. The illegality of such a contract stems from the delay, relative to B's assuming absolute possession of the anklets, in C's taking delivery of the payment from A.

In standard cases of contract law, adherence to the rule enjoining simultaneous delivery of goods and payment is measured in terms of compliance with a procedural rule: they must be exchanged before the expiry of the contractual session, as signalled by the separation of the parties. In the present case, however, the relation between the two rules is paradoxical: although A and B may have already separated, B and C (or A and C) may yet be in a position to comply with the requirement of simultaneous delivery so long as the goods are present (8.1-8.2). Conversely, a situation might arise in which, although the goods are no longer present, the transaction between B and C (or A and C) may still meet the requirement that the parties (A and B) have yet to separate (7.1-7.2). In other words, it may appear that, although the procedural rule is violated, the prohibition it is intended to safeguard is not, or that the procedural rule is obeyed, but the prohibition violated. Paragraphs 5.1-8.2, a characteristic instance of the *Mudawwanah's* technique of legal drafting, should be read as an attempt to work out the problem of which is primary:

5.1-5.2. A and B separated; anklets present; delivery (of payment) not immediate – not permissible;

- 6.1-6.2. A and B not separated; anklets present; delivery immediate – permissible;
- 7.1-7.2. A and B not separated; anklets not present; delivery (of goods) not immediate – not permissible;
- 8.1-8.2. A and B separated; anklets present; delivery immediate – permissible.

We can deduce from this schematic abstraction that, unsurprisingly, it is the prohibition that is held to supersede. Paragraphs 7 and 8, which present cases of an exceptionally hypothetical and artificial nature,¹³⁰ are contrived to show that it is not the separation of the parties that is decisive, but rather simultaneous delivery. The casuistic permutations of whom and what is present where and when culminate in an explicit statement of this rule (8.2).

Besides the rule against separation, concomitant with the prohibition of delayed delivery is the rule that the parties to a *ṣarf* transaction may not stipulate a unilateral right to confirm or annul the contract ('the right of option', or 'option', *khīyār*) such as in the case of other sales may be exercised by buyer or seller so long as they have not separated, or be extended by agreement to a specified term.¹³¹ (The exercising of an option after the parties have separated contravenes the rule that delivery be concluded before they separate.) Ashhab's assertion that C had a right of option in the anklets when A sold them to B (9) recognises that Ibn al-Qāsim's permitting the transaction described at 8.1-8.2 is systematically irrational: C's competence to transfer ownership of the anklets to B (or A) when the sale between A and B is already concluded can only

¹³⁰ It is plainly factitious that B should have sent the anklets home whilst he remained with A (7.1), and that B, having separated from A, should give to C the equivalent of what he has already paid to A (8.1), or, alternatively, that A, having separated from B, should give the anklets to C (as well as give him their price) when B, realistically, would surely taken them with him (8.1).

¹³¹ *Mudawwanah*, 3: 223-24.

be systematically explained in terms of his having owned the option to agree to the original sale or reject it, yet the existence of that option is unlawful. The same explanation may also have been intended to apply to the transaction described at 6.1-6.2, as indeed to other permitted transactions of this nature.¹³²

The principal reason why all of these transactions are problematic is that they attempt to combine two sales in one: A's original sale to B and a second transaction which, in all but two fundamentally trivial but procedurally important respects (the goods are generally not in the seller's possession and the price generally not in the buyer's), precisely resembles a sale (a transfer of ownership in exchange for value). It is imperative that some mechanism be found to allow the restitution of the anklets to their rightful owner, but A's original transaction and C's more recent one cannot *both* be made to adhere simultaneously to the procedural rules whose purpose is to prevent delayed delivery, except in the unlikely event that all three parties, and the goods, are present at the time of C's claim (as at 4.1-4.2). The only way to reconcile the second transaction with the existing system – that is, bring it into compliance with the secondary procedural rules (no separation, no option) whose purpose is to ensure compliance with

¹³² We might infer from a quotation in the *Nawādir* (5: 375) that 7.1-8.2 were absent from the recension of the *Mudawwanah* on which Muḥammad b. Saḥnūn based his abridgement (for the identification of which, v. fn. 100.). There, the paraphrase of 9 immediately follows that of 6.1-6.2, to which it is thereby implied to refer:

6.1-6.2^B: Ibn al-Qāsim said: "If he exchanges a pair of anklets and they are claimed [by a third party] in the presence of the parties to the *ṣarf* and the anklets, their owner is given the option to permit [the transaction] and take the price from the transgressor (*al-muta'addī*, viz A), or reject [it]."

9.^B: And Aṣḥhab said: "It is *istiḥsān*." He said: "The *qiyās* is [that it is corrupt], because it is a *ṣarf* in which there is an option."

Muḥammad said: "That is permissible. The first sale is not a sale."

The *Tahdhīb* of al-Barādhī reflects the recension on which the edition is based, taking 9 to refer to 8.1-8.2. (3: 111-12)

the primary rule (no delayed delivery) – is to cut it loose from the first. If the two are independent, the problem of C's having the option to confirm or annul the original sale does not arise, and his transaction with B is unproblematic provided it itself adheres to the rules (as, indeed, do both of the transactions permitted at 5.1-8.2). The need to explain, as Ashhab does, the permissibility of such transactions by excluding them from the system is thereby obviated. The unfortunate collateral effect of this manoeuvre is that it throws the status of the first sale into doubt; nonetheless, Muḥammad b. Saḥnūn seems to have approved of it. His assertion that “the first sale is not a sale”¹³³ has the effect of freeing the second sale from the difficult legacy of the first, allowing it to proceed on its own terms. Ibn Saḥnūn's denial is strikingly reminiscent of al-Shaybānī's scarcely more probable denial in his edition of the *Muwaṭṭa'* that an *'arīyah* sale is in fact a sale.¹³⁴ The anxiety is the same in both cases – delayed delivery as a means to usurious gain – and the motive for denial the same – to salvage the integrity of the system.

Ashhab, however, who also recognizes that the transaction is systematically inadmissible, responds rather differently. He does not resort to an exegetical sleight of hand to restore rationality, rather he declares that the ruling in its favour is not based on *qiyās*, but *istiḥsān*. His phrase, “the *qiyās* in respect of it is...”, is equivalent to “systematic consistency dictates that...”. As elsewhere in the *Mudawwanah*, *qiyās* is understood to be the derivational mechanism that articulates, and whose purpose is to ensure conformity in positive law with, the tenet of legal theory that a rule should be so

¹³³ V. *supra* fn. 120.

¹³⁴ V. *infra* fn. 153.

just because systematic consistency dictates it be so. Its authority is superseded by that of *istihsān*: arbitrary discretion governed, in this case, by regard for fairness and the intention of the parties. C's transaction with B is permissible because it is "unavoidable" and because A and B did not knowingly act in contravention of the law. While discretion is inherently modulated by such nuances, brute consistency obliterates them.

Ex. 4

1.1. I (*viz* Saḥnūn) asked: "Is it permissible according to Mālik that I buy from a man some coriander fruit (*jujulān*) on the condition that he presses it [for oil]?"

1.2. He said (*viz* Ibn al-Qāsim): "Mālik said: It is not permissible."

1.3. I asked: "Why?"

1.4. He said: "Because it would be as if he was selling what comes out of it (*mā yakhruj min-hu*), and he does not know what comes out of it."

2.1. I asked: "Would the same apply if he had sold him a standing crop of wheat or barley (*zar^{an} qā'im^{an}*) and the buyer had made it conditional on the seller that he reaped and threshed it?"

2.2. He said: "Mālik said this is not permissible."

3.1. I asked: "What do you suppose if he sold him some wheat (*ḥinṭah*) and the buyer had made it conditional that he grind it [into flour]?"

3.2. He said: "Mālik found it onerous (*istathqala-hū*); he permitted it and saw that it was easy (*khafif*), and Mālik's doctrine (*qawl*) was laudable for allowing it."

3.3. He said: "Mālik told me: If one man were to buy a garment from another on the condition that he made it to his measure, I see no wrong in this; if he were to buy a pair of sandals on the condition that he made them to his measure, I see no wrong in this [either]; and if he were to buy wheat on the condition that he ground it for him, – Mālik told me: there is something questionable in this (*fī-hi maqḥmaz*), but I would hope for it to be easy (*khafif*), so I do not see anything wrong in it."

4.1. He said: "So I asked [Mālik] about sesame seed (*simsim*), fodder radish (*fijl*), and olive – if someone buys it on the condition that the seller presses it [for oil] –,

4.2. and Mālik disliked it (*kariha-hū*) and said: There is no good in it (*lā khayr fī-h*), for it is conditional on what comes out of it in terms of oil and he does not know what comes out of it. So I repeated [the question] to him year after year, and all of it he disliked, but he did not adopt a position on the matter and said [only]: There is no good in it."

5.1. I said: “And [what of] wheat, if he buys it on the condition that the seller must reap and thresh it – or its grain, if he buys it as a standing crop that has dried?”

5.2. He said: “There is no good in it; I think that in [Mālik’s] view it belongs to the manifestly disliked (*min al-makrūh al-bayyin*), because he is buying what comes out of the crop.”

6.1. I said: “So what is the difference between flour (*tīḥn*) and these things he disliked, out of which what comes is unknown, when [similarly] flour comes out of wheat?”

6.2. He said: “It seemed to me that he thought (*ka-annī ra’aytu-hū yará*) that the flour was a likely matter (*amr^{an} qarīb^{an}*) and that what comes out of wheat was known. He therefore alleviated it (*khaffafa-hū*) on account of his finding it onerous in respect of *qiyās*.” He said: “Mālik once told me: I do not like it. Then he alleviated it. His doctrine (*qawl*) in the old and the new (*fī al-qadīm wa-al-ḥadīth*) – what we and our brothers have transmitted from him – was laudable for its alleviation on the basis of preference (*istiḥsān*), not for *qiyās*. God knows best what is correct.”¹³⁵

Ex. 5

Mālik permits the lease of a stallion – or donkey, goat, or camel – for breeding so long as it is for a specified term and sum. However, Mālik considers the transaction corrupt (*fāsid*) if it is leased until such time as the mare conceives – that is, if the term is vague.

Saḥnūn asks: “On what grounds did Mālik permit the lease of a stallion when you have heard that some of the scholars (*‘ulamā’*) dislike it (*karihū-h*) and mention it on the Prophet’s authority, and in terms of *qiyās* this involves [the sale of] risk (*gharar*)?” Ibn al-Qāsim replies: “Mālik permitted it because he mentioned that it was their agreed practice (*al-‘amal ‘inda-hum ‘alay-h*) and he knew the people were permitting it amongst themselves. For that reason, Mālik permitted it.”¹³⁶

Ex. 6

¹³⁵ *Mudawwanah*, 3: 320.

¹³⁶ *Mudawwanah*, 3: 438.

1.1. I said: “If the buyer says ‘I bought [the share of land (*hiṣṣah*)] for 1,000 dirhams’ and the seller says ‘I sold it for 2,000’ but the buyer denies this; they swear oaths to one another and the sale between them is annulled. Subsequently the pre-emptor (*shafī*) turns up and says ‘I will take [the share] by right of pre-emption (*shuf‘ah*)¹³⁷ for 2,000 [dirhams].’ What do you suppose in this case?”

1.2. He said: “With regard to a man who donates to another as a free gift (*hibah*) a share (*shiqṣ*) in a house of his for a counter-gift (*thawāb*) and the donee does not give him the counter-gift and the pre-emptor wishes to take possession of [the share] in exchange for giving the counter-gift [himself], Mālik said: ‘He has no right of pre-emption until the donee gives the counter-gift to the owner of the house.’¹³⁸ The case you have asked about resembles (*tushbih*) this; he has no right of pre-emption over [the buyer].”

2.1. I asked: “On account of what does Mālik permit [the donation of] a free gift without a specified counter-gift?”¹³⁹

2.2. He said: “The people (*al-nās*) permitted it. It is after the manner of (*‘alā wajh*) [the case of] giving a woman in marriage without specifying a dowry in advance (*al-tafwīd fī al-nikāh*).¹⁴⁰ In terms of *qiyās*, it is not right that it should be permissible, but the people permitted it.

2.3. “Also in the case you have asked about concerning the purchase – I do not think the right of pre-emption applies in it, as Mālik said in respect of the free gift, until the buyer accepts. He must make the purchase [before the right of pre-emption comes into effect] because the Prophet said in the case of a buyer and seller when they differ: ‘Either the seller’s word is accepted, or they both consent to annul the sale.’ So the Prophet rejected it and it became something other than a sale, so there is no right of pre-emption in respect of it except after the sale.”¹⁴¹

Ex. 7

1.1. I said: “What do you suppose if a woman dies, leaving a young orphaned male child with no [automatic] legal guardian (*waṣī*)? The

¹³⁷ Mālik understands *shuf‘ah* to be the right of a co-owner of immovable property to displace, by buying him out, a third party’s possession of a share in that property which he purchased from another co-owner. (See *Muwaṭṭa’ Yahyá*, 2: 249-58.)

¹³⁸ Cf. *Muwaṭṭa’ Yahyá*, 2: 253.

¹³⁹ If the free gift (*hibah*) is donated on the condition of the donee’s giving a counter-gift (*thawāb*), the donor (*wāhib*) must specify what the counter-gift should be. (*Mukhtaṣar Khalīl*, 1: 215.) Presumably, the rule is to ensure that the transaction does not violate the prohibition of uncertainty (*gharar*) ascribed to the Prophet. (*Muwaṭṭa’ Yahyá*, 2: 194-96)

¹⁴⁰ For this possibility, see *Mudawwanah*, 2: 162-65; also, Spectorsky, *Chapters on Marriage and Divorce*, ‘Introduction’, 19-20, for inter-school controversy on the matter.

¹⁴¹ *Mudawwanah*, 4: 222.

mother has appointed a man as executor-guardian (*waṣī*) to the boy and her estate. She has heirs besides the boy. The mother's executor transfers to the boy that of which she has made him executor (i.e., the whole of her estate?). Is this permissible according to Mālik?"

1.2. He said: "Mālik said: Nothing of the mother's bequest is permissible, nor anything the mother's executor has done. The mother's executor is not an executor: he is just like anyone else (i.e. in legal competence), and nothing he has done has legal effect on the boy."

1.3. I said: "So is he to leave the woman's estate in [the boy's] possession, having been appointed its executor, or not?"

1.4. He said: "Mālik said: 'If that which the woman leaves is little or negligible (*tāfih^{an} yasīr^{an}*), that is permissible.' This is because Mālik was asked about a woman who had died and appointed a man executor of her estate. And Mālik said: 'How much has she left?' They told him: 'Fifty or sixty dinars.' He said: 'That is very little.' He permitted it in such cases.

2.1. I said: "What do you suppose if a woman dies and bequeaths her Third (i.e., one third of her estate, the maximum bequest) so it may be executed and appoints a man as its executor?"

2.2. He said: "He is executor of the Third and it is his [to execute]. She appointed him executor of her Third, so he executes it. That is permissible according to Mālik."

3.1. I said: "And [what if] she leaves two children to her sister and her brother, and she appoints a man as executor to the two [children] and her estate, and she has no heir besides the two?"

3.2. He said: "I think her bequest is invalid unless the property she leaves is little – the like of what I have mentioned to you. And in that case it is valid only so far as possession [of the estate] is concerned; the two of them do not acquire thereby an executor-guardian with the capacity to give them in marriage, sell them, or settle disputes on their behalf."

4.1. I said: "What do you suppose if a man dies and leaves a young nephew of his (a brother's son) who is his heir? He also has another heir, who is of legal age (*kabīr*). The paternal uncle (i.e., the deceased) has appointed a man as executor to this boy. Is he his [rightful] executor and is it permissible for him to divide his estate (*muqāsamah*) according to Mālik? Or [what] if it is the paternal grandfather or a brother of the boy who dies and appoints a man as executor in the circumstances I have described to you?"

4.2. He said: "Neither much nor little from the bequest of those [persons] is permitted. None of them is entitled to much or little from the bequest, because the instructions and actions of the deceased himself, with respect to the boy's property, prior to his death, were invalid, and his executor is no better placed than he himself [was]."

5.1. I said: "So is [a paternal uncle's, grandfather's, or brother's] bequest of a small amount of property not permitted, while at the same time Mālik permitted the mother's bequest of an equally small amount?"

5.2. He said: "I do not think their bequests, be they of much or little, are permissible."

5.3. I said: "What distinguishes their situation from that of the mother?"

5.4. He said: "Mālik decided by preference (*istaḥsana*) in the case of the mother, and the mother is unlike any other of those persons because [she] brings forth the child (*al-umm wālidah*). She is not like the others [because the child] is her property, and this is not [the case with others] who bequeath him to someone else. It is not *qiyās*; it is *istiḥsān*. Do you not see that the mother may take away (*ta'taṣir*) what she has given her son or daughter – she has the same status as the father [in that respect] – while the grandfather and the brother may not so take?¹⁴² This also indicates to you the difference between them."¹⁴³

Ex. 7 treats various instances of invalid bequest, the discussion culminating in a rudimentary systematic justification by Ibn al-Qāsim of Mālik's treating bequests by mothers to their orphaned sons as a partial exception to a well-known general rule. At 1.2, a mother's bequest, and her executor's subsequent disposition of her estate, is declared invalid; her bequest violates at least one of two important restrictions (traditionally ascribed to the Prophet): first, bequests cannot exceed a third of the estate and, second, they cannot be made in favour of existing heirs. Since the mother's bequest transfers (the whole of?) her estate, via an appointed executor-guardian, to her son, an existing heir, (1.1) it is *ultra vires*. The bequests described in 3.1 through 5.2 are null for similar violations. 3.1 makes the subsidiary point that the absence of other existing heirs, besides the designated recipient, does not affect the status of the bequest, which is invalid in any case if the recipient is an existing heir. (The contingency is presumably distinguished for comment because an obvious *ratio* for the second rule is to prevent the exclusion or marginalization of other existing heirs from the estate.) The bequests

¹⁴² The mother, like the father, may take away (*ta'taṣir*) what she has freely given (*wahabat*) to her child, so long as he is not fatherless (*yatīm*). (*Mudawwanah*, 4: 409-10.)

¹⁴³ *Mudawwanah*, 4: 290-91.

of a paternal uncle to a nephew, of paternal grandfather to grandson, of brother to brother, have no legal effect (4.1 – 4.2) because they too are made in favour of a testator's existing heirs – in this case, male agnates. For comparison, 2.1 – 2.2 presents an exemplary case in which a woman appoints an executor to divide a third of her estate, presumably transferring it to non-existing heirs.

1.4 introduces a partial exception (elaborated at 3.2) to the rule against bequests to existing heirs: Mālik is said to have held that a mother's bequest to an orphaned son is valid so long as it is of only a small amount (50 or 60 dinars). Her will may then be executed. Ibn al-Qāsim perceives this to be a systematic anomaly of which *qiyās* is surely intolerant. Confronted by a threat to systematic cohesion, he responds by denying the effect of *qiyās*. At the same time, however, he justifies the exceptional status of the mother *qua* testator by denying that her relation to the son is analogous to, say, the relation of an uncle to a nephew. Paradoxically, therefore, he resorts to analogical reasoning to demonstrate why *qiyās* should have no effect. He perceives *qiyās* to be a blunt instrument, its systematizing rigour incapable of discriminating between mothers and uncles, and (elsewhere) insensitive to actual practice. However, this is partly because his grasp of it is rudimentary. His justification implies a kind of reasoning of which al-Shāfi'ī approved, but he does not pursue it to its proper extent. The *Risālah* maintains that a given set of circumstances will have parallels or analogues (*ashbāh*) in the *uṣūl* and it is in determining which of these parallels is most analogous to those circumstances – which, that is, should be made the *aṣl* of the new rule – that valid juristic disagreement arises. In the present case, Ibn al-Qāsim asserts that the relation of mother to child is distinguished by her having borne the child, by the child's being her

property, and by her entitlement to take away (*ta'taṣir*) what she has given him, none of which are features of the other relations between testators and minors under consideration. Using the framework endorsed by the *Risālah*, he might, therefore, have expressed the point differently: he might have denied that the *aṣl* of the rule governing the bequests of other persons to existing heirs was sufficiently analogous to the mother's case for it also to dictate the rule governing her bequest to a son. He might then have argued another *shabah*, if he had been able to produce one, to be the true *aṣl* of the new rule, allowing thereby the integrity of the system to be sustained within the parameters of *qiyās*. This, however, is the Shāfi'ite way. Instead, the argument is abruptly curtailed by recourse to Mālik's preference and a posterior rationalization of his decision by *tashbīh*. For Ibn al-Qāsim, to behold that a rule should not apply where consistency alone *appears* to dictate that it should is enough to justify suspension, or rejection, of *qiyās* at the point in the argument where it confers that appearance; there is no compulsion either to mend the rule or to re-articulate its systematic justification in a way that removes the appearance of inconsistency, as, for example, by asserting a different *aṣl*. The limitations of *qiyās* are thereby satisfactorily exposed, enjoining recourse to mere preference.

Ex. 8

1.1. I said: "What do you suppose if the man who had been assigned palm-trees as *'arāyā* (*viz* the *mu'rá*) (B) sold them to someone else (C) after their fruit had ripened and [consequently] selling [it] was allowed,¹⁴⁴ and the owner of the palm-trees who possesses the fruit ((A), *viz* the *mu'rī*)

¹⁴⁴ Mālik, on the Prophet's authority, and in common with all the orthodox classical schools, prohibits the sale of fruit before it ripens because it involves the sale of risk (*bay' al-gharar*). (*Muwatta' Yahyá*, 2: 141)

subsequently wishes to take possession [of the trees to cultivate them]¹⁴⁵, by bartering the fresh dates he estimates are on the tree for dried dates (*khariṣī-hā*),¹⁴⁶ from the one who had bought them from the *mu'ra* (B) – is that permissible according to Mālik?”

1.2. He said: “Mālik’s position is that it is permissible, because if a man (A1) had provided someone (B1) with lodgings in a house of his for as long as he lives, and then he (B1) had transferred as a gratuitous gift (*wahaba*) those lodgings (*sukná*) to someone else (C1) for as long as he lives, it would be permissible for the owner of the house (A1) to buy those lodgings from the recipient of the gift (C1)...¹⁴⁷ The gifting of the lodgings has the same status as (*bi-manzilāt*) the selling and gifting of the fruit to whomever (C) wishes to buy (*sic*) it from him (B).”

2.1. He said: “I asked Mālik about a man who owns a palm-orchard (*ḥā'it*) (A2) containing a palm-tree belonging to another (B2) (*not* as an *'ariyah*). After the fruit on the tree ripens and selling [it] becomes permissible, he (A2) wishes to buy [the tree] from him (B2) – by bartering the fresh dates he estimates are on the tree for dried dates – [delaying payment] until the time at which its fruit is harvested¹⁴⁸ (*an yabtā^a-hā min-hu bi-khariṣī-hā ilā al-jadād*).”

2.2. He said: “Mālik told me: ‘If it were in view of what is reprehensible (*yukrah*) in terms of [the tree’s owner] (B2) going in and out [of the orchard], I dislike it. I think it would be a form of selling dry dates for fresh dates (*bay' al-tamar bi-al-ruṭab*)¹⁴⁹ because this man (B2) owns the tree itself (*al-aṣl*) and is not the object of a gratuitous transfer of a usufructuary right to its fruit (*lam yu'ra*). If [on the other hand] it were out of regard for providing him (A2) with adequate means of sustenance (*al-kifāyah la-hū wa-al-mu'nah*), I see nothing wrong if it is done rightly and properly (*'alā wajh al-ma'rūf*).’

¹⁴⁵ For this explanation of the verb *akhadha* in such contexts, see Yanagihashi, *A History*, 280. *A'ṭā* is its opposite, meaning ‘he delivered land to the cultivator’.

¹⁴⁶ Mālik permits the holder of the usufructuary date-palm (*'ariyah*) to barter the fruit on the tree, once ripe, for the quantity of dried dates it is estimated that its fruit will produce (*bi-khariṣī-hā*). (*Muwaṭṭa' Yahyá*, 2: 142-43; *Mudawwanah*, 3: 284)

¹⁴⁷ See *Mudawwanah*, 4: 391-92.

¹⁴⁸ Mālik endorses sales where payment is delayed until the times of harvest (*ḥiṣad*, for grain; *jadād*, for fruit) on the ground that these times are known (*ma'rūf*). Ibn al-Qāsim infers from this that sales involving delayed payment are in general permitted so long as the term (*ajal*) is known. (*Mudawwanah*, 3: 196.) Cf. *Muwaṭṭa' Yahyá*, 2: 141-42, which concerns rather the term of the buyer’s entitlement to fruit on the plant: “Mālik said: ‘Our normative practice (*al-amr 'inda-nā*) with respect to the sale of melons, cucumbers, water-melons, and carrots is that it is licit to sell them when they appear good (*idhā badā ṣalāḥ^u-h*). Then the buyer is entitled to what grows until their fruit (i.e., the fruit of the plants) are picked and they spoil (or: ‘the plants dry up’ – *halaka*). There is no specified time for this because the time is well-known among the people (*ma'rūf 'inda al-nās*).”

¹⁴⁹ The Prophet is said to have forbidden the sale of dried dates for fresh dates on hearing that the latter diminish in size when they dry. (*Muwaṭṭa' Yahyá*, 2: 147)

2.3. “‘*Arāyā* [sales] (i.e., where the *mu’rī* buys the ‘*arīyah*-palm previously transferred to the *mu’rá* by bartering the fresh dates he estimates are on the tree for dried dates) are all permissible on account of [those] two considerations – [namely,] the provision of adequate means (*kifāyah*) and the reprehensibility of [the *mu’rá*’s] going in and out [of the orchard]. He (A2) might buy [the palm-tree] from him (B2) so as to provide himself with adequate sustenance (*kifāyah*), and there is nothing wrong in that.

3.1 “And if it leaves the possession of the *mu’rá* (B) in favour of someone else (C) as a gratuitous gift (*hibah*) or for a price, it does not matter if he who owns the fruit (A) buys it, because the concession (*rukḥṣah*) in respect of [the tree] is in favour of the *mu’rī* (A), out of consideration for what is reprehensible in terms of [the *mu’rá*’s (B’s)] going in and out [of the orchard], or out of regard for providing its owner (A) with adequate sustenance.

3.2. “There is nothing wrong with this in respect of either of the two matters (*viz* A’s buying the tree from C to whom B has sold it, and A2’s buying the tree within his orchard from B2) according to what I heard from Mālik – and God knows best.

4.1. “If it was reprehensible for the one who had assigned it as an ‘*arīyah* (A) to buy [the fruit] from the one who had bought it (C) (from B), it would be reprehensible for the one who had bought the fruit (C) to have bought that which he (A) had assigned to its [original] seller (B) as an ‘*arīyah*. This [would be] yet more reprehensible, but [in fact] there is nothing wrong in it (i.e., C’s purchase from B).

4.2. “Some of Mālik’s senior disciples (*kibār aṣḥāb Mālik*) said: ‘It is not permissible to sell the ‘*arīyah* to the *mu’rī* (A) except on account of [the *mu’rá*’s] (B’s) intruding on him in his orchard being a cause of damage (*maḍarrah*) that accrues to him.’ So, if what had been right and proper (*min al-ma’rūf*) of [the orchard] became a cause of damage to him, he is granted a concession in terms of the cause of damage being disallowed and removed. For this reason, he (A2) is permitted to buy the palm-tree in his orchard, even though the basis of [the palm-tree’s] possession (*aṣl milkī-hā*) is not an ‘*arīyah*, which[, however,] resembles (*tushbih*) that [situation] because it is feared that damage might be caused to accrue to the owner of the [palm-tree¹⁵⁰] (A like A2). The affair of the owner of the palm-tree (A2) is therefore permitted and alleviated, and it is not based on *qiyās* (*laysa yaḥmil^u-hū qiyās*), rather it is the object of an alleviation (*mawḍi’ takhfiḥ*).”¹⁵¹

¹⁵⁰ The printed text has ‘*ṣāhib al-‘arīyah*’ (‘the holder of the ‘*arīyah*’), but I take this to be an error for ‘*ṣāhib al-nakhlah*’ (‘the owner of the palm-tree’). Of all the justifications advanced in the early juridical literature for exempting the ‘*arīyah* sale from the prohibition of *muzābanah*, none envisages the removal of a cause of damage (*maḍarrah*) from the sphere of the *mu’rá*. Rather, it is in the interests of the *mu’rī*, the one who owns the orchard, that the damage (whose cause is the intrusions of the *mu’rá*) is claimed to be averted. See Yanagihashi, *A History*, 281-292.

¹⁵¹ *Mudawwanah*, 3: 286-87.

The background to this complex passage is to be sought in the problem of the sale of *‘arāyā*. It takes some work to pin down what is meant by the term *‘arīyah*, and accounts of that problem have sometimes misjudged it.¹⁵² In divergent accounts of its nature, Schacht saw evidence that, already by the time of Mālik, the transaction was obsolete.¹⁵³ Saḥnūn’s question, “Describe to me *‘arāyā*, what are they?”, is not merely a device of the literary form, but betrays uncertainty about the meaning of the term. It will suffice here to show its applications, pursuant to that question, in the *Mudawwanah*, which are consistent with, though range more widely than, those in the *Muwaṭṭa’*. In its basic,

¹⁵² Coulson, for example, conflates *muzābanah* contracts (for which, see below) and *‘arīyah* sales. In reference to Mālik, he states that the former involve “the barter of unripe fruits on the tree against the same species of dried fruits” but supposes, erroneously, that the latter consist in the barter of unripe dates on the palm *in general* against dry dates. That is, he fails to appreciate that the term *‘arīyah* (expressly in the *Mudawwanah*, but also in the *Muwaṭṭa’* (see 2: 143, n. 1815)) must refer specifically to the dates on palms that have been transferred to a *mu’rā*. Coulson’s misreading the term leads him to assert an erroneous chronology according to which it was only in “later doctrine” that transactions involving the barter of dates on the palm against dry dates were restricted to the barter of dates on palms held by usufructuaries and “there is no reason to suppose that the transaction allowed by the early Medinan scholars, including Mālik, was of such a particular and restricted form.” Moreover, his glossing the term as *unripe* dates on the palm is untenable, because it is inconsistent with Mālik’s endorsement of the prohibition of their sale, a prohibition from which neither Mālik nor any subsequent jurist claims the sale of *‘arāyā* to be exempt. (See Coulson, *A History of Islamic Law*, 43-44.) In his famously ill-tempered review of Coulson’s book, Schacht complains that the chronology Coulson proposes stems from an inadequate reading of his *Origins* at two places, and states, as I have said, that Mālik must already have held what he supposes is “later doctrine.” (Schacht, *Modernism and Traditionalism in a History of Islamic Law*, 397.) Oddly, however, perusal of those two places (*Origins*, 153-54, 312) does not reveal that Schacht understood *‘arīyah* in such contexts to refer in particular to the barter of the fruit on usufructuary palms. Moreover, I find in his *Introduction* (40), whose appearance coincided with that of Coulson’s *History*, the argument that *bay’ al-‘arāyā* is a later technical term that refers to, and whose purpose is to “make acceptable,” the “exchange of strictly limited quantities of dried dates for estimated equal quantities of fresh dates on the tree,” a transaction that was allowed as an exception to “the ancient contract of *muzābanah*, the exchange of [unlimited] dried dates for fresh dates on the tree.” There, too, Schacht is unspecific (or wrong) about the legal nature of the tree in question. His *obiter* supersedes.

¹⁵³ Schacht, *Origins*, 312.

though possibly not original,¹⁵⁴ sense it denotes a tree whose fruit can be dried and stored – paradigmatically, date, but also grape, fig, walnut, almond, and other such fruit – and whose owner has granted someone the temporary right to its unharvested fruit.¹⁵⁵ *Qua* donor, the owner of the orchard in which the tree is located is known as the *mu'ri*; the recipient of the gratuitous transfer of the usufructuary right to the tree, generally in need, is known as the *mu'ra*. It may also denote the fruit of such a tree,¹⁵⁶ or a particular kind of sale by which possession of that tree is restored prematurely to the *mu'ri*.¹⁵⁷ In such a sale, *mu'ri* and *mu'ra* contract to exchange the fresh fruit on the tree, now in the *mu'ra*'s possession, for dried fruit of the same kind to be delivered by the *mu'ri*. The transfer of possession is effective from the moment of contract, but the *mu'ri*'s delivery of the dry fruit is delayed until the harvesting of the fresh fruit (whose delivery in turn, despite the tree itself being in the *mu'ri*'s possession, is also considered to be delayed¹⁵⁸). Presumably to circumvent the prohibition of *riba* of excess (*riba al-faql*), the quantity of dry fruit to be delivered by the *mu'ra* must be equal to the quantity of dry fruit it is estimated during the contractual session could be produced from the fresh fruit once they are harvested, the act of estimation in this regard being known as *kharṣ*. Finally, the fruit, whose quantity must not exceed five *wasqs*, must be mature (a

¹⁵⁴ Jokisch, *Islamic Imperial Law*, 121-22, maintains it derives from *'ariyah* (loan), citing Ṭaḥāwī (no. ref.) who is said to trace it thus.

¹⁵⁵ *Mudawwanah*, 3: 284.

¹⁵⁶ E.g., *Mudawwanah*, 3: 287.

¹⁵⁷ E.g., para. 2.3 above.

¹⁵⁸ Yanagihashi, *A History*, 282. The assertion that the *mu'ra*'s delivery of the fresh dates is delayed until the harvest presumably relies on the distinction between the *'ayn* (the thing itself) and the *manfa'ah* (the usufruct); while the usufructuary object, the tree, is transferred at the time of contract, the delivery of the goods of sale, the thing itself, is not complete until the fruit is cut from the tree.

specification variously qualified) at the time of contract.¹⁵⁹ Other forms of *'arīyah* sale are possible – for instance, the *mu'rī* may purchase the *'arīyah* in specie if the quantity of fruit exceeds five *wasqs*, or in exchange for food of a different kind if the fruit is cut from the tree at the time of contract.¹⁶⁰ The *mu'rá* may also offer the fruit for sale to a third party, as at 1.1 above. However, the term *'arīyah*, where it denotes a sale, generally indicates a sale of the former type, and it is on this kind of sale that legal discussions are primarily focused. (Following the *Mudawwanah* (the *Muwaṭṭa'* mentions no other kind), henceforth I adopt the *'arīyah* date-palm as paradigmatic of an *'arīyah* tree.)

Why are such sales problematic? Yanagihashi points out that, since delivery of the dates is delayed until the harvest, they violate the prohibition of the *ribá* of delay (*ribá al-nasī'ah*, that is, profit that accrues from a delay of payment), “according to which the delivery should be executed during the contractual session.”¹⁶¹ However, it is doubtful that this reflects Mālik’s interpretation. If the prohibition were a cause for concern, one would expect to find some explanation in the *Mudawwanah* of why the prohibition does not apply to it, or some justification of why the sale should be permitted despite its breaching it, whereas we find no direct allusion to the problem of delay in its treatment of the sale. It is true that the *Muwaṭṭa'* contains reports that forbid delay.¹⁶² However, the prohibition, where not ambiguously expressed, appears to relate

¹⁵⁹ *Mudawwanah*, 3: 284; *Muwaṭṭa' Yahyá*, 2: 142; Yanagihashi, *A History*, 282; see also fns. in my translation of the present example.

¹⁶⁰ *Mudawwanah*, 3: 284.

¹⁶¹ Yanagihashi, *A History*, 282.

¹⁶² The Prophet is said to have declared the sale of dates for dates, like the sale of gold for silver, a form of *ribá* “unless [the seller] gives at the same time as [the buyer] gives (*illā hā'a wa-hā'a*)”. (*Muwaṭṭa' Yahyá*, 2: 162-3.) 'Umar is projected as commanding the seller not to leave the buyer until he has taken payment. (*Muwaṭṭa' Yahyá*, 2: 162.)

solely to transactions in which the delivery of satisfaction or goods is delayed *in relation to the other*. For instance, Mālik states that ‘Umar “wanted all gold, silver, and food not to be sold with immediate delivery for deferred payment (*‘ājil^{an} bi-ājil*).”¹⁶³ What is not envisaged is a sale, like the *‘arīyah* sale, which, in Mālik’s view, involves the delivery of *both* parties alike being postponed until the same term (*ajal*).¹⁶⁴ The stipulation that delivery be concluded “during the contractual session”, if not also a later inference, does not seem to reflect Mālik’s interpretation of the prohibition. In fact, the explanation that the *mu‘rā’s* delivery of the fresh dates is not executed until the harvest when the *mu‘rī* delivers the dry dates seems artificial; the *mu‘rī* may not only consume and sell the fresh dates *before* the harvest (the rights to do which were previously the *mu‘rā’s*), but also retains his status as the owner of the tree.¹⁶⁵ One suspects that its purpose is precisely to circumvent the prohibition of delay, a purpose that stands to be fulfilled only if the prohibition is interpreted in the less restricted sense.¹⁶⁶

Despite, however, the sale’s circumventing the letter of the prohibition, its delayed aspect – that the *mu‘rā’s* rights (though not in principle the fruit itself) are

¹⁶³ *Muwaṭṭa’ Yahyá*, 2: 164.

¹⁶⁴ That Mālik considered the *mu‘rī* not to take possession of the fresh dates until he delivers the dry dates can be seen in the quotation in the following paragraph: “no one would...make [the buyer] responsible [for it] until [the buyer] had taken possession of it.” Evidently al-*Shaybānī* took a different view for it is only by declaring the transaction not to be a sale at all that he is able to maintain that it does not violate the prohibition: “[The *‘arīyah* sale] is not a sale; if it were a sale, it would not be licit to exchange dates for dates with delayed delivery.” (*Muwaṭṭa’ al-Shaybānī*, 243) Alternatively, he interprets the prohibition differently, that is, as enjoining delivery at the time of contract.

¹⁶⁵ *Mudawwanah*, 3: 285-87.

¹⁶⁶ The importance of delay in discussions of the *‘arīyah* problem seems overstated in Yanagihashi’s account, at least where it relates to early Mālikīyah. Delayed delivery is not in fact particularly exceptional. Where they are not proscribed for other reasons, the *Mudawwanah* authorises transactions where satisfaction is delayed so long as the time of delivery is known (v. *supra* fn. 148, where the time of harvest is *primus inter pares* one such time).

transferred to the *mu'ri* before delivery of the dates takes place – is evidently perceived to be problematic. Mālik attempts to distinguish the *'arīyah* transaction from other sales, the ambition being that, having so distinguished it, he will have shown it to be exempt from restrictions that apply in other cases:

It is conceded (*urkhiṣa*) because it is has the same status as (*unzila bi-manzilat*) delegation of responsibility (*tawliyah*), revocation of rights (*iqālah*), and engagement in partnership (*shirk*). If it had the same status as other forms of sale, no one would make someone else a partner in edible produce until [the buyer] had given him full satisfaction, nor would he renounce his [own] right to it, or make [the buyer] responsible [for it] until the buyer had taken possession of it.¹⁶⁷

Mālik's characteristic appeal to practice, which provides the normative framework for interpreting the scope of a rule – *'arīyah* transactions are not *in practice* subject to the restrictions that apply to other transactions, are shown thereby to be categorically different, and *should* not, therefore, be subject to those restrictions (arguably involving a *petitio principii*¹⁶⁸) – does not, in any case, address the grievous consequence of the delay, namely, that it allows either the *mu'ri* or *mu'ra* to make inordinate gains: the quantity of the fresh dates that are estimated to be on the tree at the time of contract determines the quantity of dry dates that the *mu'ri* contracts to deliver to the *mu'ra* at the time of harvest, but if the eventual yield is higher or lower than the estimate, the *mu'ri* or the *mu'ra* gains respectively. Properly, this kind of gain is the *ribá* of excess (*ribá*

¹⁶⁷ *Muwaṭṭa' Yahyá*, 2: 143; *apud Mudawwanah*, 3: 284. In the case of the *'arīyah* sale, the guardianship, rights, and partnership are thereby implied to be, respectively, of, to, and in the date-palm. Mālik implies that the *mu'ra*'s rights to the tree are transferred to the buyer, the *mu'ri*, before the latter takes possession of the “edible produce,” i.e., the fresh dates. Cf. al-Shaybānī's denial that the *'arīyah* sale is in fact a sale. (fn. 153)

¹⁶⁸ Some would contest that characterization. See Hallaq, *On the Authoritativeness of Sunni Consensus, passim*.

al-faḍl, that is, profit that results from the superior value of the thing obtained over that of the thing given), but it is the delay, as well as the potential of the estimation to be inequitable, that makes it possible. The restriction that Mālik has in mind in distinguishing the *ʿarīyah* sale is not, in fact, the prohibition of delay, but a more direct prohibition, namely, that of *muzābanah*, discussion of which in both *Muwaṭṭaʿ* and *Mudawwanah* largely eclipses that of delay *per se*. This is because, firstly, the wrong in delay is often expressed in terms of its consequences, and these consequences (inordinate gain and uncertainty (*gharar*)) resemble those of *muzābanah*, also an aleatory transaction. Secondly, at least as expressed in many ostensibly early definitions, it relates more specifically to the *ʿarīyah* sale, whose subsequent exemption from the prohibition of *muzābanah* is sufficient to obviate an attempt to explain its possible breach of any more general prohibition.¹⁶⁹ In its treatment of the sale, the *Mudawwanah* does not, indeed, mention delay directly, although it does, obliquely, in its formulations of *muzābanah*, betray anxiety about its consequences, namely, *ribā*.

Of several definitions ascribed to earlier authorities in the *Muwaṭṭaʿ*, the narrowest is that *muzābanah* is “the purchasing of fresh dates on the heads of palms with dried dates.”¹⁷⁰ Alternatively, it is “the selling of fresh dates for dried dates by

¹⁶⁹ In later literature, the two prohibitions are sometimes hard to disengage. Yanagihashi notes an interpretation of *muzābanah* which “sees the wrong [in it] as its violation of the prohibition of *ribā* of delay.” (Yanagihashi, *A History*, 279-80) Statements of Mālik do, in fact, combine the two (for instance, “fruit which can be dried and stored should not be bartered except hand to hand, like for like, if it is of one kind.” (*Muwaṭṭaʿ Yaḥyá*, 2: 156, n. 1842)), but it is clear he does not consider delay to be a necessary condition of *muzābanah*.

¹⁷⁰ *Muwaṭṭaʿ Yaḥyá*, 2: 149, n. 1829. The definition is the exegesis of one or other of the transmitters of a *ḥadīth* in which the Prophet is said to have prohibited *muzābanah*, but it is not clear to which it is supposedly owed.

measure and the selling of grapes for raisins by measure.”¹⁷¹ By these definitions, it can scarcely be denied that the *mu’rā’s* sale of the fruit of the ‘*arīyah* palm to the *mu’rī* for dried dates is an instance of *muzābanah*; in fact, *muzābanah* is distinguished thereby from the sale of ‘*arāyā* only insofar as delayed delivery of the dates is not countenanced or the fresh dates restricted to those that are held by usufruct. Mālik’s own definition, an abstraction and enlargement, is, however, more forgiving. It asserts *muzābanah* to be “all forms of the conjectural buying and selling (*jizāf*) of something whose measure, weight, and number is unknown for something whose measure, weight, and number is known.”¹⁷² This apparently later inference vastly improves conditions for a denial that in fact the sale of the ‘*arīyah* constitutes *muzābanah*. In the *Mudawwanah*, which still occasionally preserves the older definition,¹⁷³ those conditions are mitigated again by a further abstraction, or refinement, of the definition, by which *muzābanah* is identified with *mukāyasah* ([the parties to a sale] striving to out-wit [one another]). Ground on which to distinguish the sale of ‘*arāyā* from *muzābanah* thus prepared, the *Mudawwanah* may advance the following rationalization:

Mālik said: [The sale of] ‘*arāyā* for dried dates is distinguished from *muzābanah* because *muzābanah* is selling by *mukāyasah* and the sale of ‘*arāyā* for dried dates is right and proper (*ma’rūf*) with no increase or profit (*ziyādah*) in it or *mukāyasah*. Its analogue (*mithl*) is one who exchanges with someone else his own dirhams for the other’s dirhams in equal weight. So long as it is done rightly and properly (‘*alā wajh al-ma’rūf*), it is permitted.¹⁷⁴

¹⁷¹ *Muwaṭṭa’ Yaḥyá*, 2: 148, n. 1828. The attribution is similarly unclear.

¹⁷² *Muwaṭṭa’ Yaḥyá*, 2: 150, n. 1831.

¹⁷³ Ex. 8, 2.2.

¹⁷⁴ *Mudawwanah*, 3: 285.

Mālik's allusion to the lawful exchange of dirhams in equal weight, to which he likens the exchange of fresh dates for dry dates in the *'arīyah* sale, is a reference to the *ribá* of excess, whose prohibition he considers to apply exclusively to the exchange of gold and silver and food, which, unless kind for kind, and equal in quality and in weight or measure, violates it.¹⁷⁵ *'Arīyah* sales, he argues, are not to be censured for involving *muzābanah* because *muzābanah* is *mukāyasah*, *mukāyasah* implicitly blameworthy for having as its aim the unlawful acquisition of *ribá*, and *'arīyah* sales, if properly executed, do not confer such gain. The argument is specious. Firstly, it is plain that the *'arīyah* sale does, in fact, tend to produce excess (*ziyādah*). Even in the event that the conjecture regarding the equivalent measure of dried dates is based on accurate estimation of the quantity of fresh dates on the *'arīyah* tree at the time of contract, blight, for instance, might afflict the tree before delivery of the dried dates takes place, resulting in a loss to be borne by the *mu'ri*¹⁷⁶ and, *pari passu*, a gain in favour of the *mu'rá*. Secondly, the exchange of dirhams in equal weight, which meets both of the stipulations intended to avert *ribá* of excess (parity of kind and quantity), makes a poor analogue for the *'arīyah* sale, which meets neither stipulation. The exchange of fresh dates for dried dates was a matter of dispute because the commodities involved are categorically problematic: must they be placed in the same category (*ṣinf*) owing to both being dates, or do they belong to categories of their own because one is fresh and the other dried? It was precisely because they were assigned to different categories that the *muzābanah* of earlier definition was proscribed.

¹⁷⁵ *Muwaṭṭa' Yaḥyá*, 2: 166, n. 1862; 2: 159-61;

¹⁷⁶ Elsewhere the *Mudawwanah* recognises that the *mu'ri* is to bear the loss. See Yanagihashi, *A History*, 283.

The more systematic a jurist's approach, the more averse he is to disrupting the unity of an existing system by admitting it cannot accommodate a rule he asserts to be valid, a rule which, in that case, must be declared anomalous. By his disregard for *qiyās*, which is both a cause and a consequence of his readiness to admit concessions (*rukḥaṣ*) and to alleviate (*khaffafa*) rulings (from the rigour of unyielding adherence to consistency), Mālik is to be placed towards the least systematic end of the spectrum (with al-Shāfiī at the other) by this measure. We see in this example, however, that Mālik's toleration of systematic disunity was, to an extent, reluctant. He denied, as I have shown, that 'arīyah sales are sufficiently like sales as to fall within the scope of the general rules that apply to them; he denied, too, that they meet the criteria of *muzābanah*, a kind of sale whose earlier definitions made it to be so congruent with 'arīyah sales that it ought to have seemed futile to deny that they did so. In the first case, his strategy was to articulate the new rule (the 'arīyah sale) in such a way as to distinguish it from existing rules (other sales) to which other more general rules (prohibitions of delay) were known to apply; in the second case, it was, conversely, to re-define the prohibited existing rule (*muzābanah*) in such a way that distinguished it from the new rule (the 'arīyah sale). Evidently, however, these attempts to conserve the system were perceived to be inadequate, for in the *Mudawwanah* even Mālik himself more frequently explains the sale as an exemption or concession (*rukḥṣah*): the need to explain a rule as such arises only once it is admitted to contravene a more general existing rule. In its treatment of the problem and its *furū'*, the *Mudawwanah's* predominant concern is to justify the legality of the sale implicitly notwithstanding its breach of existing rules.

Chief among the justifications advanced in that regard is that the sale benefits (*yurfiq*) the *mu'ri* by enabling him to rid himself and his family of the grievous inconvenience of the *mu'ra's* intruding into the orchard. Mālik declares that it is for this reason that the sale would be allowed “even if it had the aspect of a sale that was not permitted.”¹⁷⁷ This is one of two justifications, which, in Ex. 8, are re-employed to defend positions on two different, but related, questions. The second is that the sale provides the *mu'ri* with adequate means of sustenance.¹⁷⁸

Is the effect of these justifications intended to be confined to an abstract sphere of debate concerning the sale's legality as an institution, or does it bear upon the legality of a particular sale whether the *mu'ri* is actually in need of sustenance (*al-kifāyah wa-al-mu'nah*), or whether the *mu'ra's* intrusions are in fact a cause of damage (*maḍarrah*),

¹⁷⁷ *Mudawwanah*, 3: 285.

¹⁷⁸ *Mudawwanah*, 3: 286-87. Al-Shāfi'i knows a *ḥadīth* that embodies a more specific exegesis of this *ratio*: the Prophet permitted the sale to enable those who have dried dates, but no money, to eat fresh dates. (*Ikhṭilāf al-ḥadīth*, *Umm*, 10: 269; see also *Umm*, 4: 110-11.) It may be observed that the argument from sustenance to the *mu'ri* precisely mirrors the explanation of the donation of the 'arīyah tree to the *mu'ra*, whose usufructuary right to it is granted in consideration of his being in need. I have found no explicit statement to this effect in primary sources, although it is the kind of obvious symmetry to which one would expect Mālik and Ibn al-Qāsim to resort in order to rationalize the 'arīyah sale on the grounds of equity. Yanagihashi, whose main concern is to excavate the social reality of the 'arīyah sale (which he supposes is obscured rather than exposed by the juristic arguments), neglects to mention the argument from sustenance in his account of Mālik's justifications. He observes it only of al-Shāfi'i, arguing that if the true purpose of the sale was to “enable the poor to eat ripe dates, an exchange of ripe dates for dried dates would be permitted, whether or not the ripe dates are 'ariyya.” (*A History*, 285-86) His argument is undermined, however, if the enabling of the poor to eat ripe dates is, in fact, a justification advanced precisely in consideration of the circumstances under which the original donation was made, a possibility he does not consider. He cites two other justifications from the *Mudawwanah* (besides the one from inconvenience to the *mu'ri*) which allege benefits to the *mu'ra*, namely, that he is spared the effort and expense of caring for the 'arīyah tree, and that he is relieved from bearing the risk of loss – the *mu'ri* is bound to deliver the agreed quantity of dried dates whether or not the fruit on the tree endures loss. (*A History*, 285.) These, however, are of secondary importance. The dominant *rationes*, explicitly stated at 3.1, have to do with the concession being in favour of the *mu'ri*.

annoyance (*adhá*), or inconvenience (*mashaqqah*) to the *mu'ri*? Does the *ratio* of the rule circumscribe its application? Whether or not it does is not immediately clear from the *Mudawwanah*, for the Arabic is *prima facie* ambiguous at relevant places. Referring to his exposition of Mālik's doctrine at 2.2, Ibn al-Qāsim states at 2.3 that 'arīyah sales are permissible 'alá wajhayn. At 2.2, Mālik pronounces a certain related kind of sale (which I examine below) valid if it is 'alá wajh providing the buyer with adequate sustenance, invalid if 'alá wajh the grievous inconvenience caused by the seller's intrusions into the orchard in which the tree, the object of sale, is located. Clearly, then, the reasons for the sale matter. Ought we to infer that a particular sale of that kind is invalid unless the buyer in that case is provided, as a consequence of his purchase, with adequate sustenance, or intends thereby to acquire it, being otherwise in need? I incline to think we should not. The locution 'alá wajh is a stylistic hallmark of the *Mudawwanah*, attested there with far greater frequency than in any other early juridical text.¹⁷⁹ Comparison with parallel instances resolves the ambiguity satisfactorily, showing that what is intended is an argument in favour of the sale as a legal institution, not a limitation of the validity of actual instances of the sale depending on contingent circumstances. It typically announces not a stipulation of conditions that must be met in a particular case for a ruling to apply (whose delineation is the main purpose of Saḥnūn's

¹⁷⁹ It also occurs in the *Muwaṭṭa'*, but its use is largely restricted to three set phrases: 'alá wajh al-ma'rūf (e.g., 1: 582, n. 1304), 'alá wajh al-ijtihād (e.g., 1: 359, n. 719; 1: 587, n. 1315), and 'alá wajh al-ḥalāl (e.g., 2: 40, n. 1526; 2: 41, n. 1528), for which see foll. fn. The first of these especially is very frequent in the *Mudawwanah*, both in Ibn al-Qāsim's pronouncements and in his expositions of Mālik's doctrine. Possibly Ibn al-Qāsim adopted the locution 'alá wajh from Mālik, and broadened its range of application. It occurs quite rarely in the *Umm* – only three times in vols. 2-4 (4: 60, where Mālik's influence on the subject of debate is obvious; 4: 62 and 4: 475 ('alá wajh al-ma'rūf at both places)) – and never so far as I have found in works of the Iraqi jurists.

questions – “What do you suppose if A did such-and-such under conditions X, Y, and Z?”), but rather the *ratio* of a ruling.¹⁸⁰ In the case of the *‘arīyah* sale, Mālik’s justifications are expressions of the purposes for which the sale is claimed to have been instituted. That he did not intend thereby for actual instances of the sale to be valid only so long as the circumstances under which they are offered do not preclude the fulfillment of these purposes also seems to correspond to how al-Barādhī (d. ca. 438/1047) understood Mālik’s doctrine, for in his commentary on the *Mudawwanah* he is said to write that Mālik permitted *‘arīyah* sales whatever the *mu‘rī*’s motive.¹⁸¹

In the passage under review, Mālik’s justifications for the *‘arīyah* sale proper are extended to rulings on two related questions: firstly, whether the *mu‘rī* (A) may purchase an *‘arīyah* tree from a third party (C) to whom the *mu‘rá* (B), the erstwhile beneficiary of the *mu‘rī*’s donation, has previously sold it (1.1-1.2; 3.1-3.2; 4.1-4.2), and, secondly, whether the owner of an orchard (A2) may purchase a tree situated in that

¹⁸⁰ See, for instance, Ex.8: “[Mālik] therefore alleviated [the matter] on account of (*‘alá wajh*) his finding it onerous in respect of *qiyās*.”; Ex.10: “The people (*al-nās*) permitted [the donation of a free gift without a specified counter-gift (*thawāb*)]. It is on the basis of (*‘alá wajh*) [the case of] giving a woman in marriage without specifying a dowry in advance (*al-tafwīd fī al-nikāh*).”; Ex. 9: “On what grounds (*min ayy wajh*) did Mālik permit the lease of a stallion when you have heard that some of the scholars (*‘ulamā*) dislike it (*karihū-h*) and mention it on the Prophet’s authority, and in terms of *qiyās* this involves [the sale of] risk (*gharar*)?” *‘Alá wajh*, in its general meaning, may signify ‘in the manner, or respect, of’, and in certain conventional phrases, it merely serves to modify the noun that follows it adverbially, thus, *‘alá wajh al-ma‘rūf* (‘in the manner of what is known, customary, right and proper’), which, for convenience, I have sometimes rendered ‘rightly and properly’. For Mālik, *al-ma‘rūf* very often constitutes the justification of a rule, in which case *‘alá wajh al-ma‘rūf* must be rendered accordingly (e.g., ‘on the basis of accepted practice’). Cf. *Umm*, 4: 60, where al-Shāfi‘ī denies the effect of *al-ma‘rūf* on the legality of a sale.

¹⁸¹ Yanagihashi, *A History*, 285, quoting in MS al-Barādhī, Abū Sa‘īd, *Tahdhīb masā’il al-Mudawwanah wa-al-mukhtalafah*. On the other hand, Yanagihashi reports that “al-Barādhī quotes “some disciples of Mālik” as having stated that only when the *mu‘rī* wants to prevent the *mu‘rá* from entering the date orchard can the *mu‘rī* offer an *‘ariyya* sale.” This resembles an assertion at 4.2 above attributed to “some of Mālik’s senior disciples”, but it is clear in what follows there that Ibn al-Qāsim, apparently unlike al-Barādhī, does not interpret it as restricting the validity of particular cases.

orchard from its owner (B2) (2.1-2.3; 4.2). It is proposed that both sales be concluded in accordance with the procedure now familiar from the axiomatic *‘arīyah* sale, namely, the bartering of the fresh dates on the tree against the dry dates that are estimated could be produced from the same fresh dates once harvested.

For the first kind of sale, which is declared permissible, we can make out three distinct justifications: The first, which is attributed to Mālik, is a rationalization by analogy (*tashbīh*) with the case in which the owner of a house (A1) wishes to purchase from a third party (C1) lodgings (*sukná*), situated within that house, which he had previously gifted to another (B1), but which B1 had subsequently transferred *ad vitam* to C1. Since it is permissible for A1 to purchase the lodgings from C1, it is rational – systematically consistent – that A be permitted to purchase the *‘arīyah* tree from C (2.1). This kind of reasoning is, in fact, exemplary of what others than Mālik and Ibn al-Qāsim would have called *qiyās*. To state that “the gifting of the lodgings has the same status as (*bi-manzilat*) the selling and gifting of the fruit” is – in terms that Mālik does not shrink from using elsewhere – much like asserting that the former is the *aṣl* of the latter, which is its *far’*. The second justification (at 3.1), which is most likely owed to Ibn al-Qāsim, is an extension of the two justifications advanced by Mālik for the *‘arīyah* sale in its axiomatic form. In that case, “the concession (*rukḥṣah*) in respect of [the tree]” is inferred to be “in favour of the *mu’rī*” for the sale is permitted on account of the benefits that are alleged to accrue to him as a result (removal of damage; provision of adequate sustenance); the present case differs only in respect of the fruit on the tree being in the possession of a third party, which makes no difference to the *mu’rī*’s predicament, so it follows, if the benefits to the *mu’rī* are the sole consideration, that the concession ought

to apply there as well. Though not an outstanding example, this, too, is analogical reasoning. It implies a theoretical principle (doubtfully articulated by any follower of Mālik so early as the ninth century) by which the relevant similarity – what was later called the *'illah* (efficient cause) – between a new rule (*far'*) and an original case (*aṣl*) from which it may be derived is identified with the similarity between the hypothetical *ratio* of the new rule and the established *ratio* of the original case – a principle that invites recourse especially where the material circumstances of the one case diverge from those of the other to the extent that determination of an *aṣl* on the basis of their resemblance in that regard is precluded. (My contention is not, therefore, that when Mālik or Ibn al-Qāsim reasoned analogically, their reasoning was always distinguishable from that of proponents of *qiyās* (though, by their readiness to surrender systematic consequences to preference, it often was), rather that they recoiled from owning to using *qiyās* in name. The term *qiyās* was marred, in their perception, by its association with jurists of Iraq, whom Mālik had blamed for confounding Medinese consensus,¹⁸² and by its effect of countermanding independently rational rules, a connotation by which *tashbīh*, whose function was limited to corroborating their rational status by locating them within an existing system, remained unencumbered. To reflect these historical associations, it should be important to keep the terms straight.)

A third justification, at 4.1, is an ancillary rationalization by Ibn al-Qāsim from which a principle of entitlement can be deduced: A's entitlement to purchase the fruit from C is greater than C's entitlement to purchase it from B. Since C's purchase from B was lawful, A's purchase from C should, therefore, be permitted. One supposes that A's

¹⁸² In his famous letter to Layth b. Sa'd (d. 175/791), *apud* al-Qāḍī 'Iyāḍ, *Tartīb al-madārik*, 1: 41.

entitlement is greater because he owns the tree, while C, at the time of his purchase from B, had no interest in the tree. The principle that interest in property confers greater entitlement to purchase it resembles that expressed by the right of pre-emption (*shuf'ah*).¹⁸³

The second type of sale, defined at 2.1, cannot be called an *'arīyah* sale at all, for it involves the purchase of a tree which is not held by usufruct but is owned outright by another. Except in this most important respect, however, it resembles the *'arīyah* sale proper, and it is from that context that two now-familiar justifications are drawn. While in the case that precedes, both were advanced complementarily in favour of A's purchase from C, we observe in the present case some disagreement concerning which of the two properly applies. Mālik, at 2.2, takes the view that the sale would be hateful if its justification were the averting of the inconvenience to the owner of the orchard (A2) caused by the intrusions of the tree's owner (B2); it would be a form of "selling dry dates for fresh dates" for B2 is not a *mu'ri* but the tree's owner. If, on the other hand, its justification were the provision of adequate sustenance to A2, it would be acceptable. We can analyze this disparity by distinguishing the original scope of a justification from its extended scope – that is, its range of application in relation to an original case (*aṣl*) and its range in relation to analogous cases (*furū'*). Originally, the *rationes* are coterminous – they both apply solely to the sale of *'arāyā* (it cannot be that Mālik should have originally conceived the argument from sustenance to extend to the sale of palm trees in general, for this would have obviated the need to posit a justification for *'arīyah* trees alone); extensionally, however, their range differs. The probative force of the

¹⁸³ – for which, v. *supra* Ex. 6.

argument from detriment to the owner of the orchard gives way at the moment the analogous case to which it is extended replaces usufruct by ownership; ownership is thought to confer a right of access that survives even prejudice to the owner of the land in which its object is situated while the right of access conferred by usufruct is more readily alienable. The argument from sustenance, on the other hand, is thought to be extendable to the non-*'arīyah* sale. On those grounds, Mālik evidently sees no reason why the concession for usufructaries should not also apply to owners. While Mālik's reason for refusing to extend the first justification to the ostensibly analogous case is implicitly systematic, his acceptance of the second, notwithstanding a possible ethical inspiration (the hardship of material deficiency being greater relative to that of mere annoyance), is arbitrary and unsystematic – it might, for instance, be extended equally to the sale of fresh dates for dry dates in general, a transaction he rejects.

While, in Mālik's view, both arguments constitute valid grounds for the *'arīyah* sale proper (2.3), some of his "senior disciples" are said to have endorsed it only on the grounds of the argument from damage to the *mu'rī* (4.2). If the argument from adequate sustenance is not valid for the original case, it cannot, *contra* Mālik, be valid for the ostensibly analogous case either. This induces Ibn al-Qāsim, who hopes to sustain the ruling in favour of the non-*'arīyah* sale at all events, to extend the argument from damage in the way Mālik refused to:

even though the origin of [the palm-tree's] possession is not an *'arīyah* [donation], [the case of the non-*'arīyah* sale] resembles (*tushbih*) [the case of the *'arīyah* sale] because it is feared that damage might be caused to accrue to the owner of the [palm-tree] (A2). The affair of the owner of the palm-tree (A2) is therefore permitted and alleviated, and it is not

based on *qiyās* (*laysa yaḥmil^u-hū qiyās*), rather it is the object of an alleviation (*mawḍi' takhfiḥ*).

Here, Ibn al-Qāsim's use of *tashbīh* to rationalize a rule that he then denies is dependent on *qiyās* captures well the ambivalent attitude of early Mālikīyah towards analogical reasoning. One perceives in the denial a polemical defence of the doctrine against those who would scorn the drawing of the analogy between the *'arīyah* and non-*'arīyah* sale on the grounds of the merest likeness (*shabah*) at the expense of their much greater difference. To the Iraqis – the more so to al-Shāfi'ī – their reasoning must have seemed rudimentary, a form of primitive *qiyās*. This, indeed, was how it appeared to Schacht, for whom “technical legal thought” was one important measure of the development of Islamic jurisprudence. Through the eighth and early ninth centuries, systematic reasoning was subjected to “an increasingly strict discipline.” In Iraq, this was a process which began with “crude and primitive conclusions by analogy (*qiyās*)”, sometimes expressed in the form of “legal puzzles” or “maxims”, and culminated in the uncompromising systematic consistency of al-Shāfi'ī, which “had not been achieved before and was hardly equalled and never surpassed after him.”¹⁸⁴ As a rule of thumb, the more systematically mindful a jurist, the later the stage of legal thought he represents; the trajectory, therefore, was essentially linear. Schacht's perception of the development of legal reasoning in Medina was to a large degree predicated on his appreciation of its development in Iraq:

As we know that the doctrine of the Medinese was largely dependent on and secondary to that of the Iraqians, we may assume the same of the development of technical legal thought for Medina. The sources available

¹⁸⁴ See Schacht, *Origins*, 1, 269-74, tracking this process by examples from Ibn Abī Laylā (d. 148/765-66), Abū Ḥanīfah (d. 150/767), Abū Yūsuf (d. 182/798), and al-Shāfi'ī.

happen to be less abundant for this particular aspect of ancient Medinese doctrine, but we are able to see that legal reasoning in Medina in the ancient period was essentially of the same character as that found in Iraq though, on the whole, more primitive.¹⁸⁵

The hostility towards *qiyās* I have documented bespoke a reluctance to pursue systematic consequences. In that respect, the legal reasoning of early followers of Mālik was radically unlike that of the Iraqis studied by Schacht. Its practitioners knew that it fell short of producing the severe consistency to which that of their adversaries increasingly tended, but in the generation of Ibn al-Qāsim, to whom all of the polemical statements in the *Mudawwanah* against *qiyās* are attributed, there was as yet no irresistible compulsion to pursue it. The assumption that these statements really do go back to their putative source is credible, but not yet proven. It locates them at a time when the trend towards greater systematic reasoning in Iraq was well-advanced but had not yet reached its apogee in the mature expression of al-Shāfiʿī's theory, whose eventual acceptance would, to a large extent, extinguish disagreement regarding the principles that ought to underlie the derivation of the law, *qiyās* among them. Saḥnūn's *riḥlah* to the East is said to have lasted three years, beginning, most likely, in 188/803-4, three years before the death of Ibn al-Qāsim with whom he studied at Fustāṭ.¹⁸⁶ This situates Mālikī hostility towards *qiyās* in an Egyptian milieu at the turn of the ninth century, somewhat before al-Shāfiʿī's second sojourn in Baghdad (*ca.* 195/811), to which

¹⁸⁵ Schacht, *Origins*, 275.

¹⁸⁶ Talbi, M., "Saḥnūn", in *EP*. For Saḥnūn's life, see now Brockopp, *Contradictory Evidence, passim*, emphasizing differences between accounts and speculating on what we might infer from these differences. 188/803-4 is the latest date for Saḥnūn's departure for Egypt; the earliest is 178/794.

we probably owe the works that comprise his *qadīm*,¹⁸⁷ and just after the death of al-Shaybānī in 189/804-5.¹⁸⁸

It was under al-Shaybānī that Asad b. al-Furāt (d. 213/828) had studied in Iraq before going to Egypt to seek out the teaching of Mālik from his students Ibn Wahb (d. 197/813), Aṣḥhab (d. 204/819), and Ibn al-Qāsim. Asad, who at Qayrawān before his *riḥlah* was the most prominent of Saḥnūn's mentors, ultimately sided with the Ḥanafīyah. Whatever the truth about its relationship to its supposed predecessor, the *Asadīyah*,¹⁸⁹ the *Mudawwanah* affords us evidence, in the way material ascribed to earlier jurists like Ibn al-Qāsim is organized, of the effect that Saḥnūn's exposure to Ḥanafism had on his approach to jurisprudence. It seems plausible that Asad's influence, whether personal or textual, through the medium of the *Asadīyah*, was formative in that regard.

¹⁸⁷ Chaumont, E., "Al-Shāfi'ī", in *EP*.

¹⁸⁸ It is also possible, but less likely in my view, that some of the material ascribed to Ibn al-Qāsim represents what Asad b. al-Furāt (d. 213/828), who preceded Saḥnūn in going to Ibn al-Qāsim, heard from him. The traditional story, of which there are several variants, has it that Saḥnūn brought the *Asadīyah*, which contained Asad's replies to questions of Saḥnūn on the basis of what he had heard of Mālik's doctrine from Ibn al-Qāsim, back to Ibn al-Qāsim to scrutinize. The result of their endeavour, said to be superior to the *Asadīyah* for its fidelity to Mālik's teaching, was the *Mudawwanah*. To what extent the two are independent is therefore questionable. Muranyi has denied that the mss. of the *Mudawwanah* he studied represent Asad's transmissions from Ibn al-Qāsim in any significant degree. (*Die Rechtsbücher*, 5-11) I myself have found no trace in the printed edition of Asad's role as author or transmitter of the positive content of the *Mudawwanah*, but, as I argue below, his influence is probably ubiquitous in Saḥnūn's questions. The *Asadīyah*, like the *Mudawwanah*, presumably also comprised what Asad had learnt of Mālik's doctrine in Egypt from Ibn Wahb (d. 197/813) and Aṣḥhab (d. 204/819), under whom he had also studied. (See Melchert, *Formation*, 23.) Unfortunately, it tells us nothing about its dependence on the *Asadīyah* that the same is true of the *Mudawwanah*, for it seems likely that Saḥnūn would have consulted them, too, independently of Asad.

¹⁸⁹ See previous fn.

The general principle that governs the organization of material in the *Mudawwanah* is systematic, which, to judge by the *Muwaṭṭaʿ* (rather loosely organized by topic and a rough hierarchy of authorities) was quite unlike any principle that had informed the composition of Mālikī works to date. In particular, the outstanding organizational principle in the examples I have considered – in which questions and answers evolve by degree to a rejection of analogical consequences – is analogical. The content of a question is determined by its resemblance to that of a preceding question, the resemblance being relevant if it relates to the overarching theme of the dialogue section in which the questions occur. Thus, in Ex. 4, whose structure most clearly exemplifies this principle, the questions move from whether it is permissible to buy coriander fruit on the condition that the seller presses it to extract its oil (1.1-1.2), to whether one may purchase a standing crop of wheat or barley on the condition that it is reaped and threshed for grain (2.1-2.2; 5.1-5.2), to whether one may purchase wheat-grain on the condition that it is ground into flour (3.1-3.2; 6.1-6.2), to whether one may purchase sesame seed, fodder radish, and olive on the condition it is pressed for oil (4.1-4.2). These questions are distinguished for consideration because they are thought to be analogous, analogous because they resemble each other in a respect that is relevant to the theme of the section, namely, the sale of “what comes out of [something]” when, potentially, what comes out of it is uncertain at the time of contract (1.4) – a species of the sale of risk (*bayʿ al-gharar*). The analogical aspect of the literary end-product, and the elaborate casuistry by which it extrapolates and ramifies the law (El Shamsy argues that its effect of “generating countless hypothetical cases [*masāʾil*]” was characteristic

of the dialectic method of Iraqi *ra'y* in the eighth century¹⁹⁰), is therefore an artefact of Saḥnūn's redaction of the original material, rather than an inherent feature of the material itself. (By 'redaction', I mean to include redaction of a non-textual kind: the influence that Saḥnūn, as interlocutor, might have exerted in the scenario of an actual question-answer session.) In fact, it is striking how poorly the positive content measures up to the aspirations of the redactor. For instance, it is implicitly posited in the redactional scheme that the sale of standing wheat on the condition that it is reaped and threshed (for grain) is analogous to the sale of grain on the condition that it is ground (into flour). The expectation is that either, in recognition of their analogousness, the two cases be subject to the same ruling, or they be distinguished in a way that subverts the premise of their analogousness. Since Mālik rules against the first sale (2.2; 5.2), but – with due hesitation – allows the second (3.2; 6.2), it is the latter course that Saḥnūn expects the material – and urges Ibn al-Qāsim – to take (6.1). Ibn al-Qāsim initially tries to do what is expected of him, but his attempt to distinguish the case of the flour is marred by doubt ("it seemed to me that he thought...") and is systematically primitive ("...that the flour was a likely matter and that what comes out of wheat was known.")¹⁹¹. A resolutely systematic reasoner would surely have developed this justification without much difficulty (grinding is to be distinguished from reaping, threshing, and pressing insofar as it yields no waste or by-product like straw, husk, or pomace, which, being of indeterminate quantity at the time of contract, is the cause of uncertainty in the other

¹⁹⁰ El Shamsy, *PhD*, 21.

¹⁹¹ Similarly, it is problematic that Mālik should have obstinately refused to adopt a position on the sale of sesame, fodder radish, and olive on the condition it is pressed (for oil) (4.2), yet unequivocally disallowed the sale of coriander fruit on the same condition (1.2).

cases); however, his response is ultimately not to distinguish the sale that Mālik allows from those he does not, but to throw out the very principle on which the dialogue is premised – *qiyās* – and then to praise Mālik’s doctrine for its disregard for it and its recourse instead to preference on which the “alleviation” is based. The material provided by Ibn al-Qāsim disappoints Saḥnūn’s systematic ambitions. To a great extent, therefore, it seems to be Ḥanafism as embodied in the very questions of Saḥnūn that generates Ibn al-Qāsim’s antipathy to *qiyās* in the *Mudawwanah*. We should not conclude from this, however, that the attitude is contextually circumscribed to the extent that it is unique to the *Mudawwanah* and extends no further back; Ibn al-Qāsim’s was surely not the first disciple of Mālik’s to encounter Iraqi reasoning, and the *Muwaṭṭa’* itself, as we have seen, bears traces of the same. In the current state of knowledge, the apparent insularity of the Mālikīyah is uncertain; consequently, it is hard to measure the extent to which his encounter with the foreigner who insisted on Iraqi precepts was necessary to provoke Ibn al-Qāsim’s animosity towards *qiyās*. In any case, it does seem that Saḥnūn’s presence has brought it to the fore, if not exacerbated it.

There is an alternative way of reading the *Mudawwanah*’s polemics against *qiyās* which ascribes the attitude they express not to Ibn al-Qāsim, the faithful student of Mālik, but to Saḥnūn, the architect of a new Mālikī-Ḥanafī syncretism – a strand of jurisprudence that was Mālikī in doctrine, but Ḥanafī in method, as far as possible. The context, in that case, is mid-ninth century Qayrawān, rather than late eighth-century Egypt. On this reading, its polemics against *qiyās* are not an original feature of Ibn al-Qāsim’s transmissions to Saḥnūn, rather an exegetical feature of the latter’s

interpretation of those transmissions.¹⁹² To some extent, this diagnosis is consonant with Calder's view that the dialogue style of the *Mudawwanah*, probably as a result of Ḥanafite influence, developed later than much of the raw material that was fashioned into that format.¹⁹³ It seems plausible that a jurist versed in the superior systematic rigour of Ḥanafī jurisprudence should be inclined to mount a pre-emptive defence of his method against adversaries who, being similarly versed, would have been quick to denounce what, by their own standards, were conspicuous shortcomings. In the ninth-century Maghrib of the Aghlabids, who seem to have sometimes favoured the Kūfan schools, sometimes the Mālikī, the Mālikīyah surely did not want for opponents: they represented, perhaps, a Kūfan aristocracy in opposition to which "African jurists such as Saḥnūn and his students may have stressed the Mālikī character of their jurisprudence."¹⁹⁴ Since there were limits to how far Mālik's doctrine could be retrospectively rationalized according to the rules upheld by the native practitioners of Iraqī reasoning,¹⁹⁵ one approach was to admit that the doctrine one espoused contravened those rules, and then to assert that, for transcendent considerations, he espoused it no less.

¹⁹² One example (Ex. 3) is ostensibly transmitted not from Ibn al-Qāsim, but Ashhab. The attitude to *qiyās* expressed in that statement is qualitatively no different from that represented in many of the statements attributed to Ibn al-Qāsim: it argues that *istiḥsān* supersedes *qiyās*.

¹⁹³ Calder, *Studies*, 18, 66. It is possible, however, that Calder, who dates the *Mudawwanah* to c.250/864, wishes to imply that its dialogue style developed later than Saḥnūn's lifetime, a view to which I do not assent.

¹⁹⁴ Melchert, *Formation*, 39.

¹⁹⁵ As Schacht observed, even so accomplished a technician as al-Shāfi'ī sometimes found it impossible to rationalize existing doctrine according to the stringent rules he so insistently urged of others, though, in his case, this did not dissuade him from trying. (*V. esp., Origins*, 316-324)

The proposition that the *Mudawwanah*'s statements against *qiyās* are a pseudo-Ḥanafī expression of Mālikī doctrine is supported by the observation that the practice of opposing *qiyās* and *istiḥsān*, which is a particularly salient feature of the material we have considered¹⁹⁶ and yet has no parallel in other Mālikī texts of the period¹⁹⁷, is well attested in Ḥanafī texts. The *Aṣl*, for example, is replete with assertions that a rule is not derived by *qiyās* but by *istiḥsān*.¹⁹⁸ Al-Shaybānī's acknowledgement that a certain sale is corrupt (*fāsid*) according to the former, but permitted on account of the latter, is strikingly reminiscent of the statement attributed to Ashhab in Ex. 3.¹⁹⁹ (The obvious difference between the Ḥanafī texts and the *Mudawwanah* in that respect is that, in the former, statements confirming the effect of *qiyās* on a rule are vastly more numerous than statements denying its effect,²⁰⁰ while in the latter such statements are entirely absent.)

Moreover, there are cases in the *Mudawwanah* in which the desire to subject the Egyptian material to an analogical regime seems to have affected not only the form, but the type of language in which Mālik's doctrine is expressed. One such case, which concerns the recompense for violation of the prohibition against the killing of game

¹⁹⁶ *Qiyās* and *istiḥsān* are explicitly opposed in Exs. 2, 3, 4, and 7. In the examples in which their opposition is not explicit, it is either practice (Exs. 5 and 6) or a concern to alleviate difficulty (Ex. 8) that negates *qiyās*. The desire to alleviate difficulty in the conduct of human affairs frequently governs *istiḥsān* (e.g., Ex. 4), and Ex. 8 is clearly an instance of it, even though it is not explicitly identified as such.

¹⁹⁷ I have already noted that both terms are absent from the *Muwaṭṭa'* (v. *supra* fn. 82). From Brockopp's work, it seems that the same is probably true of the *Mukhtaṣars* of Ibn 'Abd al-Ḥakam: "It is evident that 'Abd Allah ibn 'Abd al-Hakam has no interest in defending his legal arguments according to the 'roots of jurisprudence.'" (Brockopp, *Early Islamic Jurisprudence in Egypt*, 172) (V. also Brockopp, *Early Mālikī Law*, *passim*.)

¹⁹⁸ E.g., *Aṣl*, 5: 139, 170, 171, 193, 207. Also, *Ḥujjah*, 2: 179: *Astaḥsin^u dhālika wa-ada^u al-qiyās fī-h.*

¹⁹⁹ *Aṣl*, 5: 129.

²⁰⁰ In the same sample, I count roughly three times as many such statements.

while in the state of ritual consecration called *iḥrām*,²⁰¹ exemplifies the same subversion of systematic ambition we saw above in Ex. 4.

1.1. I said: “What is Mālik’s position with regard to the pigeon of the Ḥaram (*viz* the sacred precincts incorporating Mecca) that the *muḥrim* hunts for game?”

1.2. Mālik said: “I still hear that for the pigeon of Mecca a sheep is due [as ransom (*fidyah*, *jazāʾ*, *kaffārah*)] for each one.”²⁰²

1.3. Mālik said: “The pigeon of the Ḥaram has the same status as (*bi-manzilat*) the pigeon of Mecca, for every one of which a sheep is due.”

2.1. I said: “And what [penalty] applies to one who destroys an egg of the pigeon of Mecca when he is *muḥrim*, or is not *muḥrim* but is in the Ḥaram, according to Mālik?”

2.2. He said: “One tenth of the bloodwit of its mother, and a sheep applies in respect of its mother.”

3.1. I said: “And what is Mālik’s position with respect to [birds] other than the pigeon of Mecca?”

3.2. He said: “A[n *ad hoc*] judicial decision (*ḥukūmah*) in case it resembles (*yushbih*) neither the pigeon of Mecca nor the pigeon of the Ḥaram.”

3.3. He said: “Mālik disliked the *muḥrim* to slaughter the pigeon, both wild and non-wild, because the *aṣl* of the pigeon in his view is a bird that flies.”

3.4. He said: “It was said to Mālik: ‘There is a [kind of] pigeon known to us, called the Roman [Pigeon] (*al-rūmīyah*)²⁰³, that doesn’t fly (*sc.* tends not to fly) and is adopted for its young.’ [Mālik] said: ‘I dislike [that it be slaughtered] because it flies (*sc.* is able to fly); I dislike the *muḥrim* to slaughter anything that flies.’”

²⁰¹ V. *Mudawwanah*, 1: 442-52; *Muwaṭṭaʾ Yahyá*, 1: 553-55; Q. 5: 95 prescribes for the deliberate killing of game while in the sanctified state of the pilgrim (*iḥrām*) “recompense – the like of what he has slain, in flocks, as shall be judged by two men of equity among you, an offering to reach the Kaʿbah; or expiation – food for poor persons or the equivalent of that in fasting, so that he may taste the mischief of his actions.”

²⁰² The question of the form and measure of that ransom is controversial. With regard to its form, there are three possibilities: sacrificial offering (*nusuk*, *hadī*), donation to the poor (*ṣadaqah*), and fasting.

²⁰³ This may be a breed known today as the *ḥamām al-rūmī* whose neck is devoid of feathers. It corresponds to the Naked-Neck Pigeon, which resembles the Naked-Neck Chicken (*al-dajāj al-rūmī*). The Spanish Naked-Neck Pigeon is thought to have been brought to the Iberian Peninsula by the Arabs. Alternatively, it may be the Giant Runt Pigeon (also known as the Roman Pigeon) thought to originate in Spain or Italy, whose ancestors are said to have been so large they could hardly fly. (Levi, *Encyclopedia of Pigeon Breeds*, 405-10, 664, 725) If a bird like the former is meant, it is presumably distinguished for comment not for its disinclination to flight (the Naked-Neck is an excellent flier), but for its resemblance to fowl, because it is conceived as occupying an intermediate – and, therefore, problematic – category between the pigeon of the Ḥaram and the chicken and goose, and other gallinaceous birds.

3.5. He said: “We asked Mālik: ‘May the *muḥrim* slaughter the goose and the chicken?’ [Mālik] said: ‘There is nothing wrong in that.’”

4.1. I said to Ibn al-Qāsim: “Is the goose not a bird that flies? What is the difference between it and the pigeon?”

4.2. He said: “Mālik said: ‘Its *aṣl* does not pertain to that which flies (*laysá aṣl-hū mi-mmā yaṭīr*). The same is true of the chicken: its *aṣl* does not pertain to that which flies.’”²⁰⁴

With this, the analogical development of the dialogue breaks down, and the discussion moves sideways. Its logic thus far dictates not only that it be established what, in fact, the *aṣl* of the chicken and goose is, but also that the systematic basis of Mālik’s disapproving the slaughter of the pigeon be re-assessed. That the slaughter of the chicken and goose is not disapproved shows that the innate ability to fly is not, contrary to what was suggested previously (3.3, 3.4), a sufficient condition of the prohibition’s application within even the relatively narrow category of creatures understood to be birds. It cannot, then, be the true *aṣl* of the rule against the slaughter of pigeons by *muḥrimūn* or others in the Ḥaram. The purpose of an *aṣl* is to confer maximal rationality by acting as the logical glue that binds a network of rules. If it cannot serve as the systematic linchpin for so small a network as that which comprises the rules relating to the slaughter of birds by a well-defined category of persons, it needs to be jettisoned or revised. We have seen, in each of the preceding examples, how the material ascribed to Ibn al-Qāsim, when the systematic inconsistency of its content is forcibly exposed by the scheme of Saḥnūn’s questions in this way, will respond by repudiating *qiyās* and upholding the rule that causes the inconsistency for other considerations, social or ethical in nature. Perhaps it is only because none of those considerations can be made

²⁰⁴ *Mudawwanah*, 1: 450.

to apply in the present case, whose context is somewhat remote from the conduct of human affairs (*mu'āmalāt*), that we see no similar manoeuvre here.

Saḥnūn's attempt to coerce the Mālikī material into conformity with his analogical scheme has had two substantial effects on its expression. The first is obviously formal. For instance, Ibn al-Qāsim's statement of Mālik's ruling in favour of the slaughter of the goose and chicken at 3.5, although apparently unprompted by Saḥnūn, has been introduced to test the analogousness of those birds with the domesticated pigeon, whose slaughter Mālik disapproves (3.3-3.4). It has no other reason to be, and is otherwise a departure from its surrounding context, which is roughly prefigured by the order of topics in the *Muwaṭṭa'*, where there is no mention of the chicken or goose.²⁰⁵ After 4.2, the discussion moves on to another question, which also concerns the pigeon. A second effect of Saḥnūn's redaction is the incorporation of the term *aṣl*, which is foreign to the primitive expression of Mālik's doctrine, in which *mithl* and *shibh* are its main analogues, and belongs to the terminology of *qiyās*. Without the concern for analogy that determines the form of the dialogue, the need to employ the term should not have arisen. If the analogical scheme of the *Mudawwanah* should have so profoundly affected the way in which the material with which it is fitted out is expressed, the postulate of a pseudo-Ḥanafī layer to which systematic explanations of Mālik's doctrine belong seems plausible.²⁰⁶

²⁰⁵ *Muwaṭṭa' Yahyá*, 1: 553-55.

²⁰⁶ For al-Shāfi'ī's attribution of *qiyās* to Mālik in Tr. III, see Schacht, *Origins*, 116-17: we find the term being used only once by the Medinese themselves (i.e. by al-Rabī'). Saḥnūn forced on Ibn al-Qāsim the use of the term *qiyās* as "al-Shāfi'ī forced its use on al-Rabī'".

There are, however, two reasons to think that the hostility to *qiyās* is not purely an artefact of the polemical milieu of the mid-ninth century Maghrib: First, as we have seen, the quality of the material he ascribes to Ibn al-Qāsim is a strikingly inadequate mirror for Saḥnūn's ambitions as redactor. On the one hand, it is precisely an appreciation of the inadequacy of the material that might have induced Saḥnūn to fill the gap with exegesis. On the other hand, the very existence of the asymmetry is clear evidence that there were severe limits to how far his role as redactor extended to filling that gap. My impression is that, while it was Saḥnūn's role as redactor to interpret the material transmitted to him by Ibn al-Qāsim and a few others (much as it was Ibn al-Qāsim's role before him to interpret the material transmitted to him by Mālik), the quality of the interpretation to which he subjects the material does not, on the spectrum of 'thin' to 'thick' I proposed earlier, stray as far from the thinner end as the interpretation to which Ibn al-Qāsim subjects Mālik's teaching. To be sure, Saḥnūn's ordering of the material, which I mean to be comprehended by interpretation, had, as I have argued, an important transformative effect on its meaning. However, it does not seem that interpretation in Saḥnūn's case embraced, as it not infrequently did in Ibn al-Qāsim's, its very thickest form: the inference of new doctrine, extending the meaning of the primary source in perceived accord with the intentions of its author, often in a manner that its native practitioners would have identified with *qiyās*.²⁰⁷ Saḥnūn's is a more conservative approach. On the other hand, I find it more doubtful that his interpretative role did not extend to the inference of the method behind the doctrine and that these inferences were not then incorporated into his re-telling of Ibn al-Qāsim's

²⁰⁷ E.g., Ex. 6.

responses. Whether or not this was the case is probably impossible to ascertain unless an independent textual witness to the jurisprudence of Ibn al-Qāsim comes to light. The second reason to think that the polemics against *qiyās* did not originate with Saḥnūn is that there are already traces of the attitude they express in the *Muwaṭṭaʿ*, which, as I have said, must be accounted earlier than the *Mudawwanah* for, among other considerations, its poverty of technical vocabulary. Even if Saḥnūn was responsible for the form of the *Mudawwanah*'s statements against *qiyās*, it is unlikely, especially given his Ḥanafī background, that he was the source of the attitude they express. I incline to think that Saḥnūn transmitted faithfully at least the attitude from Ibn al-Qāsim, but that, in Qayrawān, it also served his interests in competition with the Kūfans' to stress the non-Ḥanafī character of Mālikī jurisprudence.

Whether the statements in the *Mudawwanah* against *qiyās* represent the exegetical efforts of a Maghribi jurist steeped in Ḥanafī method to justify Mālikī doctrine, or the reactions of an Egyptian jurist steeped in Mālikī doctrine against Ḥanafī method, it seems accurate – if not ultimately precise – to conclude that *qiyās* first gained a presence in Mālikī jurisprudence in the West as the result of an encounter between Mālikī doctrine and Ḥanafī method. Perhaps the *Mukhtaṣar al-Kabīr* of Ibn 'Abd al-Ḥakam²⁰⁸ is suggestive of how Mālikī jurisprudence in the West, at least in the medium term, might have been, had no such encounter taken place: concerned with the presentation of the law, but not with its rationalization, the law's capacity for

²⁰⁸ - probably written sometime before the year 210/825: Brockopp, *Early Mālikī Law*, xv, and *v. supra* fn. 187. The chapter edited by Brockopp (*Early Mālikī Law*, 228-83) is a straightforward presentation of legal rules, which are neither justified by recourse to statements from earlier authorities nor rationalized in systematic terms.

elaboration, for organic growth, constrained by a lack of interest in systematization. It remains for future research to show when *qiyās* – or, rather, disapproving it – turned from being mainly an explanation of what Mālik’s doctrine was not to being also an explanation of what the doctrine in fact was, and of why it was superior to others’. Consideration of the *Nawādir* of Ibn Abī Zayd and the recently published *Tahdhīb* of al-Barādhī²⁰⁹, which has so far been only preliminary, may expedite that task. On the other hand, it may confirm only that it was not until the late tenth century, when it came into contact with the Shāfi’ite legal theory of the Eastern Mālikīyah, that Western Mālikism recognised the potential of *qiyās*.

Whenever the idea of the importance of *qiyās* gained full recognition, the *Mudawwanah* surely did much to facilitate its reception. Saḥnūn could not have opposed it so strenuously as his Mālikī antecedents had done. We have seen that the outstanding principle that governs his redaction of the Egyptian material is analogical, that he insisted on applying the concept of the *aṣl* – foreign to Mālik’s jurisprudence – and that, consequently, the practical difference between *qiyās* and *tashbīh* sometimes narrowed to the extent that it was hard to discern. On one occasion – the only instance in the *Mudawwanah* in which the term is mentioned but not explicitly disapproved – Saḥnūn asks, with respect to a certain transaction, whether the same *qiyās* applies to oil and the like as applies to dates and grain.²¹⁰ What is meant by *qiyās* in that instance is closer to what is meant elsewhere by *tashbīh* than to what *qiyās* denotes in the cases in which it is rejected: the “*qiyās*” that applies to dates and grain refers to the fact of their

²⁰⁹ *V. supra* fnn. 100, 98.

²¹⁰ *Mudawwanah*, 3: 183. (*wa-al-zayt wa-mā ashbaha-hū ‘alá hādha al-qiyās*)

being treated alike, rather than to the fact that the rule governing them is derived on the strength of their likeness. While this is some way short of implying endorsement of *qiyās* as a derivational mechanism, it does suggest that the term itself was not, for Saḥnūn, so burdened with negative association that he could use it only in order to reject what it denoted. Opposition to *qiyās* had originated in a milieu that disdained the Ḥanafism to which he had been exposed through Asad. Seeing that there were limits to how far the new doctrine could be made to conform to the systematic rules to which the Iraqis were so devoted, he probably preserved the attitude reluctantly, maintaining, where necessary, the compromise position that *qiyās* took second place to the opinion of the eponym. It may not have been an express tenet of Saḥnūn's legal theory so much as a position of last resort where the two conflicted. In any case, the compromise was not to last. Eventually, the gap between what the doctrine endorsed and what *qiyās* required it to endorse would be closed, sometimes by correction of the doctrine, but more often by retrospective rationalization of it through the ingenious application of increasingly sophisticated techniques of *qiyās*. The final closure of this gap is manifested in the classical fiction, which naturally asserted itself in time, that Mālik himself had employed *qiyās*.

It seems to have taken the Mālikīyah in the West at least a century longer than their counterparts in the East to develop an interest in legal theory. When they did, it was largely due to the efforts of the Andalusian al-Bājī (d. 474/1081), who imported there the Shāfi'ite hermeneutic of the Eastern Mālikīyah from Baghdad.²¹¹ If the

²¹¹ V. Vishanoff, *Formation*, 231. The first Mālikī unequivocally credited with a work on legal theory was the Baghdadi Abū al-Faraj al-Laythī (d. 331/943). (*op. cit.*, 229)

disregard of the early Mālikīyah for *qiyās* had persisted, it would have been hard to reconcile this hermeneutic. The subjection in the *Mudawwanah* of the doctrine of Mālik and a few of his students to a Ḥanafite redactional regime meant that the teaching materials on which the spread of the school depended were already readily analyzable along analogical lines, and the adoption of Shāfi'ite principles required only that the conception of the legal system be expanded materially to encompass revealed sources as well as positive rules rather than reformed structurally as well. It has been suggested that the demise of the Ṣāhirīyah in the eleventh century was owed, in part, to their rejection of *qiyās*, a position that was too far removed from the mainstream to allow for their recognition.²¹² The importance of *qiyās* to the survival of a given school of law was historically contingent on the spread of Shāfi'ite legal theory – in particular, on the success of the idea that positive rules derived their justification from Qur'an and Prophetic precedent. If the sufficiency of reliance on the personal opinion of later authorities like Mālik had been allowed to endure, there should have been no compulsion to adopt a mechanism that enabled the rationalization of rules in relation to revealed sources. Analogical reasoning of the form exemplified in the *Mudawwanah* – which stands somewhere between the *tashbīh* of Mālik and the *qiyās* of al-Shāfi'ī, consisting not only in the retrospective rationalization of existing rules but in the extrapolation by analogy of new rules from them – might, therefore, have continued to suffice.

²¹² Melchert, *Formation*, 187.

2 The *Muwaṭṭa'āt*

What was the nature of Mālik's jurisprudence? I have argued that in Western Islam, where the *Mudawwanah* was its principal vehicle, Mālik's teaching was mediated, re-structured, and systematically transformed by the subjection of its content to an analogical scheme whose chief inspiration was a desire to systematize the positive rules of Mālik.²¹³ This transformation amounted to much more than a superficial re-configuration of content; it facilitated the alliance of the Mālikīyah in the eleventh century with a hermeneutical tradition in which a relational property of legal rules, their analogical consistency, would be made to have implications for their intrinsic metaphysical truth. I have found no evidence to suggest that attributions to Mālik of positive legal rules in the *Mudawwanah* may not be relied upon (that they are reliable is confirmed to the extent that I have documented agreement with the *Muwaṭṭa'*); moreover, I have not proposed enlargement or extrapolation of Mālik's doctrine *per se* in that work except for that which is expressly acknowledged or implied to be such in the wording used to report it. However, recognition of the systematic transformation I have described commends vigilance of the extent to which the thinking behind those rules – his jurisprudence – has been obscured in that work. No credible account of Mālik's legal thought might straightforwardly be deduced from the kind of jurisprudence overtly evident in the *Mudawwanah*. Still more acute are the hazards of reliance on later works

²¹³ I will return to the question of systematization in Part 3, define it more precisely, and situate *tashbīh*, *qiyās*, and appeal to *ḥadīth* in the context of its development in Mālikī jurisprudence.

like those of Ibn 'Abd al-Barr, in which the principal effect of this transformation, the retrospective rationalization of Mālik's thought, came to be eloquently realised in ingenious analyses of the raw material of the *Muwaṭṭa'* along the lines promoted by the adherents of al-Shāfi'.

This raises the question whether the original jurisprudence of Mālik is at all recoverable. Except in one case (§1.2), where we examined the legal reasoning in the *Muwaṭṭa'* of Yaḥyá (whose relation to Mālik has in any case yet to be shown), what I have treated so far of jurisprudence (as distinct from positive law) may tell us more about that of later adherents to his doctrine than Mālik's own. My account has relied chiefly on a close reading of the *Mudawwanah*, and in particular on an exploration of the tensions between the evident aspirations of its principal compiler, Saḥnūn, and the earlier material supplied by Ibn al-Qāsim and others through which he strove to realise them. This approach enabled me to disengage later aspects of the text from earlier, but of even the earliest aspects only the positive rules themselves, which I have confirmed here and there by reference to the *Muwaṭṭa'*, may be said with fair certainty to go back to Mālik. So, when Saḥnūn asks why *muḥrimūn* who slaughter geese or chicken in the Ḥaram are not subject to the same penalty as those who slaughter pigeons and the latter's reply is wholly deficient according to the terms of the argument, I take it that the rule that subverts the premise of the argument (no blame attaches to one who kills geese or chicken in the Ḥaram) likely goes back to Mālik while the premise (rules that apply to objects and situations that share an *aṣl* must be analogous) goes back only to Saḥnūn. The view that the *aṣl* of the pigeon is a bird that flies, which Ibn al-Qāsim ascribes to Mālik himself, I interpret rather as representing the former's inference of his teacher's

reasoning, the type of inference inspired by the style of Saḥnūn's questions, which endeavour to cast the positive rules he supplies into an analogical mould. Mālik's jurisprudence, then, is scarcely accessible in the *Mudawwanah*.²¹⁴

I have argued, however, that, although not directly accessible in the *Mudawwanah*, one aspect of Mālik's jurisprudence (confirmed in places by the biographical literature and the *Muwatta*²¹⁵) may be perceived indirectly through an attitude it preserves or 'transmits' from Mālik: the reasoning behind his doctrine was distinguished from that which the Iraqi rationalists claimed to produce theirs by a pronounced antipathy, in principle and in practice, to the notion that the validity of positive rules was dependent on their analogical consistency. This notion was a veritable article of legal theory and not a self-evident fact (only in the attempt to rationalize rules does it emerge that their consistency should matter and, even then, it takes a further commitment – to the paramountcy of the system – to see that it should matter more than arbitrary preference). Mālik associated it with *qiyās*, which consequently he rejected. In practice, the positive rules of the Iraqis were generally anterior to *qiyās*, but it was the *principle* that it should curtail arbitrary reasoning to which Mālik objected. By contrast, *tashbīh*, which was not (even in principle) a means of deriving rules but a means of rationalizing them by assimilation once they had already been decisively pronounced, could have no effect on the validity of doctrine and seems to have been endorsed by Mālik.

²¹⁴ This is not, however, to suggest that the style of reasoning exemplified in Ibn al-Qāsim's replies represents a radical departure from Mālik's own. On the contrary, it will be seen in Part 3 that in certain respects it represents a continuation and natural development of it.

²¹⁵ V., e.g., *supra* fnn. 29, 30, 83.

I have so far said much more about the posthumous process of revision and creative reconstruction that Mālik's jurisprudence underwent than about the grounds on which I have posited what was being revised. My initial purpose in the following is to rectify this neglect by assessing whether the recensions of the *Muwaṭṭa'* afford us grounds to speak with any confidence about his legal thought. I propose to do this roughly in chronological reverse. First, I will assess Calder's claim that it was through the efforts of a later ninth-century transmitter of Yaḥyá's *Muwaṭṭa'*, Ibn Waḍḍāḥ, that the text achieved its final form (§§2.1.1-2.1.2). Secondly, I will consider by reference to instances in which his own doctrine is recorded as having diverged from Mālik's the extent to which the interventions of Yaḥyá a generation earlier might have been formative of the outcome (§2.1.3). Thirdly, I will examine other versions of the *Muwaṭṭa'* and consider the extent to which variation between them might be accounted for by changes in Mālik's doctrine in his lifetime attested in other works, and by the redactional principles of their transmitters-cum-editors (§2.2). In the case of al-Shaybānī's *Muwaṭṭa'*, I will show that it cannot be characterized as a recension in any conventional sense; rather, materials are selected for inclusion according to criteria that suggest al-Shaybānī's primary aim was to assemble a collection of Medinese reports in defence of the doctrines of his circle. Fourthly, I will analyze reports of the manner in which students of Mālik received materials from him (by *samā'* or *qirā'ah*) and argue that the mode of transmission evidently favoured by Mālik imposes severe limits on our ability to reconstruct the chronology of the *Muwaṭṭa'āt* (§2.3). Finally, having identified some of the limitations that circumscribe what we might infer of his teaching from these versions, we will arrive at the hypothetical postulate of Mālik's very own *Muwaṭṭa'*. By drawing

on a feature common to all versions of the *Muwaṭṭaʿ* (save al-Shaybānī's) and which therefore may with some confidence be ascribed to the archetype as well – namely, their combining statements of Mālik's doctrine with *ḥadīth* that contradict it and, in particular, their not infrequently furnishing *exclusively* reports that contradict it – I will consider the role of precedent in Mālik's jurisprudence (§2.4).

2.1 The *Muwaṭṭaʿ* of Yaḥyá

In the edition of the *Muwaṭṭaʿ* traditionally ascribed to Yaḥyá b. Yaḥyá al-Laythī (d. 234/848), the ubiquitous formula *ḥaddathā-nī Yaḥyá ʿan Mālik* suggested to Norman Calder rather compilation by a student of his.²¹⁶ The question who transmitted the *Muwaṭṭaʿ* from Yaḥyá derives its importance from Calder's contention that neither Mālik

²¹⁶Calder speaks instead of "composition" (*Studies*, 36), but his emphasis on the organic nature of the growth of early legal texts in general precludes his intending by this an act of original authorship; rather, he must mean something close to what I have preferred to call "compilation", consisting in the present case in the arrangement of materials of which some already belonged to the work as Yaḥyá knew it, and some, circulating extraneously, were incorporated into it. It is important to stress in this connection that Calder's re-datings of early texts should be understood in the light of his appreciation of the gradual nature of their development. Critics of Calder have often misrepresented the dates he posits for the closure of the canons as dates for the emergence of the materials they reproduce, thereby erecting a straw man. Dates of the latter kind he frequently considers beyond recovery (e.g. *Studies*, 83). Thus, Hallaq states that "Calder's contention is that the *Muwatta* is not Malik's own work, but that it was written sometime around 270/883, and not in the Hijaz, but rather in the Andalusian city of Cordoba. This argument places the chronological *origins* of the *Muwatta* a good century or more later than has hitherto been thought, and claims for it an entirely different regional origin, a claim that is not without serious implications." (Italics mine.) (Hallaq, 'On Dating Mālik's *Muwaṭṭaʿ*', in *UCLA Journal of Islamic and Near Eastern Law*, 1.1 [2002], 47-65, at 47.) Cf. Calder, *Studies*, 29: "[The] individual items which make up the *Mudawwanah* and *Muwaṭṭaʿ* had a literary history independent of their incorporation in the canons... My argument that the *Muwaṭṭaʿ* is later, as a compilation, than the *Mudawwanah* does not mean that every single item in the *Muwaṭṭaʿ* is later than every single item in the *Mudawwanah*."

nor Yaḥyá could have been responsible for the arrangement of materials in the received text. According to Calder, although these materials had a history (now doubtfully retrievable) independent of their incorporation in the recension, the way in which they are now organized therein forces the conclusion that the date of its editorial closure was later than that of the *Mudawwanah*, which could not be earlier than 250, a decade after the death of Saḥnūn²¹⁷. In its loosely grouping *ḥadīth* reports and later dicta according to a hierarchy of authorities, prosecuting a redactional scheme that strives to subvert an earlier scheme that prioritized content instead (this could still be discerned and, from the lines of cleavage and fracture wrought by the tensions between the two, it was sometimes possible to infer how the text had evolved), he perceived in the *Muwaṭṭaʿ* of Yaḥyá a theory of authority at odds with the one implicit in the *Mudawwanah*: while the former foregrounds the Prophet's authority, ranking Companions and Successors according to "a conventional and familiar scheme of distance from the Prophet", the latter foregrounds Mālik's. Because the *Muwaṭṭaʿ* agrees in this respect with what Schacht maintained was a later stage – the principle of the Prophet's supreme authority having first been asserted by al-Shāfiʿī – and the *Mudawwanah* with an earlier stage when a jurist's own preferences (as the embodiment of the school's 'living tradition') were sufficient,²¹⁸ the traditional chronology must be reversed and the architect of the

²¹⁷ Calder, *Studies*, 19.

²¹⁸ Schacht concluded that "generally speaking, the 'living tradition' of the ancient schools of law, based to a great extent on individual reasoning, came first, that in the second stage it was put under the aegis of Companions, that traditions from the Prophet himself, put into circulation by traditionists towards the middle of the second century A.H., disturbed and influenced this 'living tradition', and that only Shāfiʿī secured to the traditions from the Prophet supreme authority." (Schacht, *Origins*, 138.) Note, however, that Calder's redatings of the two texts imply a different chronology. While for Schacht the transition to widespread recognition of the Prophet's authority in law takes place in al-Shāfiʿī's lifetime or perhaps shortly thereafter as a

later work identified with the first person of the *ḥaddatha-nī Yaḥyá* formula. The *Muwaṭṭaʿ*, so Calder supposed, developed over time: “What [it] finally asserts is the role of Mālik as mediator of Prophetic law”, but this was the outcome of a process in which “the Mālikī system of law” – that is, a system like the one articulated in the *Mudawwanah*, based on the opinions of Mālik and his companions – was reformulated “in formal subordination to Prophetic authority.” The impetus for this transition from *raʿy* to *ḥadīth* came from the East and was imported to Andalus in Baqī b. Makhḷad (d. 276/889), a pupil of Yaḥyá, who had travelled and studied there. That the principle of reliance on Prophetic *ḥadīth*, an innovation in Yaḥyá's lifetime, came to establish itself in Andalus we owe to the reforms of Baqī, a celebrated jurist whose influence at court enabled him to win the support of the Sultan in this endeavour. That it came to be

direct result of his efforts, for Calder it does not take place much before 250, the earliest time at which the *Mudawwanah* could have reached its final form, and then independently of al-Shāfiʿī, whose *Risālah* he re-dates to ca. 300. (Calder, *Studies*, 19, 224, 223-229.) The present study broadly re-affirms Schacht's scheme, but modifies it in two respects: firstly, al-Shāfiʿī's hermeneutic needed far longer to exert its influence on the Mālikī school than Schacht recognised and, secondly, until it did, Mālikī jurisprudence remained essentially different from, and not merely less developed than, Shāfiʿī. In this, it challenges what Melchert ('Early History', 310) has called “the great assumption at the base of Calder's [and Schacht's] work”, namely, that “legal theory advanced fairly evenly.” For example, that Ibn Qutaybah's *Taʿwīl mukhtalif al-ḥadīth* is conspicuously less sophisticated than, and apparently ignorant of, the *Risālah* is, for Calder, a reliable indication that the former pre-dates the latter. For Schacht, of course, the assumption applies to an earlier period. He could not believe, says Melchert, “that some first- and second-century experts were faithfully transmitting reports of the Prophet's word and deed and inferring the law entirely from them at the same time others were heedlessly basing the law on custom and their personal preferences. One or the other group's practice must have been a back-projection, and of course that one would have to have been the practice agreeing with later orthodoxy.” I am more sceptical about the validity of the assumption for the later period than the earlier. I would suggest that the formation of groups of scholars around devotion to the teaching of imams from the later second century led in each of them to a collective self-assuredness that made insularity seem a less reckless choice than before, and that, consequently, we may only assume evenness of development within groups and not between them thenceforth. Insulation from and/or indifference to Shāfiʿīte method is, at any rate, the conclusion urged of the Western Mālikīyah if we accept the traditional dating of the *Mudawwanah* and the *Umm*.

reflected in the architecture of the *Muwaṭṭaʿ* in particular, however, we owe rather to Ibn Waḍḍāḥ (d. 287/900), who followed him and should be regarded as “the final redactor of the *Muwaṭṭaʿ* in the form we now know it.” This, in Calder's view, was how the *Muwaṭṭaʿ* acquired its concern for *ḥadīth* while the *Mudawwanah* remained largely satisfied with *raʿy*.²¹⁹

2.1.1 Ibn Waḍḍāḥ and ʿUbayd Allāh b. Yaḥyá: The traditionalists and the Mālikīyah of Andalus and the closing of their ranks in the later ninth century

The *prima facie* grounds on which Calder partly bases his case for the proposition that we owe the orientation of the *Muwaṭṭaʿ* towards Prophetic *ḥadīth* to Ibn Waḍḍāḥ, and not to some other transmitter from Yaḥyá, are not in themselves persuasive. In broad outline, they amount to the following argument: Yaḥyá's *Muwaṭṭaʿ*, which was a key source-book of the Andalusian judiciary, is the product of revision along traditionalist lines; Ibn Waḍḍāḥ, who continued to enjoy the favour of the court that his predecessor Baqī had secured in its name, is associated with traditionalism; therefore, it is plausible he was responsible for its revision. Acceptance of the proposition therefore depends to a large extent on prior assent to Calder's hypothesis about the nature of the reworking the text has undergone. More substantively, Calder adduces the eleventh-century evidence of *isnāds* that Ibn ʿAbd al-Barr supplies in the introduction to his *Istidhkār*, a

²¹⁹Unless otherwise indicated, all references in the foregoing paragraph are to Calder, *Studies*, 34-38.

commentary on Yaḥyá's *Muwaṭṭa'*, with cross-references to other recensions.²²⁰ However, the evidence is not quite as he describes it. He reports that the chains of transmission by which Ibn 'Abd al-Barr received Yaḥyá's recension are three: that in two of them, Ibn Waḍḍāḥ is the common link, and a third, which is composite, goes back to Yaḥyá via both Ibn Waḍḍāḥ and Yaḥyá's son 'Ubayd Allāh. From this he concludes that "the prevalent presence there of Ibn Waḍḍāḥ as transmitter from Yaḥyá fits neatly the conclusions that have already been established [*viz* the first premise of the argument above]." In fact, there are four *isnāds* of which three are composite. While it remains true that Ibn Waḍḍāḥ dominates, his presence there is overall not so prevalent as Calder supposes. At the level of the four transmitters who related the work to Ibn 'Abd al-Barr, he dominates by a ratio of 3:1, but at the level of the five (early to mid-tenth century) who related the work to them, directly from Ibn Waḍḍāḥ and 'Ubayd Allāh, he dominates only by a ratio of 3:2.²²¹ One might also measure the relative success in the West of the *riwāyahs* of Ibn Waḍḍāḥ and 'Ubayd Allāh by the incidence of twelfth-century narrations of them in the Index of Ibn Khayr (d. 575/1179). I count fourteen such narrations of Ibn

²²⁰ Calder, *Studies*, 37-38. He is relatively sanguine about their reliability: "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."

²²¹ Ibn 'Abd al-Barr, *Al-Istidhkārah*, 1: 168-71; verbatim in Ibn 'Abd al-Barr, *Al-Tamhīd* (which the *Istidhkārah* epitomizes), 1: 11; and confirmed by Ibn 'Aṭīyah, *Fihris*, 78. From the *isnāds* may be gleaned the following, which I have abstracted in the form of ratios: Ibn 'Abd al-Barr received the *riwāyah* of Ibn Waḍḍāḥ from four persons who, between them, had heard it in six separate narrations; the three persons responsible for these six narrations had, between them, heard it in three separate narrations from Ibn Waḍḍāḥ himself. The *riwāyah* of 'Ubayd Allāh Ibn 'Abd al-Barr had heard from one person who had heard it in two separate narrations; the two persons responsible for these narrations had, between them, heard it in two separate narrations from 'Ubayd Allāh himself.

Waḍḍāḥ's, sixteen of 'Ubayd Allāh's, and four of the *riwāyah* of Ibn Bāz (d. 274/887)^{222, 223}

Turning now to the biographical evidence, we find that it is 'Ubayd Allāh's transmission that achieves the greater prominence in the *Tārīkh al-'Ulamā'* of Ibn al-Faraḍī (d. 403/1013), one of our three earliest surviving Andalusian biographical works.²²⁴ In fact, of transmissions from Yaḥyá of expressly the *Muwaṭṭa'*, only 'Ubayd Allāh's *riwāyah* receives mention there, three references to it collectively attesting to its transmission through each of the generations from 'Ubayd Allāh to Ibn al-Faraḍī himself. In a sentimental anecdote, the latter relates that in the year 366, he would go to Yaḥyá b. 'Abdallāh b. Yaḥyá b. Yaḥyá b. Yaḥyá al-Laythī (d. 367/977), whose paternal great uncle was 'Ubayd Allāh, to hear the *ḥadīth* in the latter's *riwāyah* of Yaḥyá's *Muwaṭṭa'*. To this Yaḥyá, who was the last of those to transmit directly from 'Ubayd Allāh, the people would come to hear the *riwāyah* from all corners of Andalus. He had seen only one *majlis* in Cordoba more popular than his.²²⁵ In the *Akḥbār al-fuqahā'* of al-Kḥuṣḥanī (d. 360-71/971-81), it is said that the emir 'Abd Allāh (r. 275/888-300/912) heard the *Muwaṭṭa'*

²²² Alternatively, Ibn al-Qazzāz (Ibrāhīm b. Muḥammad). For his biography, v. Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 1: 18-19; al-Kḥuṣḥanī, *Quḍāt Qurṭubah*, 18. He was a member of the judicial establishment in Cordoba, like 'Ubayd Allāh, not a traditionalist like Ibn Waḍḍāḥ.

²²³ Ibn Kḥayr, *Fahrasah*, 1: 96-102.

²²⁴ The other two are the *Quḍāt Qurṭubah* and *Akḥbār al-fuqahā' wa-al-muḥaddithīn* of al-Kḥuṣḥanī (d. 361/971). The *Quḍāt Qurṭubah* mentions the *Muwaṭṭa'* only once, and then in a comment of al-Kḥuṣḥanī's to say that by "books" in a report, so-and-so must have meant the *Muwaṭṭa'* (*op. cit.*, 86). I have not been able to survey the *Akḥbār* exhaustively for references to *riwāyahs* of Yaḥyá's *Muwaṭṭa'*, but it does refer to both 'Ubayd Allāh's and Ibn Waḍḍāḥ's.

²²⁵ Ibn al-Faraḍī, *Tārīkh al-'Ulamā'*, 1: 58 (a student of 'Ubayd Allāh's transmits his *riwāyah* by *qirā'ah*); 1: 389 (so-and-so of the mid-tenth century heard the *Muwaṭṭa'* from 'Ubayd Allāh); 2: 190 (as above). 'Ubayd Allāh also features in al-Kḥuṣḥanī's dictionary of judges but, except in two cases in which features of his biography are relayed in passing (*Quḍāt Qurṭubah*, 128-29, 223), he functions merely as transmitter of information about his father (*op. cit.*, 28, 30, 61, 85, 91, 92, 107). Ibn Waḍḍāḥ, too, however, does not appear as a figure in his own right, but he is a more eclectic source than 'Ubayd Allāh and his importance is everywhere evident in the stature of earlier persons he supplies information about and of those who transmit from him (e.g., *op. cit.*, 118, 129, 130, 134, 135, 157).

from him;²²⁶ also, that the *Muwaṭṭaʿ* was read to him in accordance with the “corrections” (*bi-iṣlāḥ*) of Ibn Waḍḍāḥ and he rejected none of it.²²⁷ I shall have more to say later about the nature of those corrections when we come to assess the evidence of differences between their *riwāyahs*. For now, it suffices to note that, in sum, the evidence does not weigh so heavily in favour of Ibn Waḍḍāḥ as it appeared to Calder. Yaḥyá’s recension of the *Muwaṭṭaʿ* seems to have spread principally, and indeed more or less equally, in two *riwāyahs*: those of ‘Ubayd Allāh (d. 298/911 or 299/912), one of his two sons, and Ibn Waḍḍāḥ (d. 287/900). No doubt other *riwāyahs* initially circulated, but already by the mid-tenth century they had been largely eclipsed by these, and by the twelfth century, no other remained except Ibn Bāz’s, whose circulation was very limited by comparison.²²⁸

In Calder’s scheme, Yaḥyá’s *Muwaṭṭaʿ* represents the expression of a hard-fought compromise between those who would defer to the authority of Prophetic *ḥadīth* in law and those who “stressed the authority of Mālik (and other Hijazi jurists).”²²⁹ It matters to Calder’s hypothesis whether we owe the version we have to ‘Ubayd Allāh or, as he supposed, to Ibn Waḍḍāḥ because, of the two jurists, only Ibn Waḍḍāḥ, it will be seen, might be said to embody such a compromise. To see what Ibn Waḍḍāḥ represented – to locate him on the spectrum of those loyal to the *ra’y* of Mālik on the one hand and those

²²⁶ al-Khushanī, *Akhbār al-fuqahā*, 170.

²²⁷ *Ibid.*, 171.

²²⁸ Modern editors of Yaḥyá’s recension identify ‘Ubayd Allāh’s *riwāyah* as the one reflected in the (late) extant mss. – e.g., *Al-Muwaṭṭaʿ*, ed. Bashshār ‘Awwād Ma’rūf (the edition I generally cite), 1: 9, 33, fn. 2; *Al-Muwaṭṭaʿ*, ed. Muḥammad Fu’ād ‘Abd al-Bāqī, 1: 3, fn. 1. They do not expressly justify this claim, but it is likely to be an inference from the *Tamhīd* of Ibn ‘Abd al-Barr, which they cite frequently and which notices a small number of discrepancies between the narrations of ‘Ubayd Allāh and Ibn Waḍḍāḥ (v. *infra* fn. 300).

²²⁹ *Studies*, 36-37.

loyal to *ḥadīth* on the other – we must first consider the Mālikī reaction to the traditionalism that Baqī b. Makḥlad brought back to Andalus in 253/867 from the East, where over the course of thirty-five years he had studied under the likes of Aḥmad b. Ḥanbal, Yaḥyá b. Maʿīn, and Ibn Abī Shaybah.²³⁰

Maribel Fierro has shown that Baqī represented the traditionalist extreme in Andalus.²³¹ Aspiring to construct a legal system based solely on *ḥadīth*, he compiled a *musnad-muṣannaf*, presumably synthesizing the approaches of Aḥmad and Ibn Abī Shaybah, and was considered the foremost representative in his time of the Andalusian *ḥadīth* party. For this, he was fiercely persecuted by the Mālikī establishment, a corporation of jurists who, deducing the law as they did on the basis of the known opinions of Mālik much as Yaḥyá himself had done,²³² perceived in their agenda a serious threat to the status quo,

²³⁰ For Baqī's biography, v. Ibn al-Faraḍī, *Tārīkh al-'Ulamā'*, 1: 107-09, n. 283; al-Khushanī, *Akhbār al-fuqahā' wa-al-muḥaddithīn*, 49-62.

²³¹ V. Fierro, 'The Introduction of ḥadīth in al-Andalus', 78-79, 81-83, 84. Unless otherwise indicated, the data in the following account of Baqī are derived from Fierro's study. As for the *Muwaṭṭa'*, Baqī is said to have disregarded Yaḥyá's recension in favour of the versions of Abū Muṣ'ab and Ibn Bukayr (d. 231/845), which earned him the lasting enmity of Yaḥyá's sons, 'Ubayd Allāh and Yaḥyá, who were leading Mālikī jurists (*ibid.* 78). These versions are associated with Baghdad and Kufah respectively (v. *infra* §2.2).

²³² The issuing of judicial edicts in Andalus is said to have devolved on the death of 'Isá b. Dīnār (d. 212/827) to Yaḥyá's *ra'y* (*fa-'ādat futyā al-Andalus ba'd 'Isá... ilá ra'y-h*), which was evidently based on Mālik's (*yuftī bi-ra'y Mālik*). (Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 2: 176, n. 1556; al-Khushanī, *Akhbār*, 348) Yaḥyá, who is said to have exercised great influence on the emir 'Abd al-Raḥmān b. Ḥakam (r. 206-238/822-852), allegedly refused his invitation to join the ranks of the judiciary, maintaining there would remain none as qualified as he to arbitrate in complaints against them. (al-Khushanī, *Quḍāt Qurṭubah*, 30.) It should of course be kept in mind that a recurrent motif of juristic biography, where concerned to preserve the piety of its subjects, is the refusal of, or reluctance to assume, office that connotes association with the political establishment. It is also present, for instance, in the biography of Ziyād b. 'Abd al-Raḥmān (*ibid.*, 28), for whom v. *infra* fn. 335. Such claims probably should tend to confirm rather than disprove their association with government inasmuch as they suggest there was a need to deny it. For the role of Yaḥyá and others in the establishment of Mālikism in al-Andalus, v. Melchert, *Formation*, 156-164. For the importance of *ra'y* to the Andalusian Mālikīyah in the ninth century,

and thence to their authority. The Mālikīyah charged Baqī with heresy (*bid'ah, ilhād, zandaqah*), and it took the intervention of the emir Muḥammad (r. 238/852-273/886) to save him from death. Calder describes Baqī as “amongst the most celebrated of [the Mālikī] *fuqahā*”, but this is a mistake. He was clearly no Mālikī (indeed, only Ḥanbalī and Shāfiī biographies credit him with a notice). While it is true that, like another persecuted traditionalist whose case Fierro examines²³³, he obtained a reprieve from the court, this evidently did not arise from or produce any material shift in the balance of power between the Mālikīyah and the traditionalists in Andalus, for the administration and its jurist-consults (*fuqahā' mushāwarūn*) remained exclusively Mālikī. Nonetheless, Baqī evidently had great success in disseminating the *ḥadīth* and other knowledge he had brought back from the East (*nashara ḥadīth^a-hū wa-qara'a li-al-nās riwāyat^a-hū*), for Ibn al-Faraḍī informs us that thenceforth *ḥadīth* spread throughout Andalus (*min yawma'idhⁱⁿ intashara al-ḥadīth bi-al-Andalus*).²³⁴ However, in light of the enmity between them, which presumably endured beyond his trial,²³⁵ it is hard to imagine that this translated very soon into a rapprochement with the Mālikīyah themselves, harder still to imagine that they were persuaded to take up *ḥadīth* and reformed their cardinal source-text along traditionalist lines as they did so.

With Ibn Waḍḍāḥ, the prospect of a Mālikī-traditionalist compromise begins to appear more credible. He followed Baqī (*talā-hu*), so Ibn al-Faraḍī tells us, and Andalus,

v. Fierro, ‘Proto-Malikis, Malikis, and reformed Malikis in al-Andalus’, *The Islamic school of law: evolution, devolution, and progress*, ed. Peri Bearman, &al., Harvard series in Islamic law 2 (Cambridge, Mass.: Islamic Legal Studies Program, Harvard Law School, 2005), 57-76.

²³³ Fierro, ‘The Introduction of ḥadīth’, 82-83.

²³⁴ Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 1: 108, n. 283 (also cited in Calder, *Studies*, 37).

²³⁵ V. *infra* fn. 279 for the relations between Baqī's son Aḥmad and the Mālikī jurists in the early tenth century.

where before the memorization of the *ra'y* of Mālik and his companions had predominated, became a land of *ḥadīth* and *isnād*.²³⁶ He related that the emir 'Abdallāh (r. 275/888-299/911) instructed him to give legal opinions (*tuftī*) on the basis of Prophetic *ḥadīth* for “we have no need of *ra'y*.”²³⁷ But Ibn Waḍḍāḥ is an ambiguous figure, and, despite parallels between their biographies, not in the straightforward sense implied by Calder Baqī's successor, overcoming Mālikī resistance by sheer pertinacity. He testified against Baqī during his trial,²³⁸ and his most prominent students are said not to have heard Baqī on account of the enmity between them (*li-al-lādhī kāna bayna[-humā] min al-waḥshah*)²³⁹. But, like Baqī, with whom he had many teachers in common, Ibn Waḍḍāḥ studied in the East under prominent traditionalists whose works he brought back to Andalus.²⁴⁰ He was remembered for his perspicacity in the analysis of *isnāds* (*kāna baṣīr^{an} bi-ṭuruq [al-ḥadīth] mutakallim^{an} 'alá 'ilalⁱ-h*); for his stories about the devout (*al-'ubbād*); his piety (*wara'*), asceticism (*zuhd*), and his material poverty (*faqr*); and his virtue and patience in the transmission of knowledge (*muta'affif^{an} ṣābir^{an} 'alá al-asmā'*)²⁴¹ – in other words, as a figure in the mould of Aḥmad b. Ḥanbal, one of his

²³⁶ *talā-hu fa-ṣārat al-Andalus dār ḥadīth wa-isnād wa-inna-mā kāna al-ghālib 'alay-hā qabla dhālika ḥifẓ ra'y Mālik wa-aṣḥābⁱ-h*: Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 1: 108, n. 283 (also cited in Calder, *Studies*, 37); also, 2: 18, n. 1136.

²³⁷ al-Khushanī, *Akḥbār*, 130.

²³⁸ Fierro, 'The Introduction of ḥadīth', 82.

²³⁹ Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 1: 109, n. 283.

²⁴⁰ Concerning their respective *riḥlahs* (two each), there are two notable points of difference between his biography and Baqī's: Ibn Waḍḍāḥ's concern (*sha'n^u-h*) on his first *riḥlah* (218 or before 220; second *riḥlah* after 230) was not *ḥadīth*, but asceticism (*zuhd*) and ritual piety (*'ibādah*); he did not study at Basra. (Al-Khushanī, *Akḥbār*, 122, 122-25; Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 2: 17, 17-19, n. 1136; v. also, Fierro, 'The Introduction of ḥadīth', 80.)

²⁴¹ Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 2: 18.

teachers²⁴². But reports of his stature as a traditionalist are ambivalent in their attitude towards him: his student Aḥmad b. Khālīd (d. 322/934) is said to have regarded none of those he met in Andalus more highly than Ibn Waḍḍāḥ, yet he also reproved his frequently rejecting well-established reports of the Prophet’s speech and alleged that he was responsible for many errors which subsequently spread on his authority (*wa-la-hū khaṭa’ kathīr maḥfūz ‘an-hu*). He went on to say that he had no knowledge of jurisprudence or language (*lā ‘ilm ‘inda-hū bi-al-fiqh wa-lā bi-al-‘arabīyah*).²⁴³ While the traditionalist party was naturally wary of *fiqh* for its connotation of personal *ra’y*, some of their number, like Ibn Ḥanbal, evidently valued it so long as it was limited to discerning the legal applications of *ḥadīth*.²⁴⁴ It may have been in that sense that this Aḥmad meant Ibn Waḍḍāḥ lacked knowledge of it, reducing him to a mere transmitter of *ḥadīth*, and a defective one at that. On the other hand, he may have meant that he lacked knowledge of specifically Mālikī *fiqh*, or, yet more specifically, that he had no knowledge of how to *apply* his knowledge of the *fiqh* of other Mālikīyah – of how to practise jurisprudence as the Mālikīyah did. We will see that it was probably in this latter sense that the report was intended.

Such attempts to impugn Ibn Waḍḍāḥ’s qualities both as a transmitter and as a jurisperit were likely provoked by his conciliatory attitude towards the adherents of Mālik’s *ra’y*, which made his status among the traditionalists ambiguous and problematic. What prompted his conciliation of the Mālikīyah is an open question. Fierro

²⁴² So in Ibn al-Faraḍī, *Tārīkh*, 2: 17; Al-Qāḍī ‘Iyāḍ, *Tartīb al-madārik*, 4: 436; Aḥmad is absent from the list of his teachers in al-Khuṣṣanī, *Akḥbār*, 126, and al-Ḥumaydī, *Jadhwat al-muqtabis*, 140, n. 152.

²⁴³ Ibn al-Faraḍī, *Tārīkh al-‘ulamā’*, 2: 18-19, n. 1136.

²⁴⁴ V. Melchert, *Formation*, 15.

proposes two possibilities: first, that his readiness to witness against Baqī during his trial (by implication, his compromise with the Mālikīyah more generally) was induced by fear of his own prosecution or by rivalry with him; second, that he was “a ‘moderate’ traditionist [= traditionalist] who was at the same time a Malikite and who did not want to put an end to the legal practice predominant in al-Andalus.” She favours the second possibility, citing the following appraisal of Ibn Waḍḍāḥ’s talents by a student of his (my translation): “I cannot but liken how Ibn Waḍḍāḥ dealt with the people with respect to the disparity of their aspirations to the good doctor who confronts every ailment with the medicine that remedies it. The *ahl al-ra’y* would come to him and he would apprise them of *ra’y*; the *ahl al-ḥadīth* would come to him and he would apprise them of *ḥadīth*.”²⁴⁵ As background to his rapprochement with the Mālikīyah, I incline to see rather first rivalry with Baqī (as suggested by a report of Baqī’s disparaging him on his return to Cordoba for hearing in Kufah the *Musnad* of Ibn Abī Shaybah in a mere eighteen days – grounds on which the companions of Baqī discredited him²⁴⁶), then disaffection from the *ḥadīth* party as a result, and finally qualified acceptance of the Mālikī establishment when the realities of their subordination became apparent to the traditionalists through the persecution of Baqī and others. The establishment seems to

²⁴⁵ Fierro (‘Introduction’, 85) cites the report in ms. *apud* Mu’ammār, N., *Muḥammad b. Waḍḍāḥ al-Qurṭubī, mu’assis madrasat al-ḥadīth bi-al-Andalus ma’a Baqī b. Maḥlād* (Rabat: 1983) (= al-*Khushanī, Akhbār*, 126: *mā kuntu uṣhabbiḥu Muḥammad b. Waḍḍāḥ ma’a al-nās fī ikhtilāf himamī-him illā bi-al-ṭabīb al-rafiq al-lādhī yuqābilu kull dā’ bi-mā yuṣliḥu-hū min al-dawā’ kāna ya’tī-hi ahl al-ra’y fa-yufidu-hum fī bāb al-ra’y wa-ya’tī-hi ahl al-ḥadīth fa-yufidu-hum fī bāb al-ḥadīth*).

²⁴⁶ (*fa-ṭa’anū bi-dhālika [aṣḥāb Baqī] ‘alā Ibn Waḍḍāḥ*) Baqī had told his companions it was impossible to complete the *Musnad* in less than a full year. V. al-*Khushanī, Akhbār*, 129-30, which also quotes at length several reports that attempt to exonerate Ibn Waḍḍāḥ, suggesting that significant controversy attended this episode.

have embraced him emphatically in return, for most of those who presided over Andalus and held chieftaincies there (*ra'asa wa-sharafa bi-al-Andalus*) are said to have been students of his.²⁴⁷ His education, as evident in the lists of his teachers, and his preoccupation with the forms of piety suggest, however, that his natural sympathies lay with traditionalism. Genuine reluctance from the outset to countenance the demolition of Mālikism therefore seems unlikely to me. In any case, the twin dogmas that later established themselves as the parties compromised, that the *ra'y* of the great imams of rationalist Islam had derived from the *ḥadīth* and that the work of the traditionalists had always complemented the rationalists', were not yet available to articulate 'moderate traditionalism' in Fierro's sense.²⁴⁸ For now, the principle that the law was best discernable in the *ḥadīth* remained fundamentally antithetical to the principle that it was immanent in the *ra'y* of a later jurist. Principle aside, however, it is tempting to conclude that the report of Ibn Waḍḍāḥ's adroitness in recourse to different sources depending on the commitments of his audience reflects duplicity and attests to the kind of dissimulation that Ibn al-'Arabī (d. 638/1240) said was necessary if those who came from the East with *'ilm* were to avoid rejection and humiliation.²⁴⁹ Between this and Fierro's reading, I will propose an alternative once we have explored more fully the nature of Ibn Waḍḍāḥ's involvement with Mālikism.

²⁴⁷ Ibn Farḥūn, *Al-Dībāj*, 2: 180.

²⁴⁸ *V. infra* fn. 266.

²⁴⁹ "Whenever someone came from the East with (new) knowledge, [the Mālikite *fuqahā*] prevented him from spreading it and humiliated him, unless he went into hiding among them acting as a Malikite and put his knowledge in a position of subordination." (Fierro, 'The Introduction of ḥadīth', 81, citing Ibn al-'Arabī, *Al-'Awāṣim min al-qawāṣim*, n.p.)

It is not apparent from the earliest surviving Andalusian biographical works that Ibn Waḍḍāḥ was a Mālikī jurist at all; that is, an adherent of Mālik's *ra'y* in law. His concern for *ḥadīth* and his piety emerge as near-exclusive features of his resumé. It was presumably not for his acumen in the discernment and application of Mālik's *ra'y* that Ibn Mufarrij (d. 380/990), who is described as a *ḥāfiẓ* in *ḥadīth* and was esteemed for his knowledge of *rijāl*,²⁵⁰ compiled a book about his virtues (*manāqib*) and his informants.²⁵¹ The bibliography of Ibn Khayr (d. 575/1180) confirms his biography inasmuch as it credits him with four works now lost whose designations, so far as inferences are possible, suggest preoccupation with, by turn, *ḥadīth*, *rijāl*, and the pious forbears.²⁵² Two works of Ibn Waḍḍāḥ have survived – none of those mentioned by Ibn Khayr – and both are concerned with *ḥadīth*. The *Kitāb al-bida'*, which alone has been published,²⁵³ attests to precisely the kind of attitude normally associated with the *ahl al-ḥadīth*, denouncing as innovation (*bid'ah*) practice that contravenes precedent, especially as attested for the time of the Prophet, but more generally by *ḥadīth* for the generations up through the Successors. It displays an interest in the *ra'y* of Mālik only to the extent that it expressly asserts that a practice is an innovation or else may be put at

²⁵⁰ Ibn al-Faraḍī, *Tārīkh*, 2: 93, n. 1360. He is Abū 'Abdallāh Muḥammad b. Aḥmad b. Muḥammad b. Yaḥyá b. Mufarrij.

²⁵¹ al-Qāḍī 'Iyāḍ, *Tartīb al-madārik*, 4: 437.

²⁵² They are: *Kitāb al-Quṭ'ān*; *Juz' fī-hi tasmiyat rijāl 'Abdallāh b. Wahb riwāyat Qāsim b. Aṣḥab 'an Muḥammad b. Waḍḍāḥ*; *Kitāb fī-hi maknūn al-sirr wa-mustakhraj al-'ilm (mustakhraj usually indicates a work comprising the same ḥadīth as its model, but with alternative isnāds)*; and *Kitāb al-'ubbād wa-al-'awābid* (respectively, Ibn Khayr, *Fahrasah*, 127, n. 208; 191, n. 392; 220, n. 495; 240, n. 566).

²⁵³ Muḥammad b. Waḍḍāḥ, *Kitāb al-bid'ah* (= Tratado contra las innovaciones), ed. Fierro (Madrid: Consejo Superior de Investigaciones Científicas, 1988). The other extant work of his, the *Kitāb fī-hi mā jā'a min al-ḥadīth fī al-naẓar ilá Allāh*, identified thus by Sezgin (*GAS*, I, 474-75), is presumably a compilation of *ḥadīth* concerning knowledge of God.

the service of confirming what evidently went before it.²⁵⁴ Mālik is not the final arbiter as he generally is in the *Mudawwanah*, nor even an especially prominent authority (his *ra'y* only appears in relation to three of approximately 280 distinct arguments, comprising mainly *ḥadīth*, in the entire work). Early references to the jurisprudence of Ibn Waḍḍāḥ are very few indeed, and none speak in its favour. We have seen the statement of Aḥmad b. Khālīd denying him knowledge of *fiqh*. Ibn Lubābah (d. 314/926), who is described as an imam of *fiqh* (sc. Mālikī *fiqh*) and also transmitted from Ibn Waḍḍāḥ,²⁵⁵ reportedly said: “He had not memorized *fiqh*; the *Mudawwanah* was read to him for some time and he did not know what it was.”²⁵⁶ Ibn Lubābah in many ways seems to have represented the polar opposite of Ibn Waḍḍāḥ: Ibn al-Faraḍī states that he was pre-eminent in his time in the memorization of *ra'y* and in the discernment (*baṣar*) required to issue legal opinions (*futyā*), but that “he had no knowledge of *ḥadīth*, nor of anything associated with it.”²⁵⁷ Evidently, then, even in the generation after Ibn Waḍḍāḥ, ignorance in matters of *ḥadīth* was no impediment to career advancement in the judiciary: alongside ‘Ubayd Allāh and others, Ibn Lubābah was jurist-consult to the state (*mushāwar*) in the reign of the emir ‘Abdallāh – the same ‘Abdallāh who had implausibly instructed Ibn Waḍḍāḥ to give legal opinions on the basis of Prophetic *ḥadīth* for “we have no need of *ra'y*”²⁵⁸ – and, when ‘Abd al-Raḥmān III succeeded him in 912, it is said that he assumed sole responsibility for the issue of legal decisions and that none

²⁵⁴ *Op. cit.*, 183-84 (V, 13-14); 186-87 (VI, 4a, 6, 8a, 8b, 8c); 200 (X, 9, 10). On two other occasions, Mālik functions merely as the transmitter of a *ḥadīth*: 208 (XI, 25); 210 (XI, 31a). V. also Fierro’s introduction, 75-76.

²⁵⁵ Ibn al-Faraḍī, *Tārīkh*, 2: 36, n. 1189.

²⁵⁶ al-Khushanī, *Akhbār*, 127.

²⁵⁷ Ibn al-Faraḍī, *Tārīkh*, 2: 36, n. 1189.

²⁵⁸ al-Khushanī, *Akhbār*, 130.

shared with him in the chieftaincy of Cordoba (*riyāsat al-balad*) and the superintendence of the state council (*al-qiyām bi-al-shūrā*).²⁵⁹ Calder proposes that Baqī and Ibn Waḍḍāḥ were responsible for “introducing, with the backing of the court, reforms of which the central component was a stressing of hadith at the expense of *ra’y*”.²⁶⁰ If that were so, the reforms must have been superficial and short-lived in their effect. The report of Ibn Lubābah’s oppugning Ibn Waḍḍāḥ’s command of *fiqh* probably reflects resentment from the career Mālikī jurists who had devoted themselves from the outset to acquiring knowledge of *ra’y* and developing competence in applying it towards native traditionalists like Ibn Waḍḍāḥ who, by their transmission of works of Mālikī *ra’y*, but with little proper training in *ra’y* and jurisprudence, appeared to presume to join their ranks.

The earliest express reference I have found to Ibn Waḍḍāḥ as a Mālikī jurisprudent is ascribed by al-Qāḍī ‘Iyāḍ to Ibn Abī Dulaym (d. 351/962), the compiler of an early Mālikī *ṭabaqāt* (one of ‘Iyāḍ’s principal sources) who included him among “the *fuqahā’* of the Mālikīyah.”²⁶¹ But Ibn Abī Dulaym is the same biographer who accounted Qāsim b. Muḥammad (d. 277/890) a Mālikī, although plainly he had no allegiance to Mālik’s doctrine,²⁶² and it would be reckless to conclude from this alone that Ibn Waḍḍāḥ

²⁵⁹ Ibn al-Faraḍī, *Tārīkh*, 2: 36, n. 1189.

²⁶⁰ Calder, *Studies*, 37.

²⁶¹ al-Qāḍī ‘Iyāḍ, *Tartīb al-madārik*, 4: 437.

²⁶² (*dhakara-hū Ibn Abī Dulaym fī ṭabaqat al-Mālikīyah... kāna yuftī bi-madhhab Mālik*) Some doubted he was a Mālikī on account of his frequent disagreement with the Mālikīyah. He had composed a refutation of the blind imitators of Mālik’s doctrine (*Al-Radd ‘alā al-muqallidah*) directed against Ibn Muzayn, al-‘Utbī, and ‘Abdallāh b. Khālīd, all three teachers of Ibn Lubābah. Aḥmad b. Khālīd related that he had mentioned to Qāsim it seemed he gave decisions according to what he did not believe; the latter replied that if he was being asked about the *madhhab* that prevailed in the place in question, he would give decisions on that basis, and if he was asked about his own *madhhab*, he would inform them accordingly. (Al-Qāḍī ‘Iyāḍ, *Tartīb*, 4: 447.) Ibn

practised *fiqh* in the manner of other Mālikī jurists; that is, in accordance with Mālik's *ra'y*. The proposition that one who would insist on conformity to *ḥadīth* would also deduce the law along the same lines as those like Ibn Lubābah who knew only *ra'y* seems paradoxical at best, and cannot readily be conceded. What his classifying Ibn Waḍḍāḥ as a Mālikī jurist does indicate, however, is that the school had come to embrace as jurists of its own some of those who originally inclined to affiliation with the *ahl al-ḥadīth*; those who once represented a threat to the Mālikī tradition could now be recruited as representatives of it, and presumably were thought to amplify its stature.

Ibn Waḍḍāḥ's association with Mālikī jurisprudence could not, however, have been merely a posthumous construct. Saḥnūn features without exception in the lists of those from whom he transmitted, although the *Ṭabaqāt* of Abū Ishāq al-Shīrāzī (d. 476/1083) is the first biographical work to state expressly that it was *fiqh* he took from him: "he learnt jurisprudence with (*tafaqqaha bi-*) Saḥnūn and the shaykhs of North Africa"²⁶³. To judge by the evidence of *isnāds* in two twelfth-century Andalusian bibliographical works, the *Fihris* of Ibn 'Aṭīyah (d. 541/1146) and the *Fahrasah* of Ibn

al-Faraḍī said that he adopted the *madhhab* of argument and speculation (*al-ḥujjah wa-al-naẓar*) and rejected *taqlīd*, but inclined to the *madhhab* of al-Shāfi'ī. (Ibn al-Faraḍī, *Tārīkh*, 2: 398, n. 1049; v. also Fierro, 'The Introduction of ḥadīth', 85.) The ambiguity of figures like Qāsim and Ibn Waḍḍāḥ with respect to their allegiance to ideal scholarly groups probably tended to increase over time as some of those groups became less distinct through compromise and others died out. It meant they could be recruited as representatives of the tradition a biographer hoped to elevate by association. Exploitation of such ambiguity seems to be an important mechanism of retrospective synthesis.

²⁶³ *apud* al-Qāḍī 'Iyāḍ, *Tartīb al-madārik*, 4: 437, corresponding to al-Shīrāzī, *Ṭabaqāt al-fuqahā'* (composed ca. 452/1060), 163. It is not apparent from Abū Ishāq's terms *tafaqqaha bi-Saḥnūn wa-shuyūkh al-Maghrib* whether he meant that Ibn Waḍḍāḥ had learnt the ways of jurisprudence from Saḥnūn and others or merely that he had applied himself to the acquisition of their *fiqh* and that of other Mālikīyah (*tafaqqaha 'alā* seems to be the more conventional construction for the former sense). This distinction will be of some importance to our argument.

Khayr (d. 575/1180), he was instrumental in the dissemination in Andalus of the *Mudawwanah*,²⁶⁴ which he had brought back from Qayrawan.²⁶⁵ Moreover, Muranyi has argued that comments recorded in the marginal notes of Qayrawānī manuscripts from the beginning of the eleventh century, referring to discrepancies between his auditions of Saḥnūn, may be traced back to Ibn Waḍḍāḥ himself.²⁶⁶ However, while his transmission of the *Mudawwanah* (I will leave aside for now his transmission of the *Muwaṭṭa'*) suggests concern for the *ra'y* of Mālik and his students, the nature of that

²⁶⁴ The *Fihris* mentions exclusively *riwāyāt* from Ibn Waḍḍāḥ. Six different lines of transmission converge on four of his students: Wahb b. Masarrah (x 2) (Ibn 'Aṭīyah, *Fihris*, 72, 113); Aḥmad b. Khālid (x 2) (*op. cit.*, 92, 125); Muḥammad b. 'Ub[ay]dūn (*op. cit.*, 92); Ishāq b. Ibrāhīm (*loc. cit.*). Ibn Khayr's *Fahrasah* (207-08) mentions eight *isnāds* of which three go back to Ibn Waḍḍāḥ. However, of the five *riwāyāt* for which he is not responsible, four are said to be incomplete, on which account the author did not hear them. On the other hand, the *Kitāb al-bida'* contains nine reports that go back to Saḥnūn, but Ibn Waḍḍāḥ relates only two of them directly from him. (*Op. cit.*, 175 [III, 19], 182 [V, 4], 186 [VI, 6], 199 [X, 8], 200 [X, 10], 223 [XII, 32, 34], 224 [XII 37, 37a].) V. also Fórneas, J. M., 'Datos para un estudio de la *Mudawwana* de Saḥnūn en al-Andalus', in *Actas del IV Coloquio Hispano-Tunecino (Palma de Mallorca 1979)* (Madrid: 1983), 93-118. One might also check the Andalusian commentaries on the *Mudawwanah* from the early twelfth century for *riwāyāt* of that work. I have only been able to consult *Al-Muqaddimāt al-mumahhadāt* of Ibn Ruṣhd (ed. Muḥammad Ḥajjī, 3 vols. [Beirut: Dār al-Gharb al-Islāmī, 1408/1988]), which supplies none. *Al-Tanbīhāt al-mustanbaṭah 'alá al-kutub al-mudawwanah wa-al-mukhtaliṭah* of al-Qāḍī 'Iyāḍ is now available in print (ed. Muḥammad al-Waṭḥīq, 4 vols. [Beirut: Dār Ibn Ḥazm, 2011]), but I have not been able to obtain a copy. The *Tahdhīb* of al-Barādhī'ī (1: 167-68), which according to Ibn Ruṣhd the shaykhs of North Africa adopted to the exclusion of other works (*v. supra* §1, fn. 360), does provide a *riwāyah* but it is Qayrawānī as one would expect.

²⁶⁵ The extent to which the *Mudawwanah* that Ibn Waḍḍāḥ exported to Andalus resembled the one we have remains to be established, but it will suffice here to show that he was involved in the transmission of material from Saḥnūn of which the current *Mudawwanah* may be assumed to be broadly representative in terms of its emphasis on the authority of Mālik as opposed to *ḥadīth*.

²⁶⁶ Muranyi, *Die Rechtsbücher*, 93-95, 115; Muranyi, 'A Unique Manuscript from Kairouan in the British Library: The *Samā'*-work of Ibn al-Qāsim al-'Utaqī and Issues of Methodology' in *Method and Theory in the Study of Islamic Origins*, ed. Berg, 350-56. It should be noted that Muranyi's identification might be called into question inasmuch as it requires us to trust what possibly represents merely the inference of a copyist two centuries later than Ibn Waḍḍāḥ. The comments he attributes to him are earliest recorded in the marginal notes of a ms. produced in 394/1003, and there they are ascribed only to a Muḥammad. It is not until a century later in mss. of the early twelfth century, which quote variants of these same comments, that we find this Muḥammad explicitly identified as Ibn Waḍḍāḥ.

concern, and its relation to his evident affinity with traditionalism, is not yet apparent. It is a commonplace among historians of early Islamic legal movements (often from paucity of other evidence) to determine the allegiance of scholars to apparently distinct groups – *ahl al-ra'y* and *ahl al-ḥadīth*, and the nascent schools of law – by their teachers and the works they helped to propagate. In Ibn Waḍḍāḥ, however, we appear to be witnessing the dissolution of exclusive loyalties to *ḥadīth*, on the one hand, and *ra'y* on the other, and an emerging coalescence of groups previously hostile. Accordingly, it is questionable whether his transmission of the *Mudawwanah* should be understood as an expression of exclusive attachment to the Mālikīyah and their tradition of *ra'y*. In what sense might Ibn Waḍḍāḥ be characterized as Mālikī?

Evidence of Ibn Waḍḍāḥ's engagement with the content of the works of *fiqh* he transmitted is very scarce. Although later bibliographical works do not credit him as the author of a work of *fiqh*, the *Kitāb al-Nawādir wa-al-ziyādāt* of Ibn Abī Zayd preserves a quotation from a work that its author claims to have transmitted from him which, in a certain restricted sense, might be qualified as such.²⁶⁷ I present below the passage that incorporates the quotation in full, for it offers a rare window on to the nature of his engagement with *fiqh* and that of other traditionalists who, without necessarily abandoning *ḥadīth*, now applied themselves to the personal *ra'y* that their erstwhile adversaries continued to uphold as the primary source of law.

²⁶⁷ The paucity of evidence, including quotations in later works, attesting to Ibn Waḍḍāḥ's involvement with Mālikī jurisprudence may then reflect a failure of preservation from low prestige rather than his own disengagement from it. There is only one such quotation in the *Nawādir* and I have found no similar examples in the commentary of Ibn Ruṣṣd on the *Mudawwanah*.

[Ibn Abī Zayd:] It is permitted for one [to cut the throat of the slaughter animal] above or below the *madhbaḥ* (i.e. the part of the throat below the section beneath the lower jaw) so long as it is [still] the throat [that he is cutting]. If the cut passes to the body, Ibn al-Qāsim said [the animal] is not eaten. Aṣḥab (d. 225/839) said this too, and I prefer it, because [in that case] the windpipe has not been cut at all. Aṣḥab and [ʿAbdallāh] Ibn ʿAbd al-Ḥakam (d. 214/829) permitted it. Al-ʿUtbī mentioned on the authority of Ibn al-Qāsim, Aṣḥab, and Saḥnūn that it is not eaten, and that Ibn Wahb said it was.

From another book we have related from Ibn Waḍḍāḥ: He said: *ʿAbdallāh b. ʿAbd al-Ḥakam said it was not eaten, but Aṣḥab, Ibn Wahb, Abū al-Muṣʿab (= Abū Muṣʿab al-Zuhrī), and Mūsá b. Muʿāwiyah (al-Ṣumādihī [d. n.d.]) said that it was.* Ibn Waḍḍāḥ said: *Nothing has been recorded of Mālik on [the matter]. I mentioned to Abū Zayd (= Yazīd b. Kāmil al-Qarāṭīsī [d. 287/900]) that it had been related on his authority from Ibn al-Qāsim from Mālik that it was not eaten and he denied it. Abū Zayd maintained it was eaten. Ibn al-Qāsim used to say it was eaten but then he revoked [his position] and said that it was not.*

[Ibn Abī Zayd:] Muḥammad b. ʿUmar (= Ibn Lubābah) stated that Mālik and Ibn al-Qāsim had said it was not eaten. Ibn Waḍḍāḥ said: *[The matter] only came to be discussed in the time of Ibn ʿAbd al-Ḥakam when I was with him.* [Ibn Abī Zayd:] Muḥammad b. ʿUmar and Muḥammad [b. ʿAbdallāh] b. ʿAbd al-Ḥakam (d. 268/882) said: It is eaten. [The latter] said: By analogy (*qiyās*) from what Ibn al-Qāsim asserted, if [the cut] goes to the body and a portion of [the section of the neck] that proceeds around from the furrow at the base of the nape (*ḥalqat al-khātīm*) remains attached to the head, it is eaten unless what remains of it on the head is not circular, in which case it is not eaten.²⁶⁸

Much of this passage comprises the *raʿy* of Mālikī authorities besides Ibn Waḍḍāḥ, and their contributions to the discussion confirm in general terms the nature of Mālikī jurisprudence through the ninth and tenth centuries. First, it consisted in the accumulation and comparison of legal opinions propagated by earlier luminaries in the

²⁶⁸ Ibn Abī Zayd, *Al-Nawādir*, 4: 360-61. The incision is made on the neck perpendicular to the spine, resulting in the (partial) detachment of the head from the body. Ibn ʿAbd al-Ḥakam’s so-called analogy (which is in fact merely an inference from the statement of Ibn al-Qāsim quoted earlier in the passage) seeks to resolve the question of where the neck ends and the body begins. The circularity of the portion of the neck that remains attached to the body is mentioned because it is proposed that it is at the point where the neck – as it broadens at its base – ceases to be circular that the body begins.

Mālikī tradition. Second, it consisted in the assertion of opinions in one's own right; that is, in adopting the position of an antecedent (preferably one that was known to go back to Mālik himself) and maintaining it at the expense of positions that conflicted with it. (In the present case, where an opinion generally accepted to be that of Mālik could not be found, it is the *ra'y* of Ibn al-Qāsim that prevails; the primacy of his authority is reflected in the structure of the passage, a tenth-century artefact.) It would not suffice for a Mālikī jurist merely to relate the opinions of earlier Mālikīyah as a traditionalist might have been content to relate *ḥadīths*. If they conflicted, he would employ arbitrary reasoning to produce an argument for one against the other, like Ibn Abī Zayd's against the validity of slaughter by cutting below the neck on the grounds that the animal's windpipe would not in that case be severed. A traditionalist, meanwhile, might only have resolved outright disagreement between *ḥadīths* insofar as evaluating their transmission histories in the terms of *ḥadīth* criticism (*'ilm al-rijāl*) allowed him to pronounce one more authoritative than another. Third, the Mālikī jurist would engage in the extrapolation of the known opinions of his predecessors by inference (*takhrīj*) and analogy. Muḥammad b. 'Abdallāh b. 'Abd al-Ḥakam, who maintained that the animal might be eaten, extrapolated from the statement of Ibn al-Qāsim – which maintained it might not, but referred expressly only to the throat and the body – a more precise ruling based on a particular understanding of where the one ended and the other began, and succeeded thereby in harmonizing the two positions.

Of these three constituent aspects of Mālikī jurisprudence, it would seem from the contributions of Ibn Waḍḍāḥ to this discussion (in italics) that he was concerned only with the first: he collected and transmitted the *ra'y* of a constellation of Mālikī

authorities but did not espouse a position on his own account or extrapolate from those he collected. He comes across not as a jurist in his own right, nor even as one necessarily devoted to the *ra'y* of others to the exclusion of *ḥadīth*, but as a transmitter who now applied the acumen of the traditionalists in the transmission and appraisal of *ḥadīth* to *ra'y*. The priorities and sensibilities of the *ḥadīth* party are subtly evident in the general focus on accuracy of transmission – in particular, on what had *not* been recorded of Mālik and who had denied transmitting it – and in the concern to establish that a question had not been discussed until a later time (innovation?). If the quotation is representative of the work from which it came, it might fairly be characterized as a work of *fiqh* only in the sense that it was a work that comprised the *fiqh* of others. While this example does not alone furnish sufficient grounds on which to make general inferences concerning the nature of Ibn Waḍḍāḥ's involvement with *fiqh*, I propose that in conjunction with the biographical data, which we have found to be ambiguous and paradoxical, it gives rise to a plausible hypothesis – plausible, in part, because it suggests a particular interpretation of those data that does much to resolve their ambiguity.

We have seen that Ibn Waḍḍāḥ's status in the biographical literature compiled two or three generations after his death (and on which subsequent biography largely relies) is problematic because, on the one hand, he displays the attributes that conventionally indicate devotion to *ḥadīth*, yet, on the other, he is embraced by the Mālikīyah and sometimes expressly accounted one of their jurists, which suggests rather devotion to the *ra'y* of Mālik and his circle. The enmity between the *aṣḥāb al-ḥadīth* and the *aṣḥāb al-ra'y*, which manifested itself in the persecution of Baqī and others, leads us to expect, on the contrary, separation and exclusivity of identity.

Moreover, their respective styles of jurisprudence, and the theoretical convictions in which they were rooted, were fundamentally antithetical and hardly possible to reconcile. As a distillation of the problem, the report of Ibn Waḍḍāḥ's responding with *ḥadīth* to members of the one group and with *ra'y* to members of the other at once corroborates and confounds our expectations: it corroborates them inasmuch as it confirms that there had been no compromise on method (the adherents of *ḥadīth* still sought out exclusively *ḥadīth*, and the adherents of *ra'y* exclusively *ra'y*), but it subverts them by the implication that it was possible to achieve recognition from both parties alike. One way to read the report of the "good doctor" is as an expression of esteem for Ibn Waḍḍāḥ's skill in making different types of source supply the same answer – the answer that agreed with his own position. This is perhaps how Fierro reads it, for she mentions it in support of the notion that Ibn Waḍḍāḥ hoped to preserve the predominant "legal practice" in Andalus, based on *ra'y*, and yet also maintain the *ḥadīth* as sources of law.²⁶⁹ Another way to read the report is to take it to indicate that Ibn Waḍḍāḥ would give *different* answers, one answer to *aṣḥāb al-ḥadīth* and another to *aṣḥāb al-ra'y*, in the latter case dissembling his own position which in fact was based on the *ḥadīth*. It was behaviour of this kind that, according to Ibn al-'Arabī, the traditionalists needed to adopt if they were to save themselves from humiliation by the Mālikīyah.

Neither of these explanations is convincing. The problem for the first is that it implies Ibn Waḍḍāḥ was an adept and sensitive jurist while, as we have seen, the rare instances in which he is mentioned by contemporaries in connection with

²⁶⁹ V. *supra* fn. 237.

jurisprudence either deny him knowledge of it, or denigrate his expertise. The problem for the second explanation is that it is not borne out by the direct evidence in the *Nawādir*, which shows his involvement with *ra'y* to have been both thoroughgoing and sincere. A third explanation, I propose, better accommodates the evidence: namely, that the report is intended to depict Ibn Waḍḍāḥ not as a clever jurist but as a pure transmitter of knowledge – of *ḥadīth* and *ra'y* alike – without loyalty to either party or commitment to legal positions of his own. Consideration of the evidence in general gives rise to the following postulates concerning his status in Andalus and the possibilities that the ambiguity of similar figures created for the way in which the Mālikī tradition could construct its relationship with the traditionalists in the longer term.

Ibn Waḍḍāḥ should be assigned not to a category of jurists between the *ahl al-ḥadīth* and *ahl al-ra'y* comprising native traditionalists who compromised with the rationalists either by modifying their principles or by dissimulating their traditionalism, but to a category of auxiliaries parallel to both groups comprising transmitters of *ḥadīth* and *ra'y* alike. Although this new ramification of categories had not come about as a result of a rapprochement of principle between the two parties and to that extent made no difference to the conduct of their jurisprudence at a fundamental level, it contributed significantly to the erosion of boundaries between them. It was clearly an advance on the animosities that culminated in the trial of Baqī that one who had devoted himself to the transmission of *ḥadīth* and was a natural ally of the advocates of *ḥadīth*-based law could win the acceptance of those who championed the *ra'y* of Mālik and his followers, albeit in the limited capacity of transmitter of *ra'y*. While the interventions of the emir on behalf of Baqī and his colleague Muḥammad b. 'Abd al-Salām al-Khushanī (d.

286/899), which seem to have coincided with a cessation of hostilities,²⁷⁰ no doubt caused the Mālikīyah to reflect that there would be limits to which the political élite would allow them to pursue their vendetta against the traditionalists, they should be interpreted not as Calder supposes as a sign that the court positively favoured the traditionalists (for the juristic establishment remained almost exclusively Mālikī thereafter), but as part of a policy to maintain stability in Andalus. That some traditionalists were not cut off entirely from the Mālikī establishment, but could find an outlet and a measure of recognition for their expertise in transmission as auxiliaries to it, may have contributed to the diffusion of tension between the two groups and helped sustain the relative quiet that ensued.

We have seen that social factors likely played a role in the estrangement of Ibn Waḍḍāḥ from the *ḥadīth* party – that the followers of Baqī derided his transmissions from the East from rivalry and that their persecution by the Mālikī establishment made, in any case, joining their ranks a distinctly unattractive proposition – but there had also been intellectual developments in the past half century that made this limited coalescence of *ahl al-ḥadīth* and *ahl al-ra’y* a far likelier prospect than it had been at any time in the eighth century. While there was still a clear divide between the approaches of the two groups inasmuch as pronouncing the law on the basis of *ḥadīth* was plainly incompatible with pronouncing it on the basis of the *ra’y* of a late eighth-century expert, the divide was not nearly so sharp as it had once been. The *ahl al-ra’y* were no longer practitioners of *ra’y* in the old sense. As the progression from the *Muwaṭṭa’* to the *Mudawwanah* and the successive quotations in the *Nawādir* show, they had increasingly

²⁷⁰ Fierro, ‘Introduction’, 84, 82-83.

turned away from the production of their own *ra'y* – from rationalism proper – towards the reproduction of their antecedents'. Their "imitation" of earlier *ra'y* may not have been so self-abnegating as modern scholarship once implied under the phrase "the closing of the gate of *ijtihād*", but by the third quarter of the ninth century (the generation of Muḥammad b. 'Abdallāh b. 'Abd al-Ḥakam) it was not without justification that their adversaries could accuse them of *taqlīd*. Their relationship with *ra'y* had evolved such that it was now broadly analogous to the relationship of the *ḥadīth* party with *ḥadīth*. The traditionalists in fact expressly approved of *taqlīd*, but it was not, of course, imitation of the teaching of later jurists that they advocated, but imitation of the Prophet and Companions.²⁷¹ Although the respective objects of their *taqlīd* differed, it was inevitable that the Mālikīyah would come to share, to a far greater extent than before, with the traditionalists in their recognition of the importance of transmission as an activity in its own right. Their growing reliance on what had gone before and, moreover, the proliferation of the *ra'y* of Mālik's followers in the earlier ninth century, especially around questions that Mālik was not known to have addressed (or had doubtfully addressed, such as the one in connection with which we saw Ibn Abī Zayd quote Ibn Waḍḍāḥ), made it both more important and more difficult to keep track of what had been said and whom had said it. The demise of old-style rationalism therefore created a new demand for specialist transmitters of *ra'y* that disaffected traditionalists like Ibn Waḍḍāḥ were both disposed and well-qualified to meet.

Later Mālikī prosopographical works such as the *Tartīb* of al-Qaḍī 'Iyāḍ (d. 544/1149) – that is, works comprising biographies of men who are presented by virtue

²⁷¹ Melchert, *Formation*, 17-18.

of their inclusion therein as belonging to and constitutive of the Mālikī legal tradition – include a plethora of entries for ninth-century figures who were not evidently, or were evidently not, adherents of the *ra'y* of Mālik and his followers, even though this was what identification with the Mālikīyah in their time presupposed. For one reason or another, the status of many of these men between the parties loyal to Mālikī *ra'y* on the one hand and to *ḥadīth* on the other was ambiguous, and it was the ambiguity of their status that made them susceptible of recruitment by the tradition. In many cases, their ambiguity had to do with their association with jurists who were in fact Mālikī in the proper sense, but who also transmitted *ḥadīth* alongside *ra'y*.²⁷² And although it had been for *ḥadīth* not *ra'y* that they had sought these authorities out (esteem for another's *ḥadīth* did not presuppose approval of his jurisprudence²⁷³), the very fact of their association gave rise to the mistaken inference that they were jurists in the same mould. As each group gradually made concessions to the other – the adherents of *ra'y* taking up *ḥadīth*, the traditionalists asserting that their project had always been fully complementary with the work of their erstwhile adversaries and that their imam had been an expert jurist as well as traditionist²⁷⁴ – they became harder to distinguish

²⁷² The Medinese Abū Muṣ'ab al-Zuhrī, who spread his recension of the *Muwatta'* in predominantly traditionalist Baghdad, would be a good example of such. I will consider the role of *ḥadīth* transmission in relation to the production of *ra'y* in the Mālikī tradition below in §3.

²⁷³ Thus, Aḥmad regarded highly the *ḥadīth* of Mālik but disapproved his *ra'y*.

²⁷⁴ V. Melchert, 'Traditionist-jurists', 405-06, and *passim*. Specifically in relation to Baghdad, Melchert finds that the traditionalists began to embrace retrospectively certain rationalistic jurists – Mālik, al-Awzā'ī, Sufyān al-Thawrī – around the late 250s/ early 870s. In the West, however, circumstances were very different. Firstly, the balance of power weighed far heavier in favour of the adherents of *ra'y* (the Mālikīyah) than in Iraq, where power was more evenly distributed. Secondly, the inter-regional polemics among the rationalists, which Schacht supposed had provoked, say, the Kufans in the eighth century to take up Prophetic *ḥadīth* against the Companion *ḥadīth* of the Medinese and which must have done much to accelerate the rationalists' embrace of *ḥadīth* generally, were largely absent in the West. Conditions there,

in retrospect (or their differences easier to suppress) and *pari passu* the traditionalists easier to absorb into the fabric of the tradition. It was still not obvious at mid-century that the tradition would stand to gain from association with the *ahl al-ḥadīth* (and as the persecution of Baqī shows, the Mālikīyah positively eschewed it), but as the latter gained ground in the latter half of the century in other legal centres (particularly the Iraqī), they became harder to ignore. Ultimately, the tradition would express its acknowledgement of the *ḥadīth* party in the notion of Medina as the very birthplace of traditionalism,²⁷⁵ and by this it would consolidate its place in the Islamic legal tradition as a whole. Traditionalists like Ibn Waḍḍāḥ, ambiguous for another reason, were also unwitting agents of this (limited) retrospective synthesis. It was natural that biographers like Ibn Abī Dulaym toward the middle of the tenth century should classify Ibn Waḍḍāḥ as a Mālikī jurist. By then, as in the earlier ninth century, men who transmitted works of *ra'y* from the Mālikī *fuqahā'* were invariably Mālikī jurists themselves. It would have seemed, then, an obvious inference from the fact that he had transmitted the books of Saḥnūn and collected the *ra'y* of the likes of Ibn 'Abd al-Ḥakam that Ibn Waḍḍāḥ had been a Mālikī jurist himself. Moreover, by the mid-tenth century (after Ibn Lubābah, who could still flourish as a jurist without knowledge of *ḥadīth*), the divisions between the two parties had eroded to the point at which training in Mālikī jurisprudence, whose core curriculum remained *ra'y* nonetheless, would probably have incorporated some element of *ḥadīth*. It would have seemed, therefore, a great deal less incongruous to Ibn Abī Dulaym than to a contemporary observer that simultaneously he

then, seem to have been at once less conducive to compromise on the part of the *ahl al-ra'y* and more conducive to compromise by the traditionalists.

²⁷⁵ V. Melchert, 'How Hanafism', 322-47.

bore the hallmarks of loyalty to traditionalism. Ibn Waḍḍāḥ belonged to a relatively short, but pivotal, chapter in the history of Andalus when these boundaries were neither so strictly observed as they had been, nor as porous and indistinct as they would become.

If, as Calder supposed, the *Muwaṭṭaʿ* of Yaḥyá as we have it is the product of revision along traditionalist lines, Ibn Waḍḍāḥ would seem to make a distinctly plausible candidate as the instigator and prosecutor of that revision. The duality of his concerns – his pronounced affinities with traditionalism on the one hand and his involvement with Mālikī *raʿy* on the other – suggest that he would have been both well-qualified and motivated to undertake such a project. Moreover, the recognition he achieved among the old adversaries of the *ḥadīth* party makes it plausible that, if indeed he had proposed revisions to Yaḥyá’s recension, they might have conceded to adopt them. ‘Ubayd Allāh, on the other hand, whose *riwāyah* of the work circulated widely alongside Ibn Waḍḍāḥ’s, makes a highly improbable candidate as the architect of traditionalist reform of the *Muwaṭṭaʿ*. In almost all respects, his personality and career stand in stark contrast to Ibn Waḍḍāḥ’s. Where Ibn Waḍḍāḥ was renowned for his piety, asceticism, and material poverty – the ideal signs of traditionalist mien –, ‘Ubayd Allāh was remembered for his worldliness: “He was extremely adulating of the rich (*shadīd al-ʿiẓām li-ahl al-dunyā*). If wealth (*al-dunyā*) came to someone, he would go to him; if it turned its back on him, he would shut himself off from him; and if it returned [to him], he would go back to him.”²⁷⁶ This toadyism and unabashed pursuit of material interest evidently had the desired

²⁷⁶ Al-Khushanī, *Akhbār*, 172.

outcome, for he is said to have acquired great wealth and social standing.²⁷⁷ Where Ibn Waḍḍāḥ had devoted himself in exemplary fashion to the acquisition of *'ilm*, 'Ubayd Allāh came to it relatively late in life. In Andalus, he heard no one besides his father.²⁷⁸ And when finally he travelled to the East, it was not *'ilm* that drew him there but trade and pilgrimage (the latter a conventional compensation for the former in encomiastic biography of early Muslims).²⁷⁹ Though he is alleged to have attended *majālis* at Baghdad and Cairo, it seems to have been only for the *ḥadīth* he related from his father – mainly *ḥadīth* of the Successor al-Layth b. Sa'd (d. 175/791), whom the latter had heard at Cairo²⁸⁰ – that he was known in Andalus as a traditionist.²⁸¹ It is probably to the need to excuse the evident shortcomings of his education that we owe the report of his father's seeking to divert him from the path of *'ilm* on account of its rigours, extolling instead the attractions of joining the merchant class and a career in commerce.²⁸² The same report seems to imply that it was in deference to his father's wishes that he only turned to *'ilm* a long time (*dahr*) after his death.²⁸³ Despite the deficiencies of his scholarly credentials, he attained high office in the legal apparatus of the state, no doubt thanks to his political sagacity and to the prestige that inevitably attached to him as the son of Yaḥyá. Ibn al-

²⁷⁷ Ibn al-Faraḍī, *Tārīkh*, 1: 293, n. 764. (*'aẓīm al-māl wa-al-jāh*)

²⁷⁸ Ibn al-Faraḍī, *Tārīkh*, 1: 292, n. 764.

²⁷⁹ Al-Khushanī, *Akḥbār*, 170; Ibn al-Faraḍī, *Tārīkh*, 1: 293, n. 764.

²⁸⁰ Al-Khushanī, *Akḥbār*, 348.

²⁸¹ Al-Khushanī, *Akḥbār*, 172.

²⁸² Al-Khushanī, *Akḥbār*, 171. (*ḥāda bi-ibnī-hī 'Ubayd Allāh 'an ṭarīq al-'ilm... wa-zayyana la-hū al-tijārah wa-al-dukhūl fī ṭabaqat ahlī-hā*)

²⁸³ Yaḥyá's date of death is 234/848; 'Ubayd Allāh's date of birth according al-Khushanī is 210/825-26 (*Akḥbār*, 170). In that case he was 24 at his father's death. From this we infer that it was probably not until his thirties that al-Khushanī believed he turned to *'ilm*. Dates of birth are rarely more than guesses, however. Elsewhere (*Quḍāt Qurṭubah*, 128-29), the same author includes a report to the effect that 'Ubayd Allāh was 17 at his father's death. In any case, it seems safe to assume that his scholarly credentials were thought to be deficient and there was a need to account for this.

Faraḍī describes him as a leading jurist-consult, occupying the chieftaincy of Cordoba alone and unopposed.²⁸⁴ ‘Ubayd Allāh’s affiliation, unlike Ibn Waḍḍāḥ’s, was plainly with the Mālikī establishment, and not the traditionalists.

But relations between the two parties were not as they had been in the days of Baqī. An insight into how far their relations had progressed (or at least how far anonymous persons in the early tenth century believed they had progressed) may be gleaned from the following report, cited by al-Khuṣṣhanī in both his *Akḥbār* and his dictionary of Cordoban judges:

[Al-Khuṣṣhanī] said: I heard some of the *ahl al-‘ilm* say that the caliph ‘Abd Allāh b. Muḥammad instructed his ministers to send for ‘Ubayd Allāh and Aḥmad b. Baqī and consult them on a matter. They did so and they came; they were questioned and they gave their replies. Once the two of them had left, Naḍr b. Salamah began to speak to his companions, causing them to marvel at how much things had changed (*wa-yu’jib^u-hum min taḡhayyur al-aḥwāl wa-taqallub al-umūr*). He told them: “‘Ubayd Allāh came to me when I was a judge (*qaḍī*) in the lifetime of Baqī b. Makḥlad and said: By God, it displeases me that you consult me with Baqī in a single sitting (*majlis*) as if I were his equivalent (*fa-taj’al^u-nī la-hū nazīr^{an}*). If you wish to consult me about something, send for him one time, and send for me another time, and don’t have us both come together (*wa-lā tajma’-nā jamī^{an}*).” [Naḍr] said:

²⁸⁴ Ibn al-Faraḍī, *Tārīkh*, 1: 293, n. 764. (*kāna muqaddam^{an} fī al-muṣḥāwarah fī al-aḥkām munfarid^{an} bi-ri’āsat al-balad ḡhayr mudāfa’*)

Within the emir's lifetime [things had changed to the extent that now] he would send for Baqī's son and 'Ubayd Allāh and consult both of them in a single sitting (*fa-lam yamut ḥattā arsala al-amīr fī walad Baqī wa-fī 'Ubayd Allāh wa-shāwara-humā fī majlis wāḥid*).²⁸⁵

It is unnecessary, and probably erroneous, to assume that 'Ubayd Allāh ever sat side by side with Baqī, or indeed that he ever sat with his son Aḥmad. The report is to be read as a metaphor for the closing of the ranks between the parties. Aḥmad b. Baqī (d. 324/936), as the potential bearer of old hostilities, represents the traditionalists with whom the Mālikīyah, represented by 'Ubayd Allāh, had now compromised. The story of their compromise is cast in the perspective of Naḍr b. Salamah (d. 302/914), whom the emir 'Abd Allāh appointed to judgeships twice before finally installing him in the ministry²⁸⁶. It is perhaps because he belongs to the state administration rather than the judiciary, and is distanced thereby from their hostilities, that he is thought well placed to recount the development of relations between the two parties. That the choice of these particular individuals was probably governed by literary rather than historical considerations does not, however, imply that the report is of no use as a historical document. Approximately two generations separated al-Khushanī from the latest events it purports to recount and it is fair assumption that it was put into circulation no later

²⁸⁵ Al-Khushanī, *Quḍāt Qurṭubah*, 223; Al-Aḥbār, 172. My translation derives from both these versions, which do not differ significantly. (*Jināzah* and *nimtu* in the latter should be amended in accordance with the text of the former to *ḥayāh* and *yamut* respectively.) 'Ubayd Allāh has no entry in *Quḍāt Qurṭubah*. He was not a qadi but a jurist-consult (*mushāwar*, and therefore of higher rank), but the *Quḍāt* does otherwise encompass his category.

²⁸⁶ Ibn al-Faraḍī, *Tārīkh*, 2: 155, n. 1499.

than a generation before him. This relative chronological proximity makes it likely that the conciliation of the parties represented in the report reflects a real historical memory. The death date of the caliph 'Abd Allāh, who died in office in 300/912, should be accepted as a *terminus ante quem* for the establishment of a state-sponsored coalition between the *ḥadīth* party and the Mālikīyah in Andalus.

Of the general nature of the truce that now prevailed, al-Khushanī's characterization of Aḥmad elsewhere is suggestive: "The manners (*akhlāq*) of Aḥmad b. Baqī were like his father's with respect to dissemblance (*al-mudārāh*) and connivance (*iqḥḍā'*). [He was] kindly towards his enemy and gracious in forgiving his oppressor (*ḥusn al-iqbāl 'alá 'adūwī-hī wa-jamīl al-ṣafḥ 'an zālimī-h*)."²⁸⁷ To maintain their position in the coalition, which was one of subordination, the traditionalists evidently needed to conduct themselves astutely: if they disagreed with the Mālikī jurists, it was better to look the other way – to connive or to conceal their disagreement – than to openly challenge their authority. In the short term, what they had settled for seems to have been more the outcome of capitulation than compromise, but they had gained a foothold in the legal apparatus of the state. Moreover, a relatively stable institutional basis conducive to a gradual convergence of the approaches of the two parties had now been established.

²⁸⁷ Al-Khushanī, *Quḍāt Qurṭubah*, 224.

2.1.2 The *Riwāyahs* of Ibn Waḍḍāḥ and ‘Ubayd Allāh: Differences between them and Ibn Waḍḍāḥ’s corrections to the *Muwaṭṭa’*

We have seen that, as the would-be architects of a project to re-cast the materials of Yaḥyá’s *Muwaṭṭa’* in a form that sublimated the authority of Mālik, previously paramount, to that of the Prophet and Companions, ‘Ubayd Allāh b. Yaḥyá makes as unlikely a contender as Ibn Waḍḍāḥ makes a likely one. I will consider below the evidence of the latter’s proposed corrections to Yaḥyá’s recension now preserved in al-Khushanī’s *Akhbār* to determine which of their *riwāyahs* is reflected in the extant *Muwaṭṭa’* and the extent to which it is the product of re-working after Yaḥyá’s lifetime.

Calder, we recall, cited the *isnāds* supplied by Ibn ‘Abd al-Barr in the introduction to his *Istidhkār*, a commentary on the *Muwaṭṭa’* configured along the lines of (‘*alá rusūm*) Yaḥyá’s recension, but also collating other recensions (in particular, those of Ibn Bukayr, Ibn al-Qāsim, al-Qa’nabī, and Muṭarrif b. ‘Abdallāh (d. 214-220/829-835), sororal nephew of Mālik).²⁸⁸ He does not, however, mention the *Tamhīd* of Ibn ‘Abd al-Barr, of

²⁸⁸Ibn ‘Abd al-Barr, *Al-Istidhkār*, 1: 168, 171 (where *isnāds* for these latter recensions are provided). It was specifically in this sense that Ibn ‘Abd al-Barr meant he had “restricted himself” to Yaḥyá’s *Muwaṭṭa’* (cf. Calder, *Studies*, 37). It may be noted that from the *Kitāb al-Ṣalāt*, which alone I have surveyed comprehensively, the *Istidhkār* seems to confirm the contents and organization of the version we have. What appear to be discrepancies between the two are probably only apparent. For instance, the section entitled [Bāb] *al-Nahy ‘an al-ṣalāt ba’da al-ṣubḥ wa-al-‘aṣr*, which in the *Istidhkār* appears, as one expects, with other materials such as would conventionally appear under the heading *Mawāqīt al-ṣalāt*, is printed under the same title in Yaḥyá’s *Muwaṭṭa’* at the end of the book on prayer generally (*Al-Istidhkār*, 1: 356-389, nn. 26-32; cf. *Muwaṭṭa’* 1: 301-03, nn. 584-590 – its parallel context would be *Muwaṭṭa’*, 1: 48f.). The author, however, notes its original position in Yaḥyá’s text, which corresponds to its position in the modern edition, and states he has re-arranged it in line with other recensions (*Al-Istidhkār*, 1: 355). Reports in our version of Yaḥyá’s text that are not reproduced where we would expect them to be in the *Istidhkār* are to be found in the text of the commentary (e.g., *Muwaṭṭa’*, 1: 37-8, nn. 7-8, and 1: 48, n. 28-29, absent from *Al-Istidhkār*, 1: 241 and 355, respectively, are mentioned at 1: 238, 240, 344). Usually the omission of a report from the main body of quotation

which the *Istidhkār* is an epitome. The author, having laid out the chains of transmission by which he received Yaḥyá's *Muwaṭṭa'* from Ibn Waḍḍāḥ and 'Ubayd Allāh (which correspond to those in the *Istidhkār*), states in his introduction to the *Tamhīd* that there are minor differences (*hurūf*, lit. letters or particles) between the two *riwāyahs* which he had recorded in the work.²⁸⁹ A comprehensive search of the *Tamhīd* turns up only five recorded instances of divergence. Four of these have to do with minor discrepancies between *isnāds*, probably the result of errors by copyists or readers (e.g. mistaking 'an for *ibn* or *wa-* for 'an, leading to mis-identification or mis-attribution).²⁹⁰ A fifth concerns the location of a *ḥadīth*.²⁹¹ In one case, Ibn Waḍḍāḥ is expressly acknowledged to have

has to do with the repetition of its content in another report which is in fact quoted; the former proves useful for the purposes of commentary on the latter insofar as it corroborates it.

²⁸⁹ Ibn 'Abd al-Barr, *Al-Tamhīd*, 1: 11. (*wa-bayna riwāyat 'Ubayd Allāh wa-riwāyat Ibn Waḍḍāḥ ḥurūf qad qayyadtu-hā fī kitābī*)

²⁹⁰ (1) *Tamhīd*, 17: 183-85, indicates that the *isnād* of a *ḥadīth* of 'Urwah b. al-Zubayr in 'Ubayd Allāh's *riwāyah* commits "a grievous error" which Ibn Waḍḍāḥ's expressly does not commit; namely, its substituting *ibn* for 'an with the result that the relation of the *ḥadīth* is credited to the Anṣārī Muḥammad b. 'Amr b. Ḥazm instead of 'Abd Allāh b. Abī Bakr b. Muḥammad b. 'Amr b. Ḥazm (d. 130/747 or 135/752). We find that the "error" is 'corrected' in 'Abd al-Bāqī's edn. of the *Muwaṭṭa'* (1: 42, n. 58) but is reproduced in Ma'rūf's (1: 84-85, n. 100) with a note to say that in some mss. and edns. it is "corrected"; (2) *Tamhīd*, 17: 418, indicates that in the *riwāyah* of Ibn Waḍḍāḥ a Prophetic *ḥadīth* via 'Ā'ishah is *musnad* but in 'Ubayd Allāh's, which omits 'Ā'ishah, it is not. The *isnād* is 'corrected' in the edn. of Ma'rūf with acknowledgment of the *Tamhīd* (1: 390, n. 793, and fn. 2); in 'Abd al-Bāqī's edn. also according to Ibn Waḍḍāḥ's *riwāyah* but with no note; (3) *Tamhīd*, 20: 94, indicates that 'Ubayd Allāh's *riwāyah* names the Prophet's son-in-law Abū al-'Āṣī b. Rabī'ah, with *tā' marbūṭah*, while Ibn Waḍḍāḥ's names him without, which the author takes to be correct. Both Ma'rūf's (1: 240-41, n. 471) and 'Abd al-Bāqī's (1: 170, n. 81) edns. agree with the former; (4) *Tamhīd*, 21: 165, indicates that 'Ubayd Allāh's *riwāyah* is alone in committing "a clear mistake"; namely, its substituting *wa* for 'an in an *isnād*. The "mistake" is reproduced in Ma'rūf's edn. (1: 200, n. 365).

²⁹¹ (5) *Tamhīd*, 22: 11, indicates that the third part of a *ḥadīth* ("three *ḥadīths* in one") is incorporated with the remainder of the *ḥadīth* in Ibn Waḍḍāḥ's *riwāyah* (which the author takes to be correct for it agrees with other transmissions from Mālik) but is re-located to another *bāb* in 'Ubayd Allāh's *riwāyah*. Both edns. agree with Ibn Waḍḍāḥ's version: Ma'rūf's edn. 1: 190-91, n. 346; 'Abd al-Bāqī's 1: 131, n. 6; cf. respectively, 1: 114, n. 174 and 1: 68, n. 3, where the third part of the *ḥadīth* occurs separately. *Bāb 'utmah wa-ṣubḥ*, which the author identifies as the location of the *ḥadīth* in Ibn Waḍḍāḥ's *riwāyah*, is also thus named in the edns.

“corrected” an error in Yaḥyá’s *Muwaṭṭa’*.²⁹² In every case, it is the *riwāyah* of Ibn Waḍḍāḥ that Ibn ‘Abd al-Barr pronounces correct – that is, correct in respect of transmission from Mālik, and correct on grounds of agreement with other recensions of the *Muwaṭṭa’*. As for transmission from Yaḥyá, including the accurate reproduction of Yaḥyá’s mistakes, it is ‘Ubayd Allāh’s that is implicitly the more authoritative *riwāyah* – obviously so in two cases by the inadvertent conflation of it with the recension itself²⁹³. It is always his *riwāyah* that is to be checked against Ibn Waḍḍāḥ’s, and not *vice versa*. That Ibn Waḍḍāḥ is treated as the authority best qualified to adjudicate between different transmissions from Mālik, and ‘Ubayd Allāh as the one who most reliably reproduces what Yaḥyá related, corresponds well to the image we sketched earlier on the basis of their biographies: Ibn Waḍḍāḥ is the perceptive *muḥaddith* with sufficient knowledge from the East to know what Mālik really said, while ‘Ubayd Allāh, who ascended to the ranks of the Mālikīyah judiciary with no training in *ḥadīth* (or even *ra’y*), is the reliable (slavish) transmitter of Yaḥyá’s teaching – reliable, indeed, perhaps *because* he lacks the means to question what went before.²⁹⁴ Concerning the textual history of the *Muwaṭṭa’*, the key observation is that, firstly, Ibn ‘Abd al-Barr believed the two transmissions from Yaḥyá to be independent and, secondly, that he believed discrepancies between them to be few, now and at the point of relation from Yaḥyá.

²⁹² *wa-ka-dhālika aṣṣaḥa-hū fī riwāyat Yaḥyá*, ref. as for (3), fn. 282. The error in question does not feature in the list reproduced in al-Khushanī’s *Akḥbār*.

²⁹³ (3) and (5) above (fnn. 282, 283)

²⁹⁴ Perhaps we see a parallel in another tradition in al-Rabī and al-Muzanī, the latter criticized for presuming to correct al-Shāfi‘ī, the former represented as being incapable of independent thought and implicitly more faithful in relating what al-Shāfi‘ī said. V. Melchert, ‘The Meaning of *Qāla ‘l-Shāfi‘ī*’, in *‘Abbasid Studies: Occasional Papers of the School of ‘Abbasid Studies*, ed. James E. Montgomery (Leuven: Peeters, 2004), 277-301, at 296.

It will not suffice, however, to adduce an eleventh-century belief in demonstration of a historical fact of the ninth century. Given the conditions that prevailed by the end of that century – the coalition between the traditionalists and the Mālikī loyalists, and, in particular, the insinuation of some traditionalists into the opposite camp by their transmission of Mālikī *ra'y* – it is likely that if a standardization, a rationalization, of originally different *riwāyahs* had occurred, it had occurred in the interim. For a more convincing demonstration of the independence and the relative congruity of the original transmissions, we must look to earlier evidence inaccessible to Calder.

Yaḥyá's version of the *Muwaṭṭa'* was widely acknowledged in the early tenth century to contain errors. Ibn Bāz, whose own *riwāyah* continued to circulate in the twelfth century, claimed that Yaḥyá had committed mistakes in around three hundred places (*mawāḍi'*) – an exaggeration, says al-Khushānī. Aḥmad b. Khālīd, the student of Ibn Waḍḍāḥ, estimated the number at thirty.²⁹⁵ This same Aḥmad had noticed an error in the *isnād* of a *ḥadīth* in one of the three chapters (*abwāb*) of the *Kitāb al-I'tikāf* that Yaḥyá is said to have related indirectly from Mālik via Ziyād b. 'Abd al-Raḥmān (d. 204/810).²⁹⁶ Hoping to discover whether Yaḥyá or Ziyād was to blame for the error, he called on the latter's family who produced the book he had related from Mālik. Unfortunately the page in question had been removed. Aḥmad supposed that Ziyād had

²⁹⁵ Al-Khushānī, *Akḥbār*, 349.

²⁹⁶ The number of chapters that al-Khushānī reports Yaḥyá related from Ziyād corresponds to the number evidently related from him in the current edns. (*Muwaṭṭa' Yaḥyá*, 1: 423-426 [*Khurūj al-mu'takif li-al-'īd*]; 1: 426-427 [*Al-Nikāḥ fī al-i'tikāf*]; 1: 427-431 [*Mā jā'a fī laylat al-qadr*].)

removed it to augment Yaḥyá's reputation (*i'ẓām^{an} li-Yaḥyá*) by ensuring that no one else would transmit it from him.²⁹⁷

Ibn Waḍḍāḥ evidently applied himself to the systematic identification of errors in Yaḥyá's recension, largely on the basis of the independent transmissions from Mālik of al-Qa'nabī and Ibn Bukayr (d. 231/845), whom he had heard in Iraq and whose own versions of the *Muwaṭṭa'* enjoyed the favour of the traditionalists there.²⁹⁸ Al-Khushānī, who had heard from another informant that Ibn Waḍḍāḥ had identified all the errors present in Yaḥyá's version and that they occurred in thirty-six places in all, states in his *Akhbār* that he had read all of them in a book of Muḥammad b. 'Abd al-Malik b. Ayman (d. 330/942), who was a student of Ibn Waḍḍāḥ and himself an esteemed traditionist.²⁹⁹ Announcing his intention to reproduce them in full, as he found them, he informs us that the errors concern the *isnāds* of *ḥadīth* and not their *mutūn*.³⁰⁰ In fact, the corrections as he records them relate to forty-eight *ḥadīth*,³⁰¹ which incorporate a total of fifty

²⁹⁷ Al-Khushānī, *Akhbār*, 348-49.

²⁹⁸ For their recensions, v. *infra* §2.

²⁹⁹ Ibn al-Faraḍī, *Tārīkh*, 2: 52-53.

³⁰⁰ Al-Khushānī, *Akhbār*, 349.

³⁰¹ Al-Khushānī, *Akhbār*, 349-357: The location of the *ḥadīth* in Ma'rūf's edn. of Yaḥyá's *Muwaṭṭa'* follows in parentheses the location in the *Akhbār* of Ibn Waḍḍāḥ's corrections to that *ḥadīth*: (1) 349, l. 16f. (1: 56-57, n. 46); (2) 349, l. 23f. (1: 84-85, n. 100); (3) 350, l. 3f. (1: 94, n. 122); (4) 350, l. 7f. (1: 103, n. 148); (5) 350, l. 10f. (1: 105, n. 155); (6) 350, l. 14f. (1: 129, n. 209); (7) 350, l. 18f. (1: 153, n. 259); (8) 351, l. 1f. (1: 182, n. 321); (9) 351, l. 4f. (1: 184, n. 326); (10) 351, l. 7f. (1: 200, n. 365); (11) 351, l. 11f. (1: 214-15, n. 411); (12) 351, l. 14f. (1: 248, n. 484); (13) 351, l. 18f. (1: 268, n. 520); (14) 352, l. 1f. (1: 419, n. 867); (15) 352, l. 3f. (1: 585, n. 1311); (16) 352, l. 7f. (1: 589, n. 1320); (17) 352, l. 13f. (1: 434, n. 901); (18) 352, l. 18f. (1: 505-06, n. 1104); (19) 353, l. 1f. (1: 507, n. 1105); (20) 353, l. 4f. (1: 524, n. 1159); (21) 353, l. 7f. (1: 528, n. 1169); (22) 353, l. 11f. (1: 545, n. 1220); (23) 353, l. 15f. (1: 553, n. 1239); (24) 353, l. 18f. (1: 567-68, n. 1276); (25) 354, l. 1f. (2: 68, n. 1610); (26) 354, l. 4f. (2: 82, n. 1658); (27) 354, l. 8 f. (2: 93-94, n. 1697); (28) 354, l. 13f. (2: 99, n. 1715); (29) 354, l. 15f. (2: 106-07, n. 1729); (30) 354, l. 19f. (2: 114, n. 1750); (31) 355, l. 1f. (2: 136, n. 1797); (32) 355, l. 5f. (2: 146, n. 1825); (33) 355, l. 9f. (2: 185-86, n. 1918); (34) 355, l. 12f. (2: 325, n. 2244); (35) 355, l. 15f. (2: 333, n. 2263); (36) 355, l. 20f. (2: 445, n. 2559); (37) 356, l. 1f. (2: 126, n. 1778); (38) 356, l. 4f. (1: 642, n. 1436); (39) 356, l. 8f. (2: 262, n. 2108); (40) 356, l. 11f. (2: 281, n. 2153); (41) 356, l. 15f. (2: 296, n. 2183); (42) 356, l. 20f. (2:

individual errors³⁰². Five of these errors have to do with *mutūn*, the omission of a word or its confusion with another, not obviously explicable by transmission from written notes or mis-audition, but only occasionally of significant legal consequence.³⁰³ The remainder relate to *isnāds*, the omission or addition of a transmitter; the confusion of *wa-* with *'an* or *aw*; confusion of names; mis-identification of familial relations and toponyms – again, not in many cases obviously explicable in terms of the technologies of transmission. As for specific authorities that Ibn Waḍḍāḥ expressly names against Yaḥyá, al-Qa'nabī and Ibn Bukayr, who are associated with Kufah and Baṣrah respectively and are only once not cited together, feature pre-eminently, achieving nine and ten citations respectively.³⁰⁴ Muṭarrif and Ibn Wahb achieve two and three respectively.³⁰⁵ Otherwise it suffices for Ibn Waḍḍāḥ to assert that Yaḥyá was mistaken, or to say that the anonymous generality of transmitters from Mālik disagree.

If the influence of Ibn Waḍḍāḥ – or indeed of other traditionalists, who shared in his knowledge from the East – had been decisively formative in the history of the text of the *Muwaṭṭa'*, we should not expect to see these errors reproduced in the version we have. If there had been a rationalization of *riwāyahs* in the tenth century under the auspices of a state-sponsored coalition of the Mālikīyah and the traditionalists, we should not expect to see Ibn 'Abd al-Barr in the eleventh century implying an urtext of

306, n. 2211); (43) 357, l. 2f. (2: 535, n. 2724); (44) 357, l. 6f. (2: 569, n. 2793); (45) 357, l. 9f. (2: 583-84, n. 2820); (46) 357, l. 12f. (2: 591-92, n. 2839); (47) 357, l. 13f. (2: 596, n. 2847); (48) 357, l. 17f. (2: 472, n. 2610).

³⁰² (16) and (35) (in fn. 293) include two errors each.

³⁰³ (9), (16), (24), (31), (41) (in fn. 293).

³⁰⁴ Al-Qa'nabī: (1), (4), (7), (11), (17), (22), (24), (30), (48); Ibn Bukayr (1), (4), (7), (11), (17), (22), (24), (30), (39), (48) (in fn. 293),

³⁰⁵ Muṭarrif: (22), (30); Ibn Wahb (1), (7), (17) (in fn. 293).

Yaḥyá's recension – which he implicitly identifies with the *riwāyah* of 'Ubayd Allāh – that did not incorporate these revisions. Yet, broadly speaking, we do. In the modern edition of *Bashshār 'Awwād Ma'rūf*, thirty-nine of the fifty errors identified as such by Ibn Waḍḍāḥ are reproduced as he attributes them to Yaḥyá. Eleven, however, have been amended along the lines he proposed.³⁰⁶

While the correction of these supposed errors represents standardization of the text after Yaḥyá's lifetime against other known transmissions from Mālik, the scale of revision was clearly limited. Moreover, it can hardly have been the result of a concerted and systematic programme of reform that these corrections came to be reflected in the received text; rather, it seems to have been the outcome of an incremental process in which changes came about through common vicissitudes of transmission, such as contamination with other variants of Mālik's *ḥadīth*. Of the eleven errors no longer extant in Yaḥyá's *Muwaṭṭa'*, some evidently lapsed from the text before the mid-eleventh century, others later on, for we find that the *Tamhīd* sometimes reproduces a *ḥadīth* in error, sometimes as Ibn Waḍḍāḥ revised it.^{307 308}

³⁰⁶ (6), (8), (9), (20), (22), (24), (25), (26), (40)?, (42), (47).

³⁰⁷ Thus (7), (8), and (9) still occur as Ibn Waḍḍāḥ attributed them to Yaḥyá (respectively, *Tamhīd*, 20: 108; 24: 137-40; 13: 250) while (22), (42), and (47) appear already as he proposed they be amended (respectively, *Tamhīd*, 17: 250; 21: 92; 4: 295).

³⁰⁸ It should be noted that there are discrepancies between the edns. of Ma'rūf and 'Abd al-Bāqī (and to that extent the instability of the text persists to this day). I have not systematically compared the two editions, but from occasional comparison and from the footnotes of Ma'rūf's edn., which sometimes cite 'Abd al-Baqī's (by the sigla *mīm*), I have noticed that on at least five occasions – (7), (15), (16), (17), (18, partially), (45) – 'Abd al-Bāqī's edn. produces what Ibn Waḍḍāḥ asserts is correct while Ma'rūf's retains the error. Counter-checks against the *Tamhīd* give rise to the impression that this tendency of 'Abd al-Bāqī's edn. is owed to unsystematic substitution according to what Ibn 'Abd al-Barr argues is correct (not merely what he reproduces of Yaḥyá). Although the ms. basis of Ma'rūf's edn. is late (v. editor's intro. at 1: 22-23), though not exceptionally so, it is probably to be preferred for this reason.

Of the five points of difference between the *riwāyahs* of ‘Ubayd Allāh and Ibn Waḍḍāḥ observed in the *Tamhīd*, two relate to errors identified in al-Khuṣṣanī’s list, the others to *ḥadīth* that do not appear there. In those two instances, what Ibn ‘Abd al-Barr ascribes to ‘Ubayd Allāh’s *riwāyah* corresponds to what Ibn Waḍḍāḥ ascribes to Yaḥyá; what he ascribes to Ibn Waḍḍāḥ’s *riwāyah* corresponds to the revised material in al-Khuṣṣanī’s list.³⁰⁹ If we assume, firstly, that the *Tamhīd* is exhaustive in its identification of differences between their *riwāyahs* (as suggested by the author in his introduction to the work) and, secondly, that al-Khuṣṣanī’s list includes all the *ḥadīth* with which Ibn Waḍḍāḥ took issue in Yaḥyá’s recension (as al-Khuṣṣanī implies it does), it follows that, in the interim between Yaḥyá and Ibn ‘Abd al-Barr, only four percent of the errors Ibn Waḍḍāḥ had identified in the recension had been incorporated into his *riwāyah*. Both these assumptions are certainly unrealistic (the second evidently false on the grounds of the three differences that do not correspond to errors on al-Khuṣṣanī’s list), but it does seem wholly untenable that the *riwāyah* of Ibn Waḍḍāḥ familiar to Ibn ‘Abd al-Barr represented to any significant extent his own revised version of the *Muwaṭṭa’* available to Yaḥyá.

A more extensive body of evidence against Calder’s argument that Yaḥyá’s *Muwaṭṭa’* was the outcome of traditionalist reform consists in the frequent identifications in the *Tamhīd* of deficiencies in its *ḥadīth* on the basis of more widely attested variants, many of which (to extrapolate from the citations of Ibn Bukayr, al-Qa’nabī, and others in al-Khuṣṣanī’s list of corrections) would seem to have been already available to the Andalusian traditionalists in the ninth century, brought back from the

³⁰⁹ *Tamhīd*, 21: 165; 17: 183-85, respectively corresponding to (10) and (20), fn. 293.

East by figures like Baqī and Ibn Waḍḍāḥ. The great majority of the *ḥadīth* that Ibn Waḍḍāḥ determines to be in error are also judged in the same respect erroneous (or variant) in the *Tamhīd* (that is, in the thirty nine cases where they have not already been amended).³¹⁰ Although Ibn ‘Abd al-Barr unsurprisingly displays a far wider knowledge of variants than Ibn Waḍḍāḥ, those he adduces against the allegedly erroneous versions in Yaḥyá’s recension (sc. ‘Ubayd Allāh’s *riwāyah* of it) generally include the same variants, ascribed to the same transmitters from Mālik, that Ibn Waḍḍāḥ himself brings up to corroborate his corrections. If the *ḥadīth* in the recension that circulated under his name in the eleventh century were not originally a part of what Yaḥyá related but had been incorporated into the text by the Andalusian traditionalists in the second half of the ninth century, we would not expect them to include errors already identifiable as such in their own time.

While the nature of the reworking to which Calder supposed a student of Yaḥyá had subjected his recension clearly amounted to far more than mere re-arrangement of material already present in the text (indeed, he speaks of “composition” by a student), re-arrangement was doubtless an aspect of the reworking he envisaged; in particular, the ranking of *ḥadīth* by the order of their citation according to “a conventional and familiar scheme of distance from the Prophet.”³¹¹ Might, then, this aspect of Calder’s hypothesis be salvaged? The evidence of Ibn Waḍḍāḥ’s corrections suggests it might not. Although it broadly dis-confirms the arrangement of materials in the received text at the

³¹⁰ For examples, v. refs. to the *Tamhīd* in Ma’rūf’s edn. in the fns. relating to (1), (2), (13), (15), (16), (17), (18), (19), (21), (27), (32), (38).

³¹¹ Calder, *Studies*, 35, 34-38.

largest level of books (*kutub*) within the whole work,³¹² it confirms without exception the current arrangement both at the medium level of chapters (*abwāb*) within books, and at the smallest level of *ḥadīth* within chapters.³¹³ In several cases, the confirmation is very strong; that is, the sequences of *ḥadīth* and of chapters in al-Khuṣṣanī's list that we find repeated in the received text are sufficiently long that we might rule out the possibility that their repetition is owed to chance. In other words, it would appear that by the later ninth century the text of Yaḥyá's *Muwaṭṭa'* had stabilized at the level of *ḥadīth* and chapters, but remained fluid at the level of books. The proposition that, in general, textual materials stabilize progressively from the smallest unit to the largest (which admittedly does not take into account such phenomena as the subsumption of marginalia through copying) is one that seems borne out by the technologies of written transmission documented notably by Muranyi in relation to the transmission of the works of Saḥnūn and their commentaries in Qayrawan and Andalus from the later ninth through the eleventh centuries. *Ajzā'* (fascicles comprising two to three dozen parchment pages on a minor topic) would be assembled into *rizmāhs* (bundles of *ajzā'* under the rubric of the corresponding major topic), which in turn were collected, generally at a much later stage, in the form of works that somewhat resembled the ones we know.³¹⁴ Perhaps, then, the stabilization of the arrangement of *ḥadīth* in the

³¹² Items as listed in fn. 293 are followed by the title of the book to which they correspond (as it appears in Ibn Waḍḍāḥ's corrections), then by a number in bold type designating its relative position in Ma'rūf's edn: (1)-(14), *K. al-Ṣalāt*, **1**; (15)-(16), *K. al-Jihād*, **3**; (17)-(24), *K. al-Ḥajj*, **2**; (25)-(30), *K. al-Nikāḥ*, **5**; (31)-(33), *K. al-Buyū'*, **7**; (34)-(35), *K. al-Mu'taq*, **9**; (36), *K. al-'Uqūl*, **10**; (37), *K. al-Raḍā'*, **6**; (38), *K. al-Dḥabā'ih*, **4**; (39)-(42), *K. al-Aqḍiyah*, **8**; (43)-(48), *K. al-Jāmi'*, **11**. Note that the book titles supplied by Ibn Waḍḍāḥ confirm those in the received text in all but one case (*K. al-Mu'taq* corresponds to *K. al-'Itq wa-al-walā'*).

³¹³ V. fn. 293.

³¹⁴ Muranyi, *Die Rechtsbücher*, 141f.

Muwaṭṭa' corresponds to the stage at which they were compiled into *ajzā'*, the stabilization of chapters within books to the stage at which those *ajzā'* were assembled into *rizmahs*. If the text had already stabilized at the level of chapters in the lifetime of Ibn Waḍḍāḥ, it seems probable that it should have done so at least at the level of *ḥadīth* within those chapters in Yaḥyá's, the mid-ninth century also being about the time when Muranyi's data begin to show uniformity in the reproduction of material consolidated by Saḥnūn's students in the form of *ajzā'*. Moreover, that the arrangement of *ḥadīth* attested by Ibn Waḍḍāḥ's corrections is also broadly confirmed by that in the *Istidhkār*, and thence by the *riwāyah* of 'Ubayd Allāh on which, like the *Tamhīd*, it is based,³¹⁵ suggests that the two principal *riwāyahs* of Yaḥyá's recension, which I have argued to be independent, were alike in that respect as they circulated in the later ninth century. These data, in sum, suggest that the theory of authority articulated in the organization of *ḥadīth* in the received text was already inherent in the recension at the point of transmission from Yaḥyá.

To conclude, the biographical evidence suggests that only at the beginning of the tenth century had conditions come to prevail that were conducive to a convergence, on a general scale, of the respective methods of the parties loyal to *ḥadīth* and to the *ra'y* of Mālik and his students. It also suggests, however, that Ibn Waḍḍāḥ, a traditionalist at root, was able to secure a measure of acceptance from the Mālikīyah, perhaps at a slightly earlier stage, by applying his acumen as a transmitter of *ḥadīth* to the transmission of *ra'y*. Perhaps then, we supposed, he had also used his superior

³¹⁵ The *Istidhkār* is structured according to topic, after the arrangement of books and chapters in ('Ubayd's Allāh's *riwāyah* of) Yaḥyá's *Muwaṭṭa'*; the *Tamhīd* is arranged according to Mālik's informants and therefore cannot be used as witness to its organization.

knowledge of *ḥadīth* to produce a revised version of Yaḥyá's recension of the *Muwaṭṭa'* along the lines Calder proposed. We found, however, that the evidence relating directly to the text of Yaḥyá's *Muwaṭṭa'* militates against this proposition. The *riwāyahs* of Ibn Waḍḍāḥ and 'Ubayd Allāh were regarded in the eleventh century as being independent. Since the latter had little knowledge of *ḥadīth* and is readily identifiable with the Mālikī establishment, he could not have been the architect of traditionalist reform of the text. Yet, despite their contrary affiliations, the version of 'Ubayd Allāh's *riwāyah* available to Ibn 'Abd al-Barr evidently diverged from Ibn Waḍḍāḥ's only in respect of minor details. Besides being explicable by accurate transmission of a common text, the similarity of their *riwāyahs* as they were known to Ibn 'Abd al-Barr might also be explained, we suggested, against the background of standardization in the interval before the *Tamhīd*. I argued, however, that this did not occur. The version of the text familiar to Ibn 'Abd al-Barr in the eleventh century contained many features that already in the ninth century Ibn Waḍḍāḥ judged to be erroneous, features that would have appeared so to other contemporary traditionists who came with knowledge from the East and would surely have been amended if their involvement in the history of the text had been substantially formative. Finally, we saw that the arrangement of *ḥadīth* and chapters attested for the later ninth century by the inventory of Ibn Waḍḍāḥ's corrections, and independently corroborated by the *riwāyah* of 'Ubayd Allāh as represented in the works of Ibn 'Abd al-Barr, broadly confirms their arrangement in the received text. Calder's postulate that we owe the current form of Yaḥyá's *Muwaṭṭa'* to the influence of Andalusian traditionalists like Baqī and Ibn Waḍḍāḥ therefore seems untenable. On the other hand, the text we have cannot be a precise equivalent of the recension as Yaḥyá himself related it. Besides

the subsequent ordering of its books, whose canonical arrangement had yet to be established, we have seen that a significant proportion – one fifth – of the fifty errors identified by Ibn Waḍḍāḥ in the ninth century have been ‘corrected’ without trace of their history in the best edition available to us. Moreover, it is safe to assume (from the many other discrepancies identified in the *Tamhīd*) that al-Khuṣṣanī’s list is far from comprehensive of all the errors that traditionalists in the generations after Yaḥyá identified as such. However, despite a probably substantial number of minor differences, the recension as we know it should be regarded as representative – in all respects relevant to discerning the essence of the legal thought behind it – of the version of Mālik’s *Muwaṭṭa’* spread by Yaḥyá in the first half of the ninth century.

2.1.3 Yaḥyá’s Disagreements with Mālik

To what extent was Yaḥyá’s role in its history formative of the text that Ibn Waḍḍāḥ and ‘Ubayd Allāh transmitted in his name? He is said to have travelled to the East at the age of twenty-eight and heard the *Muwaṭṭa’* from Mālik in the last year of his life, except for chapters of the *Kitāb al-l’tikāf*.³¹⁶ Once returned to Andalus, his influence on the emir ‘Abd al-Raḥmān II is said to have become such that the latter would only appoint a judge with his prior approval.³¹⁷ We would expect, then, that if Yaḥyá’s involvement had been formative of the text as he related it, it would have reflected precisely the rules that

³¹⁶ Ibn al-Faraḍī, *Tārīkh*, 2: 176; v. also *supra* fn. 224.

³¹⁷ M. Fierro, ‘Yaḥyā b. Yaḥyā al-Laythī’, *EP*².

Yaḥyá desired the judiciary to apply. By extension (on the grounds of the argument advanced above, §§2.1.1-1.2), we would also expect the received text to reflect the law as he desired it. Comparison with the biographical evidence, however, shows that this is not the case.

In the early tenth century, Yaḥyá was remembered as having deviated from Mālik's *ra'y* on four counts, whence he adopted instead positions of Mālik's student al-Layṭh b. Sa'd (d. 175/791), whom he had heard in Egypt. First, he held that the *qunūt* supplication³¹⁸ should not be performed at the prayer of daybreak, or at any other prayer.³¹⁹ Second, he required the oaths of two witnesses, against Mālik who held the oath of a single witness to be sufficient.³²⁰ We can infer from the *Muwaṭṭa'* that the ruling from which Yaḥyá dissented was specifically that which concerned property transactions (*al-amwāl*), which Mālik had distinguished in this respect from other contexts (penal law, marital transactions, the manumission of slaves, etc.) in which the stipulation of two or more witnesses held good.³²¹ As Mālik's adversaries pointed out,

³¹⁸The *qunūt*, inserted at a particular point in the prayer, evidently consisted, in the time of the Prophet, in supplications to God for his blessings or curses on specified others. In which of the prayers, if any, and at what point it was to be inserted, was controversial. V. A. J. Wensinck, *Ḳunūt, EI²*. Though conventional formulae were later established, there was as yet in Mālik's time no such formula (*qāla Mālik wa-laysá fī al-qunūt du'ā' ma'rūf wa-lā wuqūf mu'aqqat*). V. *Mudawwanah*, 1: 192.

³¹⁹Aḥmad b. *Khālīd apud al-Khushanī, Akhbār*, 348; also al-*Khushanī apud al-Qādī 'Iyāḍ, Tartīb al-Madārik*, 3: 383. Ibn al-Faraḍī, without naming a source, lists the first three of the four positions Yaḥyá is said to have adopted from al-Layṭh. Via Ibn Waḍḍāḥ and two more recent transmitters, he also quotes the *ḥadīth* that Yaḥyá transmitted from al-Layṭh in which the Prophet is projected as abandoning the *qunūt* ritual. (*Tārīkh al-'ulamā'*, 2: 176-77, n. 1556).

³²⁰ al-*Khushanī, Akhbār*, 348; also, Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 2: 177, n. 1556; al-Qādī 'Iyāḍ, *Tartīb al-Madārik*, 3: 383.

³²¹ *Muwaṭṭa' Yaḥyá*, 2: 263-67. Though Yaḥyá himself is said to have insisted on two witnesses, one report suggests that after his time the judges of Cordoba may have either abandoned the requirement or observed it only arbitrarily. Muḥammad b. Ziyād al-Lakḥmī, appointed in 234/848, was evidently expected to adhere to al-Layṭh's position, but disregarded it nonetheless (oddly, however, the case in question seems to have been penal, not commercial). Decades

his acceptance of a single witness was in apparent contravention of the Qur’anic injunction to substantiate a plaintiff’s claims by the testimony of at least two male witnesses, or of at least one male and two female witnesses (Q. 2:282),³²² which he held to have been superseded by Prophetic and later *sunnah*.³²³ Thirdly, if there were no such two arbiters (*ḥakamān*) as established by Q. 4:35³²⁴ among the people (*ahl*) of a husband and wife to settle their disputes, Yaḥyá ruled that the couple should go to the house of a trusted man (*dār amīn*).³²⁵ Without naming an informant, Ibn al-Faraḍī (d. 403/1012) asserts simply that Yaḥyá did not agree with Mālik’s sending two arbiters to the couple in dispute, omitting the provision that the two arbiters be lacking.³²⁶ His source was probably Aḥmad b. Muḥammad b. ‘Abd al-Barr (d. 338/950), who al-Qāḍī ‘Iyāḍ quotes in similar phrase to the same effect³²⁷ and whose work on Cordoban jurists Ibn al-Faraḍī identifies elsewhere as a source.³²⁸ It is hard to know which of the two reports is the more reliable – whether al-Khushanī’s reflects merely later discomfort with Yaḥyá’s complete abandonment of the Qur’anic injunction, retrospectively mitigating it, or a real intermediate stage of compromise between Mālik’s unqualified acceptance of it and its

later, his son Aḥmad (d. 312/924-25), several times appointed a judge after him, would speak nostalgically of his father’s practice, indicating that Yaḥyá’s success in supplanting Mālik’s doctrine was shortlived. (al-Khushanī, *Quḍāt Qurṭubah*, 129.)

³²² Q. 2: 282: "O believers, when you contract a debt one upon another for a stated term, write it down... And call in to witness two witnesses, men; or if the two be not men, then one man and two women..."

³²³ *Muwaṭṭa’ Yaḥyá*, 2: 264, 267. For Mālik’s adversaries in this controversy and an account of the principles that may have underpinned the derivation of competing positions, v. Umar F. Abd-Allah Wymann-Landgraf, *Mālik and Medina: Islamic Legal Reasoning in the Formative Period*, 318-322.

³²⁴ Q. 4:35: "And if you fear a breach between the two, bring forth an arbiter from his people and from her people an arbiter, if they desire to set things right..."

³²⁵ al-Khushanī, *Akhbār*, 348; al-Qāḍī ‘Iyāḍ, *Tartīb al-Madārik*, 3: 383.

³²⁶ Ibn al-Faraḍī, *Tārīkh al-‘ulamā’*, 2: 177, n. 1556.

³²⁷ al-Qāḍī ‘Iyāḍ, *Tartīb al-Madārik*, 3: 383.

³²⁸ Ibn al-Faraḍī, *Tārīkh al-‘ulamā’*, 1: 50-51, 9.

eventual replacement in al-Andalus. Maribel Fierro, who has studied the phenomenon in detail, maintains that Yaḥyá was responsible for the wholesale substitution of the Qur’anic precept for the practice of sending the couple to the house of the *amīn*.³²⁹ At any rate, then, it seems clear that Yaḥyá initiated a movement away from Mālik’s doctrine in this respect. Fourthly, he followed “the *madhhab* of al-Layṭh” in maintaining that land could be rented for the produce it would yield (*kirā’ al-arḍ bi-mā yakhruj^u min-hā*).³³⁰ Citing the practice of later authorities, against a *ḥadīth* in which the Prophet forbade the renting of arable land whatever the payment (its transmitter – so Mālik had heard from Ibn Shihāb – had exaggerated it), Mālik had permitted the renting of it for money;³³¹ he disapproved (*kariha*), however, its being rented for what would issue from it.³³²

On all but the first of these questions (which I discuss below in relation to al-Shaybānī’s *Muwaṭṭa’*), we find in Yaḥyá’s version of the *Muwaṭṭa’* Mālik’s opposing positions represented, mostly verbatim as we find them in the version of Abū Muṣ’ab, whose circulation was quite remote from the Andalusian milieu that Calder identifies as formative.³³³ If the text had developed in response to the requirements of the

³²⁹María Isabel Fierro, 'Los mālikíes de al-Andalus y los dos árbitros (al-ḥakamān)', in *Al-Qantara* 6: 1/2 (1985), 79-102; Maribel Fierro, 'Yaḥyá b. Yaḥyá al-Layṭhī', in EI².

³³⁰ al-Khushanī *apud* al-Qāḍī ‘Iyāḍ, *Tartīb al-Madārik*, 3: 383. The quotation must derive from a lost work al-Khushanī for I have been unable to trace it in either of his two extant works. Ibn al-Faraḍī does not record this of Yaḥyá.

³³¹*Muwaṭṭa’ Yaḥyá*, 2: 249-50, nn. 2073-77.

³³²*Op. cit.*, 2: 250, n.2078.

³³³ For discussion of the *qunūt* supplication, v. *infra* fn. 355f. For the oath a single witness (*al-yamīn ma’a al-shāhid*), v. *Muwaṭṭa’ Yaḥyá*, 2: 263-64; *Muwaṭṭa’ Abī Muṣ’ab*, 2: 472-73 (verbatim); *Muwaṭṭa’ Suwayd*, 285. For the two arbiters (*al-ḥakamān*), v. *Muwaṭṭa’ Yaḥyá*, 2: 97-98, nn. 1709-10; *Muwaṭṭa’ Abī Muṣ’ab*, 1: 646, nn. 1681-82. For renting land for its produce (*kirā’ al-arḍ bi-mā yakhruj^u min-h*), v. *Muwaṭṭa’ Yaḥyá*, 2: 249-50, n. 2078; *Muwaṭṭa’ Abī Muṣ’ab*, 2: 286-87, n. 2428 (verbatim). The recensions of al-Qa’nabī, al-Shaybānī, and Suwayd (unless otherwise indicated) do not include corresponding sections or material.

Andalusian judiciary under the influence of Yaḥyá, and his editorial control of the text had been decisive, we would not expect it to incorporate materials in support of practices he opposed – at least not in the form of Mālik’s *ra’y*, which is said to have been the basis on which he issued his own opinions as a consult³³⁴. That his recension evidently did incorporate such materials lends credibility to the traditional view that he reproduced what Mālik transmitted to him not only accurately but comprehensively. I shall propose below (§2.3) that differences between the *Muwaṭṭa’āt* are better explained by the way in which Mālik transmitted the *Muwaṭṭa’* and thereby authorized its publication than by subsequent reformation of the work reflecting the ambitions of its transmitters.

³³⁴ *V. supra* fn. 224.

2.2 Other Recensions of the *Muwaṭṭaʿ*

2.2.1 Abū Muṣʿab's *Muwaṭṭaʿ* and the Possibilities for a Chronology of Recensions

Comparison with other extant recensions of the *Muwaṭṭaʿ* (more accessible to scholars today than to Calder) shows that, although they diverge considerably from Yaḥyá's version in terms of the materials they incorporate, they share the essential characteristics of Yaḥyá's version that Calder supposed were an expression of Andalusian traditionalism in the later ninth century. First published in 1992 on the basis of a newly discovered manuscript,³³⁵ the recension of Abū Muṣʿab al-Zuhrī (Aḥmad b. Abī Bakr, d. 242/856), jurist (*faqīh*) and qadi of Medina, is especially close to Yaḥyá's, both in its wording and in its organization of Prophetic *ḥadīths*, later authority statements, and opinions of Mālik.³³⁶ Brockopp estimates that it incorporates between five and ten

³³⁵ *Al-Muwaṭṭaʿ li-Imām Dār al-Hijrah Mālik b. Anas: riwāyat Abī Muṣʿab al-Zuhrī al-Madanī*, ed. Bashshār ʿAwwād Maʿrūf (Hyderabad: Dāʿirat al-Maʿārif al-Niẓāmīyah, 1992).

³³⁶ Abū Muṣʿab is described by the historian al-Zubayr b. Bakkār (d. 256/870) as “the undisputed *faqīh* of the people of Medina”, an expression also applied to the Follower Ibn al-Musayyab before him; he was eventually appointed their chief judge (*walī al-qaḍāʾ*), a position he held until his death (al-Dhahabī, *Siyar*, 11: 437), having previously held the equivalent position at Kufah, according to Ibn Abī Khaythamah (d. 279/892). (*apud* al-Qāḍī ʿIyāḍ, *Tartīb*, 3: 348.) His recension of the *Muwaṭṭaʿ* is associated with Baghdad, where it was made known in the transmission of Ibrāhīm b. ʿAbd al-Ṣamad al-Hāshimī (d. Samarra, 325/936). (al-Khaṭīb al-Baghdādī, *Tārīkh Madīnat al-Salām*, 7: 60-62) His is the sole transmission recorded of Abū Muṣʿab's *Muwaṭṭaʿ*. He is said to have related the *Muwaṭṭaʿ* (and otherwise *ḥadīth*) directly from Abū Muṣʿab, but his extreme youth at the time of the latter's death (which follows even if we accept al-Dhahabī's assertion [*Siyar*, 15: 72] that he died at the age of ninety-odd) makes this unlikely. He may have received it from his father (of Samarra, d. n.d.), whose connection with the Hijaz is established by his office: he was Leader of the Pilgrims (*walī imārat al-mawsim*, or *amīr al-ḥajj*) for three years from 243. (al-Khaṭīb al-Baghdādī, *Tārīkh Madīnat al-Salām*, 12: 306) If it had been in the course of those three years that he had brought it to Iraq, he could not, however, have heard it directly from Abū Muṣʿab, who had died in 242. There are signs of

percent more paragraphs (including both reports and Mālik's dicta) than Yaḥyá's version.³³⁷ Abstracting from the data provided by Bashshār Ma'rūf and Maḥmūd Khalīl in the introduction to their edition of the recension, we find that it incorporates twenty-two Prophetic *ḥadīths* (fifteen *musnad ḥadīths*, six *mursal*, and one *balāgh*), thirty-two reports of the Companions, seventeen of the Successors, and sixty-eight statements of

scepticism in the biographical notices for Ibrāhīm concerning the provenance of his transmission from Abū Muṣ'ab. The Baghdadi traditionist and publisher (*warrāq*) Abū al-Ḥasan b. Lu'lu' (d. 377/987) told the *ḥadīth* critic Ḥamzah b. Yūsuf al-Qurashī (of Jurjān, d. 427-8/1035-6) that he had travelled to Samarra to hear the *Muwaṭṭa'* from Ibrāhīm only to leave without doing so on discovering it lacked a "sound provenance" (*aṣl^{an} ṣaḥīḥ^{an}*). On the other hand, Abū al-Ḥasan Ibn Umm Shaybān (d. 369/979), qadi at times for Medina, Baghdad, and Old Cairo, is said to have reported to the Baghdadi critic al-Dāraqutnī (d. 385/995) and the Kufan traditionist Muḥammad b. Ḥumayd al-Khazzāz (d. 391/1001) that he had seen an old *samā'* on a copy of Abū Muṣ'ab's *Muwaṭṭa'* certifying the direct audition of both Ibrāhīm and his father from Abū Muṣ'ab himself. (al-Khaṭīb al-Baghdādī, *Tārīkh Madīnat al-Salām*, 7: 61-62) Ibn Umm Shaybān is described as "middling" (*mutawassīṭ*) when it came to jurisprudence according to the *madhhab* of Mālik. (al-Khaṭīb al-Baghdādī, *Tārīkh Madīnat al-Salām*, 3: 340) Melchert (*Formation*, 170-75) locates him in a long line of Mālikī qadis in Baghdad beginning with Ismā'īl b. Ishāq (*fl.* 246/860-61-282/896). The reports of Ibn Umm Shaybān's verifying Ibrāhīm's transmission attest to the interest that, in the ninth and tenth centuries, the Mālikīyah of Baghdad took in Abū Muṣ'ab's *Muwaṭṭa'*. We are far, however, from being able to judge the extent of their reliance on his recension. Evidently there were many others in circulation of which most have not survived. Al-Dāraqutnī, for example, who adds that Abū Muṣ'ab was trustworthy (*thiqah*) in respect of the *Muwaṭṭa'*, is said to have ranked most highly the recensions of Ma'n b. 'Īsá, Ibn Wahb, and al-Qa'nabī (al-Dḥahabī, *Siyar*, 10: 263). Ibn Abī Ḥātim asked his father whether he preferred al-Qa'nabī's *Muwaṭṭa'* or the recension of Mālik's nephew, Ismā'īl b. Abī Uways (d. 226-27/840-42), and he pronounced al-Qa'nabī's superior. (al-Dḥahabī, *Siyar*, 10: 259) Al-Qāḍī 'Iyāḍ (*Tartīb*, 1: 53) identifies al-Qa'nabī (d. 221/835) as one of the two who spread Mālikism in Basra, the other being 'Abd al-Raḥmān b. Mahdī (d. 198/814), who Melchert (*Formation*, 168) doubts was a follower of Mālik himself, suggesting that what he taught may rather have consisted in the jurisprudence of the Medinese ancients, beyond personal allegiance to any particular jurist. Al-Qa'nabī's recension probably eclipsed Abū Muṣ'ab's, at least at Basra, where the traditionalist wing of the Mālikī school, with which al-Qa'nabī can readily be identified, seems to have based itself. It certainly enjoyed high status among traditionalists: the Iraqī 'Alī b. al-Madīnī (d. 234/849) ranked no transmission of the *Muwaṭṭa'* higher (al-Dḥahabī, *Siyar*, 10: 260); the Egyptian Naṣr b. Marzūq al-'Utaqī (d. 261/875) is said to have considered it the most reliable of all (*op. cit.*, 10: 262); he ranked second the transmission of the Damascene 'Abdallāh b. Yūsuf (d. 218/833), which the Baghdadi Yaḥyá b. Ma'īn (d. 233/848) ranked highest and equal to al-Qa'nabī's (*op. cit.*, 10: 358).

³³⁷Brockopp, *Early Mālikī Law*, 73-77, with an example from the two recensions, showing the slight extent to which the materials they have in common differ.

Mālik not included in Yaḥyá's recension.³³⁸ This confirms the lower end of Brockopp's estimate.³³⁹ Though probably incomplete in its present form, al-Qa'nabī's *Muwaṭṭa'* is likely to have comprised far less material than Yaḥyá's even in its original form.³⁴⁰ To what do we owe these disparities? Ibn Ḥazm (d. 456/1064) is quoted as saying that the last of the *Muwaṭṭa'āt* to be transmitted from Mālik were those of Abū Muṣ'ab and Aḥmad b. Ismā'īl al-Sahmī (Abū Ḥudhāfah, d. 259/872, reputedly the last of Mālik's companions to die) and that between them they comprised around a hundred *ḥadīths* that were not to be found in Yaḥyá's. This he took to be evidence that Mālik continually added *ḥadīths* to the work. He would neglect *ḥadīths* and then later restore them - a practice, he assures us, typical of how scholars worked.³⁴¹ Yasin Dutton, on the other hand, explains the relative similarity of the versions of Yaḥyá and Abū Muṣ'ab on the grounds that both were received from Mālik towards the end his life.³⁴² To what extent are the differences

³³⁸ *Muwaṭṭa' Abī Muṣ'ab*, 1: 41-42. The quality of the *isnāds* of Prophetic *ḥadīth* (as evaluated by the standards of tenth-century *ḥadīth* criticism) is inferior overall in Abū Muṣ'ab's version: nine *mursal ḥadīths* and one *balāgh* appear *muttaṣil* in Yaḥyá's recension; whereas only three Prophetic *ḥadīths* in Yaḥyá's text have superior *isnāds* in Abū Muṣ'ab's.

³³⁹ The number of additional reports and statements of Mālik in Abū Muṣ'ab's version (139) corresponds to five per cent of the total number of paragraphs that are numbered in Ma'rūf's edn. of Yaḥyá's recension. However, the latter is fairly haphazard in its allocation of numbers to statements of Mālik, so the percentage (on the assumption that these data are accurate) will be somewhat lower than five.

³⁴⁰ The edn. comprises only around a quarter of the number of reports in Yaḥyá's recension. However, it also includes far fewer books than other recensions and, on that basis, would appear to be 'incomplete' (the measure of its completeness being what al-Qa'nabī originally heard from Mālik or read to him, rather than the hypothetical fixed urtext of the *Muwaṭṭa'* that is often implied by 'incomplete'). On the other hand, the books it does comprise also contain much less material than corresponding books in other recensions, so even with the books presumed missing it was probably far smaller in size than Yaḥyá's.

³⁴¹ *wa-fī dhālika dalīl 'alá anna-hu kāna yazīd^u fī al-Muwaṭṭa' aḥādīth kull waqt kāna aghfala-hā thumma aṭhбата-hā wa-hākadhā yakūn^u al-'ulamā' raḥima-hum Allāh: Ibn Ḥazm, apud al-Dhahabī, *Siyar al-'ālam al-nubalā'*, 11: 437-38, s.n. Abū Muṣ'ab.*

³⁴² Dutton, *The Origins of Islamic Law*, 23.

and similarities between the *Muwaṭṭa'āt* explicable in terms of the chronology of their transmission from Mālik?

To test Ibn Ḥazm's inference that we owe the greater number of *ḥadīths* in later recensions to Mālik's accumulating them over the course of his career and adding them to an urtext, we might compare the corresponding chapters (*abwāb*) in the apparently late recension of Abū Muṣ'ab with the three chapters in the *Kitāb al-I'tikāf* of Yaḥyá's recension that would seem, from the biographical evidence and the *isnāds* in the received text, to have been transmitted from Ziyād b. 'Abd al-Raḥmān (d. 193-94/808-09 or 204/820) rather than Mālik himself. It was not Yaḥyá, as sometimes thought, but Ziyād, known as Shabtūn, who first brought the *Muwaṭṭa'* to al-Andalus.³⁴³ Ziyād is also said to have been responsible for introducing *fiqh* to Andalus and perhaps the law generally (*al-ḥalāl wa-al-ḥarām*).³⁴⁴ Al-Khushanī reports that he travelled to the East, where he received the *Muwaṭṭa'* from Mālik and a book of his *ra'y* which came to be known as *Samā' Ziyād*, in the reign of 'Abd al-Raḥmān I (r. 138/756-172/788).³⁴⁵ It was on his authority that Ibn al-Faraḍī tells us Yaḥyá first related the work; "he then travelled to meet Mālik, and [thenceforth] transmitted it [directly] from him except for chapters of *Kitāb al-I'tikāf*, his audition of which from Mālik he had doubts about (*shakka fī samā'ī-hā min Mālik*) and which he continued to relate on the authority of Ziyād from Mālik."³⁴⁶ Al-Khushanī specifies that there were three such chapters, presumably the three that

³⁴³al-Qāḍī 'Iyāḍ, *Tartīb al-Madārik*, 3: 117; Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 1: 183, n. 458. Pace Maribel Fierro, 'Yaḥyā b. Yaḥyā al-Laythī', in EI2. Al-Khushanī (*Akhbār*, 98) provides the earlier death date.

³⁴⁴al-Khushanī, *Quḍāt Qurṭubah*, 72.

³⁴⁵Al-Khushanī, *Akhbār*, 95.

³⁴⁶Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 1: 183, n. 458; also, 2: 176, n. 1556, with similar wording.

are indicated as having been transmitted from Ziyād in the text we have.³⁴⁷ In the interim between Ziyād's transmission from him and Abū Muṣ'ab's, we might have expected Mālik to have accumulated additional *ḥadīth* in relation to these three topics or added new statements of his *ra'y* to the text and that these would be reflected in the chapters that Abū Muṣ'ab related. We find, however, that Abū Muṣ'ab's chapters contain no material that evidently was not already available to Ziyād, and indeed that Ziyād's chapters contain a small amount of additional material.³⁴⁸ In §2.3, I will argue that, even if new material did accrete to the *Muwaṭṭa'* in the course of Mālik's career, it is unlikely that this growth would be perceptible in successive recensions of it, for many of those recensions probably represent merely the audited versions of corpora that the persons subsequently associated with their transmission had already acquired from other sources before going to Mālik.

Our best hope of recovering the chronology of the *Muwaṭṭa'āt* ought to consist in cases in which the opinion recorded of Mālik in one recension is contradicted by an opinion recorded in another, and a reference in another source that attests to Mālik's having changed his mind to that effect. Unfortunately, such instances are extremely rare; coverage of Mālik's opinions in the *Muwaṭṭa'āt* is patchy and changes in his doctrine are

³⁴⁷ Al-Khushanī, *Akhbār*, 348. We may note that the Yaḥyá's open acknowledgement of indirect transmission from Mālik at this point, which surely could only have detracted from the reputation of his recension, adds credibility to the view that he did indeed transmit the remainder of the recension directly from Mālik.

³⁴⁸ *Muwaṭṭa' Yaḥyá*, 1: 423, nn. 878-79 (*Khurūj al-mu'takif li-al-'īd*); 1: 424-426, nn. 880-85 (*Qaḍā' al-i'tikāf*); 1: 427-31, nn. 890-97 (*Mā jā'a fī laylat al-qadr*). Cf., respectively, *Muwaṭṭa' Abī Muṣ'ab*, 1: 335-36, nn. 873-75 (*Bāb Ṣiyām al-mu'takif wa-khurūj-hī ilá al-'īd min al-muṣallá*) (n. 873 = n. 877 in Yaḥyá's *Muwaṭṭa'*, which occurs in the *bāb* that precedes the corresponding *bāb*); 1: 336-38, nn. 876-79 (*Bāb [Qaḍā'] al-i'tikāf*); 1: 339-42, nn. 883-90 (*Bāb Mā jā'a fī laylat al-qadr*). Nn. 884 and 885 are not available in Abū Muṣ'ab's recension.

infrequently attested in other sources. We know from the *Mudawwanah*, however, that Mālik's doctrine did change. Just as the students of al-Shāfi'ī ascribed a *qadīm* to their teacher, Ibn al-Qāsim sometimes ascribes to Mālik a *qadīm* (an earlier period in which he promulgated doctrine later superseded), sometimes a *qawl awwal*, as opposed to a corresponding *qawl ākhir*, or *qawl ḥadīth*.³⁴⁹ Regrettably, I have found no such case that correlates to differences between the *Muwaṭṭa'āt*. An example is available, however, in the *Ikhtilāf Mālik wa-al-Shāfi'ī*, a work that Schacht proposed was the first of al-Shāfi'ī's Egyptian period³⁵⁰.

The recensions of Yaḥyá, Abū Muṣ'ab, al-Qa'nabī (d. 221/835), and al-Ḥadathānī each furnish three incompatible reports (in the same order and nearly verbatim) concerning the performance of the so-called *ṣalāt al-khawf* ('Prayer of Fear').³⁵¹ These

³⁴⁹ E.g., *Mudawwanah*, 2: 555; 3: 320; 3: 367; 4: 201 (In the first example, Ibn al-Qāsim prefers the later dictum; in the last two, he prefers the earlier – *qawlī-hī al-qadīm*, or *qawl Mālik al-awwal*.)

³⁵⁰ Schacht, *Origins*, 330. Abd-Allah incorrectly ascribes to Schacht the view that the Shāfi'ī interlocutor in the *Ikhtilāf* is al-Rabī'. In fact, Schacht assumes that he is al-Shāfi'ī himself. It is the Mālikī interlocutor for whom Schacht believes al-Rabī' speaks. (*Origins*, 13, cited by Abd-Allah in *Mālik and Medina*, 62, fn. 120.)

³⁵¹ *Muw. Yaḥyá*, 1: 256-58, nn. 503-5; *Muw. Abī Muṣ'ab*, 1: 232-234, nn. 599-601; *Muw. al-Qa'nabī*, 263-65, nn. 345-47; *Muw. al-Ḥadathānī*, 208-10, nn. 418-420. The *ṣalāt al-khawf* is understood to be a mode of prayer valid in situations in which the presence of an enemy posed an immediate threat (evident variation in Muḥammad's practice could be explained by the varying seriousness of the threat, by the consequent intensity of the fear it induced, in different situations). There is no disagreement regarding its basic form, which is explained in Q. 4: 102: the congregation separates into two groups, the one guards the other as it prays, and then the roles are reversed. (Q. 2: 239, which exhorts the believers to pray "afoot or mounted" when in fear, was thought to relate to situations of actual combat and may be excluded from this discussion.) Disagreement attends the following aspects of the rite: how many *raka'āt* are to be performed by each of the three parties or units - the *imām* (= 'I'), the first group (= 'A'), and the second (= 'B') - and in what order; when the *takbīr* is pronounced, and when the *taslīm*. The three reports related from Mālik agree that each of the units is to perform two *rak'ahs* over the course of the rite (the same number as in the Travel Prayer, *ṣalāt al-safar*). The first two (of which the first is Prophetic, the other of a Companion) agree that one *rak'ah* is performed in each of the following combinations in succession: I with A, A alone, I with B, B alone; the third report (of Ibn 'Umar, but elevated to the Prophet in a comment Mālik relates separately from his informant) favours a different permutation: I with A, I with B, A, then B. The *takbīr* is mentioned only in the

are followed in each, at the end of the section on that topic, by a statement of Mālik expressing his preference for one or other of the three. The preference ascribed to Mālik in Abū Muṣ‘ab's text (Report 2), however, is different from that which the others ascribe (Report 1).³⁵² The following passage from the *Ikhtilāf*, which is explicable only against the background of the *Muwaṭṭa’*, knows all three reports. Al-Shāfi‘ī goes by the third (Report 3):

Al-Rabī’ < al-Shāfi‘ī: Mālik reported to us from Nāfi’ from Ibn ‘Umar something concerning the Prayer of Fear which you (pl.) contradict (*viz* Report 3). And Mālik said: I think it could only have been the Prophet from whom he related it.³⁵³ [Al-Shāfi‘ī said:] Ibn Abī Dhī‘b [also] narrated it from al-Zuhrī from Sālim from Ibn ‘Umar from the Prophet. He did not doubt it.

Al-Shāfi‘ī said: If you abandon (*taraktum*) the *ra’y* of Ibn ‘Umar and his transmission [from the Prophet] concerning the Prayer of Fear (*viz* Report

second report, where B pronounces it before its *rak‘ah* with I (as opposed to all three units pronouncing it at the outset, the alternative most frequently countenanced elsewhere). With respect to the *taslīm*, the first report (in its most plausible interpretation) affirms its pronouncement by everyone at the end; in the second, each of the units pronounces it once it has reached its quatum of *raka‘āt*, A first, then I, then B; the third report asserts only that A does not pronounce it after its first *rak‘ah* with I, but the inference from that must be either that it is pronounced by all at the end, or by I alone after his *rak‘ah* with B then separately by A and B. The three reports (which I shall refer to respectively as Reports 1-3) are therefore reconcilable on some levels but not on others.

³⁵²*Muwaṭṭa’ Yahyá*, 1: 259; *Muwaṭṭa’ Abī Muṣ‘ab*, 1: 234, n. 603; *Muwaṭṭa’ al-Qa‘nabī*, 265; *Muwaṭṭa’ al-Ḥadathānī*, 210. V. fn. 30. In all but Abū Muṣ‘ab's text, Mālik's preference (*aḥabb mā sami‘tu ilayya*) is the second report; in the latter, it is the first. Recall that Reports 1 and 2 (whose *isnāds* have a link in common) are closer to each other than they are to Report 3: they recommend the same combination of *raka‘āt* (in which respect they differ from 3), but diverge in terms of when they assert the *taslīm* to be pronounced (in which respect Report 3, to which al-Shaybānī and al-Shāfi‘ī adhere [*v. infra*], might be harmonized with the first, though only by inference). The *Mudawwanah* is implicitly closer to the majority of the *Muwaṭṭa’āt* on this point. It provides no express statement of Mālik's position concerning the modalities of the *ṣalāt al-khawf* when its *raka‘āt* are only two per individual (a concession, so Mālik maintains, specifically for those who are travelling); however, in its treatment of how to perform the prayer when its *raka‘āt* are four (such as applies to the settled population), the configuration of *taslīmāt* is the same as it is in Report 2 (*Mudawwanah*, 1: 240).

³⁵³A version of this comment, attributed to Nāfi’, is appended to Report 3 in all the *Muwaṭṭa’āt* in which the latter is reproduced; for instance: "Mālik < Nāfi’: I think it could only have been the Prophet from whom Ibn ‘Umar mentioned [the report]." (*Muw. Abī Muṣ‘ab*, 1: 234, n. 601.)

3)³⁵⁴ on the strength of the *ḥadīth* of Yazīd b. Rūmān from the Prophet (*viz* Report 1), how can you [in another case] abandon a Prophetic *ḥadīth* more reliable than (*athbat min*) the Prophetic *ḥadīth* of Yazīd in favour of the *ra'y* of Ibn 'Umar?³⁵⁵ And then you relinquish the *ḥadīth* of Yazīd for what Sahl b. Abī Ḥaṭmah pronounced (*viz* Report 2) - you abandon the [Prophet's] *sunnah* for what Sahl asserted! I do not know of you in *'ilm* a way of proceeding (*madhhab*) that is correct.³⁵⁶

The source on which the *Ikhtilāf* drew for Mālik's teaching at this point, and of which it confidently assumes knowledge in its audience (suggesting a milieu of reception in which knowledge of Mālik's teaching was so general and thorough as to obviate the need for explicit quotation), was clearly one that very closely resembled what survives in the majority of *Muwaṭṭa'āt* today on the subject of the *ṣalāt al-khawf*. On the other hand, it can hardly have been a single *Muwaṭṭa'* for it observes that the adherents of Mālik, as represented by al-Shāfi'ī's interlocutor, have changed their position. (It seems likely that there exists in the *Ikhtilāf* a network of affinities with different recensions, some extant and others not, that together represent a common pool of Mālikī learning on which it draws eclectically.) Al-Shāfi'ī derides them for their inconstancy: they have abandoned the Prophetic *ḥadīth* of Yazīd for the Companion *ḥadīth* of Sahl b. Abī Ḥaṭmah. The position that al-Shāfi'ī implies they adopted later is the one we find expressed as Mālik's preference in the majority of *Muwaṭṭa'āt* (and is closest to what we find in the

³⁵⁴The report proper consists in the *ra'y* of Ibn 'Umar, and is framed as a *responsum*, but is elevated to the Prophet by Nāfi' (v. fn. 32), hence al-Shāfi'ī's implying that it is both his *ra'y* and his transmission.

³⁵⁵The case in which the Mālik and his disciples abandon a Prophetic *ḥadīth* in favour of the *ra'y* of Ibn 'Umar seems to be a source of especial grievance for al-Shāfi'ī. I have not identified it, but it is likely to be the same as that mentioned at several other places in the *Ikhtilāf* - e.g., at 8: 703, where it is said to concern the *Ḥajj*, and 8: 706. Possibly, al-Shāfi'ī considers the Prophetic *ḥadīth* from Yazīd weaker because the immediate link in its *isnād* to the Prophet is anonymous (that is, in the terminology of classical *ḥadīth* criticism, it is *mursal*).

³⁵⁶*Ikhtilāf Mālik wa-al-Shāfi'ī*, 8: 706-7.

Mudawwanah); the one he implies is the earlier, also identified as such by Ibn ‘Abd al-Barr,³⁵⁷ is recorded only in Abū Muṣ‘ab’s recension. On this basis, then, Abū Muṣ‘ab’s seems to be the earlier version, contrary to what his biographers tell us. The evidence I present below in §2.3, with respect to the manner in which Mālik transmitted the *Muwaṭṭa’*, suggests we may account for this apparent contradiction in terms of Abū Muṣ‘ab’s transmitting from Mālik by reading to him an earlier version of the work he already possessed.

2.2.2 The View from Iraq: Mālik and the Medinese in al-Shaybānī’s Analects of the *Muwaṭṭa’* and the *Ḥujjah ‘alá Ahl al-Madīnah*

One approach to the dating of early juristic texts is to compare the material – typically *ḥadīth* reports – used to justify a given legal position in a corpus P with the material used to justify the same position in a corpus Q. If the material cited in P in favour of the position is found to be absent from a context in Q that comprises an argument for the same, the inference will be that P attained its editorial closure later than Q attained its, so long as two conditions hold: first, that we can ascribe to those who would otherwise appear to have been responsible for the compilation or redaction of P no evident socio-legal advantage, conferred by geography or association, over the compilers of Q such as might otherwise account for their superior knowledge of the material (Condition 1); and, second, that the nature of the context in Q is such that, had the material cited in P been

³⁵⁷*Al-Tamhīd*, 23: 166.

available to its compilers, they would surely have cited it as an argument (Condition 2). Condition 1 acknowledges, with critics of Schacht's argument from silence (which gives rise to this, a related but not identical method),³⁵⁸ that from the circulation of a report or other justification within one group it does not necessarily follow that the same material was accessible to another, albeit contemporary, group. The presumption that the material would have been accessible to both parties alike, if in fact they had undertaken to compile their respective works contemporaneously, will be optimally strong where P and Q are the putative products of the same juristic circle. Unfortunately there are no two or more works for the period in question outside of the Shāfi'i corpus, *Al-Umm*, that both originate in the same circle and are sufficiently polemical to satisfy the second condition. The *Hujjah 'alā ahl al-Madīnah*, a refutation of Medinese positions attributed to al-Shaybānī, for instance, has no parallel among Ḥanafī texts of the period, the *Aṣl* being an exposition of Ḥanafī positions cast in more or less the dialogue form familiar from the *Mudawwanah* but not polemical, and the respective *Āthārs* attributed to al-Shaybānī and Abū Yūsuf being collections of *ḥadīth* reports and earlier authority statements conceived in justification of Ḥanafī positions but probably not intended for reception outside of the school circle. In practice, then, we are largely restricted in our application of the method to works that do not originate in the same scholarly circle but whose respective compilers may be assumed on the basis of their evidently wide

³⁵⁸“The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed.” (Schacht. *Origins*, 140.) Note, however, that the inferential leap the present method requires us to make is smaller than the one that Schacht's requires: rather than its non-existence (universal ignorance), it is sufficient to infer from the absence of a report from a text that it was unknown to the party responsible for its redaction.

circulation to have had access to the same sources. We have seen that this assumption holds for the *Ikhtilāf Mālik wa-al-Shāfiʿī* vis-à-vis the common pool of Mālikī sources that circulated in the various *Muwaṭṭaʿāt*, citations in the former text not only demonstrating thorough acquaintance with the latter but also so terse that their significance could only have been recognizable in a milieu steeped in Mālikī learning. Condition 2 is necessary because ignorance of a report or other item need not follow from lack of citation. Zafar Ishaq Ansari, in an article which, despite being intended as such, should not be credited as a refutation of Schacht’s argument from silence, gives many examples that show the importance of observing it.³⁵⁹

³⁵⁹ Zafar Ishaq Ansari's 'The Authenticity of Traditions: A Critique of Joseph Schacht's Argument *e silentio*' (*Hamdard Islamicus* 7.2 [1984], 51-61) comprehensively misrepresents the method it purports to refute. Its chief complaint is that the argument is predicated on three assumptions that are demonstrably incorrect: "(1) that during the first two centuries of Islam whenever legal doctrines were recorded, their supporting arguments, especially the traditions, were also consistently mentioned; (2) that the traditions known to a jurist (or traditionist) would necessarily have been known to all the other jurists (and traditionists) of his time; (3) that all the traditions which were 'in circulation' at a particular period of time were duly recorded, were widely publicised and were subsequently preserved so that if we fail to find a tradition in the works of a known scholar that is tantamount to its non-existence in his time – in his own region as well as elsewhere in the realm of Islam." Schacht's method does not, however, require that we posit either (1) or (3) as a *general assumption*. It requires that we ascertain by appeal to the evidence of the context in question (the "discussion") whether a certain tradition would have been mentioned – because its citation was imperative – *in that particular case*. If the context does not satisfy this criterion, the inference of non-existence from non-citation will not be permissible within the constraints of the method. One might legitimately object that the method is mis-applied in a particular instance on the ground that the context fails to meet the criterion, but Ansari's quarrel is not with particular instances of its application, rather with the method *per se*. (He does, however, state that "in his actual resort to [the argument *a silentio*]... Schacht is not consistently mindful of his own restrictive stipulation" but provides no actual examples of such neglect. If Schacht sometimes falls foul of his stipulation, the response should not be to reject the method but to show that the material in question does not meet its requirements.) None of the twenty-four examples he accumulates of contexts in which relevant traditions are not cited, although they appear from other collections to have existed at the time of the compilation of the works in question, satisfies the criterion; they are not susceptible of the method and do not, therefore, constitute a valid test. (One of his examples – apparently a case in which al-Shaybānī fails to cite a Prophetic *ḥadīth* that supports his own position – would appear to be an exception, but misrepresents the sources and in fact is not. *V. infra* fn. 76.) For instance, Ansari takes it to discredit the method that traditions cited in the *Āthār* of Abū Yūsuf

The application of this method to a range of early texts led Calder to conclude that “the *Muwaṭṭa’ Shaybānī* represents a Mālikī position rather earlier than that represented in the final versions of the *Mudawwanah* and *Muwaṭṭa’*” and that the *Ḥujjah* is “undoubtedly later than the *Muwaṭṭa’ Shaybānī*”. The main strand of his argument to that effect was that al-Shaybānī’s *Muwaṭṭa’* fails to cite a Prophetic *ḥadīth* that appears in the *Muwaṭṭa’* of Yaḥyá, the *Mudawwanah*, and the *Ḥujjah* alike. On that basis, he supposed it was “necessary to infer that the redactors of the *Muwaṭṭa’ Shaybānī* were dealing with a Mālikī group who did not know or utilize the *ḥadīth*”.³⁶⁰ For present purposes it suffices to know that the *ḥadīth* in question is one that supports a position of Mālik (whose doctrine, we will see, Calder erroneously assumes to be synonymous with that of the Medinese in general) in direct contradiction with a unanimous position of the Ḥanafī circle, whose most recent and primary representative in the texts that concern us is Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805).

What Calder supposes is a “necessary” inference – that the report was unavailable to the Mālikī group whose positions al-Shaybānī’s *Muwaṭṭa’* is concerned to refute – in

are absent from the putatively later *Āthār* of al-Shaybānī, yet neither of those works, as a rule, is overtly argumentative or is otherwise such as to make citation of supporting arguments imperative. (That the redactors of al-Shaybānī’s *Āthār* did not strive, for instance, for comprehensiveness – a principle that would have made citation imperative – is confirmed by Ansari’s examples.) Why a similar objection should apply to his examples of non-citation in al-Shaybānī’s *Muwaṭṭa’* (versus citation in Yaḥyá’s) of reports that support positions of Mālik will be made clear in my account of the redactional principles that governed the compilation of that work. In respect of Ansari’s (2), however, it is true that the argument from silence, in its classic form, does not make sufficient allowance for the possibility that a tradition may have been known to one jurist or traditionist but not to another. Schacht is aware of this, though, and acknowledges in one case that Abū Yūsuf’s ignorance of a tradition his contemporary Mālik knows “calls for caution in the use of the argument *e silentio*” (*Origins*, 142). To formalize this caution and ensure that the terms of the present method do not subsume (2) as a general assumption, I introduce the first of the two conditions above.

³⁶⁰Calder, *Studies*, 57; 58. v. 55 for the *ḥadīth* of Busrah bint Ṣafwān.

fact requires us to make a crucial assumption: if not that the redactors of al-Shaybānī's *Muwaṭṭa'* reproduced as much of the material utilized by the Mālikī group as was available to them, then certainly that they reproduced as much of the key evidence that the Mālikīyah might have cited in support of positions with which they disagreed. On the premise that Calder's understanding of the nature of the text is correct, this is indeed a very reasonable assumption. He writes: "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".³⁶¹ In Calder's perception, al-Shaybānī's *Muwaṭṭa'* is not merely a text that contains occasional polemical passages, but a work that is fundamentally conceived as a refutation of Mālikī positions. If refutation were the main purpose of the passage in question, it would indeed be implausible that the redactors of the text had neglected the major item of proof utilized by their opponents in favour of the position they wished to refute. Excluding it would have defeated the purpose of the text. Condition 2 of the method is satisfied, then, if the view of the work as a polemical treatise is correct. (Condition 1 is presumptively satisfied inasmuch as it is implicit in the text itself that it has comprehensive access to the materials available to the Mālikīyah.) To assess the accuracy of this characterization, let us return to the question of the *qunūt* supplication, which Yaḥyá, in contravention of an opinion of Mālik, held should not be performed at the prayer of daybreak, or at any other prayer.³⁶²

The *qunūt* receives coverage in five recensions, though none gives Mālik's express position. Recall, however, that the position implied of Mālik in the biographical notices

³⁶¹ Calder, *Studies*, 57.

³⁶² *V. supra* fn. 310.

for Yaḥyá, which is confirmed by the *Ikhtilāf Mālik wa-al-Shāfiʿī*³⁶³, is that the *qunūt* ought to be, or may be, performed specifically at the prayer of daybreak. (The position ascribed to him in the *Mudawwanah* is that its performance then is optional, no remedial prostration [*sujūd al-sahw*] being due against one who forgets it.³⁶⁴) The recensions of Abū Muṣʿab, al-Qaʿnabī, and al-Ḥadaṭhānī, at this point corresponding verbatim, each quote two exempla: one against performing the *qunūt* at any of the prayers, another in favour of its performance specifically at the prayer of daybreak, against it at the other prayers.³⁶⁵ By contrast, Yaḥyá’s recension quotes the first of these (which agrees with the position imputed to him) but not the second (which disagrees with it).³⁶⁶ In its corresponding section, al-Shaybānī’s recension shows signs of interference, possibly contamination: it quotes the first *ḥadīth* alone (like Yaḥyá’s) but a difference of wording has the effect that the report now opposes specifically the *qunūt* at the prayer of daybreak. Al-Shaybānī endorses it: *wa-bi-hi naʿkhuḍh^u wa-huwa qawl Abī Ḥanīfah*.³⁶⁷

So Yaḥyá and al-Shaybānī agree against Mālik that there is no *qunūt* at the daybreak prayer; their respective recensions omit the *ḥadīth* that conflicts with their position, and the latter seems to sharpen the wording of the *ḥadīth* it does reproduce so that it speaks more impressively in its favour. Does the absence of this *ḥadīth* from the

³⁶³Op. cit., *Umm*, 8: 706, where the Mālikīyah differ from al-Shāfiʿī in holding the *qunūt* to be performed after the prostrations, rather than before them.

³⁶⁴*Mudawwanah*, 1: 192.

³⁶⁵*Muw. Abī Muṣʿab*, 1: 165, nn. 427-28; *Muw. al-Qaʿnabī*, 205, n. 232; *Muw. al-Ḥadaṭhānī*, 180, n. 339.

³⁶⁶*Muw. Yaḥyá*, 1: 226, n. 438.

³⁶⁷*Muw. al-Shaybānī*, 87, n. 242. Instead of *lā yaqnut^u fī shayʿ min al-ṣalāt*, we now find *lā yaqnut^u fī al-ṣubḥ*.

two recensions reflect deliberate redaction? In the case of Yaḥyá's, it probably does not. As we have seen, it reproduces, in common with other recensions, statements of Mālik and earlier authorities expressing three of the four positions with which Yaḥyá is said to have disagreed (or exempla consonant with them), and its similarity to other *Muwaṭṭa'āt* more generally militates against the suggestion that Yaḥyá's intervention was significantly transformative of either the content or the organization of the materials he received from Mālik. In the case of al-Shaybānī's recension, I suggest, however, that the absence of the *ḥadīth* does reflect deliberate redaction. Calder's view of the work as shaped by a polemical impulse suggests that not only would it not be averse to reproducing *ḥadīth* that conflicted with Ḥanafī positions, but also that it would positively seek them out for the purposes of refuting them. Closer examination of the text, however, reveals that where there are two or more reports of a contrary indication concerning the same issue, al-Shaybānī tends to quote only the report that may be taken to support the position to which he and his circle adhere. For instance, in the case of the *ṣalāt al-khawf* where, as we have seen, other recensions furnish three incompatible reports followed by a statement of Mālik's preference for one or other of the three,³⁶⁸ we find in al-Shaybānī's *Muwaṭṭa'* only one of these three reports, and after it the comment "to this we adhere; it is what Abū Ḥanīfah pronounced - but Mālik did not adhere to it."³⁶⁹ Al-Shaybānī clearly knew (or presumed to know) that to which Mālik did adhere, but thought it superfluous, or against his interests, to quote it. There are many other examples that point to this tendency.³⁷⁰

³⁶⁸V. *supra*, fn. 343f.

³⁶⁹*Muw. Shaybānī*, 98, n. 290.

³⁷⁰E.g., *Muw. Shaybānī*, 92, n. 267; 104, n. 310-12; 107, n. 341-42; 121, n. 480-84.

Al-Shaybānī's *Muwaṭṭa'* is quite unlike the other *Muwaṭṭa'āt* generally. Its most obvious differences are as follows. First, it presents far fewer *ḥadīth* under any given topic heading (rarely sufficient to reveal a principle of organization, and frequently just one or two reports). Second, it shows far less concern for Mālik's own doctrine; the direct statements of his *ra'y* that we typically find at the end of a succession of reports in other recensions, purportedly transcriptions of what Mālik actually said, are entirely lacking in al-Shaybānī's, and where sometimes his opinion is mentioned, usually at points of disagreement, it is expressed in the words of al-Shaybānī himself (e.g., "Mālik did not suppose (*kāna lā yará*) [such-and-such]"). Third, where in other recensions we find statements of Mālik's *ra'y*, we find statements of al-Shaybānī's and of other prominent members of the Ḥanafī circle (usually expressing unanimity between them, but, where their positions differ, most commonly the position of Abū Ḥanīfah himself).

Expressions of disagreement in al-Shaybānī's *Muwaṭṭa'* are few and far between. I would estimate that in at least ninety-five percent of cases the statements of al-Shaybānī that follow the *ḥadīth* quoted consist in straightforward expressions of agreement – *bi-hādhā na'khuḍh* and the like. This must be considerably higher than the rate of agreement between the actual doctrines of Mālik and al-Shaybānī, which I would estimate on the basis of comparison between Yaḥyá's *Muwaṭṭa'* and the *Aṣl* to be at around seventy percent.³⁷¹ It must be higher still, by a long way, than the rate of agreement between the *ḥadīth* available to Mālik and Ḥanafī doctrine (which would be the relevant measure if we hoped to test the proposition that the text aspires to refute

³⁷¹ Based on a sample comprising the sections on prayer (*ṣalāt*) and ablution (*wuḍū'*) in each text where outright agreement or disagreement is discernable.

the materials available to the Mālikīyah as opposed to their doctrine). What this tells us is that al-Shaybānī's *Muwaṭṭa'* is oriented around agreement with the materials it presents, not (as one would expect from a polemical text) disagreement. Moreover, in the small proportion of cases where reports provoke adverse comments (and certainly it is impossible to maintain that the work excludes *all* materials inimical to Ḥanafī doctrine), the quotation of those reports is invariably – so far as I have found – motivated by considerations other than the desire to refute them or to represent comprehensively what circulated among the Mālikīyah on the topic in question. For example, a *ḥadīth* may incorporate elements that agree with al-Shaybānī position, others that do not, and it will be worthwhile to quote it for those that do, if the latter can be distinguished in a subsequent comment in favour of the Ḥanafī doctrine.³⁷² Sometimes, a report may be quoted that contradicts al-Shaybānī position but then clarified, or directly discredited by a subsequent *ḥadīth*. Thus, a report that projects 'Abd Allāh b. 'Umar as having disdained weeping at funerals because it causes distress to the deceased is followed by a report in which 'Ā'ishah claims he was mistaken and pleads his forgiveness. Both reports, the latter in agreement with al-Shaybānī's position, are available in the recensions of Yaḥyá and Abū Muṣ'ab.³⁷³ Similarly, the report of a late Successor that is interpreted as indicating that no expiation is due against one who fails, due to bodily weakness, to fulfill his vow to walk to the Ka'bah is followed by a report of the earlier follower 'Aṭā' indicating that, in agreement with the Ḥanafī position, expiation in the form of animal sacrifice would be due. Again, both reports appear in the recensions of Yaḥyá and Abū

³⁷² E.g., *Op. cit.* 110-11, nn. 329-30; 118-19, nn. 352-53.

³⁷³ *Op. cit.* 107, nn. 319-20. Cf. *Muwaṭṭa' Yaḥyá*, 1: 320-21, nn. 629-30; *Muwaṭṭa' Abī Muṣ'ab*, 2: 120-21, nn. 840-41.

Muṣ'ab.³⁷⁴ In such cases, the *ḥadīth* that conflicts with the doctrine of al-Shaybānī's circle is cited just so it may be contradicted by another *ḥadīth*; probably the motivation is to show that those who would follow the former (not necessarily Mālik and his adherents) are mistaken. At other times, a *ḥadīth* may be quoted because it corresponds to the doctrine of Abū Ḥanīfah, even though it disagrees with al-Shaybānī's own position.³⁷⁵ In all cases, therefore, a report that disagrees with the current doctrine of the Ḥanafī circle will only be cited if it can be turned to its advantage.

The *Hujjah* frequently confirms that the material al-Shaybānī intentionally omitted from his *Muwaṭṭa'* corresponded to what Yaḥyá and other transmitters retained in theirs – that he was familiar with the material but chose not to include it. For instance, the wording of its statement of the Medinese position concerning the *ṣalāt al-khawf* adheres so closely to that of one of the two reports that are absent from al-Shaybānī's *Muwaṭṭa'* that it presupposes familiarity with it. (Such mirroring of the wording of *ḥadīth* in statements of doctrine is a common phenomenon in the *Hujjah*.³⁷⁶) The report to which it corresponds is not, however, the one that the majority of the *Muwaṭṭa'āt* record as Mālik's preference; it is the report that Abū Muṣ'ab's alone identifies as such, the one we saw identified as the earlier in al-Shāfi'ī's *Ikhtilāf*.³⁷⁷ Similarly, in its discussion of the

³⁷⁴ *Op. cit.* 238-39, nn. 746-47. Cf. *Muwaṭṭa' Yaḥyá*, 1: 607, nn. 1355, 1358; *Muwaṭṭa' Abī Muṣ'ab*, 2: 230-31, nn. 1014, 1017.

³⁷⁵ *Op. cit.* 313, n. 989.

³⁷⁶ E.g., *op. cit.* 1: 121, in which case it is the statement of Abū Ḥanīfah's position that is made to mirror a *ḥadīth*; the latter is then quoted in full with *isnād* later in the same section (1: 130). V. *infra* fn. 369 for another example.

³⁷⁷ *Hujjah*, 1: 341; cf. *Muw. Yaḥyá*, 1: 256, n. 503; *Muw. Abī Muṣ'ab*, 1: 232, n. 599; *Muw. al-Qa'nabī*, 263, n. 345; *Muw. al-Ḥadathānī*, 208, n. 418. We should not be surprised that the third report (v. *supra* fn. 343f.) makes no appearance in the *Hujjah*, for it supports neither al-Shaybānī's own position nor Mālik's. The wording of the first half of the statement of Abū Ḥanīfah's position in the *Hujjah* (prefaced by "*qāla Abū Ḥanīfah*") corresponds nearly verbatim

qunūt, the *Hujjah* reproduces what al-Shaybānī's *Muwaṭṭa'* leaves out, the report that conflicts with Ḥanafī doctrine.³⁷⁸

The intention behind al-Shaybānī's *Muwaṭṭa'* is not, as unfortunately implied by the term 'recension', to represent Mālik's *Muwaṭṭa'* in a form that is true to an urtext (for this reason, I propose that 'analects' would be a better term), nor is it, as Calder supposed, to reproduce Mālikī materials for the purpose of refuting them. It is entirely mis-conceived to characterize the work as polemical. While consonance with its compiler's doctrine is generally a sufficient condition for a report's inclusion in the work, dissonance is generally a sufficient condition for its exclusion.³⁷⁹ Dissonance typically

to that of the first half of the *ḥadīth* that al-Shaybānī quotes approvingly from Mālik in his *Muwaṭṭa'* and indeed a few pages later in the *Hujjah* (*Hujjah*, 1: 340; cf. *Muw. al-Shaybānī*, 98, n. 290 [= *Hujjah*, 1: 343]). There was probably a certain rhetorical advantage to be gained from couching, where possible, one's own position in terms that one's opponents would recognize from a *ḥadīth* that they themselves had transmitted. (The same doctrine was expressed indigenously on the authority of Ibrāhīm al-Nakha'ī, v. *Āthār al-Shaybānī*, 1: 204-5 [= *Hujjah*, 1: 345].) Such 'plagiarism' suggests that a *Muwaṭṭa'* was in a very direct sense used as a textual source in the composition of the *Hujjah*. This *Muwaṭṭa'* could not have been coterminous with al-Shaybānī's; it was far broader in its coverage of materials transmitted from Mālik. The present context suggests in particular that it was close to Abū Muṣ'ab's recension, but, like the *Ikhṭilāf*, the *Hujjah* probably comprises a network of affinities with different recensions.

³⁷⁸*Hujjah*, 1: 98-99; v. fn. 357f. for references to the omitted report in other recensions.

³⁷⁹Ansari ('The Authenticity of Traditions', 53) mentions what would be a violation of this principle if his characterization of the evidence were not inaccurate. He alleges that al-Shaybānī's *Muwaṭṭa'* (1:32) fails to cite a Prophetic *ḥadīth* available in the *Muwaṭṭa'* of Yaḥyá (which Ansari implicitly treats as Mālik's own) "which supports the doctrine of [al-Shaybānī's] school." However, it is incorrect to say that the former could (in any straightforward sense) be used as an argument to support the doctrine in question, for it speaks to a different, albeit related, legal question. The *ḥadīth*, which is also cited in two other recensions of the *Muwaṭṭa'*, purposes to establish the temporal limits within which the dawn prayer (*fajr* or *ṣubḥ*) might be performed: "at first light" (*ḥīna ṭala'a al-fajr*) is the earliest time, "after the dawn shines" or "becomes white" (*ba'da an asfara*) the latest. (*Muw. Yaḥyá*, 1: 35, n. 3; *Muw. Abī Muṣ'ab*, 1: 4, n. 3; *Muw. al-Qa'nabī*, 83, n. 6.) Other reports stipulate different limits. The doctrine to which Ansari alludes, on the other hand, is concerned with the *preferred* time of its performance, which according to the *Muwaṭṭa'* of al-Shaybānī Abū Ḥanīfah assigned to the 'whiteness of the dawn' (*al-isfār*, i.e. the latest time envisaged by the *ḥadīth*). The *Hujjah* (1:1) confirms that this was also the position of al-Shaybānī (confirmation is advisable for their doctrines by no means always agree – cf. their disagreement concerning the earliest time at which the *'aṣr* might be performed [*Muw. al-Shaybānī*, 1:32]). Neither the *Muwaṭṭa'* of Yaḥyá nor any other *Muwaṭṭa'* gives Mālik's express

survives the principle of selection from consonance only where the inconvenient datum can be turned to the advantage of the group.³⁸⁰ The reverse is true in works that may be characterized unreservedly as polemical. Thus, in the *Hujjah*, dissonance is generally sufficient (and necessary) for inclusion, consonance for exclusion. Calder’s argument that the absence of a report in al-Shaybānī’s *Muwaṭṭa’* indicates its late closure is, therefore, not credible.

The highest editorial principle governing the selection of material in al-Shaybānī’s analects is the promotion of the doctrine of the Ḥanafī circle. It recruits materials from within the Medinese tradition to corroborate Ḥanafī teaching, not to refute Mālik’s. It treats Mālik as a traditionalist, his *Muwaṭṭa’* as a collection of Medinese *ḥadīth*, and displays only occasional interest in Mālik’s teaching. This suggests that the principal division was not yet personal, but regional. Al-Shaybānī’s primary focus is the Medinese, not Mālik, who – as we will see from the *Hujjah* – was considered to be just one of their number.

position, but the *Mudawwanah* (1:156) and the *Hujjah* (1:1) inform us that he took the view that the *ṣubḥ* should be performed in “the darkness of the last part of the night” (*al-ghalas* or *al-ighlās*) – the former adds “when the stars are clearly manifest and numerous (*bādiya mushṭabikah*)”, a stock phrase of such contexts (cf. *Muw. Yaḥyá*, 1: 37-38, nn. 6-7), and states that Mālik held its very latest permissible time to be “when the dawn shines” (*idhā asfara*, i.e. al-Shaybānī’s preferred time). The *ḥadīth* might have been used as an argument against Mālik’s doctrine inasmuch as its implication that the *fajr* may not be performed earlier than first light contradicts the view that its preferred time is the darkness before dawn. However, it could not have been used as a direct argument in favour of the corresponding doctrine of al-Shaybānī’s, that its preferred time is the whiteness of the dawn. Nor could the *ḥadīth* have been used to support al-Shaybānī’s position concerning the valid limits of the prayer, for the two do not agree. According to the *Aṣl* (1:144-45), al-Shaybānī held that the earliest it might be performed was at the break of dawn, though not before “the dawn has spread wide across the horizon”; its latest time was at sunrise. Both these times are later than the respective limits imposed in the *ḥadīth*. The absence of this *ḥadīth* from al-Shaybānī’s *Muwaṭṭa’* therefore confirms that material is selected for inclusion in that work not because it might be used to refute Mālik, but because it supports positions of al-Shaybānī’s own circle.

³⁸⁰*V. infra.*, for instance, 208-211.

It is usually assumed that the Medinese in the *Ḥujjah* are synonymous with Mālik and his Medinese followers, that Mālik’s doctrine represents or is a distillation of theirs. Thus, Calder states that the “*Kitāb al-Ḥujjah* is better informed [than the *Muwaṭṭa’ Shaybānī*]. It knows that the chief prop of the *Mālikīs* is the Prophetic hadith from Busra... The *Ḥujjah*, then, is undoubtedly later than the *Muwaṭṭa’ Shaybānī*; and its *Mālikī* opponents know and use the hadith from Busra” (italics mine).³⁸¹ In this particular instance, the conflation of the Medinese with the Mālikīyah has not had significant consequences for the argument that precedes (which we have discredited on other grounds³⁸²) since the *ḥadīth* in question happens to agree with the doctrines of both parties alike and was cited by both (as apparent from Yaḥyá’s *Muwaṭṭa’* on the one hand and from the *Ḥujjah* on the other). In other cases, however, where their respective doctrines differ, the conflation of the two can have a more detrimental effect. Thus, Melchert sees “contradiction in the sources” in the fact that the *Ḥujjah* ascribes to the Medinese the position that there is no prostration in *Ṣād* (Q. 38), adduces a long series of *ḥadīth* against them,³⁸³ and yet the *Mudawwanah* appears to suggest that Mālik did in fact hold there was a prostration in that chapter.³⁸⁴ (The *Muwaṭṭa’āt* may not be so much silent on the issue as inexplicit. They quote a laconic statement of Mālik in which he asserts there are eleven points of prostration in the Qur’an. I would suggest that the location of those

³⁸¹ Calder, *Studies*, 58.

³⁸² Namely, that al-Shaybānī’s *Muwaṭṭa’* tends to reproduce only reports that are favourable to Ḥanafī doctrine and that, consequently, the absence there of a report favourable to the Mālikīyah does not reflect ignorance of it.

³⁸³ *Ḥujjah*, 1: 109-13.

³⁸⁴ Melchert, ‘Early History’, 314-16.

eleven points was deemed to be implicit in that statement. The *Mudawwanah* reproduces it, but now attaches to it a list, which includes the prostration in *Ṣād*, specifying their location.³⁸⁵) In fact, there is no such contradiction. The Medinese held that there was no prostration in *Ṣād*, Mālik that there was.

In the *Hujjah*, Mālik is not assumed to represent the Medinese. Thus, al-Shaybānī states: “This is what the people of Medina assert, yet some of their legal experts (*fuqahā’u-hum*), among them Mālik, are of a different opinion.”³⁸⁶ At times, the text (through the authority of al-Shaybānī) does seem to regard Mālik as the pre-eminent jurist of the Medinese in his time – *faqīh’u-hum*, without need of further qualification.³⁸⁷ More often, however, Mālik is just one of “the people of Medina”, thus: “Some of the people of Medina pronounce in accordance with what Abū Ḥanīfah said... among them Mālik b. Anas and those who pronounce as he does.”³⁸⁸ Theirs is not in any case a homogenous body of doctrine or a unified praxis.³⁸⁹ Mālik’s main function in the text is as a transmitter of reports, especially of reports that contravene the evident practice of the Medinese and can be turned to polemical advantage. Thus, al-Shaybānī states: “What the people of Medina assert with respect to the *qunūt* supplication is contradictory: they perform the supplication at the prayer of daybreak after the prostrations and their legal experts (*fuqahā’u-hum*) relate something different.”³⁹⁰

³⁸⁵V. fnn. 430, 432.

³⁸⁶ *Hujjah*, 1: 208 (*‘alā dhālika qāla ahl al-Madīnah wa-yarā ba’d fuqahā’i-him min-hum Mālik b. Anas ḡhayr^a-hū*).

³⁸⁷ *Hujjah*, 1: 116; 1: 270.

³⁸⁸ *Hujjah*, 1: 234; also, 1: 378 (*qāla ba’d ahl al-Madīnah min-hum Mālik...*)

³⁸⁹ *Hujjah*, 1: 181 (“The people of Medina say thus, but they differ regarding the time [of the prayer].”); 1: 297.

³⁹⁰*Hujjah*, 1: 98-99.

Similarly: “The *sunnah* of the prayer is what Ibn ‘Umar pronounced – what your *faqīh* [Mālik] related [in *ḥadīth*] – and it is not as you say.”³⁹¹ Express references to the companions of Mālik are rare, but where they are mentioned, they are blamed for ignoring the *ḥadīth* he relates.³⁹²

In sum, the picture that emerges from the *Ḥujjah* is one of division among the Medinese. Mālik is certainly their pre-eminent expert, but his doctrine is not coterminous with either their doctrine or their practice. He is valued as a transmitter of *ḥadīth*, but these *ḥadīth* are frequently neither representative of Medinese practice nor followed, as a rule, even within Mālik’s own circle. The relation between Medinese practice and Mālik’s doctrine is surely not one of straightforward derivation, as some have maintained.³⁹³ I will propose an alternative view of the role of precedent and practice in Mālik’s jurisprudence below in §2.4.

³⁹¹ *Ḥujjah*, 1: 270. The editor supposes “Ibn ‘Umar” should read “Ibn ‘Amr”.

³⁹² *Ḥujjah*, 1: 212; 1: 231.

³⁹³ Mainly, Abd-Allah, *PhD*; Dutton, *Origins*; Dutton, ‘*Sunna, Ḥadīth, and Madinan ‘Amal*’, *Journal of Islamic Studies*, vol. iv (1993); and Abd-Allah, *Mālik and Medina*.

2.3 How Mālik Transmitted the *Muwaṭṭa'*: The text as an *oeuvre mouvante*

The evolution of the contents of the *Muwaṭṭa'* of Mālik himself, at least in respect of *ḥadīth*, is almost certainly irrecoverable, and a chronology of *Muwaṭṭa'āt* is possible only in the following qualified sense. Dutton assumes that because Yaḥyá is reputed to have "studied the *Muwaṭṭa'* under Mālik during the last year of Mālik's life (i.e. 179 AH)", his recension must represent "the text as Mālik was teaching it at the end of his life"; that Abū Muṣ'ab is said to be "the last to have related the *Muwaṭṭa'* from Mālik" he takes to explain the similarity of his recension to Yaḥyá's.³⁹⁴ The evidence of biographical sources, however, suggests that at least some of the *Muwaṭṭa'āt* should not be considered to represent the successive latest revisions by Mālik of his *Muwaṭṭa'*, but rather the authorized versions of earlier *Muwaṭṭa'āt*, probably incorporating unidentifiable subsequent additions and losses, that the persons now associated with their transmission had received from other students of Mālik and had brought to him to be audited. Consequently, they should reflect better what his students were interested in verifying with him than what Mālik himself was given to transmitting at a particular stage; if, for example, one recension contains fewer statements of Mālik's *ra'y* as compared with an 'earlier' recension,³⁹⁵ the likelier inference is that we owe its stress on *ḥadīth* to its transmitter, not to Mālik's having gone over to *ḥadīth* from *ra'y*.

³⁹⁴Dutton, *Origins*, 23.

³⁹⁵Abdel-Magid Turki has noticed that al-Qa'nabī's recension supplies *ḥadīth* where Yaḥyá's cites merely Mālik's *ra'y*. V. Abdel-Magid Turki, "Le *Muwatta'* de Malik, ouvrage de *fiqh*, entre le *ḥadīth* et le *ra'y*," *Studia Islamica*, no. 86 (1997), 5-35, at 10.

Some sources suggest that Mālik's preferred mode of transmission consisted in his students' reading out to him (*qirā'ah* [*'arḍ*] *'alay-h*) material they had already had in their possession. Abū al-Ḥasan al-Maymūnī (d. 274/887), disciple of Aḥmad, reported that al-Qa'nabī had said, "I went to Mālik time after time in the course of thirty years. The *Muwaṭṭa'* contains no *ḥadīth* that I did not desire [it to contain]. I heard him numerous times but I restricted myself to reading to him because Mālik took the view that it was more reliable (*athbat*) for someone to read to the scholar (*'ālim*) than for the scholar to read to him."³⁹⁶ The qadi Ismā'īl b. Iṣḥāq (d. 282/896), who was instrumental in the spread of Mālikism in Baghdad,³⁹⁷ reported that al-Qa'nabī "was not satisfied with the reading of Ḥabīb [b. Marzūq (d. 218/833)]³⁹⁸ and did not cease until he had read the *Muwaṭṭa'* to Mālik for himself."³⁹⁹ The starting point of al-Qa'nabī's recension seems, therefore, to have been what he had heard of Mālik from Ḥabīb, not what Mālik had related to him directly. No source tells us when he had heard Ḥabīb or when Mālik audited what he had heard. We know too little about the process of revision to which the corpus supplied by Ḥabīb was subject either to estimate the extent to which Mālik's involvement was formative of its outcome – the recension that circulated under al-Qa'nabī's name –, or to correlate that outcome to a particular stage of Mālik's career. The most we might say is that it was the end result of a gradual process in which Ḥabīb, al-Qa'nabī, and Mālik had each played a role.

³⁹⁶Al-Mizzī, *Tahdhīb al-kamāl*, 16: 140. For Abū al-Ḥasan al-Maymūnī, v. *op. cit.*, 18: 335.

³⁹⁷V. Melchert, *Formation*, 170-71, and references there.

³⁹⁸Ḥabīb is remembered as secretary-copyist, like his father Marzūq, and dictation master (*mustamlī*) to Mālik. He later became a copyist and bookseller at Medina and in Egypt, where he settled. His transmissions were of ill-repute. (V. Nabia Abbott, *Studies in Arabic Literary Papyri II: Qur'ānic Commentary and Tradition*, 125.)

³⁹⁹Al-Dḥahabī, *Siyar*, 10: 262.

Since it was mainly they who attached importance to the modes of transmission (*samāʿ*, *qirāʿah* [*arḍ*], *ijāzah*, *munāwalah* etc.) and made them a criterion by which they judged the quality of *ḥadīth* transmitted accordingly,⁴⁰⁰ it is natural that we should find many reports of the manner in which transmitters had received material from Mālik circulating among traditionalists. The metropoleis of Iraq, where they had emerged as a distinct party in the later eighth century,⁴⁰¹ form the background to virtually all these reports; the presence of Basra is especially salient, which corroborates Melchert's finding that the traditionalist wing of the nascent Mālikī school is often associated with it.⁴⁰² Thus, Mālik is said to have told the Basran 'Abd al-Raḥmān b. Maḥdī (d. 198/814) that his reading out to 'Abd al-Raḥmān (*samāʿ* alone) was equivalent to his reading out to him *and* having 'Abd al-Raḥmān read back to him (both *samāʿ* and *qirāʿah*).⁴⁰³ Some traditionalists considered *qirāʿah* without *samāʿ* inferior, if not inadequate. (Although this was evidently how al-Qa'nabī received his *Muwaṭṭaʿ* from Mālik, traditionalists continued to hold it in the highest regard.⁴⁰⁴) Thus, the Kufan Yūnus b. Bukayr (d. 199/815), one of the transmitters of the *Kitāb al-Maghāzī* attributed to Ibn Ishāq (d. 150-59/761-770), would declare: "All that pertains to the *ḥadīth* of Ibn Ishāq is 'supported' (*musnad*) because he dictated it to me (*amlā-hu 'alayya*) or read it to me (*qara'a-hū 'alayya*) or related it to me (from memory?) (*ḥaddathā-nī bi-hī*); what is not 'supported'

⁴⁰⁰V. *infra* fn. 405.

⁴⁰¹Melchert, *Formation*, 1-7.

⁴⁰²Melchert, *Formation*, 168.

⁴⁰³Aḥmad, *Al-'Ilal*, 3: 320-21, n. 5425. Al-Qāḍī 'Iyāḍ identifies 'Abd al-Raḥmān and al-Qa'nabī as the two who spread Mālikism in Basra, but other reports suggest it is more likely the former was an expert in "the *madhhab* of the ancient Medinese jurists" than a follower of Mālik himself. (Melchert, *Formation*, 168.) His interest in the *Muwaṭṭaʿ* is consistent with both possibilities.

⁴⁰⁴V. fn. 24, last paragraph.

concerns what was recited [by a student] before Ibn Ishāq (*qirā'ah qur'ā 'alā Ibn Ishāq*).⁴⁰⁵ Certain transmitters of the *Muwaṭṭa'* had similar scruples. Ma'n b. 'Īsā (d. 198/814), related 'Abd al-Raḥmān, declared that all the *ḥadīth* in his *Muwaṭṭa'* – which the Iraqi critic al-Dāraqutnī ranked with al-Qa'nabī's among the three best⁴⁰⁶ – he had heard from Mālik himself except in cases where he specified merely reciting them before him; the converse held for material besides *ḥadīth* (presumably, Mālik's *ra'y*): he had recited it before Mālik unless he specified asking him about it.⁴⁰⁷ Ma'n's reversing, in the case of *ra'y*, the presumption that what he transmitted he had heard in Mālik's own speech must reflect the relatively low priority he accorded it. For Ma'n as for al-Qa'nabī, then, receiving the *Muwaṭṭa'* from Mālik was not the simple procedure implied by Dutton whereby a student would go to Mālik and transcribe the latest version of the text as the latter recited it to him. In particular, his reading out of Mālik's *ra'y* – reserving what he considered the superior form, *samā'*, for *ḥadīth* – suggests that he, too, relied in part on recourse to pre-existing material. This again suggests a process of verification

⁴⁰⁵Apud Gregor Schoeler, *The Biography of Muhammad: Nature and Authenticity*, at 28. My translation incorporates some aspects of Schoeler's reading (e.g., the suggestion that *ḥaddathānī bi-hī* might refer to transmission from memory), but differs from it in several respects (e.g., Schoeler interprets *kull shay' min ḥadīth Ibn Ishāq* – in my translation, “All that pertains to the *ḥadīth* of Ibn Ishāq – to mean “All of Ibn Ishāq's narrative”, which suggests of Ibn Ishāq a more cohesive work than I would concede, or is justified by the Arabic. There is a precisely analogous phrase in the report of Ma'n I paraphrase below, where it can only refer to *ḥadīth*). Of the fifteen *riwāyahs* of his *Sīrah*, only one is Medinese; Kufah, Rayy, and Basra feature most prominently (J. M. B. Jones, 'Ibn Ishāq', EI²). It will be evident from a subsequent discussion that I am more inclined to doubt than Schoeler that the principles expressed in the report were those of Ibn Ishāq himself. The Kufah of Ibn Bukayr (for whom v. al-Mizzī, *Tahdhīb al-kamāl*, 32: 493ff.) will be seen to be the more plausible *Sitz im Leben* of the statement concerning what counted as 'supported' transmission.

⁴⁰⁶V. fn. 24.

⁴⁰⁷Ibn Abī Ḥātim, *Jarḥ*, 8: 278.

and redaction that was complex and chaotic, one in which Mālik figured not so much as author as authorizer.

In the discipline of *ḥadīth* criticism, as it was in the High Middle Ages, the question of how a *ḥadīth* had been transmitted – by *samāʿ*, *qirāʿah* (*ʿarḍ*), *ijāzah*, *munāwalah*, and so on – was no matter of mere historical interest, but rather had implications for the extent to which it was considered sound.⁴⁰⁸ Ibn al-Ṣalāḥ al-Shahrazūrī (d. 643/1245), in an influential work conceived as an introduction in the field of *ḥadīth* studies broadly (*uṣūl al-ḥadīth*), devotes his longest chapter to this topic, distinguishing eight modes of transmission, of which several may be combined.⁴⁰⁹ On the inadmissibility of certain modes, such as bequeathing books (*al-waṣīyah bi-al-kutub*), agreement had been virtually unanimous through history, so far as Ibn al-Ṣalāḥ knew.⁴¹⁰ Other modes had been more controversial. He tells us, for instance, that Ibrāhīm al-Ḥarbī (d. 280/894) and Ibn ʿAdī (d. 365/976) had rejected the audition (*samāʿ*) of a student who transcribed the teacher's words as he recited them, but that others had accepted it.⁴¹¹ The reports of Mālik's transmitting the *Muwaṭṭaʿ* to his students have to do mainly with *samāʿ* and *qirāʿah*, and I have suggested that whether we owe the *Muwaṭṭaʿāt* to one or the other

⁴⁰⁸Identifying when the study of modes of transmission, and of the terms prescribed for recording them in *isnāds*, became a formal part of the curriculum of *ḥadīth* criticism exceeds the ambition of this discussion. The interest I detect already in the late eighth and early ninth centuries in the methods by which Mālik transmitted does not yet amount to systematic evaluation of *ḥadīth* on those terms.

⁴⁰⁹Ibn al-Ṣalāḥ al-Shahrazūrī, *K. Maʿrifat anwāʿ ʿilm al-ḥadīth* (popularly known as the *Muqaddimah*), 247-291 (*Nawʿ* 24). Eerik Dickinson has published a translation of this work: *An Introduction to the Science of Ḥadīth: Kitāb Maʿrifat anwāʿ ʿilm al-ḥadīth*. For its historical importance and the life of its author, see the translator's introduction at xiii-xxiv.

⁴¹⁰*Op. cit.*, 288.

⁴¹¹Ibn al-Ṣalāḥ, *K. Maʿrifat anwāʿ ʿilm al-ḥadīth*, 260.

bears on our assessment of the nature of Mālik's involvement in their composition. We will see that there existed in the later eighth century through into the ninth a party of traditionalists who rejected *qirā'ah* outright. Those at the other extreme held *qirā'ah* to be superior to *samā'*. (In a predominantly oral tradition the view that *samā'* was inadmissible, which would represent the diametrically opposite extreme, could hardly have been a tenable position. The absence of *ḥadīth* and other arguments justifying *samā'* – in contrast to the several that were used to justify *qirā'ah* – confirms that none espoused it.⁴¹²) By the thirteenth century, the parties to the debate had long since converged on middle ground, the question now being whether *qirā'ah* was equal to or inferior to *samā'*. Ibn al-Ṣalāḥ recalled as follows the practice of the eighth century, which he now couched in terms of doctrine:

[Scholars] have disagreed with respect to whether [a student's recitation before a teacher] is equivalent in rank to audition of the teacher's speech, or whether it is inferior or superior. It was transmitted from Abū Ḥanīfah, Ibn Abī Dhī'b, and others that [they] held recitation before the teacher to be preferable to audition of his speech – and this was related from Mālik, too. It was [also] related from Mālik, and [from] others, that they are equal. It is said that equating them is the doctrine (*madhhab*) of the majority of scholars of the Hejaz and Kufah, the doctrine of Mālik, his followers, and his teachers among the scholars of Medina, and the doctrine of al-Bukhārī and others. The correct [approach] is to give preference to audition of the teacher's speech and to rank recitation to him second. It is said that this is the doctrine of the majority of people in the East. God knows best.⁴¹³

⁴¹²That *samā'* had not been contested is in fact Ibn Ḥajar's explanation for why al-Bukhārī, in recording in his *Ṣaḥīḥ* that al-Ḥasan al-Baṣrī, Sufyān al-Thawrī, and Mālik had pronounced *qirā'ah* permissible, neglects to mention their position on *samā'*. (Ibn Ḥajar, *Fatḥ al-Bārī*, 1: 149.)

⁴¹³*Op. cit.*, 254.

We may note that, of the two doctrines attributed to Mālik concerning the relative status of *samāʿ* and *qirāʿah*, the first agrees with – and, indeed, may have been known of him from – al-Qaʿnabīʿs assertion that Mālik thought *qirāʿah* more reliable than *samāʿ*. The second doctrine, which is incompatible with the first, is ascribed to Mālik and the Kufan Sufyān al-Thawrī (d. Basra, 161/777-78) in a report quoted in the *Ṣaḥīḥ* of al-Bukhārī (d. 256/870): [ʿUbayd Allāh b. Mūsā (d. 213-14/829-30)] said: I heard Abū ʿĀṣim (d. 211-14/826-30) say from Mālik and Sufyān: Recitation before the scholar and [the scholar’s] recitation are equal.⁴¹⁴ The Kufan ʿUbayd Allāh is also the source of a report in which Sufyān asserts there is nothing wrong in saying “*ḥaddathā-nī*” (“he related to me”) even if the *muḥaddith* of whom one said it had merely audited the *ḥadīth* in question in the student’s recitation.⁴¹⁵ The existence of the controversy concerning which of the two was the superior form gives rise to the question whether the reports of Mālik’s transmission constitute not so much a historical record of his actual practice or doctrine as expressions of the competing interests of the parties to the controversy, who projected back on to Mālik and others what they desired them to have said or done in the furtherance of those interests.

To address the question whether reports of Mālik’s transmission of the *Muwaṭṭaʿ* are reliable, it will be necessary to posit a distinction between two aspects of their presentation; namely, the practice of transmission *per se* they ascribe to Mālik, and the

⁴¹⁴*Ṣaḥīḥ al-Bukhārī*, 1: 24 (K. *al-ʿilm*, *Bāb* 6). Abū Ḥātim and al-ʿIjlī (who approved of his mirthlessness, a mark of traditionalist bearing) pronounced ʿUbayd Allāh trustworthy (*thiqah*). Abū Dāwūd accepted his *ḥadīth* despite his “ardent *Shīʿism*”, but Aḥmad impugned him. (Mizzī, *Tahdhīb*, 19: 164-70) For the Basran Abū ʿĀṣim (al-Ḍaḥḥāk b. Makhḥad), v. Mizzi, *Tahdhīb*, 13: 281-91.

⁴¹⁵*Loc. cit.*

normativity they imply he vested in that practice as a matter of doctrine. For instance, al-Qa'nabī's assertion that he had restricted himself to reading the *Muwaṭṭa'* to Mālik constitutes the descriptive aspect of the report in question, his assertion that Mālik maintained *qirā'ah* to be more reliable than *samā'* its normative. I will argue that, insofar as such reports reflect interest in the normative status of the practice they describe, they are to be understood as reflecting the concerns of the milieu of the traditionalists in Iraq rather than those of Mālik's in Medina. This is not, however, to say that Mālik had expressed no preference, or produced no argument, for one mode of transmission versus another (we will see, in fact, that he had, though probably in response to Iraqi opposition rather than from any native conviction); my contention is rather that the question of which was the objectively superior form was a matter of serious consequence only for the Iraqi traditionalists. With respect to the practice they describe of Mālik, I will argue that such reports are historical inasmuch as they suggest he transmitted by auditing pre-existing material in the recitation of his students, a practice at odds with the preference for *samā'* of those responsible for their circulation.

Emerging in Iraq, the traditionalists formed a distinct party only once they had split from the rationalists at the end of the eighth century.⁴¹⁶ Mālik, rationalist in jurisprudence, lived before general capitulation to their forms – and in Medina, remote from the context in which they evolved. *Samā'* and *qirā'ah* were not, of course, forms peculiar to the traditionalist party; all who had transmitted *ḥadīth* or *ra'y* must have done so at one time by one or the other. Yet it does seem that it was principally the

⁴¹⁶Melchert, *Formation*, 3-7. Melchert proposes the death of Abū Yūsuf in 182/798 as a rough *terminus ad quem* for the split.

traditionalists who were preoccupied with the question of which was the more prestigious form, and that it was only in the ensuing controversy that the two forms acquired their normative status, and the practice of earlier transmitters was elevated to the sphere of doctrine. The *isnāds* of the five reports in which, by turn, *qirā'ah* is presented as better than *samā'* (al-Qa'nabī < Mālik), *qirā'ah* equal to *samā'* ('Ubayd Allāh < Abū 'Āṣim < Mālik and Sufyān), *samā'* alone as good as *samā'* and *qirā'ah* combined ('Abd al-Raḥmān < Mālik), *samā'* implicitly better than *qirā'ah* (Ma'n), and *qirā'ah* expressly insufficient (Ibn Bukayr < Ibn Iṣḥāq) converge on traditionalist Iraq.⁴¹⁷ To these five may be added the report of the Basran Wuhayb b. Khālīd (d. 165/781-82) I shall refer to below, which like that of Ma'n implicitly treats *samā'* as the superior form. I have encountered no analogous reports whose *isnāds* at the level of the generation after Mālik name men who may not be securely identified with Iraqi traditionalism. It is therefore with this context, not Mālik's Medina, that we are persuaded to identify the *Sitz im Leben* of these statements.⁴¹⁸ They are the products of a milieu in which what should count as best practice – more importantly, perhaps, which groups possessed the best transmissions in consequence – was still in the process of being worked out; their competing claims are expressions of a controversy among the Iraqi traditionalists

⁴¹⁷Ibn Ḥajar (d. 852/1449) reports that al-Dāraquṭnī transmitted of Mālik (in his now lost work *Gharā'ib Mālik*) the view that recitation before the shaykh is superior to audition of his speech (*Fath al-Bārī*, 1: 150), but I do not assume the attestation is independent of al-Qa'nabī's since no *isnād* is provided.

⁴¹⁸I posit here a variant of Schacht's method of dating traditions by common links (for which v. *Origins*, 163-175) whereby the 'common link' of a group of reports that have a distinctive feature in common – in this case, concern to establish *in principle* the status of certain forms of transmission – is correlated not with a particular individual, but with the geographical or socio-intellectual context on which the *isnāds* of those reports converge at their highest point. This context is considered to be the *Sitz im Leben* of the group in question – or of the mode or aspect common to its members – and signifies its *terminus a quo*.

themselves (*samā'* versus *qirā'ah*, or permutations thereof) whose *terminus ad quem* we may locate at the turn of the ninth century. Six of the seven men who coalesce in the context I treat as the 'common link' of this feature of the five reports died between 198/814 and 221/835 ('Abd al-Raḥmān, Ma'n, Ibn Bukayr, al-Qa'nabī, 'Ubayd Allāh, Abū 'Aṣim). Wuhayb, whom 'Abd al-Raḥmān declared the most perspicacious (*abṣar*) of his companions in *ḥadīth* and *rijāl*, and the Baghdadi traditionist Yaḥyá b. Ma'īn (d. 233/848) one of the most reliable of the "shaykhs of the Basrans",⁴¹⁹ reportedly died somewhat earlier in 165/781-82 or 169/785-86.⁴²⁰ Perhaps, then, we may locate the *terminus a quo* of the controversy at mid-century.

That the positions ascribed to Mālik by 'Abd al-Raḥmān, al-Qa'nabī, and 'Ubayd Allāh (or Abū 'Aṣim) are contradictory induces further scepticism with respect to whether they really go back to Mālik. It seems likely that the historical record of Mālik's practice and supposed 'doctrine' of transmission was generated, at least in part, by the controversy among the traditionalists. Is Mālik's actual practice recoverable? A report quoted in the early *rijāl* encyclopedia of Ibn Abī Ḥātim (d. 327/938) provides, I suggest, an escape from this evidential impasse:

⁴¹⁹Ibn Abī Ḥātim, *Jarḥ*, 9: 35; Mizzī, *Tahdhīb*, 31: 166-67; Ibn Ḥajar, *Tahdhīb*, 11: 169.

⁴²⁰Mizzī, *Tahdhīb*, 31: 168. Ibn Ḥajar (*Tahdhīb*, 11: 170) gives the former date on the authority of al-Bukhārī (d. 256/870), the latter on the authority of two sources a century later. We must, of course, reckon with the likelihood that these dates represent no more than the approximate inferences of later biographers or their sources (as argued by Eerik Dickinson in *Development* at 115-18). I am inclined to speculate that the statement attributed to Wuhayb may rather be owed to the Egyptian Yaḥyá b. Ḥassān al-Tinnīsī (d. 208/823), whose transmission of the report, as we will see, may be dated between 179/795 and 208/823. Although it was to another Egyptian, Aḥmad b. Ṣāliḥ (d. 248/862), that he transmitted it, both Yaḥyá and he were strongly associated with the traditionalists in Iraq, who generally held them in high esteem. (For Yaḥyá, v. Ibn Abī Ḥātim, *Jarḥ*, 9: 136, Mizzī, *Tahdhīb*, 31: 266-69; for Aḥmad, v. Ibn Abī Ḥātim, *Jarḥ*, 2: 56, Mizzī, *Tahdhīb*, 1: 340-54.)

Yaḥyá b. Ḥa[ss]ān said: We were with Wuhayb when he related a *ḥadīth* from Ibn Jurayj and Mālik b. Anas from ‘Abd al-Raḥmān b. al-Qāsim (d. ca. 126/743-44) and I said to a companion of mine: Write down “Ibn Jurayj” and omit “Mālik”. I only said this because Mālik was still alive at that time, but Wuhayb overheard [me] and said: Did you say “omit Mālik”? There is no one in East or West more reliable (*āman*) in our view than Mālik in that. Recitation (*‘arḍ*) before Mālik is dearer to me than audition (*samā’*) from others than him.⁴²¹

Wuhayb’s reaction to Yaḥyá’s advising his companion to omit Mālik’s name (which in fact was apparently motivated not, as Wuhayb presumed, by his higher regard for Ibn Jurayj but by his desire to hear the *ḥadīth* from Mālik in person) implies, firstly, that the traditionalists held *samā’* to be the higher form and, secondly, that it was widely known – and acknowledged by the traditionalists who nonetheless admired him – that Mālik had transmitted by *qirā’ah*, or *‘arḍ*. We can be comparatively sanguine about the reliability of this information because its disclosure is incidental to the main purpose of

⁴²¹Ibn Abī Ḥātim, *Jarḥ*, 1: 15. “Yaḥyá b. Ḥayyān”, reproduced in the edn. from one of the mss., is a mistake for “Yaḥyá b. Ḥassān [b. Hayyān]” (reportedly thus in another ms.) and cannot refer to the latter’s grandfather as the editor suggests. If the encounter depicted here is historical, it must have taken place sometime between the death of Ibn Jurayj in 150/767-68 and the death of Wuhayb in 165/781-82, for it is implied that, while Mālik was still alive at the time and Yaḥyá could therefore still hope to hear the *ḥadīth* from him in person (for this reason he instructed his companion to exclude his name from the *isnād*), Ibn Jurayj was not alive and he would have to settle for the *ḥadīth* in Wuhayb’s transmission. I doubt, however, the historicity of the report for two reasons: First, reports that display an awareness of the *samā’/qirā’ah* controversy are generally, as we have seen, to be ascribed in that respect to the generation after Wuhayb. Second, the account seems muddled or contrived. Initially, the logic of the narrative requires us to believe that Wuhayb had failed to grasp the intention behind Yaḥyá’s suggesting that his companion omit Mālik’s name: if he had understood that it had not been from low esteem of Mālik that Yaḥyá had done so, he should not have been moved to protest and praise Mālik in response. For the final part of Wuhayb’s contribution, however, we are asked to assume the reverse – that Wuhayb had, in fact, grasped his intention: why would he mention *‘arḍ* and *samā’* at all if not from recognition that Yaḥyá hoped to *hear* the *ḥadīth* from Mālik in his own speech rather than read it out to him? Since the report implies that Mālik is no longer alive, we can date Yaḥyá’s relating it to Aḥmad b. Šāliḥ to the period between his death in 179/795 and Yaḥyá’s own death in 208/823. It is to this period that I am inclined to assign the report.

the report, which is to glorify Mālik. (Incidental evidence, where the thing witnessed is disclosed in passing, is generally better than explicit, where the thing is in plain sight.) Moreover, that the very group who ascribe the practice of *qirā'ah* to Mālik and consider it to be a relative deficiency are also concerned to elevate his stature makes deliberate false ascription implausible (by the criterion of embarrassment). Mālik's predilection for *qirā'ah* seems to be confirmed.

It seems likely that Mālik's arguments in favour of *qirā'ah* were provoked by his encounters with Iraqi traditionalists who disdained it. The Medinese historian al-Zubayr b. Bakkār (d. 256/870) reported that Mālik's sororal nephew Muṭarrif b. 'Abdallāh (d. 214-220/829-835), whose recension of the *Muwaṭṭa'* was still known to Ibn 'Abd al-Barr,⁴²² had said: "I was a companion of Mālik's for seventeen years and I never saw him recite the *Muwaṭṭa'* to anyone; they recited it to him. I heard him express extreme disdain for those who said that only *samā'* sufficed them. He would say: How can [*qirā'ah*] not suffice you in *ḥadīth* yet suffice you in Qur'an when the Qur'an is greater?"⁴²³ The comparison with Qur'anic transmission was later developed to great effect in the commentary on the *Ṣaḥīḥ* of al-Bukhārī of Ibn Ḥajar (d. 852/1449), referencing earlier works of *ḥadīth* criticism. In a chapter of his *Ṣaḥīḥ* devoted to the question of recitation before the *muḥaddith*, al-Bukhārī had ascribed to Mālik, Sufyān al-Thawrī, and al-Ḥasan the view that *qirā'ah* is permissible. Ibn Ḥajar comments: "As for Mālik's analogy of the *qirā'ah* of *ḥadīth* with the *qirā'ah* of the Qur'an, al-Khaṭīb [al-Baghdādī] (d. 463/1071) relates in *Al-Kifāyah [fī ma'rifat uṣūl 'ilm al-riwāyah]* via Ibn

⁴²²V. fn. 88.

⁴²³ Al-Ḥākim al-Naysābūrī (d. 405/1014), *Ma'rifat 'ulūm al-ḥadīth*, 1: 675, n. 586.

Wahb: He said: When Mālik was asked – in reference to books that were read before him (*tu'raḍu 'alay-h*) – ‘Might a man not say *ḥaddatha-nī?*’, I heard him say: ‘Yes, the Qur’ān is thus. Might a man not read before another and say ‘So-and-so has taught me to recite (*aqra'a-nī?*)?’”⁴²⁴ The rationalization that Ibn Ḥajar himself ascribed to Mālik derived from commercial law: “Mālik justified *qirā'ah* by reference to the debenture (*ṣakk*), which is read before the people... If it is read to [the debtor] and he acknowledges it, the testimony against him is valid even though he himself does not pronounce what is in it. Therefore, if a scholar is read to, and he affirms [what is read to him], it is valid to relate from him.”⁴²⁵

The controversy concerning the relative prestige of *samā'* and *qirā'ah* was a regional one. It played out between the Medinese and the Iraqi traditionists in the late eighth and early ninth centuries and was evidently very bitter. Ibn Ḥajar tells us that the arguments against the sufficiency of recitation before the shaykh eventually dwindled away, but that “some of the zealots among the people of Iraq continued to assert [them]”. Al-Khaṭīb related that the Medinese Ibrāhīm b. Sa'd (d. 182/798-184/800) had exclaimed: “When will you cease in your obstinacy, O people of Iraq?! 'Arḍ is equal to *samā'*!”⁴²⁶ The Medinese position that *'arḍ* did suffice was evidently taken to extremes by some, who maintained (on the flimsiest of pretexts) that it was in fact superior to

⁴²⁴ Ibn Ḥajar, *Fatḥ al-Bārī*, 1: 149. I have not been able to trace the reference in the extant work of al-Khaṭīb.

⁴²⁵ Ibn Ḥajar, *Fatḥ al-Bārī*, 1: 150.

⁴²⁶ *Apud* Ibn Ḥajar, *Fatḥ al-Bārī*, 1: 149.

audition, Mālik himself being one of the authorities recruited in favour of that position.⁴²⁷

While many of these reports are clearly the product of a controversy of which Mālik himself may only have been dimly aware, the sheer weight of evidence in favour of Mālik's preference for *qirā'ah* or *'arḍ* – and the apparent absence of an ulterior motive to ascribe to Mālik such a preference in the circles in which the controversy played out – makes it impossible to ignore. (Among reports whose primary concern is the mode of Mālik's transmission, I have come across only one reference, besides that in the report of Ma'n, to Mālik's transmitting by means other than auditing his students' readings,⁴²⁸ but the report is purposed to lend support to those who resist the opponents of the writing down of *ḥadīth* and is not, therefore, without an axe to grind.⁴²⁹) In particular, it

⁴²⁷ Al-Dāraquṭnī (d. 385/995) in his now-lost work *Gharā'ib Mālik*, *apud* Ibn Ḥajar, *Fath al-Bārī*, 1: 151. Al-Khaṭīb is said to have reported on the authority of various Medinese that *'arḍ* is superior on the ground that the shaykh is inattentive and unresponsive to the student if he himself is reading out.

⁴²⁸It is quite common, however, to read in reports with a more general focus that so-and-so had heard the *Muwaṭṭa'* from Mālik, e.g. Ibn al-Faraḍī, *Tārīkh al-'ulamā'*, 387, n. 1015;

⁴²⁹Alī b. al-Madīnī (d. 234/849) said: I heard Yaḥyá b. Sa'īd al-Qaṭṭān (d. 198/813) say: I met Mālik b. Anas in the year [1]34, two years after I had met Sufyān when he was an old man (*ashyab*). [Alī] asked Yaḥyá: Did he dictate to you (*kāna yumli 'alay-k*)? He replied: I wrote in his presence (*bayn^a yaday-h*). (al-Khaṭīb al-Baghḍādī, *Taqyīd al-'ilm*, 113.) The year 134 is strange. Sufyān al-Thawrī would be the obvious choice for this Sufyān – and Yaḥyá b. Sa'īd is named as one of his three (principal) followers (Ibn Ḥajar, *Tahdhīb*, 11: 125) – but he is said to have lived from 97/715-16 until 161/777-78. If this was so, he could hardly have been the old man Yaḥyá said he was when he met him in 132/749-50. Interpreting the phrase *wa-huwa ash-yab* to refer to Mālik, who was only four years Sufyān's senior, makes for a scarcely more plausible reading. Al-Khaṭīb also attributes to Yaḥyá the view that *qirā'ah* is superior to *samā'* (*apud* Ibn Ḥajar, *Fath al-Bārī*, 1: 150). For the controversy surrounding the writing down of *ḥadīth*, v. Michael Cook, 'The Opponents of the Writing of Tradition in Early Islam', *Arabica*, tome XLIV (1997). For the attitude of Mālik in particular, v. §43 (Mālik disapproves of the writing of *maghāzī*, claiming that people had not done so in the past), and fn. 202 (noting that the exchange of epistles between Mālik and al-Layṭh b. Sa'd mentions the latter's sending to Mālik of books [of traditions] to be checked), 462; §99, 487 (Mālik recalls the days of Zuhri when people used to write, if at all, only to aid memorization); §110, 493 (Mālik objects to the recording in writing of his personal opinion on a point of divorce law on the grounds that by evening his position may have changed). Mālik's

is important that the implications of that evidence are reflected in our appreciation of the nature of the various receptions of Mālik's *Muwaṭṭa'* that are represented by the versions we know. Al-Qa'nabī said that his *Muwaṭṭa'* comprised only what he desired it to comprise, Muṭarrif that he had never seen Mālik read his *Muwaṭṭa'* to anyone. Al-Shāfi'ī had evidently come to Mālik hoping to hear him read the *Muwaṭṭa'*, but could only persuade him to listen to his own reading.⁴³⁰ It seems unlikely that a given *Muwaṭṭa'* represents what Mālik personally related to the individual now associated with its transmission. Close parallels of content and organization between certain *Muwaṭṭa'āt*, especially those of Yaḥyá and Abū Muṣ'ab, do indicate a common urtext, but that urtext should not be assumed to correspond to Mālik's own *Muwaṭṭa'* as it had evolved to be by the occasion of their authorization. The notion that the extant recensions represent authorizations of material assembled by their redactors/transmitters from pre-existing sources seems to account well for the degree of variation between them while at the same time allowing for what in some cases are close similarities. The degree to which the persons who brought their collections to Mālik for him to audit were responsible for their form and content (and may therefore be considered their redactors) will vary. Some

checking of al-Layth's books (for which v. al-Fasawī, *Al-Ma'rifah wa-al-tārīkh*, 1: 695) is analogous to the procedure we have identified for the *Muwaṭṭa'āt* whereby transmission from Mālik consists in his checking – in this case by audition – a pre-existing text or compilation of texts.

⁴³⁰ Mālik's preference for *'arḍ* is perceptible in the story of how al-Shāfi'ī finally persuaded Mālik to hear his reading of the *Muwaṭṭa'* through persistence and the eloquence of his speech: "Al-Rabī b. Sulaymān said: I heard al-Shāfi'ī say: I went to Mālik having already memorized the words of the *Muwaṭṭa'* (*zāhir^{an}*). I said: I would like to *hear* the *Muwaṭṭa'* from you. He said: Ask whomever will read for you. I said: No, you must hear my reading – if it is easier for you, I will read for myself. He said: Ask whomever will read for you. But I went on at him and he said: Read. And when he heard my reading, he said: Keep reading. So I read to him until I had finished it." (Ibn Abī Ḥātim, *Ādāb al-Shāfi'ī*, 22)

no doubt read out to Mālik what they had received from others in more or less the form in which it had come to them; others had assembled the material from more or less disparate sources, and selected only what they hoped Mālik would verify. In general terms, it is safe to say that it was not Mālik himself but his students who were responsible for the fixing the contents of the *Muwaṭṭa'āt*.

2.4 The *Muwaṭṭa'* of Mālik

The *Muwaṭṭa'* of Mālik was not, and never became, a fixed text; only the versions of that text transmitted by his students attained that status. All we can know about the former consists in inference from those of the latter that survive. Corroboration between them should mitigate the insecurity of the inferences we draw from them, but the differences between them are sometimes substantial. The following account of the nature of the *Muwaṭṭa'* of Mālik – by which I mean the hypothetical fluid archetype that prefigured the recensions of his students – is largely dependent on the observation of a feature common to all the *Muwaṭṭa'āt*, and which therefore may be ascribed with confidence to the archetype – namely, their combining statements of Mālik's doctrine with *ḥadīth* that contradict it.

The most inscrutable aspect of the *Muwaṭṭa'* we discern behind the recensions is the relation between the *ḥadīth* accumulated therein on a given legal question and the statements of Mālik's doctrine that typically follow them. *Ḥadīth* generally do not represent or speak for Mālik's doctrine in the *Muwaṭṭa'*, although sometimes their content coincides. I propose to address here two questions that arise naturally from consideration of the nature of their relation: What was the function of traditionism if not to furnish *ḥadīth* on which to base the law? What was the final criterion by which jurists pronounced the law in the Medinese tradition of which Mālik was a part?

Sometimes, as in relation to the *ṣalāt al-khawf*,⁴³¹ it is Mālik's strategy in the *Muwaṭṭa'* to present a number of *ḥadīth* of different or contradictory import and then to say which he prefers. At other times, he will accumulate such reports and then give his (usually, "our") position without explicitly relating it to what precedes, even in cases where it observably agrees with a part of it.⁴³² Occasionally, he will only present reports that are consonant with his stated position, whose relation to the former as Mālik perceives it similarly may or not be explicit in the way in which it is expressed.⁴³³ In each of these cases, Mālik looks like a kind of traditionalist, patiently compiling precedent and then deciding thereby what the law should be – hardly so stringently single-minded in his adherence to Scriptuary authority as the *ahl al-ḥadīth* ('Traditionalists', perhaps, with a capital tee – adherents of the movement, who in any case emerged as a distinct party only at the end of the eighth century when they separated from the *ahl al-ra'y*⁴³⁴), but nonetheless basically concerned to relate positive rules to *ḥadīth*. The reasoning that informs his preference for one or other practice attested in the reports he relates may be arbitrary, but a general tenor of traditionalism seems pronounced enough – a far cry, as Calder emphasized, from the thoroughly rationalist complexion of the *Mudawwanah* where it is sufficient for Mālik, through Ibn al-Qāsim, to opine with scant recourse to *ḥadīth*. However, there exists in the *Muwaṭṭa'* a class of instances where Mālik looks like no kind of traditionalist at all: namely, that which comprises cases where the *ḥadīth* that would otherwise appear to furnish a background in tradition for the expressions of

⁴³¹V. *supra* fn. 343.

⁴³²E.g., *Muwaṭṭa' Yahyá*, 1: 53-54, n. 39.

⁴³³E.g., *Muwaṭṭa' Yahyá*, 1: 340-42, nn. 670-676.

⁴³⁴Melchert, *Formation*, 1-7.

Mālik's doctrine that follow them in fact imply positions that, without exception, are wholly inimical to it. Consideration of this class of instances will render discussion of how Mālik decides between conflicting reports largely superfluous, for it will suggest that what appears, on occasion, to be a deliberately positive relation between *ḥadīth* and statements of Mālik's doctrine in the *Muwaṭṭa'* is illusory and, consequently, that the image of Mālik as traditionalist (even with a small tee) is illusory as well.

Ex. 1: It is sometimes not possible to trace in any early source (where there exist contexts in which mention of it should have been indispensable if it had been known) a report that corresponds to a position of Mālik stated in one or other of the *Muwaṭṭa'āt*. The *Muwaṭṭa'* of Abū Muṣ'ab reproduces two reports (a Prophetic exemplum and a dictum of 'Umar II), of which the first is also available in the recensions of Yaḥyá and al-Qa'nabī, exemplifying prostration at the utterance of *idhā al-samā' inshaqqat* (i.e. at Q. 84:1).⁴³⁵ Al-Shaybānī's *Muwaṭṭa'* quotes the Prophetic exemplum, followed by the comment, "to this we adhere; it is what Abū Ḥanīfah pronounced. Mālik b. Anas did not suppose there was a prostration in [that *āyah*]."⁴³⁶ Though al-Shaybānī's is the only *Muwaṭṭa'* to expressly state Mālik's position concerning prostration at that point, the other *Muwaṭṭa'āt* ascribe to him a more general assertion in which his position may be seen from other sources to be implicit: "the people are agreed (*ajma'/ijtima'a al-nās 'alá*) that the points of prostration in the Qur'an (*'azā'im*

⁴³⁵*Muw. Abī Muṣ'ab*, 1: 101, n. 259; 1: 103, n. 269; *Muw. Yaḥyá*, 1: 282, n. 547; *Muw. al-Qa'nabī*, 157, n. 138.

⁴³⁶*Muw. al-Shaybānī*, 92, n. 267.

sujūd al-Qur'ān)⁴³⁷ are eleven, none of them in *Al-Mufaṣṣal*".⁴³⁸ While the portion of the Qur'ān to which the appellation *Al-Mufaṣṣal* applies was reckoned by some to include *Al-Inshiqāq* (Q. 84) and by others not,⁴³⁹ Mālik is surely to be counted with the former. The *Mudawwanah*, which quotes an abridged version of this statement, proceeds additionally to list the eleven points of prostration endorsed by Mālik and does not include *al-Inshiqāq* among them.⁴⁴⁰ Moreover, the *Ikhtilāf Mālik wa-al-Shāfi'ī* makes it plain that Mālik, like al-Shāfi'ī himself, does consider it to belong to the *Mufaṣṣal* (also *Al-Najm* [Q. 53], which is more frequently not accounted a part of it). It has the Mālikī interlocutor adduce Mālik's claim of consensus on the lack of prostrations in the *Mufaṣṣal*, a claim that al-Shāfi'ī derides by citing the two reports quoted by Abū Muṣ'ab that

⁴³⁷I interpret the phrase '*azā'im sujūd al-Qur'ān*' to be the appellation of those portions of the Qur'ān where prostration is due, without attaching to it any further descriptive significance. 'Abd al-Razzāq provides an etymological gloss, or rationalization, which may be artificial: "*al-azā'im* means one is enjoined to prostrate oneself at [those points] (*ya'nī al-azā'im azama 'alay-ka an tasjud^a fi-hā*)." ('Abd al-Razzāq, *Al-Muṣannaḥ*, 3: 200, n. 5880; cf. '*azā'im al-Qur'ān*' and '*azā'im Allāh*, Lane, *Lexicon*, s.v. '*azīmah*.)

⁴³⁸*Muw. Abī Muṣ'ab*, 1: 102-3, n. 265; *Muw. al-Qa'nabī*, 158, n. 141; *Muw. Yaḥyá*, 1: 284, n. 553. In Yaḥyá's version, we find the characteristic locution "*al-amr ind^a-nā*" in place of "*ajma'/ijtima'a al-nās 'alá*". The difference may not be trivial. Abd-Allāh proposes that in the *Muwaṭṭa'* the former phrase "stands for types of '*amal* [Medinese practice] that do not have consensus" in distinction to '*amal* that does, which is signified by such phrases as *al-amr al-mujtama' 'alay-hi ind^a-nā*. (Abd-Allāh, *PhD*, 301, 419-434.)

⁴³⁹There is agreement that the *Mufaṣṣal* ends with the end of the Qur'ān, disagreement with respect to where it begins. For the range of possibilities in that regard, v. Gilliot, Claude. 'The "Collections" of the Meccan Arabic Lectionary', *The Transmission and Dynamics of the Textual Sources of Islam*, 105-133, at 119-20.

⁴⁴⁰Note that, in its omission of one or other of the phrases that in the *Muwaṭṭa'āt* identifies consensus or practice as the basis of the doctrine (v. fn. 78), the *Mudawwanah* shows itself to be characteristically unconcerned with the basis of Mālik's position: "Saḥnūn said, Ibn al-Qāsim said, Mālik said: The points of prostration in the Qur'ān are eleven, none of them in *Al-Mufaṣṣal*: *Alif lām mīm ṣād* [Q. 7:206]; *Al-Ra'd* [Q. 13:15]; *Al-Naḥl* [Q. 16:50]; *Banū Isrā'īl* [Q. 17:100]; *Maryam* [Q. 19:58]; *Al-Ḥajj*, the first [prostration] [Q. 22:18]; *Al-Furqān* [Q. 25:60]; *Al-Hudḥud* [Q. 27:26]; *Alif lām mīm tanzīl* [Q. 32:15]; *Ṣād* [Q. 38:24]; and *Ḥā' mīm tanzīl* [Q. 41:37 (not 41:38)]." (*Mudawwanah*, 1: 199.)

conflict with Mālik's position.⁴⁴¹ The *Hujjah*, where this time the position of the Medinese ("there are no prostrations in the *Mufaṣṣal*") conforms to that ascribed elsewhere to Mālik himself, also considers *Al-Inshiqāq* to belong to the *Mufaṣṣal*,⁴⁴² and accumulates five *ḥadīth*, including the Prophetic exemplum recorded in the *Muwaṭṭa'āt* but not the dictum of 'Umar II, in favour of prostration in that chapter.⁴⁴³ It is striking that no early juristic source furnishes even a single report that could have been used in an argument for Mālik's position. The inference must be, if not that it did not exist (cf. Schacht's argument from silence), that no such report was known to Mālik, his Egyptian adherents, or to the Medinese in general. Al-Shāfi'ī, in fact, expressly disclaims both that the Mālikīyah had ever advanced such a report, and that any of the Medinese besides them agreed with Mālik: "... You have said [the people] are agreed [that there is no prostration in the *Mufaṣṣal*] when what you pronounce you have not related from a single one of the imams and I do not know [of it] from the people there with you (*al-nās 'inda-kum*)... We have not brought an

⁴⁴¹*Ikhtilāf Mālik wa-al-Shāfi'ī, Al-Umm*, 8: 549-52. (The implication that *Al-Inshiqāq* and *Al-Najm* belong to the *Mufaṣṣal* is found at 8: 550, ll. 14-16.) Here, two features of the *Ikhtilāf* suggest that its knowledge of Mālik's teaching is grounded in a *Muwaṭṭa'* more like Abū Muṣ'ab's than Yaḥyá's. First, the wording of the statement denying prostrations in the *Mufaṣṣal* as it is reproduced here (at 8: 549, not expressly ascribed to Mālik) is distinctly closer to that of the versions of Abū Muṣ'ab and al-Qa'nabī than to that of Yaḥyá's (v. fn. 78). Second, al-Shāfi'ī alludes (also at 8: 549) not only to the Prophetic report, but to 'Umar II's dictum as well, which is available in Abū Muṣ'ab's recension alone. On the other hand, one of the two reports al-Shāfi'ī cites in favour of two prostrations in *Al-Hajj*, which is found in the recensions of Yaḥyá and al-Qa'nabī, is absent from Abū Muṣ'ab's recension (v. fnn. 86, 90). These shifting affinities, as well as his observation of variation in Mālik's doctrine over time (v. *supra* §2.2.1), give rise to the impression that al-Shāfi'ī draws eclectically on knowledge of Mālik's teaching circulating generally in the form of several *Muwaṭṭa'āt* rather than on a single *Muwaṭṭa'* that he himself had received from Mālik.

⁴⁴²*Hujjah*, 1: 109.

⁴⁴³*Hujjah*, 1: 114-15.

argument (*ḥujjah*) against you except from what the Medinese themselves pronounce; and we have not made the consensus (*al-ijmāʿ*) to be aught but their consensus."⁴⁴⁴ In the classical era, proponents of Mālik's position were able to recruit an impressive array of names and *ḥadīth* in its favour.⁴⁴⁵ Their antecedents in the later eighth century, however, evidently did not adduce such proof in argument. The question of whether we owe their failure to do so to the existential lack of this proof, or to the lack of a juristic imperative to resort to it is one that I shall address in my discussion of Mālik's jurisprudence at the end of this chapter.

Ex. 2 – The recensions of Abū Muṣʿab, Yaḥyá, and al-Qaʿnabī reproduce two reports each – three different reports in all – exemplifying (in one case explicitly urging) two prostrations in *Al-Ḥajj* (Q. 22). Two are traced back to Ibn ʿUmar, one to ʿUmar.⁴⁴⁶ In no recension do we find a report from Mālik consonant with the doctrine ascribed to him in the *Mudawwanah* and *Ikhtilāf* that there is only one prostration in *Al-Ḥajj*.⁴⁴⁷ Although the *Muwaṭṭaʿāt* do not state his position explicitly, the *Ikhtilāf* suggests that those immersed in his teaching would have understood it to be virtually implicit in the laconic general statement, "the people are agreed that the points of prostration in the Qurʾān are eleven, none

⁴⁴⁴*Ikhtilāf Mālik wa-al-Shāfiʿī, Al-Umm*, 8: 551.

⁴⁴⁵E.g., Ibn ʿAbd al-Barr, *Al-Istidhkār*, 8: 96-100.

⁴⁴⁶(1) With the *isnād* Mālik < Nāfiʿ < a man of the people of Egypt < ʿUmar: *Muw. Yaḥyá*, 1: 283, n. 548; *Muw. al-Qaʿnabī*, 1: 157, n. 1386; (2) With the *isnād* Mālik < Nāfiʿ < Ibn ʿUmar: *Muw. Abī Muṣʿab*, 1: 101, n. 260; (3) With the *isnād* Mālik < ʿAbdallāh b. Dīnār < ʿAbdallāh b. ʿUmar: *Muw. Yaḥyá*, 1: 283, n. 549; *Muw. al-Qaʿnabī*, 1: 157, n. 139a.

⁴⁴⁷V. fnn. 80, 91.

of them in *Al-Mufaṣṣal*".⁴⁴⁸ Implication, as I observed earlier, tends to be sufficient in the *Ikhtilāf*, knowledge of Mālik's teaching being so thoroughly presumed that explication is generally unnecessary. This time the implication arises not from the denial of prostrations in the *Mufaṣṣal* (*Al-Ḥajj* does not belong to it), but from the limitation of obligatory prostrations in the Qur'ān to eleven overall. The *Ikhtilāf*, having adduced against Mālik two of the reports available in the *Muwaṭṭa'āt*⁴⁴⁹, goes on to protest, "You (pl.) relate from 'Umar and Ibn 'Umar that they prostrated themselves twice in *Sūrat al-Ḥajj*, yet you say there is only one [prostration] in it and claim that the people are agreed that there is only one in it".⁴⁵⁰ The claim al-Shāfi'ī imputes to the Mālikīyah, that "the people are agreed there is only one [prostration in *Al-Ḥajj*]", probably represents an inference from their actual claim, recited from the *Muwaṭṭa'*, that "the people are agreed that the points of prostration in the Qur'ān are eleven", whose previous citation by the interlocutor has provoked a lengthy refutation.⁴⁵¹ Al-Shaybānī is evidently in agreement with Mālik, although neither his *Muwaṭṭa'* nor the *Hujjah* mentions that Mālik adheres to the doctrine as well. The former includes all three of the reports available in the other *Muwaṭṭa'āt*, followed by the comment: "This has been related from 'Umar and Ibn 'Umar. Ibn 'Abbās did not suppose there was more than one prostration in *Sūrat al-Ḥajj*, the first one. To this we adhere; it is what Abū Ḥanīfah pronounced."⁴⁵² The *Mudawwanah*

⁴⁴⁸V. fn.78.

⁴⁴⁹(1) and (2) (v. fn. 86) at *op. cit.*, 8: 549.

⁴⁵⁰*Op. cit.*, 8: 551, ll. 2-4.

⁴⁵¹Cited at 8: 549, ll. 8-9; refuted 8: 549-552.

⁴⁵²*Muw. al-Shaybānī*, 93, nn. 269-71.

also associates the doctrine with Ibn ‘Abbās (d. 68/686-88), the Qur’anic exegete *par excellence* of later tradition. Ibn al-Qāsim names him there alongside al-Nakha‘ī (‘Alqamah b. Qays, d. 62/681-82),⁴⁵³ esteemed disciple of Ibn Mas‘ūd (d. 32/ 652-53), to whom *Al-Āthār* of Abū Yūsuf ascribes the same.⁴⁵⁴ The *Hujjah*, arguing against the Medinese who hold the contrary view, neglects the two reports of Ibn ‘Umar known to the *Muwatta’ al-Shaybānī*, and mentions only the report of ‘Umar: “The generality among us (*al-‘āmmah ‘inda-nā*)⁴⁵⁵ do not agree with that. This was related of ‘Umar b. al-Khaṭṭāb only by a man of the people of Egypt.⁴⁵⁶ If it had been widely known to be something that ‘Umar did, those who were with ‘Umar at Medina and those who came to it from far away (*wa-man atá bi-hā min al-āfāq*)⁴⁵⁷ would have known it, and it would be widely known to be something he had done.”⁴⁵⁸

In both these examples, al-Shāfi‘ī adduces against Mālik *ḥadīth* that he himself had transmitted. In Ex. 1, we see that Mālik transmitted *exclusively* reports that his doctrine

⁴⁵³*Mudawwanah*, 1: 199.

⁴⁵⁴*Āthār Abī Yūsuf*, 40, n. 206. I have not found relevant data in any other Ḥanafī source earlier than al-Ṭahāwī (d. 321/933).

⁴⁵⁵For the distinction between *‘ilm al-‘āmmah* and *‘ilm al-khaṣṣah* in al-Shāfi‘ī’s conception, v. Schacht, *Origins*, 136.

⁴⁵⁶V. fn. 86, (1).

⁴⁵⁷My translation reflects the editor’s substitution of the fem. pronoun for the masc. of the mss. (*atá bi-hā* for *atá bi-hi*). The meaning he intends thereby is certainly plausible, but can only properly be achieved by the elimination or substitution of the preposition as well (*atā-hā* or *atá ilay-hā*, for *atá bi-hi*). The alternative – to interpret the masc. pronoun as referring back to the suppressed subject of *kāna* (sc. ‘Umar’s transmitted practice) – results in incoherence: “those who brought [to us the knowledge of ‘Umar’s practice] from far away would have known [‘Umar’s practice]” (cf. *atá bi-ḥadīth* and the like).

⁴⁵⁸*Hujjah*, 1: 108.

contravened. There are several other examples of this phenomenon.⁴⁵⁹ More typical are cases where the *Muwaṭṭa'* accumulates a number of reports of which one or two agree with the statement of Mālik's position that follows while the remainder either are not strictly germane to it or disagree with it. Though the question why Mālik should bother with disagreeable reports at all would still remain, it might be argued in those cases that Mālik is simply the arbitrary exegete of former practice, exercising his personal preference over conflicting reports beyond which he recognizes his own reason cannot legitimately stray (alternatively that he is choosing between reports on the basis of how wide he judges the consensus of Medinese authorities to be on the positions they express⁴⁶⁰). Such, however, is not possible in cases where Mālik adopts a position in contravention of *all* the reports he evidently knows on the question at hand.

Abd-Allah has characterized the *Muwaṭṭa'* as "a book of *ḥadīth* put into the context of *'amal*... There may be different, conflicting reports on a subject, but what should be done in any one case is what is, or was, done in Madina."⁴⁶¹ He does not tell us whether Mālik would have present practice override past practice or *vice versa* in cases where they conflict (presumably because he believes that what "is" done in Medina was also what was done, or at least that the consensus of the past corresponds to that of the present). At any rate, the view that Medinese practice, whether past or present, is the final criterion of Mālik's jurisprudence we have already seen discredited by the evidence of the *Ḥujjah*, which suggests that his doctrine was often at variance

⁴⁵⁹ E.g., *Muwaṭṭa' Yahyá*, 1: 238f., nn. 434-440 (on *raf' al-yadayn*); 1: 441f., nn. 770-781 (on performing the pilgrimage on someone else's behalf); 2: 335f., nn.1788-1791 (on *khiyār al-majlis*).

⁴⁶⁰Dutton, *Origins*, 40-41.

⁴⁶¹ Abd-Allah, *Mālik and Medina*, 33-34.

with, and could not therefore have been aligned in principle with, both the current practice of the “people of Medina” and the earlier Medinese practice attested in the *ḥadīth* they related. Here, too, we see that proposition discredited. In Ex.1, al-Shāfi‘ī expressly adduces the (present) consensus of the Medinese against Mālik. In Ex. 2, as very often elsewhere, he adduces the evidence of Medinese *ḥadīth* reports to disparage Mālik’s claim of consensus among the people. For al-Shāfi‘ī, at least, then, the consensus of Medina consisted in both past and present consensus. But it is not only in polemics that we find the postulate of Medinese practice as Mālik’s decisive source of law undermined. In neither example do the *Muwaṭṭa’āt* themselves furnish a report in agreement with Mālik’s doctrine; they furnish only reports that contradict it. Since we must assume that Mālik, like al-Shāfi‘ī, conceived of the practice of the Medinese past as immanent in the *ḥadīth* he related, we must conclude not only that precedent did not weigh decisively for Mālik, but that he perceived there to be no conflict of interest in relating reports that attested to it which were antithetical to his doctrine.

This pronounced disconnection between *ḥadīth* and positive law seems to be a feature unique to the *Muwaṭṭa’*. In the *Āthār* of al-Shaybānī, which is otherwise an analogous work comprising *ḥadīth* reports followed by statements of al-Shaybānī’s doctrine (stylistically a striking parallel with al-Shaybānī’s analects of the *Muwaṭṭa’*), we find only reports that corroborate Ḥanafī positions. In the *Āthār* of Abū Yūsuf, again we find only reports that support the doctrines of the circle. (The two *Jāmi*’s present straightforward expressions of doctrine without *ḥadīth* to support them.) Similarly, in the encyclopedic sections of *Al-Umm*, we generally do not find *ḥadīth* that controvert al-Shāfi‘ī’s doctrine. Where the Ḥanafī circle and al-Shāfi‘ī relate *ḥadīth* almost exclusively

to support their doctrines, Mālik will relate them and immediately assert a rule that contradicts them.

The frequently antithetical relation of *ḥadīth* to statements of Mālik's doctrine in the *Muwaṭṭa'* should, I propose, be interpreted as evidence that, for Mālik, the collection of *ḥadīth* was, in terms of jurisprudence, an entirely separate enterprise from pronouncing the law. If Mālik's doctrine is sometimes consonant with the *ḥadīth* he transmits, we probably owe it not to some hermeneutical strategy, such as those that are classically back-projected, but to a phenomenon no more reducible to systematic terms than Mālik's partaking of the same cultural koine as those whose practice is represented in the *ḥadīth* he accumulates (not necessarily, of course, the same persons to whom their *isnāds* ascribe the practice). In other words, the direct genetic link of Mālik's doctrine is not to the practice of venerable figures of the historical Hijaz, but to a common ethos, which the reports that circulated in their name could not but reflect. The rate of agreement in the *Muwaṭṭa'* between Mālik's doctrine and *ḥadīth* does not seem to be higher than would suggest that the agreement is incidental to a shared ethos; the rate of difference between them does not seem to be higher than would reflect a normally narrow latitude for non-conformity in a conservative culture. Precedent, as Crone and Hinds have written, "tends to play a major role in the dispensation of law regardless of whether it is formally binding or not, even under modern conditions; and like most members of pre-industrial societies the Muslims took a conservative view of law."⁴⁶² For Mālik, precedent inhibited innovation only to the extent that it naturally would in a conservative milieu; *qua* jurist, he was not formally bound by it.

⁴⁶²Patricia Crone and Martin Hinds, *God's Caliph*, 55.

Western scholars (and indeed the Muslim tradition in its own way⁴⁶³) have long struggled to locate the figure of Mālik represented in the *Muwaṭṭaʿ* on the spectrum of *ahl al-ḥadīth* and *ahl al-raʿy*, whose split at the end of the eighth century is rightly considered to be a fundamental element in the development of classical jurisprudence. On the terms of that spectrum, Mālik seems schizophrenic: his appeal to *raʿy* makes him look like a rationalist, his amassing *ḥadīth* like a traditionalist. I would propose that they are not sides of the same coin but different coins altogether. The disengagement of *ḥadīth* from positive law in the *Muwaṭṭaʿ* on the one hand, and Mālik's evident preoccupation with collecting and presenting *ḥadīth* on the other are paradoxical. Overall, the *Muwaṭṭaʿ* suggests that Mālik was a traditionist and yet not a traditionalist – that is, he collected and transmitted *ḥadīth* but suffered no compunction from ignoring them in law. That traditionism was not an ancillary of traditionalism in some form seems an unlikely postulate. It appears deprived thereby of purpose: why collect *ḥadīth* if not to heed them in law? So long as we are committed to locating motivations for traditionism strictly in the sphere of jurisprudence, the paradox seems insoluble. If the amassing of *ḥadīth* by jurists who pronounced nonetheless by *raʿy* is to be saved from vacuity, motivations must be sought in another sphere. As a hypothesis of which the *Muwaṭṭaʿ* is suggestive, I would propose that jurists were motivated to acquire and to demonstrate their learning in *ḥadīth* by the authority that knowledge of precedent was thought to confer on them and that this authority was a personal authority whose exercise consisted in pronouncing the law arbitrarily. Knowledge of how earlier

⁴⁶³ Thus traditionalists in Iraq in the ninth century claimed Mālik as a principal antecedent while his adherents in the West continued to pronounce the law on the basis of his *raʿy*, displaying little concern for *ḥadīth*.

authorities had perceived the law and expressed it in their practice qualified a jurist to pronounce the law on his own terms. The division of jurists into those with enthusiasm for *ra'y* and those who stuck to *ḥadīth* is artificial and anachronistic for the Medinese of Mālik's time. *Ra'y* and *ḥadīth* were not yet independent categories. The *ra'y* of the last generations was continually being reproduced as the *ḥadīth* of the next. Mālik saw himself in that 'living tradition' and was probably its last notable representative. That the Iraqi traditionalists of the ninth century could claim Mālik as one of their own we owe to his stature as a traditionalist; that in other circles he was claimed as one of the *ahl al-ra'y*, their main adversaries, we owe to the (correct) perception that personal discretion was the final criterion by which he pronounced the law.

3 Conclusions

We have seen that the jurisprudence of Mālik b. Anas in the late eighth century and that of the nascent school devoted to his doctrine in the Islamic West in the early ninth were both radically different from the systematic jurisprudence of the classical schools outlined in the introduction to this study. Mālik's legal thought cannot be said to have been dependent on, or to have articulated, a legal system of any kind; the rules he pronounced, the material basis of the later system, did not accrue from a structured interaction of objective sources, but from arbitrary reasoning, guided and restrained only by a personal ethical sensibility. I have argued, however, that the onset of systematic consciousness is perceptible in Mālik's resort to *tashbīh*, a mode of analogy applied to existing rules to rationalize them retrospectively by assimilating them to others. Unlike *qiyās*, Mālik's *tashbīh* was not, and could not have been, the structural component of a legal system; it was not a mechanism for generating new rules, and the validity of a rule it was intended to rationalize, already pronounced according to subjective criteria, was thought to be independent of its rationality – that is, whether it was consistent with, and therefore predictable on the basis of, another rule, or other source such as a *ḥadīth* or report of the opinion of an earlier authority. The notion that the rationality of a rule should affect its validity probably originated in Iraq where, through the second half of the eighth century, it gained momentum in polemics between rival groups of jurists. That these groups were divided by competing allegiances brought it about that in their disputes with one another the personal authority of the

jurist to which a group was allied could no longer be treated as a sufficient guarantee of the validity of the rules he pronounced: they needed to be rational in relation to materials whose authority was recognized by all groups alike. From this emerged the concept of an objective source of law, or *aṣl*. It is not trivial that the term *aṣl* does not appear in the original vocabulary of *tashbīh*: the notion of an objective legal source was foreign to the ancient Medinese tradition to which Mālik belonged and he resisted its implications; namely, that the requirement of rationality it implied would undermine his personal authority and ability to exercise discretion. Rather than inherent in sources external to a jurist's idiom, authority in Medina was still thought to be vested in his own arbitrary judgment and sense of equity. Legal reasoning in Medina in the later eighth century was not, therefore, as Schacht supposed, "essentially of the same character as that found in Iraq."⁴⁶⁴ Although in both centres jurisprudence is likely to have been arbitrary at the outset and to have remained so for much of the first half of the century, latterly there had emerged in Iraq a new trend towards rationality from which Medinese jurists remained largely insulated.

Analogy has hitherto been understood to be synonymous in the Islamic legal tradition at large with *qiyās*, which consists in the derivation of a derived case or new rule (*far'*) from an original case or source (*aṣl*). *Qiyās* is a mechanism for bringing positive legal rules, precedent and current practice, objects and other features of the world into mutual relation, *both horizontally and vertically*. That is, a given operation by *qiyās* may relate a *ḥadīth* to a rule, a Qur'anic dictum to a rule, a thing or practice to a rule, or a rule to another rule. *Tashbīh*, on the other hand, functions only horizontally, and then

⁴⁶⁴ Schacht, *Origins*, 275.

only at the highest level of the system. That is, it may only bring into relation a rule with another rule. We can perceive this clearly in the evidence by comparing their respective objects. While the objects of an analogical operation by *qiyās*, an ‘original case’ (*aṣl*) and a ‘derived case’ (*far*), correspond respectively to a source of one kind or another and a positive rule,⁴⁶⁵ the objects of an operation by *tashbīh*, each of which is a ‘similar case’ (*shibh*, *mithl*), correspond invariably to positive rules alike.⁴⁶⁶ *Tashbīh* reflects an archaic view of the Islamic legal system as constructed horizontally from positive rules alone, *qiyās* the view of the system that became classical, as constructed vertically from sources to rules.

Over time, however, *tashbīh* tended increasingly towards the vertical, encompassing more material and approaching *qiyās* in its capacity to rationalize as it did so. It began in Mālik’s time as a means of rationalizing existing rules retrospectively in relation to other existing rules, an exercise that could have no effect on their validity. Subsequently, as the notion of allegiance to the doctrine of the eponym (*taqlīd*) took hold and Mālik’s Western adherents ramified his teaching, it became a means of determining the validity of a proposed rule *ab initio*. Only if it could be shown to be assimilable to a rule already established in the tradition (and therefore rational in relation to it) might a rule be valid. At this stage in its development, *tashbīh* approximates *qiyās* except in two respects: Firstly, although like *qiyās* inasmuch as it structures the material elements of a system analogically, the system it structures is one that generates output on the basis of a far narrower range of elements than *qiyās*.

⁴⁶⁵ *V. supra* fn. 62f.

⁴⁶⁶ *V. supra* §1.4.

Where *qiyās* belongs to a system that will generate an output rule on the basis of sources external to the tradition (*ḥadīth*, for instance), *tashbīh* will only do so on the basis of internal sources, namely, the rules espoused by Mālik. Secondly, *tashbīh* is never employed to rationalize the rules already established in the tradition: the belief endures that the rules of the eponym derive their authority not from their rationality in relation to objective sources or themselves, but from the person of Mālik. Presumably for this reason, and in recognition of the transmitted memory of Mālik's principled rejection of rationality, the term *tashbīh* is kept distinct from *qiyās* throughout the *Mudawwanah*. While *tashbīh* and its associated terms appear frequently in the *Mudawwanah* and everywhere in a positive light, only once does *qiyās* (or its cognates) appear without being expressly repudiated. In one respect, however, the terminology of *tashbīh* in the *Mudawwanah* departs from that of the *Muwaṭṭa'āt*. The term *aṣl* in the *Mudawwanah*, which occurs very occasionally, represents a Ḥanafite translation of the native Mālikī equivalents *shibh*, *mushabbah*, or *mithl*. This was a superficial modification and the referents of the term *aṣl* in the *Mudawwanah* continue to be exclusively the rules themselves, and not items at a lower level of the system. Subsequently, in the tenth century, as the Mālikī tradition yielded to the influence of *Shāfi'ī* legal theory, and *ḥadīth* were added to the canon of authoritative sources alongside the rules of the eponym and the rules that had already been derived from them, *tashbīh* grew almost imperceptibly into *qiyās*. The system as it stood could expand materially, absorb *ḥadīth* and other materials of the classical canon, without need of essential structural modification. With the assimilation of *qiyās* into Mālikī jurisprudence, the gradual shift from a horizontal to

a vertical conception of the legal system over the preceding two centuries had reached completion.

The accuracy of Max Weber's assessments of particular legal systems aside, his conception of rationality as a function of calculability proves a useful tool for characterizing the relation between *qiyās* and *tashbīh*. *Qiyās* is a means of imparting rationality, calculability, to a legal system conceived as constituted of both positive rules and objective legal sources – that is, sources independent of any particular jurist's personal preference or sense of equity. *Tashbīh*, by contrast, is a means of imparting rationality to a legal system constituted of positive rules alone – rules pronounced on the basis of a jurist's arbitrary preference, a subjective legal source. Analogy in general, which is a means of organization according to resemblance, is utilized in the Islamic legal tradition as a tool for conferring the appearance of consistency on ontologically disparate elements, elements that by the application of analogy are made to constitute an emergent system constructed after the resemblance of its parts. To the extent that both *tashbīh* and *qiyās* are responses to a desire to rationalize the constitutive elements of a legal system (a desire that, in both cases, was generally posterior to the rules themselves, implying a stage where Weber's rationality was not a concern), they confirm Weber's perception of a historical drive towards mastery through calculation. Rules pronounced arbitrarily (though inevitably they reflect a communal ethos) come first. This corresponds to the phase made out by Goldziher when '*ra'y*' was not a term of abuse, but the competence to pronounce it a mark of personal authority. The impulse to systematize – to make consistent, predictable, and thus to confer rationality on – those rules in relation to each other comes second (the system is still closed to sources

external to an arbiter's subjective idiom). This corresponds to the late phase of the Medinese tradition represented in Mālik with *tashbīh* as the realization of the impulse. Next, the notion of objective legal sources emerges when an awareness of competing systems of rules is galvanized by competition between rival groups of jurists and by polemics between them – when thereby the appreciable spectrum of possible rules is opened up, and the possibility of instituting rationality across these different sets of rules is frustrated by outright contradiction between them. At this point, the legal system is reconfigured and its scope extended. No longer is it sufficient for the law to issue from an arbitrary source; there must be a set of universally recognized, or impersonal, sources that govern the validity of those rules, and which make a jurist's decisions predictable. These materials (mainly, *ḥadīth* and other rules for which authority could be claimed by consensus [*ijmā'*]) only now come to be incorporated into the system. (Many doubtless existed already and had been related by jurists like Mālik for the authority that knowledge of precedent conferred on them; others had come into existence as a response to the demand generated by this competition between rival groups.) Finally, the impulse to rationalize these sources in relation to the established rules of the tradition gave rise to the legal systems of classical Islam.

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