Al-Shāfiʿī's Ḥadīth-Centrism Revisited: A Historical Re-examination of al-Shāfiʿī's Risāla

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Al-Shāfiʿī's Ḥadīth-Centrism Revisited

A Historical Re-examination of al-Shāfiʿī's Risāla

MASTER THESIS

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MA MIDDLE EASTERN STUDIES OF LEIDEN UNIVERSITY

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Transliteration Key

ا	a, ā	ط	ṭ	ى	ā
ب	b	ظ	ẓ	ي	ī
ت	t	ع	ʿ	و	ū
ث	th	غ	gh	َـ	a [*fatḥah*]
ج	j	ف	f	ِـ	u [*kasrah*]
ح	ḥ	ق	q	ُـ	i [*ḍammah*]
خ	kh	ك	k		
د	d	ل	l		
ذ	dh	م	m		
ر	r	ن	n		
ز	z	ه	h		
س	s	و	w, ū		
ش	sh	ي	y, ī		
ص	ṣ	ء	ʾ		
ض	ḍ				

Table of Contents

Transliteration Key 1

Introduction 3

A Disconcerted Scholarly Field 8

Islāmic Origins Between Revisionism and Traditionalism 8

Isnād Paradigm and the Ḥadīth Fabrication Thesis 11

1. The Historical Evolution of the Sunna and Ḥadīth 15

The Sunna in Early Islām 15

The Umayyad Caliphate and the Ḥadīth Fabrication Movement 20

The Early Legal Specialists 22

The Rise of Ḥadīth Literature 23

2. The Proto-Legal Schools and al-Shāfiʿī's Disengagement 27

The Rationalist-Traditionist Divide 28

The Context of Kufan- and Medinan Law 30

The Origins of Kufan- and Medinan Law 30

Legal Authority in Kufan- and Medinan Law 32

Al-Shāfiʿī's Opposition to Kufan Doctrine and Medinan Praxis 35

3. The Risāla Deconstructed 39

Legal Authority of Solitary Ḥadīth 40

Post-Prophetic Reports (*āthār*) and Disconnected Ḥadīth (*al-ḥadīth al-mursal*) 42

Consensus (*ijmāʿ*) 44

Analogical Reasoning (*qiyās*) 49

Conclusion 53

First Quality - Bayān Theory 53

Second Quality - Ḥadīth Principle 55

Third Quality - Legal Interpretation (*ijtihād*) 56

Bibliography 58

Introduction

Following the works of Gustav Weil (d. 1889), Ignác Goldziher (d. 1921) and David Samuel Margoliouth (d. 1937), modern-Western scholars have become increasingly sceptical about the classical Islāmic narrative on the legal-historical evolution of the Prophetic *Sunna* (the model behaviour of the Prophet Muḥammad).[1] In capsule form the classical Islāmic narrative asserts that the Prophet bequeathed a normative legal tradition (commonly known as the 'Prophetic *Sunna*', or simply the '*Sunna*') that proliferated intergenerationally through personal- and aural transmissions, until it was formalized and codified in authenticated *ḥadīth* reports (pl. *aḥādīth*; textual narrations containing sayings of the Prophet) during the seventh- and eight centuries CE.[2] Together with the *Qurʾān*, the Prophetic *Sunna* constitutes the body of sacred sources that is collectively known as the *nuṣūṣ al aḥkām*.[3] Sunni Muslims thus pride themselves on a continuous legal tradition that emanates directly from the Prophet and which was scrupulously retained, transmitted and formalized by consecutive generations of pious Muslim scholars. Western critics, on the other hand, contest the presumed continuity of the Sunnaic legal tradition and render the Prophetic *Sunna* a spurious invention of the late first- or second Islāmic century.[4]

In modern scholarship, the formal introduction of the Prophetic *Sunna* is commonly associated with the juristic works of Muḥammad ibn Idrīs al-Shāfiʿī (d. 820; the eponymous founder of the Shāfiʿī school of law). Al-Shāfiʿī's jurisprudential treatise known as *Kitāb al-Risāla fī Uṣūl al-Fiqh* (hereinafter 'Risāla') is widely believed to have inaugurated the 'science of legal theory' (*uṣūl al-Fiqh*; hereinafter '*uṣūl'*), which concomitantly cemented the Prophetic *Sunna* as an autonomous source of law.[5] This reading of Islāmic legal history is mainly popularized by the influential works of the eminent British-German professor Joseph Franz Schacht (d. 1969).[6] Through his two *magna opera – An Introduction to Islāmic Law* and *The Origins of Muḥammadan Jurisprudence* [hereinafter *Origins*] – Schacht monumentalized the idea that al-Shāfiʿī anchored the entire edifice of the law in the *Qurʾān* and the Prophetic *Sunna*, thereby laying the foundations for the classical theory of Islāmic law.[7] According to Schacht the pre-Shāfiʿite legal traditions (or 'ancient schools' as he called them), operated on the basis of a 'composite *sunna*' (for which he coined the term 'living tradition') that was rooted in the 'generally

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[1] Joseph Schacht, *Origins of Muhammad Jurisprudence* (Oxford: Clarendon Press, 1979), 58.

[2] Nicolet Boekhoff-van der Voort, "The Concept of Sunna Based on the Analysis of Sīra and Historical Works from the First Three Centuries of Islam," in *The Sunna and its Status in Islamic Law: The Search for a Sound Hadith*, ed. Adis Duderija (New York: Palgrave Macmillan US, 2015), 14; Herbert Berg, *The Development of Exegesis in Early Islam: The Authenticity of Muslim Literature from the Formative Period* (Richmond, Surrey: Routledge Curzon, 2005), 6-8.

[3] Wael B. Hallaq, "Was al-Shafiʿi the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies*, vol. 25, no. 4 (November 1993): 587 [henceforth cited as Hallaq, "Master Architect"]; Joseph E. Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfiʿī* (Leiden: Brill, 2007), 2 [henceforth cited as Lowry, *Risāla*].

[4] Yasin Dutton, "Sunna, Ḥadīth, and Madinan ʿAmal," *Journal of Islamic Studies*, vol. 4, no. 1 (January 1993): 1 [henceforth cited as Dutton, "Sunna"]; John L. Esposito, *Islam: The Straight Path* (New York: Oxford University Press, 1988), 2.

[5] Hallaq, "Master Architect," 587; Lowry, *Risāla*, 2.

[6] Hallaq, "Master Architect," 587.

[7] Schacht, *Origins*, 1-2, 10; Dutton, "Sunna," 1; Esposito, *Islam,* 81-2; Hallaq, "Master Architect," 587.

agreed practice' (*ʿamal al-amr al-mujtamaʿ ʿalaih*) of the community.[8] In other words, the *sunna* was not entirely tied to the figure of Muḥammad until al-Shāfiʿī reconstituted its legalistic scope on the exclusive basis of Prophetic authority, thereby giving rise to the 'Prophetic *Sunna*' as a distinguishable and autonomous source of law.[9] And since Prophetic authority can only be inferred directly from the Prophet himself, it followed that the Prophetic *Sunna* should be exclusively rooted in Prophetic statements that are retained in authentic *ḥadīth* traditions. According to Schacht, al-Shāfiʿī's identification of *ḥadīth* as the literary expression of the Prophetic *Sunna* was one of the most important turning points in Islāmic legal history.[10]

Additionally, in what is occasionally referred to as his 'transformation theory,' Schacht attributed to al-Shāfiʿī a foundational role as the progenitor of the first 'personal school of law'.[11] He notes: "Any legal specialist […] who became converted to [al-]Shāfiʿī's thesis became a personal follower of [al-]Shāfiʿī, and in this way [al-]Shāfiʿī became the founder of the first school of law on an exclusively personal basis, certainly with a common doctrine, but a doctrine which had once and for all been formulated by the founder."[12] Accordingly, it was al-Shāfiʿī's textual approach which enabled the Islāmic legal discourse to unhinge itself from the communal and geography-based traditions of the 'ancient schools' and to progress instead into 'personal schools of law'.[13] Schacht thus considered al-Shāfiʿī's doctrinal position a radical break from the hitherto continuous traditions of the 'ancient schools'.[14] In short, as Wael Hallaq candidly pointed out: "Schacht was an even more enthusiastic fan of [al-]Shāfiʿī than are Muslims themselves."[15]

Persuaded by Schacht's thesis, scholars have long taken al-Shāfiʿī's legal-historical centrality for granted.[16] In recent decades, however, several scholars have taken up the task of confuting the Schachtian view (if we may call it that). One of the first in this regard was George Makdisi (d. 2002) who in his 1984 publication *The Juridical Theology of Shâfiʿî: Origins and Significance of Uṣûl al-fiqh*,

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[8] Schacht, *Origins*, 11, 58; David F. Forte, "Islamic Law: The Impact of Joseph Schacht," *Loyola International and Comparative Law Quarterly* 1 (1978): 9 [henceforth cited as Forte, "The Impact of Joseph Schacht"].

[9] Schacht, *Origins*, 58; According to John Burton this was al-Shāfiʿī's principle achievement. See John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990), 15. Others have also taken this view. See Esposito, *Islam*, 112; Hüseyin Hansu, "Debates on the Authority of Hadith in Early Islamic Intellectual History: Identifying al-Shāfiʿī's Opponents in Jimāʿ al-ʿIlm," *Journal of the American Oriental Society*, vol. 136, no. 3 (July-September 2016): 516.

[10] Schacht, *Origins*, 80. See also Majid Khadduri, "Translator's Introduction," in *Al-Shāfiʿī's Risāla: Treasise on the Foundations of Islamic Jurisprudence*, 2nd ed. (Cambridge: The Islamic Texts Society, 1997), 32 [henceforth cited as Khadduri, "Introduction"].

[11] Schacht, *Origins*, 10.

[12] Schacht, *An Introduction to Islamic Law* (1966; repr., Oxford: Oxford University Press, 1982), 58.

[13] Wael B. Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," *Islamic Law and Society*, vol. 8, no. 1 (2001): 1 [henceforth cited as Hallaq, "Reevaluation"].

[14] Schacht, *Origins*, 1-2, 10, 80.

[15] Wael Hallaq, "The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse," *UCLA Journal of Islamic and Near Eastern Law*, 2, no. 1 (2002–03): 27.

[16] Hallaq, "Master Architect," 587-605; Fachrizal A. Halim, *Legal Authority in Premodern Islam: Yaḥyā b. Sharaf al-Nawawī in the Shā-fiʿī School of Law* (New York: Routledge, 2015), 108. See also George Makdisi, "Tabaqāt-Biography: Law and Orthodoxy in Classical Islam," *Islamic Studies*, vol. 32, no. 4 (Winter 1993): 371-96.

argued that the Risāla was not a substantive work on *uṣul* at all.[17] Instead, Makdisi identified the Risāla as a polemic work that was directed against dogmatic rationalist-theology, a movement which had gained particular popularity due to the extensive influence of the Muʿtazila (a rationalist school of Islāmic theology which emerged during the eight century CE).[18] Later studies by Hallaq and Christopher Melchert, however, tempered Makdisi's conclusions and argued instead that al-Shāfiʿī occupied somewhat of an uneasy position between the rationalists and the traditionists.[19] More notably is Hallaq's 1993 seminal article, suitably titled *Was al-Shafiʿi the Master Architect of Islāmic Jurisprudence*, in which he argued that the Risāla remained largely ignored throughout the ninth century, and therefore played but a marginal role in the formative period of Islāmic law.[20] In Hallaq's assessment, al-Shāfiʿī's esteemed status as the pioneer of *uṣul* was only retrojected by later Muslim scholars and has effectively no bearing on al-Shāfiʿī's actual achievements.[21] Additionally, Hallaq asserted that the Risāla did not exposit a comprehensive theory of *uṣul*, but instead aimed to defend the legislative status of Prophetic *ḥadīth*.[22] In that same year (1993) Norman Calder published his *Studies in Early Muslim Jurisprudence* wherein he discredited the historicity of the foundational works attributed to al-Shāfiʿī.[23] According to Calder, both the *Kitāb al-Umm* (al-Shāfiʿī's *magnum opus* and multi-volume work on positive law) and the Risāla were conceived through collective contributions of later Shāfiʿite scholars (of the ninth- and tenth centuries CE).[24] With minor modifications, Melchert would later also align himself with the view that the Risāla was conceived by later Shāfiʿite scholars.[25]

Substantial critique was also directed at Schacht's transformation theory, starting with Melchert's 1997 publication *The Formation of the Sunni Schools of Law*. Although Melchert is generally receptive of Schacht's thesis, he nonetheless objected to the timeline of his transformation theory and noted that the process of transformation into personal schools was not yet completed by the middle of the ninth century and therefore cannot be fully attributed to al-Shāfiʿī.[26] A more forceful refutation was enunciated by Hallaq's 2001 critical re-evaluation of Schacht's transformation theory.[27] By craftily

[17] Makdisi, "The Juridical Theology of Shâfiʿî: Origins and Significance of Uṣûl al-fiqh," *Studia Islamica,* no. 59 (1984): 5–47.
[18] Ibid.
[19] Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh* (Cambridge: Cambridge University Press, 1997), 31-32; Christopher Melchert, *The Formation of the Sunni Schools of Law: 9th–10th Centuries C.E.* (Leiden: Brill, 1997), 70.
[20] Hallaq, "Master Architect," 587-605.
[21] Ibid.
[22] Ibid.
[23] Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Oxford University Press, 1993), 67-86.
[24] Mentioned in, Ahmad El Shamsy, "The First Shāfiʿī: The Traditionalist Legal Thought of Abū Yaʿqūb al-Buwayṭī (d. 231/846)," *Islamic Law and Society*, vol. 14, no. 3 (2007): 302 [henceforth cited as El Shamsy, "The First Shāfiʿī"]. See also Aisha Y. Musa, *Ḥadīth as scripture: Discussions on the Authority of Prophetic Traditions in Islam* (New York: Palgrave Macmillan, 2008), 32.
[25] Christopher Melchert "Traditionist-Jurisprudents and the Framing of Islamic Law," *Islamic Law and Society*, vol. 8, no. 3 (2001): 383-406.
[26] Ibid., 35. Schacht states that the transformation into "personal schools" was concluded by the middle of the ninth century CE. See Schacht, *Origins*, 58.
[27] Hallaq, "Reevaluation," 1-26.

dismantling Schacht's notions of 'regional schools' and 'living traditions', Hallaq sat out to replace Schacht's "artificial diversion" with an alternative model, which instead suggested a process of transformation from 'individual juristic doctrines' into 'doctrinal schools'.[28] Where Hallaq's 1993 study[29] had already established that al-Shāfiʿī's achievements were highly exaggerated by Schacht, his newfound transformation theory further deflated al-Shāfiʿī's presumed centrality. In his most recent publication on this matter, Hallaq reinforces his earlier conclusions and pushes the date of the Risāla's compilation further forward.[30]

Hallaq's abovementioned counter-thesis and postdating of the Risāla, has in turn prompted several scholarly rejoinders. For example, recent entries by Sherman A. Jackson, Murtaza Bedir, Joseph Lowry, John Burton and Ahmed El Shamsy have invested considerable efforts in reasserting the Risāla as an authentic and integral text emanating from al-Shāfiʿī's intellect; although they do not necessarily recognize it as a foundational work of *uṣul*.[31] Jackson for instance points out to numerous ninth-century Māliki texts that were composed under the title of *al-Radd ʿalā al-Shāfiʿī* (The Refutation of al-Shāfiʿī) as evidence that the Risāla must have had a near immediate impact.[32] In a similar fashion, Bedir used various Ḥanafi texts to demonstrate al-Shāfiʿī's immediate impact on legal discourse, although he agrees with Hallaq's assessment in that the Risāla does not exposit a theory of *uṣul* but instead aimed to advance the legalistic status of Prophetic *ḥadīth*.[33] Burton and Lowry also settled on the Risāla's immediate impact, and agreed that it does not represent a comprehensive theory of *uṣul.* But unlike Bedir and Hallaq, they identified the Risāla as a legal-technical analysis that was aimed at harmonizing the apparent contradictions in the sacred sources (this will be discussed in more detail in chapter 3).[34] Arguably the most compelling rendition of Hallaq's transformation theory was articulated by El Shamsy's *The Canonization of Islāmic Law* (2013). With striking similarity to Schacht's transformation theory, El Shamsy relocates al-Shāfiʿī at the juncture between an old model of legal authority, defined by communal traditions and scholarly precedence (comparative to Schacht's 'living traditions'), and a new individualistic model initiated by al-Shāfiʿī himself, which insisted on a "direct and unmediated"

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[28] Ibid., 26.

[29] Hallaq, "Master Architect," 587-605.

[30] Hallaq, "Uṣūl al-Fiqh and Shāfiʿī's Risāla Revisited," *Journal of Arabic and Islamic Studies*, 19 (2019): 129-183.

[31] Sherman A. Jackson, "Setting the Record Straight: Ibn al-Labbād's Refutation of al-Shāfiʿī," *Journal of Islamic Studies*, vol. 11, no. 2 (May 2000): 121-146; Murteza Bedir, "An Early Response to Shāfiʿī: ʿĪsā b. Abān on the Prophetic Report (Khabar)," *Islamic Law and Society*, vol. 9, no. 3 (2002): 285-311; Joseph E. Lowry, "The Legal Hermeneutics of al-Shāfiʿī and Ibn Qutayba: A Reconsideration," *Islamic Law and Society*, vol. 11 (2004): 1–41; *Idem.*, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfiʿī* (Leiden: Brill, 2007); *Idem.*, "Ibn Qutayba: The Earliest Witness to al-Shāfiʿī and His Legal Doctrine," in *ʿAbbasid Studies*, ed. James E. Montgomery (Leuven: Peeters, 2004): 303–19; Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (Cambridge: Cambridge University Press, 2013); *Idem.*, "The First Shāfiʿī," 301–41; *Idem.*, "Al-Shāfiʿī's Written Corpus: A Source-Critical Study," *Journal of the American Oriental Society*, vol. 132 (2012): 199–220; John Burton, *Sources of Islamic Law*, 199–220.

[32] Jackson, "Setting the Record Straight," 122.

[33] Bedir, "An Early Response," 309.

[34] Burton, *Sources of Islamic Law,* 1-18; Lowry, *Risāla*, 16, 58.

interpreting of the canonized sources (comparative to Schacht's notion of 'personal schools'). Yet, at the same time El Shamsy maintains Hallaq's transformation theory by admitting that it was indeed al-Shāfiʿī's prime students (most notably al-Buwayṭī and al-Muzanī[35]) who synthesized al-Shāfiʿī's "cannon-centred individualism" with a newly emerged communal institution known as the *madhhab fiqhī* (school of law).[36] According to El Shamsy, the *madhhab fiqhī* emerged from the ninth century onwards as a synthesis between the old communitarian model and al-Shāfiʿī's "cannon-centred individualism," gradually evolving into full-fledged schools of law, with a common doctrine and interpretative framework.[37] By synthesizing the transformation theories of Schacht and Hallaq, El Shamsy craftily repositioned al-Shāfiʿī as the main impulse that set the process of canonization and transformation of Islāmic legal discourse into motion.[38]

In short, while modern scholarship has made significant headways in defining al-Shāfiʿī's contribution to Islāmic jurisprudence, progress has been rather slow and moving in opposite directions; either affirming or repudiating al-Shāfiʿī's status as a central figure of some sorts. As far as the Risāla is concerned contemporary scholarship is mainly concerned with matters of historicity and post-historical contextuality. Whereas Schacht was mainly concerned with the Risāla's pre-historical and contemporary setting, post-Schachtian scholarship has instead diverted its attention to the Risāla's post-historical period. This is primarily instigated by Schacht's emphatic embrace of al-Shāfiʿī's legal-historical centrality and is furthermore elongated by the disputatious rejoinders of Calder, Hallaq and others. Consequently, the dominant trend in contemporary scholarship is aimed at al-Shāfiʿī's effective contribution to Islāmic legal development. While this has certainly benefited our understanding of al-Shāfiʿī's legal-theoretical legacy, it has inadvertently also obscured the underlying motives of his *ḥadīth*-centric theory, as well as the extent of his disengagement from the other legal traditions. Moreover, recent studies on al-Shāfiʿī's Risāla rarely engage with the legal-historical setting into which it was introduced; this is true, even, for Lowry's study which, to date, represents the most elaborate, and indeed enriching, analysis of the Risāla.[39]

In order, to better understand al-Shāfiʿī's commitment to *ḥadīth*, it is imperative that we re-examine the pre-historical conditions which led to his *ḥadīth*-centric doctrine in the first place. To this end, this thesis aims to answer the following question: *How does al-Shāfiʿī's ḥadīth-centric methodology, outlaid in the Risāla*, *set him apart from his predecessors annex contemporaries?* To answer this question as effectively as possible, we will re-examine the historical evolution of the Prophetic *Sunna* and *ḥadīth* (chapter 1); the rise and development of the early legal traditions, with

[35] Hallaq instead identified Ibn Surayj as the main vehicle who disseminated al-Shāfiʿī's teachings. See Hallaq, "Master Architect," 598-601.
[36] El Shamsy defines the *madhhab* institution as a "community of interpretation". See El Shamsy, *Canonization of Islamic Law,* 167.
[37] Ibid.
[38] Ibid., 5-6.
[39] Lowry admits that he did not "rigorously or consistently compare al-Shāfiʿī's reasoning with that found in contemporaneous texts". Lowry, *Risāla*, 17.

particular focus on the traditions of Abu Ḥanifa (d. 767) and Mālik ibn Anas (d. 795; chapter 2); and finally, we will engage in a deconstructive and comparative analysis of the Risāla (chapter 3). The comparative angle, throughout this thesis, will be mainly drawn with the doctrinal positions of Abu Ḥanifa and Mālik ibn Anas. The reason for this is that these jurists represented some of the most influential jurisprudential traditions of the late eight century CE, which (both directly and indirectly) played an important role al-Shāfiʿī's intellectual and legal development. By retracing al-Shāfiʿī's intellectual ideas from a pre-historical, conceptual and comparative angle, this thesis aims to uncover new insights into al-Shāfiʿī's *ḥadīth*-centric methodology. But before we can commence with our analysis, we must first address some fundamental methodological issues regarding the formative period of Islāmic legal history.

A Disconcerted Scholarly Field

Although this thesis is not immediately concerned with the historicity of Islām's formative period, it is nonetheless necessary to address some of the methodological disparities that persist in modern scholarship. For as any ardent student of early Islāmic history will attest, the historicity of Islām's formative period (a scholarly field commonly known as "Islāmic Origins"[40]) is fraught with methodological difficulties which affect every subsequent inquiry into Islām's formative period. The issue at hand is primarily caused by the paucity of first-century physical and literary sources and contentions regarding the authenticity and reliability of the extant Muslim sources of the late seventh- and eight centuries CE. Not only are the extant sources largely post-dated, but they are also highly inconsistent and unverifiable due to the scarcity of corroborative evidence. Moreover, a significant number of the extant sources is based on oral traditions and eyewitness accounts that are in themselves inaccessible or otherwise brimming with religious idealizations and polemics.[41] In the following sections we shall address the methodological issues that are most relevant for our current inquiry.

Islāmic Origins Between Revisionism and Traditionalism

In his *Narratives of Islāmic Origins,* Donner discerns four approaches that modern scholars have typically relied on in their search for "Islāmic Origins".[42] These approaches have emerged chronologically but are largely coexistent and overlapping in specific fields of research. The four approaches are: (1) The DESCRIPTIVE APPROACH, which entails a non-critical reception of Islāmic historical narratives; (2) the SOURCE-CRITICAL APPROACH, which applies comparative source

[40] Fred Donner, *Narratives of Islamic Origins: The Beginnings of Islamic Historical Writing* (Princeton, NJ: The Darwin Press Inc., 1998), 1. See also Herbert Berg, "Competing Paradigms in the Study of Islamic Origins: Qur'ān 15:89-91 and the value of Isnāds,'' in *Method and Theory in the Study of Islamic Origins*, ed. Herbert Berg (Leiden: Brill, 2003), 259-90.
[41] Donner, *Narratives*, 1.
[42] Ibid., 5-25.

criticism to sift authentic from inauthentic sources, thereby aiming to reconstruct a consistent historical account; (3) the TRADITION-CRITICAL APPROACH, which aims to extrapolate early accounts from post-dated sources through analyses of informational transmissions.[43] This approach is particularly used for the analysis of 'chains of transmission' (*isnād*) of *ḥadīth* reports; and (4) the SKEPTICAL APPROACH, which dismisses the historical authenticity of Muslim literary works and effectively renders it apocryphal or outright fabrication.[44]

Others have applied more reductive taxonomies in their categorisation of scholarly approaches. For example Koren and Noven divide the field into two antithetical approaches consistent with the Revisionist- and Traditionalist schools of Islāmic studies (while also taking note of the early Orientalist tradition as the methodological precursor of modern Revisionism).[45] Herbert Berg applies a similar binarism based on the measure of source-critical scepticism, or lack thereof, and proposes a taxonomy that distinguishes between "sanguine" and "sceptical" scholarship.[46] Chase Robinson also offers a binary taxonomy but instead distinguishes between "mistrusting minimalists" and "trusting maximalists".[47] The number of taxonomies offered by scholars is, in fact, more extensive than suggested here, but ultimately all of them (Donner included) recognize an overarching polarity between 'those who reject' and 'those who accept' most of the Islāmic tradition literature.[48] For purposes of convenience I shall henceforth use the taxonomy of Koren and Noven.

At its core the distinction between Revisionists and Traditionalists is prompted by conflicting epistemologies that have generated alternative approaches to the extant (Muslim) sources. In the words of Robert G. Hoyland, the fundamental difference between these two antithetical approaches manifest as either "a guilty until proven innocent approach or an innocent until proven guilty approach".[49] Generally speaking, Revisionists are sceptical towards the Muslim tradition literature, while their

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[43] Donner accredits Goldziher as the pioneer of this approach, but he also notes that Goldziher called into question the authenticity of the whole corpus of hadith [Donner, *Narratives*, 14]; Harold Motzki calls this approach the "tradition-historical approach" (*Überlieferungsgeschichtlich*), and traces its origins to the works of the Orientalist scholar Julian Wellhausen. See Harald Motzki, "The Muṣannaf of ʿAbd al-Razzāq al-Sanʿānī as a Source of Authentic Aḥādīth of the First Century A. H.," *Journal of Near Eastern Studies*, vol. 50, no. 1 (January 1991): 1-2.

[44] Donner, *Narratives*, 5-25.

[45] Judith Koren and Yehuda D. Nevo, "Methodological Approaches to Islamic Studies." *Der Islam*, vol. 68 (1991): 87–107.

[46] Regarding the Traditionist approach Berg adds an important distinction between those who adhere to a non-critical method of "ascription" (whom he occasionally refers to as the "Ascriptionists") and the more sophisticated methods of "sanguine" scholars (his approximation of the Traditionists) that are critical (sometimes even sceptical) but yet optimistic about the historical value of the extant sources. According to Berg the assume that the extant sources contain an accurate and authentic account on Islamic Origins. See Berg, "Competing Paradigms," 259;

[47] Chase F. Robinson, "Review: The Ideological Uses of Early Islam," Past and Present, vol. 203, no. 1 (2009): 216–17. See also Harald Motzki, "The Question of the Authenticity of Muslim Traditions Reconsidered: A Review Article," in Method and Theory in the Study of Islamic Origins, ed. Herbert Berg (Leiden: Brill, 2003), 212.

[48] Mun'im Sirry, *Controversies Over Islamic Origins: An Introduction to Traditionalism and Revisionism*, (Newcastle: Cambridge Scholars Publishing, 2021), 37; Robert G. Hoyland, *In God's Path: The Arab Conquest and the Creation of an Islamic Empire* (New York: Oxford University Press, 2015), 232.

[49] Ibid.

Traditionalist counterparts are more receptive of its potential historical value, albeit to varying degrees. Traditionalists are therefore more comfortable extrapolating historical accounts from Muslim biographical and historical sources, such as the *sīra* (Prophetic biography) and *ḥadīth*.[50] By approaching the post-dated sources as potential vistas into Islām's formative period, Traditionalists maintain that an accurate recollection of Islāmic Origins is, to a large extent, feasible.[51]Revisionists, on the other hand, deem most of the tradition literature historiographically unfit and dismiss it largely as mere "salvation history".[52] The fact that the tradition literature is largely obtained from 'post-dated' sources is taken by Revisionists as proof of a material disconnect in Islām's historical records. This casts suspicion on the continuity of the Islāmic tradition as a whole, and increases the likelihood that its foundational sources are either inauthentic or, worse, fabricated.[53] For Revisionists the extant sources thus yield little historical value except that they reflect the views, opinions and interpretations held by Muslims of the second- and third Islāmic centuries.[54]

Among other things, Islāmic Revisionism has generated critical re-evaluations of the centrality of the Prophet (see below), the origins of the *Qurʾān*, the identitary formation of Islām, and Muslim *ḥadīth*- literature and methodologies. It is instructive to mention here Hallaq's identification of several doctrinal undercurrents in modern-day Orientalist/Revisionist scholarship. According to Hallaq Western critical reception of Islāmic legal history (which he terms "Islāmic legal Orientalism") is prepossessed by particular "Orientalist assumptions" that are imbedded in a persistent and paradigmatic "Orientalist doctrine".[55] This "Orientalist doctrine," is supposedly "entangled in a complex web spun from its own internal epistemology," and continues to (re)produce general misconceptions about the origins and evolution of Islāmic legal history.[56] These misconceptions are identified by Hallaq as follows: (1) Muslim narratives are apocryphal; (2) Prophetic *aḥādīth* are spurious until proven otherwise; (3) Islāmic law started nearly a century after the Prophet; (4) Islāmic law is primarily and fundamentally inspired by (or even borrowed from-) foreign influences (mainly Mesopotamian and Roman); (5) The subject-matter of Islāmic law is to a great extent neither Prophetic nor *Qurʾānic*; (6) The desolate and primitive environment of Arabian culture cannot account for the technically sophisticated system of Islāmic law.[57]

Yet in spite of the ensuing criticism raised by Hallaq and others, Revisionism has maintained a prominent foothold in modern scholarship and is once more reinvigorated by the recent influx of literary and physical sources derived from archaeology, numismatics, extra-Islāmic sources, epigraphy and

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[50] Berg, "Competing Paradigms," 283-4.
[51] Ibid., 259-60.
[52] Sirry, *Controversies Over Islamic Origins*, 235.
[53] Ibid., 38.
[54] Both Goldziher and Schacht viewed hadith traditions attributed to the Prophet in this light. See Joseph Schacht, "A Revaluation of Islamic Traditions," *The Journal of the Royal Asiatic Society of Great Britain and Ireland*, no. 2 (October 1949): 143; and *idem*, *Origins*, 4.
[55] Hallaq, "The Quest for Origins," 1-3.
[56] Ibid., 20.
[57] Ibid., 1-31.

newly uncovered written materials (in papyrus, parchment and paper).[58] However, the output of latter day Revisionism varies significantly in both scope and approach. While some modern Revisionists have presented compelling counter-narratives that redress the contextual and intertextual inconsistencies of the literary sources, others (occasionally referred to as Neo-Orientalists or Radical-Revisionists) have purported entirely controversial re-readings of Islāmic history, which dismiss the historicity of the Prophet, the *Qurʾān* and/or Islām as a whole.[59] Withstanding its varying manifestations, the fundamental feature of contemporary Revisionism is marked by its critical reassessment of Muslim literary sources, methods and narratives.

According to Berg, the differences between Revisionists and Traditionalists are irreconcilable due to the fact that both camps operate "mutually exclusive paradigms".[60] While this is true in general, it is also important to keep in mind that the differences between Revisionists and Traditionalists will often dissipate in practice as scholars from either camp may map out alternative or intermediate positions. For example, G.H.A Juynboll (who is generally categorized as a critical Orientalist) is receptive to the idea that *ḥadīth* in general originates from the time of the Prophet. In his understanding it is not *ḥadīth per se,* but rather, the formal and systemic transmission of *ḥadīth* which is post-dated and thus problematic.[61] Yet unlike Schacht, Juynboll does not infer from this that the origins of Islāmic law are untraceable, nor does he shun away from using individual *ḥadīth* for historiographic purposes.[62] The intricacy of these sub-distinctions will become clearer in the next section as we will discuss various scholarly positions regarding the historicity of the Prophetic *Sunna* and *ḥadīth*.

Isnād Paradigm and the Ḥadīth Fabrication Thesis

Broadly speaking a *ḥadīth* (lt. a narration or saying) consists of two integral parts: (1) Its actual content (*matn*) that takes the form of a textual narration that usually involves an action, saying or event relating to the Prophet and; (2) its *isnād* or 'transmissive support', which serves to connect the narration to its original transmitter (usually a first-tier companion).[63] The *isnād* is commonly presented in the form of a *silsila* or 'chain' of transmitters which is then examined by the scholars of *ḥadīth* (*muḥadithūn*) to verify its connectedness (*iṭiṣāl*) to the Prophet. Using various historical and biographical sources, the *muḥadithūn* will carefully, and critically, evaluate the reliability of each transmitter in the chain and assess whether or not the *isnād*, and by extension its *matn*, is authentic (this field of study is typically

[58] Jonathan E. Brockopp, "Interpreting Material Evidence: Religion at the Origins of Islam," *History of Religions*, vol. 55, no. 2 (November 2015): 127-128.

[59] Interestingly, a great number of these so called Neo-Revisionists are affiliated with the German based '*Inārah* Institute for Research on Early Islamic History'. See Marcin Grodzki, "Muslims and Islam in Middle Eastern Literature of the Seventh And Eighth Centuries AD: An Alternative Perspective of West European Oriental Scholarship," *Studia Orientalia*, vol. 112 (January 2014): 1-16. See also the *Inārah* website for an overview of some controversial publications: http://inarah.net/publications.

[60] Berg, "Competing Paradigms," 261.

[61] Juynboll, Muslim Tradition Studies 9-10.

[62] Patricia Crone, Roman, provincial and Islamic law (Cambridge: Cambridge University Press, 1987) 7.

[63] Herbert Berg, *Exegesis in Early Islam*, 6-8.

known as *ḥadīth*- or *isnād* criticism).[64] By sifting authentic from inauthentic traditions, Muslim scholars believe that the *isnād* paradigm has managed to successfully retrace the Islāmic tradition back to the Prophet; a claim that is categorically rejected by Revisionists.

Particularly since Goldziher's *Muhamedischen Studien*, have Orientalists and Revisionists been swayed by the idea that the majority of *ḥadīth* are apocryphal.[65] The quintessential outlook amongst Revisionists is that Islāmic law originates from foreign praxes, concepts and norms that were later transposed into Prophetic *aḥādīth*.[66] Some (including Goldziher[67]) even concluded that the entire history of Islām is ultimately immersed into an Arabian façade.[68] Considering their effective debasement of Islāmic law as both un-Islāmic and un-Arabian, it is hardly shocking that most Revisionists reject the normative exclusivity of the *Qurʾān* and Prophetic *Sunna* before the eight century CE. [69] By subverting the historical roots of Islāmic law, the Prophetic *Sunna* ceased to serve its function as a normative legal tradition, which in turn opened the door for a wholesale rejection of *ḥadīth*.[70] These suspicions cast on *ḥadīth* extend more broadly to the overall historicity of the classical Islāmic narrative, which is effectively predicated on the normative exclusivity of the *Qurʾān* and Prophetic *Sunna*.[71]

Yet, Orientalists and Revisionists were not the only ones who took issue with the historicity of *ḥadīth*. Interestingly, the notion of mass *ḥadīth* fabrication was also suggested by some modern Muslim scholars. Most notably was the critique issued by the Indian modernist scholar Sayyid Ahmad Khan (d. 1898) who, in a bid to reconcile Islāmic law with modernity and reason, advocated a critical re-evaluation of *ḥadīth* literature.[72] In his view the classical scholars of *ḥadīth* (*muḥadithūn*) were too narrowly focused on the 'continuity of transmission' and as a result failed to take into consideration the actual content (*matn*) of *aḥadīth*.[73] Sayyid Ahmad's associate and follower Moulvi Gerágh ʿAli (d. 1895)

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[64] John Burton, "Qurʾān and Sunnah: A Case of Cultural Disjunction," in *Method and Theory in the Study of Islamic Origins,* ed. Herbert Berg (Leiden: Brill, 2003), 141.

[65] Mentioned in Schacht, *Origins*, 3-4. See also *idem*, "A Revaluation of Islamic Traditions," 145; Dutton, "Sunna," 1; Forte, "The Impact of Joseph Schacht," 9; Boekhoff-van der Voort, "The Concept of Sunna," 15-16.

[66] Schacht postulated the notion that Islamic law was mainly conceived through foreign borrowings. See Joseph Schacht, "Problems of Modern Islamic Legislation," *Studia Islamica*, no. 12 (1960): 100.

[67] According to Crone this view was held by Ignác Goldziher and Carl Heinrich Becker. See Patricia Crone, *Roman, Provincial, and Islamic Law*: *The Origins of the Islamic Patronate* (Cambridge: Cambridge University Press, 1987), 7.

[68] Hallaq, "The Quest for Origins," 7.

[69] Jonathan E. Brockopp, "Competing Theories of Authority in Early Mālikī Texts," in *Studies in Islamic Legal Theory,* ed. Bernard G. Weiss, vol. 15 (Leiden: Brill, 2002), 4-5; Walter Edward Young, "Origins of Islamic Law," *The Oxford Encyclopedia of Islam and Law, Oxford Islamic Studies* (2014): 4; Patricia Crone and Martin Hinds, *God's Caliphs: Religious Authority in the First Centuries of Islam* (Cambridge: Cambridge University Press, 1986), 59.

[70] It is for this reason that both Goldziher and Schacht concluded that the majority of *ḥadīth* were apocryphal or fabricated. See Schacht, "A Revaluation of Islamic Traditions," 143.

[71] For example, echoing Revisionist critique, Calder concluded that the early legal traditions (including al-Shāfiʿī) are virtually irrecoverable. Mentioned in Christopher Melchert, "How Ḥanafism came to Originate in Kufa and Traditionalism in Medina," *Islamic Law and Society*, vol. 6, no. 3 (1999): 319.

[72] Esposito, *Islam*, 135; Daniel W. Brown, *Rethinking Tradition in Modern Islamic Thought*, Cambridge Middle East Studies 5 (Cambridge: Cambridge University Press, 1996), 97.

[73] Ibid.

went even further and concluded that the majority of *aḥadīth* were most likely fabricated, and therefore could not be relied upon as independent legal sources.[74] He displayed similar scepticism towards the historical roots of Islām's legal tradition. He notes: "the Mohammadan [*sic*] Common Law is by no means divine or superhuman. It mostly consists of uncertain traditions, Arabian usages and customs, some frivolous and fortuitous analogical deductions from the Koran [*sic*], and a multitudinous array of casuistical sophistry of the canonical legists."[75] Along with other scholars, ʿAli propagated the idea that Muslims should reform their laws by reverting to the centrality of the *Qurʾān*.[76] As such the issue of mass *ḥadīth* fabrication gave rise to the movement of 'Qurʾānic scripturalism' (also known as 'Qurʾānism'), a movement which emerged more ostensibly during the early twentieth-century as a countermovement to the *Ahl-i-Ḥadīth* scripturalists in India.[77] It is unclear to me whether the Qurʾānist movement has influenced the views of Goldziher and Schacht, but their denunciation of the historical validity of *ḥadīth* certainly bears resemblance.[78]

Nevertheless, the overwhelming majority of Muslim scholars (both classical and modern alike) consider authenticated *aḥādīth* sufficiently reliable for legal adjudication. Traditionalist Western scholars also maintain an optimistic outlook *vis-a-vis ḥadīth*-literature and continue to utilize it for historiographical purposes. An excellent example in this regard is Motzki's reconstruction of the early Meccan legal tradition on the basis of the *Muṣannaf* of 'Abd al-Razzāq al-Sanʿani (d. 827). Motzki illustrates quite effectively that, in spite of its flaws, *ḥadīth* can still provide valuable historical insights that should not be dismissed. He concludes: "While studying the *Muṣannaf* of 'Abd al-Razzāq, I came to the conclusion that the theory championed by Goldziher, Schacht, and, in their footsteps, many others – myself included – which, in general, rejects *ḥadīth* literature as a historically reliable source for the first century A.H., deprives the historical study of early Islām of an important and useful type of source."[79] Similarly, Yassin Dutton has, successfully, reconstructed the early Medinan tradition based on Mālik's Muwaṭṭaʾ (an early compendium of *ḥadīth*).[80]

In short, the historiographical conundrums surrounding Islām's formative period are copious indeed. Nonetheless, this current re-evaluation of the historical development of Islāmic legal theory, and the gradual endorsement of Prophetic authority and *ḥadīth* is primarily focused on al-Shāfiʿī's Risāla. Since this study is mainly related to the late eight century CE, most of the contentions regarding the

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[74] Gerágh ʿAli, *A Critical Exposition of the Popular Jihad: Showing that all the Wars of Mohammad Were Defensive; and that Aggressive War, or Compulsory Conversion, is not Allowed in The Koran* (Calcutta, India: Thacker, Spink and Co., 1885), 138-40.

[75] Ibid.

[76] Adherents of this movement are also called the *Qurʾāniyyūn* in Arabic or Qurʾānists in English. The most notable scholars associated with the origins of the Quranist movement are: Abdullah Chakralawi, Khwaja Ahmad Din Amritsari, Gerágh ʿAli, and Aslam Jairajpuri, Muhammad Tawfiq Sidqi and Mahmoud Abu Rayya. See Brown, *Rethinking Tradition*, 38-41.

[77] Ibid.

[78] For a more detailed overview of scholarly responses regarding the history of *ḥadīth* see Herbert Berg, *The Development of Exegesis*, 6-64.

[79] Harald Motzki, "The Muṣannaf of ʿAbd al-Razzāq al-Sanʿānī," 21.

[80] Dutton, "Sunna," 1-31.

earliest sources are irrelevant. However, in order to contextualize al-Shāfiʿī's juristic contribution, I will necessarily draw on secondary sources which might expose me to some of the contentious issues that have been mentioned. In such instances, I shall aim to synthesize these approaches as much as possible. Furthermore, I shall take each source on its merit, but where contention does arise, I shall either declare my preference or otherwise substantiate my own position. However, considering both approaches, I must confess that I find the Traditionalist approach more useful to the aim of this inquiry. For ultimately, the eight century Muslim authors were either recipients (Traditionalist view) or originators (Revisionist view) of the classical Islāmic narrative. In both cases the authors reveal the developmental consciousness out of which the foundational logic of Islāmic legal theory arose.[81] For as Schacht keenly observed, the early sources "reflect opinions held during the two and a half centuries after the *hijra*".[82] In order to understand the foundational development of Islāmic legal theory, it is thus necessary to understand the minds that produced it. Moreover, it would be counterproductive to discard the classical sources without good cause. In conclusion it should be noted that my incidental references to primary sources, not related to al-Shāfiʿī's Risāla, are either on the authority of others, or otherwise merely illustrative and never demonstrative. By way of illustration, we can arrive at the general *Zeitgeist* that underlines the formal theorization of Islāmic law, as well as the subsequent involvement of al-Shāfiʿī, which is the ultimate objective of this inquiry.

[81] Schacht, "A Revaluation of Islamic Traditions," 143.
[82] Ibid.

1. The Historical Evolution of the Sunna and Ḥadīth

The *sunna* (pl. *sunan*) is originally a pre-Islāmic notion which designates a habitual practice, customary norm or a usage sanctioned by tradition; the 'Prophetic *Sunna*' is then the derivative Islāmic term which denotes the normative or exemplary conduct of the Islāmic Prophet Muḥammad.[83] However, the legalistic scope of the *sunna* is more complex than its etymological definition would suggest. Not only does the concept precede Islām, but it also manifested inconsistently throughout various episodes of Islāmic history.[84] In order, to assess the objectives of al-Shāfiʿī's *ḥadīth*-centric doctrine we must first come to terms with the historical evolution of the Prophetic *Sunna* and *ḥadīth*. To this end, this chapter offers a foundational analysis of the historical evolution of the Prophetic *Sunna* as well as the subsequent rise of *ḥadīth* literature.

The Sunna in Early Islām

In pre-Islāmic Arabia the *sunna* was fundamentally used to refer to the exemplary and normative traditions of the forebears.[85] By resorting to ancestral customs, the pre-Islāmic *sunna* offered moral guidance, social norms and binding precedents that were enacted behaviourally, situationally and structurally.[86] In that sense the pre-Islāmic *sunna* corresponds with the Roman tradition of *mos majorum* (ancestral custom).[87] However, it is important to note that the pre-Islāmic *sunna* was not only 'imitated,' but it was also set and modified by authoritative individuals such as tribal leaders, poets and saints. The pre-Islāmic *sunna* was thus neither static nor limited to single precedents, but instead utilized the authority of leading men of the past and present.[88] As such, the pre-Islāmic *sunna* served as a normative social construct that provided expressive, tacit and conventional recourse for societal organization. This conventional constitution of the pre-Islāmic *sunna* would be both endorsed and challenged by the rise of Islām.

To a large extent Islām supplanted Arabian ancestral customs by redirecting normative authority to God and His prophets.[89] The prospect of averting their forebears was particularly troubling for the

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[83] Hans Wehr, J. Milton Cowan, *The Hans Wehr Dictionary of Modern Written Arabic*, 3rd ed. (Ithaca, NY: Spoken Language Services Inc., 1977), 433. According to Schacht the *Sunna* technically means a "precedent" and "way of life". See Schacht, *Origins*, 58. Fazlur Rahman states that the pre-Islāmic Sunna literally meant a "trodden path" and "denoted the model behaviour established by the forefathers of a tribe". See Fazlur Rahman, *Islām* (New York: Holt, Rinehart and Winston, 1966), 44.

[84] Ahmad Hasan, "Sunnah as a Source of Fiqh," *Islāmic Studies*, vol. 39, no. 1 (Spring 2000): 3-11.

[85] Muhammad Y. Guraya, "The Concept of Sunnah: A Historical Study," *Islāmic Studies*, vol. 11, no. 1 (March 1972): 17.

[86] Rosalind W. Gwynne, *Logic, Rhetoric and Legal Reasoning in the Qur'ān: God's Arguments* (London: Routledge Curzon, 2004), 41.

[87] Crone, *God's Caliph*, 58.

[88] Meïr M. Bravmann, *The Spiritual Background of Early Islām: Studies in Ancient Arab Concepts*, vol. 4 (Leiden: Brill, 2009), 167. Also mentioned in: Gwynne, *Logic, Rhetoric and Legal Reasoning*, 42; and Boekhoff-van der Voort, "The Concept of Sunna," 15.

[89] George F. Hourani, "The Basis of Authority of Consensus in Sunnite Islām," *Studia Islāmica*, no. 21 (1964): 15 [henceforth cited as Hourani, "The Basis of Authority"]; Guraya, "The Concept of Sunnah," 17.

Meccan Arabs, most of whom persisted in following their ancestral customs instead. To this point the Qurʾān's admonishment was unequivocal: "When it is said to them, 'Follow what Allāh hath revealed:' They say: 'Nay! we shall follow the ways of our fathers.' What! even though their fathers Were void of wisdom and guidance?"[90] The re-enactment with the *sunan* of earlier prophets is reflected by Muḥammad's adoption of Jerusalem as the primary direction of prayer (*qibla*), long before the *Kaʿba* in Mecca was designated as the final *qibla*.[91] This symbolic act enabled the Prophet to include the *sunan* of earlier Abrahamic prophets and thereby to extend his message beyond the ancestral customs of the Arabs.[92] Nevertheless, the normative traditions of the pre-Islāmic Arabs were not entirely uprooted by Islām either. On the contrary, much of the customs and mores of the pre-Islāmic Arabs were in fact absorbed and/or modified by Islām.[93] An example of this is the pre-Islāmic newborn practice (*ʿaqīqa*) which was endorsed by the Prophet and became technically part of his *Sunna*.[94] In short, as David Forte rightly observed, the pre-Islāmic *sunna* formed the "tablet on which the *Qurʾān* wrote a more highly developed moral and legal sense".[95]

While the integration of pre-Islāmic customs into the *sunna* of early Islām is well established, several (mainly) Revisionist scholars remain sceptical about whether Muḥammad himself articulated a *Sunna* that was both normative and authoritative *ab initio*.[96] As we have noted earlier, these dismissive views towards an early Prophetic *Sunna* arise primarily from the lack of (corroborative) evidence. In addition to that, they also arise from secular reservations and a general rejection of Muḥammad's exceptionalism. Consider for example the following remarks by Crone and Hinds: "In pre-Islāmic Arabia every person endowed with a modicum of authority was a potential source of normative practice within his own family, tribe or wider circle of contacts; why should Muḥammad have been an exception?"[97] If we concede, however, to the idea that Muḥammad was perceived by his followers as a

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[90] Abdullah Yusuf Ali, trans., *The Holy Qur'an* (Hertfordshire: Wordsworth Editions Limited, 2000), 21 (2:170).

[91] According to *Tafsīr al-Jalālayn* verse 2:144 stipulates that the *Kaʿba* was henceforth to be taken as the *qibla*. This underscores the common belief that the *Kaʿba* was built by Abraham and Ismael, as is also supported by verse 2:127. See Jalāl al-Dīn al-Maḥallī and Jalāl al-Dīn as-Suyūṭī, *Tafsīr al-Jalālayn*, trans. Feras Hamza (n.p.: Royal Aal al-Bayt Institute for Islāmic Thought, 2008), 21. Furthermore, al-Shāfiʿī mentions a narration on the authority of Mālik ibn Anas regarding the change of *qibla* from al-Shām (Syria) to the *Kaʿba* in Mecca. See *Risāla*, 254-55. The same narration is also mentioned in the Muwaṭṭaʾ of Mālik, along with an additional narration which states that the Prophet prayed to Bayt al-Maqdis (referring to the holy site of Jerusalem) for sixteen months after arriving in Medina until it was changed some two months before the battle of Badr. See Mālik ibn Anas, *Al- Muwaṭṭaʾ of Imam Mālik ibn Anas: The First Formulation of Islāmic Law*, trans. Aisha A. Bewley (Schotland: Madinah Press Inverness, 2004), 74-5. For a more detailed discussion on this point see Ari M. Gordon, "Sacred Orientation: The Qibla as Ritual, Metaphor, and Identity Marker in Early Islām," (PhD diss., University of Pennsylvania, 2019).

[92] Guraya, "The Concept of Sunnah," 17. For a more elaborate discussion on the *sunan* of earlier prophets see Gwynne, *Logic, Rhetoric and Legal Reasoning*, 48.

[93] Fazlur Rahman, "Concepts Sunnah, Ijtihād and Ijmāʿ in the Early Period," *Islāmic Studies*, vol. 1, no. 1 (1962) 6-9.

[94] ʿUmar F. ʿAbd-Allāh Wymann-Landgraf, *Mālik and Medina: Islāmic Legal Reasoning in the Formative Period* (Leiden: Brill, 2013), 138 [henceforth cited as ʿAbd-Allāh, *Mālik and Medina*).

[95] Forte, "The Impact of Joseph Schacht," 3.

[96] Young, "Origins of Islāmic Law," 4-5.

[97] Crone, *God's Caliphs*, 59.

Messenger of God, then it would follow logically that his personal conduct bequeathed a compelling, and indeed exceptional, *sunna*. Certainly, Qurʾānic allusions alongside documented traditions (*ḥadīth*) and Muslim biographical and historical works (such as the *sīrah-maghāzī* literature) would support such a premise. But for most Revisionists the historicity of these sources is also at stake and therefore they cannot be relied upon to offer a final verdict on the matter. Then what about non-Islāmic sources of the seventh century CE; do these provide any clarity on Muḥammad's Prophetic career? On this the scholarly community is rather divided, and in my estimation, offers neither a resounding affirmation nor a compelling negation. While several non-Islāmic sources confirm the existence of Muḥammad, few offer additional information about his involvement and status amongst his contemporaries.[98] For example the chronicles of Sebeos (a 7th century Armenian Bishop), dated in the 660s CE, records Muḥammad in the following light:

> At that time [619/620; Thomson et.al] a certain man from along those same sons of Ismael, whose name was Mahmet [i.e., Mụhammad; ibid], a merchant, as if by God's command appeared to them as a preacher [and; ibid] the path of truth. He taught them to recognize the God of Abraham, especially because he was learnt and informed in the history of Moses. Now because the command was from on high, at a single order they all came together in unity of religion. Abandoning their vain cults, they turned to the living God who had appeared to their father Abraham. So, Mahmet legislated for them: not to eat carrion, not to drink wine, not to speak falsely, and not to engage in fornication […].[99]

Regarding Sebeos, Hoyland notes that: "[…] he is the first non-Muslim author to present us with a theory for the rise of Islam that pays attention to what the Muslims themselves thought they were doing."[100] Similar non-Islāmic references to Muḥammad can be found in some Arabic, Syriac, Coptic, Greek, Armenian and (Middle) Persian sources, albeit sparsely.[101] These sources feature explicit depictions of Muḥammad as either a prophet, preacher, king, leader, guide or (moral) instructor. For example the *Doctrina Iacobi nuper baptizati* (*The Teaching of Jacob, the Recently Baptized*), frequently dated as early in 634 CE (a mere two years after Muḥammad's death), mentions the following: […] "What can you tell me about the prophet who has appeared with the Saracens?" He replied, groaning deeply: "He is false, for the prophets do not come armed with a sword" […].[102] Another early reference

[98] Solomon A. Nigosian, *Islām: Its History, Teaching, and Practices* (Bloomington, Indiana: Indiana University Press, 2004), 6-7; John J. Saunders, *A History of Medieval Islām* (1965; repr., Taylor & Francis e-Library, 2002), 19-22.

[99] Robert W. Thomson, *The Armenian History Attributed To Sebeos: Part - I: Translation and Notes*, Translated Texts For Historians, vol. 31, with contributions from J. Howard-Johnson and T. Greenwood (Liverpool University Press, 1999), 95-96.

[100] Robert G. Hoyland, *Seeing Islām as Others Saw It: A Survey and Evaluation of Christian, Jewish and Zoroastrian Writings on Early Islām* (Princeton: The Darwin Press, Inc., 1997), 128.

[101] Ibid., 598.

[102] Ibid., 57.

is found in an anonymous Nestorian chronicle from Khuzistan (also known as the Khuzistan Chronicle; dated in 660 CE) which mentions the following in passing: […] "Then God raised up against them the sons of Ishmael, [numerous] as the sand on the sea shore, whose leader (*mdabbrānā*) was *mḥmd* (Muḥammad). Neither walls nor gates, armour or shield, withstood them, and they gained control over the entire land of the Persians" […].[103] Some explicit references to Muḥammad as a Messenger or Prophet have also been uncovered in epigraphic and palaeographic findings, however, the exact dating of these sources has proven to be rather difficult. For example in 1968 a limestone inscription was uncovered in Jerusalem which seems to refer to an event which saw the drafting of the text: […] "protection of God and the guarantee of His Messenger" […] (*dhimmat Allāh wa ḍamān rasūlih*).[104] This inscription also lists three notable companions of Muḥammad as witnesses to the effect of the draft. Moshe Sharon initially dated this inscription from either 652-653 or 672 CE, but more recent scholarship has refuted this dating.[105] A reference with the identical phrase "*dhimmat Allāh wa ḍamān rasūlih*" was also uncovered in a corpus of papyri that is dated (with high probability) in the year 680 CE. If correct this would establish the earliest mentioning of Muḥammad as a Prophet in papyri.[106] From about the 690s onwards epigraphic and palaeographic findings with specific references to Muḥammad become more frequent, and by the end of the seventh- and early eight-century CE, Muḥammad features prominently as a Prophet in a variety of sources.[107]

In sum, the non-Islāmic material evidence in support of Muḥammad's Prophetic career is available but indeed scarce. However, if we look at the totality of both Islāmic and non-Islāmic sources, the evidence in support of Muḥammad's Prophetic career increases significantly, and will likely continue to increase as future discoveries unfold. Certainly, if we abandon the shackles of scepticism we would be able to conclude with high probability that Muḥammad was indeed perceived by his followers as a Prophet. Moreover, Muḥammad's status can also be inferred from the material evidence in support of Islāmic religiosity in general, which as Sean Anthony noted, manifests extraordinarily early.[108] Ultimately, the persuasiveness of the material evidence depends on one's methodological orientation and approach to the sources. In one of her more recent statements Crone concludes on the matter as follows: "The evidence that a prophet was active among the Arabs in the early decades of the

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[103] Ibid., 186.

[104] Moshe Sharon, *Inscriptionum Arabicarium Palaestinae*, Handbook of Oriental Studies, vol. 1 (Brill: Leiden, 1997), xiii.

[105] Ibid; For a criticism on Sharon's dating see Sean W. Anthony, *Muhammad and the Empires of Faith: The Making of the Prophet of Islām* (Oakland, CA: University of California Press, 2020), 34-5n34.

[106] R. Hoyland, "The Earliest Attestation of the Dhimma of God and His Messenger and the Rediscovery of P. Nessana 77 (60s AH / 680 CE)," in *Islāmic Cultures, Islāmic Contexts - Essays In Honor Of Professor Patricia Crone,* eds. B. Sadeghi, A. Q. Ahmed, A. Silverstein and R. Hoyland, Islāmic History and Civilization - Studies and Texts, vol. 114 (Leiden: Brill, 2015), 51-71.

[107] Anthony, "Muhammad and the Empires of Faith," 28-9. For a more detailed survey on non-Islāmic historical references see Hoyland, *Seeing Islām As Others Saw It*.

[108] Anthony, "Muhammad and the Empires of Faith," 28.

7th century, on the eve of the Arab conquest of the middle east, must be said to be exceptionally good."[109] If this is indeed the case, it would be appropriate to conclude that Muḥammad must have had a tremendous impact on his nascent community, and that his personal conduct served as an exemplary model for later generations. Moreover, if the premise of Muḥammad's status as a Prophet stands, it would be credible to assume that the post-dated documentation of his *Sunna* was predicated on the raw and practical manifestation that preceded it. For it is highly unlikely that the early Muslim community remained uninspired by the exemplary behaviour of a 'Prophet of God'.[110] One of the possible explanations for the relatively late verbal transmission of the Prophetic *Sunna* is offered, in this regard, by Fazlur Rahman (d. 1988), who argued that the early Muslim community did not develop a theoretical or even verbal notion of the Prophetic *Sunna* but instead internalized the Prophet's exemplary conduct through natural appropriation. For this he coined the term "silent living *Sunna*," which essentially designates a non-verbal and practical *Sunna* which materialized *in actu*.[111]

It is furthermore alluding that the posthumous articulation of the Prophetic *Sunna* was prompted by political and social events that demanded ontological elucidation of the characteristics of Islām. In light of this, it is hardly surprising that Muḥammad's closest companions were most emphatically involved in the foundational ratification of Islāmic precepts (in the aftermath of Muḥammad's death in 632 CE). The early caliphs[112] in particular, initiated various socio-religious ordinances that pioneered the foundations of Islāmic law. One of their most significant contributions was the Qurʾānic compilation project which provided the *textus receptus* for legal activity.[113] In addition to serving as transmissive vehicles of the Prophet's message, the companions also established normative praxes (i.e. *sunan*) of their own.[114] The early jurists referred to such praxes as the *sunna māḍiya*; a notion which broadly

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[109] Patricia Crone, "What do we actually know about Mohammed?" Open Democracy, last modified June 10, 2008, https://www.opendemocracy.net/en/mohammed_3866jsp/.

[110] Wael B. Hallaq, *The Origins and Evolution of Islāmic Law* (Cambridge: Cambridge University Press, 2005), 47 [henceforth cited as Hallaq, *Origins*].

[111] Rahman, *Islām*, 54.

[112] The term 'caliph' (Arabic sing. *khalīfa*) denotes a 'successor', 'steward' or 'depute'. According to the Islāmic tradition the title was first adopted by Abū Bakr, who ruled as the *khalīfat rasūl Allāh* or 'successor of the Messenger of God'. See Wadad Kadi, Aram A. Shahin, "Caliph, Caliphate," in *The Princeton Encyclopedia of Islāmic Political Thought*, ed. Gerhard Bowering (Princeton, NJ: Princeton University Press, 2013), 81–6. There is some debate, however, about whether the early rulers actually used the title *khalīfat rasūl Allāh.* It would seem that the early rulers adopted several titles, amongst them *amīr al-muʾminīn* (commander of the faithful) and *khalīfat Allāh* (deputy of God). See Fred M. Donner, *Muhammad and the Believers: At the Origins of Islām* (Cambridge, MA: Harvard University Press, 2010), 99; and especially Crone, God's Caliph, 4-23.

[113] Hallaq, *Origins*, 66.

[114] The following narrative presented in Mālik's Muwaṭṭaʾ shows that the Companions were aware of their exemplary status amongst the populous: "Yaḥyā related to me from Mālik from Hishām ibn ʿUrwa from his father from Yaḥyā ibn ʿAbd ar-Raḥmān ibn Ḥāṭib that he had set off for *ʿumra* withʿUmar ibn al-Khaṭṭāb in a party of riders among whom was ʿAmr ibn al-ʿAs.ʿUmar ibn al-Khaṭṭāb dismounted for a rest late at night on a certain road near a certain oasis. ʿUmar had a wet dream when it was almost dawn and there was no water among the riding party. He rode until he came to some water and then he began to wash off what he saw of the semen until it had gone. ʿAmr ibn al-ʿĀṣ said to him, "It is morning and there are clothes with us, so allow your garment to be washed." ʿUmar ibn al-Khaṭṭāb said to him, "I am surprised at you, ʿAmr ibn al-ʿĀṣ! Even if you can find clothes, is everybody able to find them? By Allah, if I were to do that, it would become a *sunna*. No, I wash what I see, and I sprinkle with water what I do not see." See Ibn Anas, *Muwaṭṭaʾ*, 18, *ḥadīth* no. 85.

entails 'the model and authoritative conduct of leading men of the past'. [115] It is likely that Muḥammad's Sunnaic precedents were fused into the legal injunctions of the early caliphs, companions and successors (i.e. the *sunna māḍiya*); this was the understanding, at least, of the Medinan scholars of the late seventh- and early eight century CE, as will be discussed in more detail in chapter 2.[116] And it is also likely that this 'composite *Sunna*' was transmitted diffusely by means of oral traditions, both during and after Muḥammad's lifetime, until it was composed into written formats (*ḥadīth*) and ultimately sifted from non-Prophetic elements, thus bequeathing the Prophetic *Sunna* proper.[117] In order to understand how this process unfolded we need to take a closer look at the earliest documentation period in Islāmic history.

The Umayyad Caliphate and the Ḥadīth Fabrication Movement

The ascension of the Umayyads to the caliphate marks a definitive turning point in Islāmic political history. For the first time, the caliphal office passed over core companions of the Prophet and political rule dissociated sharply from the old communities of Mecca and Medina and instead centred on the newfound capital in Damascus. It is important to keep in mind that the Umayyad caliphate was essentially born out of a succession war with several members of the Prophet's household (*ahl al-bayt*) and descendants of the early companions and caliphs. This, in itself, complicated the Umayyad's bid for political legitimacy and created a milieu wherein the Umayyad administration faced continuous challenges by various oppositional movements and rivalling factions.[118] One of the most successful oppositional movements was led by ʿAbd Allāh ibn al-Zubayr (an offspring of the major companion al-Zubayr ibn al-ʿAwwām), who's Meccan based counter-caliphate (the Zubayrid caliphate) at one stage even eclipsed the Umayyad caliphate in size and strength.[119] As a consequence of this political-religious environment, the Umayyad's bid for legitimacy relied less on association with the Prophet and his nascent community, and more on political pragmatism and brute force.[120] However, as Guillaume rightly pointed out, it would be wrong to brand the Umayyad caliphate as a 'godless régime' altogether.[121]

More than anything, it was their deficient political-religious legitimacy and troubled relations with Islām's traditional heartland which incentivised late Umayyad rulers to resort to religious symbolism for propaganda purposes.[122] It is for example no coincidence that the formal appropriation of religious symbolism emerged during the rule of the late Umayyad caliph ʿAbd al-Malik ibn Marwān.

[115] Hallaq, *Origins*, 66

[116] Ibid., 47. See also Marshall G. S. Hodgson, *The Venture of Islām, The Classical Age of Islām*, vol. 1 (Chicago: University of Chicago Press, 1974), 198.

[117] Rahman, *Islām*, 56.

[118] Gerald R. Hawting, *The First Dynasty of Islām: The Umayyad Caliphate AD 661-750*, 2nd ed. (London: Routledge, 2000), 11; Hodgson, *The Venture of Islām*, 229.

[119] Ibid., 218-223.

[120] Ibid., 217-18.

[121] Alfred Guillaume, *The Traditions of Islām: An Introduction to the Study of the Hadith Literature* (Oxford: Clarendon Press, 1924), 38.

[122] Hawting, *The First Dynasty of Islām*, 12-5.

For it was he who ultimately defeated the Zubayrids and reunited the empire through a series of centralization policies and socio-religious reforms.[123] Among other things, ʿAbd al-Malik initiated religious inscriptions on coinage, re-administered the Qurʾānic script, appointed new judges to the (garrison) cities and towns, and assumed formal authority over religious rites and judicial procedures.[124] As far as is evidenced, this is the first time that the Islāmic state displayed religious slogans on coins, documents and practical objects, and also the earliest manifestation of formal Islāmic documentation.[125]

Considering the extensive proliferation of Islāmic symbolism during this period, it is hardly surprising why some scholars have traced the origins of Islāmic theology to ʿAbd al-Malik. Some scholars even went so far by arguing that the character of the Prophet Muḥammad was invented by ʿAbd al-Malik as a means to bolster political allegiance.[126] These assertions hold little merit, if any, and are of little interest for our current inquiry. However, while some of the attributions to ʿAbd al-Malik are clearly exaggerated and misguided, there is ample evidence to suggest that his establishment resorted to *ḥadīth* fabrication for propaganda purposes.[127] One of the remarkable episodes in this regard was brought to light by Goldziher and involves the scholastic efforts of the notable jurist Ibn Shihāb al-Zuhrī (commonly known as Ibn Shihāb or simply Zuhrī). Based on several sources Goldziher (and others after him) concluded that Zuhrī was closely involved with the higher circles of the Umayyad administration in supporting their *ḥadīth* propaganda efforts, aimed to deflect the political-religious influence of Ibn al-Zubayr (the aforementioned anti-caliph).[128] To this end Zuhrī was allegedly tasked by ʿAbd al-Malik to justify the pilgrimage to Jerusalem instead of Mecca (the operational base of al-Zubayr).[129] While Zuhrī's precise involvement remains contested, it is clear that he sought service at the Umayyad court, and in that sense followed in the footsteps of his own teacher and fellow jurist, ʿUrwa ibn al-Zubair, who was also well acquainted with the inner circles of Umayyad administration.[130]

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[123] Hoyland, *In God's Path*, 195.

[124] Hodgson, *The Venture of Islām,* 223-226. ʿAbd al-Malik allegedly also erected the notable al-ʾAqṣā Mosque in Jerusalem, which became an important holy sight for Muslims. See Zayde Antrim, "Jerusalem," in *The Princeton Encyclopedia of Islāmic Political Thought*, ed. Gerhard Bowering, with the assistance of Patricia Crone et al. (Princeton, NJ: Princeton University Press, 2013), 272.

[125] Hoyland, *In God's Path*, 195.

[126] For example Crone and Cook argued that the recognizable Islāmic character, as well as its origins, are retractable to the reign of ʿAbd al-Malik. See Patricia Crone and Michael Cook, *Hagarism: The Making of the Islāmic World* (Cambridge: Cambridge University Press, 1977), 29. Koren and Nevo even argued that the terms 'Islām' and 'Muslim' did not exist before ʿAbd al-Malik, and that prior to his reign the official religion was some sort of an "indeterminate monotheism," while a significant section of the population remained pagan. They also argue that the figure of Prophet Muḥammed was invented by ʿAbd al-Malik and does not appear in earlier sources. See Yehuda D. Nevo and Judith Koren, *Crossroads to Islām: The Origins of the Arab Religion and the Arab State* (New York: Prometheus Books, 2003), 162, 220, 234, 247, 255-66.

[127] Hallaq, *Origins*, 73; Guillaume, *The Traditions of Islām*, 44.

[128] Mentioned in Michael Lecker, "Biographical Notes on Ibn Shihab al-Zuhri," *Journal of Semitic Studies XLI/1* (Spring 1996) 42.

[129] Ibid.

[130] Zuhrī was eventually appointed as a supreme judge by the Umayyad caliph Yazid II. See J. Fueck, "The Role of Traditionalism in Islam," in *Hadith Origins and Developments*, ed. Harald Motzki (New York: Routledge, 2016), 6.

Politicization of *ḥadīth* continued under subsequent ʿAbbāsid administrations who instead construed religious narratives for the purpose of delegitimizing the Umayyads. As a countermovement the ʿAbbāsid contenders revised chronicles in support of the notion that political legitimacy hinged on closeness to the Prophet.[131] These narratives were generally construed in messianic overtones and prophecies and sometimes even employed invented narratives and the framing of historical events (such as the martyrdom of the Prophet's grandson al-Ḥusayn at the hands of the Umayyad ruler Yazid I).[132] Additionally, their propaganda efforts aimed to buttress the ʿAbbāsid's ancestral claim to the uncle of the Prophet, al-ʿAbbās ibn ʿAbd al-Muṭṭalib (from whom they derived their name).[133] The ʿAbbāsids were thus naturally inclined towards a Muḥammad centric interpretation of the *sunna*, simply because their political legitimacy hinged on their self-acclaimed relationship with the Prophet.[134]

In short, the evidence in support of a political rift between the spiritual community of Islām and the administrative body of the late Umayyad and early ʿAbbāsid administrations is cogent. What is furthermore conclusive is the politicization of *ḥadīth* in service of the state, which in Schacht's view, involved the endorsement, modification or rejection of *ḥadīth*.[135] However, while this certainly complicates the historical authenticity of *ḥadīth* in general, it does not, in any way, justify a categorical rejection of *ḥadīth*. As Muḥammad Zubayr Ṣiddīqī noted, the fact that consecutive Umayyad rulers resorted to *ḥadīth* fabrication is in itself sufficient proof that *ḥadīth* was already an important vehicle for religious transfer of knowledge.[136] More importantly, while the state (both Umayyad and ʿAbbāsid alike) held executive authority, it played a rather limited role in legal-theoretical discourse. In fact, Islāmic legal theory was mainly formulated by independent legal scholars as will become clear in the following section.

The Early Legal Specialists

From approximately 700 to 740 CE numerous private study circles, or *ḥalaqāt,* emerged independently from the administrative judiciary of the Umayyad caliphate. These *ḥalaqāt*, centred mainly in mosques, were attended by private individuals who took a scholarly interest in various Islāmic disciplines. The bulk of their activities involved discussions on Qurʾānic exegesis, Prophetic history (*sīra*) and personal piety, while in some cases they also engaged in elaborate discussions on legal rulings. These *ḥalaqāt* were spearheaded by notable legal specialists such as: Abū ʿAbd Allāh Muslim ibn Yasār (d. ca. 728), al-Ḥasan al-Baṣrī (d. 728), Qatāda ibn Diʿāma al Sadūsī (d. 735), Sufyān al-Thawrī (d. 777), ʿĀmir al-

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[131] Hugh Kennedy, *The Early Abbasid Caliphate: A Political History* (1981; repr., Abingdon: Routledge, 2016), 38.
[132] Hala Mundhir Fattah, Frank Caso, *A Brief History of Iraq* (New York: Facts on File Inc., 2009), 77.
[133] Ibid, 76.
[134] Kennedy, *The Early Abbasid Caliphate*, 41.
[135] Mentioned in John Burton, *An Introduction to the Ḥadīth* (1994; repr., Edinburgh: Edinburgh University Press, 2001), xxi.
[136] Muḥammad Zubayr Ṣiddīqī, *Ḥadīth Literature: Its Origin, Development, Special Features and Criticism* (Calcutta, India: Calcutta University Press, 1961), xviii, n3.

Shaʿbī (d. 728), Ḥammād ibn Abī Sulaymān (d. 737), Rabīʿa ibn Abī ʿAbd al-Raḥmān (also known as Rabīʿat al-Raʾy; d. 753), ʿAṭāʾ ibn Abī Rabāḥ (d. ca. 733), Nāfiʿ (d. 736), ʿAmr ibn Dīnār (d. ca. 743/44), Saʿīd ibn al-Musayyib (d. 712 or 723), al-Qāsim ibn Muḥammad (d. 728), Sulāyman ibn Yasār (d. 728) and ʿUrwa ibn al-Zubair (d. 712).[137] These private jurists expounded innovative approaches to a wide range of subjects and issued 'personal' legal opinions (*fatāwā*) on the basis of Qurʾānic interpretations, the *Sunna* of the Prophet and the *sunna māḍiya* (the model and authoritative conduct of leading men of the past).[138] They additionally progressed epistemic legal knowledge as a principle foundation for legal arbitration and contributed to the textualization of legal sources.[139] It is about this period that we witness an early advancement of Prophetic authority as a distinguishable source of positive law. While *ḥadīth* already played an important role during this period, it was yet quantifiably insufficient to postulate positive law.[140] Prophetic authority was therefore mainly derived from the Prophetic *sīra* and the *sunna māḍiya*.[141] Notwithstanding, the *Qurʾān* remained the primary source for legal recourse and was followed in minutiae by both the judiciary and private specialists.[142]

The Rise of Ḥadīth Literature

The earliest transmissions of *ḥadīth* are retraceable to the period of the *ḥalaqāt* and were most likely mediated in unarranged oral settings. It should be noted, that the extent of oral transmissions in early Islām has elicited contradictory scholarly responses over the years.[143] For example, Nabia Abbott's *Studies in Arabic Literary Papyri* (1957) and Fuat Sezgin's *Geschichte des arabischen Schrifttums* (1996), initially questioned the effective contribution of oral transmissions in early Islām and suggested an early, albeit sporadic, written tradition of *ḥadīth*.[144] More recent works, however, have reinstated the importance of oral transmissions and pointed out that the writing of *ḥadīth* was, for a long time, discouraged, or even forbidden, by Muslim scholars.[145] For example, a recent study by Garrett Davidson suggests (quite convincingly) that oral transmissions and aural receptions of *ḥadīth* remained dominant well after its canonization in the tenth century CE.[146] It is more likely, however, that the *ḥadīth* transmissions of the eight century took place in a combination of written and oral settings, whereby oral

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[137] Hallaq, *Origins*, 64.
[138] Ibid., 66; Brown, *Rethinking tradition*, 10.
[139] Hallaq, *Origins*, 66.
[140] Ibid; Boekhoff-van der Voort, "The Concept of sunna," 16.
[141] Ibid., 68-70, 102-3.
[142] Josef van Ess, *Theology and Society in the Second and Third Centuries of the Hijra: A History of Religious Thought in Early Islām*, trans. John O'Kane (Leiden: Brill, 2017), 43.
[143] Harald Motzki, *The Origins of Islāmic Jurisprudence: Meccan Fiqh Before the Classical Schools*, trans. Marion H. Katz (Leiden: Brill, 2002), 95.
[144] Mentioned in Gregor Schoeler, *The Oral and the Written in Early Islām*, trans. Uwe Vagelpohl, ed. James Montgomery (Abingdon: Routledge, 2006), 22-30.
[145] Burton, *An Introduction to the Ḥadīth*, 175; Van Ess, *Theology and Society,* 441; Gregor Schoeler, "Mündliche Thora und Hadīṯ: Überlieferung, Schreibverbot, Redaktion," *Der Islām*, vol. 66, issue 2 (2009): 221.
[146] Garrett A. Davidson, *Carrying on the Tradition: A Social and Intellectual History of Hadith Transmission across a Thousand Years* (Boston: Brill, 2020), 6.

transmissions were supplemented in writing.[147] Yet the pivotal role of oral transmissions cannot be underestimated since they outweighed textual transmissions in legal rulings.[148] This is evidenced by the prioritization of *isnād* which use wordings such as "*samiʿtuhu yaqūl*," (I heard him say) or "*akhbaranī*," (he informed me) over ambiguous wordings such as "*qāla*" (he said). [149]The first category indicates audition (in good faith) and is generally attributed greater authenticity and legal strength compared with textual narrations. The expert's preference for *samāʿ* (hearing) is furthermore conducive because it precluded diligent dissemination of *ḥadīth* in *ipsissima verba* which in turn reduced the possibility of scriptural inadequacies.[150]

The earliest compilations of textual *aḥādīth* appear in brief personal collections that are arranged in various formats such as: *rasāʾil* (letters; sing. *risālah*), *ṣuḥuf* (notebooks; sing. *ṣaḥīfa*), *ajzāʾ* (booklets; sing. *juzʾ*), *aṭrāf* (partial narrations; sing. *ṭaraf*) and *nuskha* (copies, transcripts or recensions; sing. *nuskhah*).[151] These textual collections (if they can be called that) provided an early measure for distinction and were particularly useful for corroborating oral transmissions.[152] The earliest available example of such collections is the *Ṣahīfa* of Hammām ibn Munabbih (d. 719) which survived only in secondary copies. The interesting feature of Hammām's *Ṣahīfa* is its partial use of *isnād*, which indicates that the technique was probably used earlier than commonly assumed.[153]

The historical origins of *isnād* remains a topic of much debate amongst scholars. Some retrace its origins to Talmudic practices and infer its appropriation by Muslims around the period of the Second Civil War in Islām (680-92 CE).[154] Others locate its effective introduction in the early eight century CE. Although *isnād* was certainly not fully endorsed until the ninth century, there is ample evidence of earlier usage. For example, about half of the traditions that go through Ibn Shihāb al-Zuhrī (d. 741-2) already

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[147] Herbert Berg mentions that Schoeler argued that the early traditionists probably did not employ written materials in their public teachings while privately holding written collections as mnemonic aids. Mentioned in Herbert Berg, "The Divine Sources," in *The Ashgate Research Companion to Islāmic Law*, ed. Peri Bearman and Rudolph Peters (New York: Routledge 2014), 31; Harald Motzki, Nicolet Boekhoff-van der Voort, and Sean W. Anthony, *Analysing Muslim Traditions: Studies in Legal, Exegetical and Maghāzī Ḥadīth* (Leiden: Brill, 2010), 119.

[148] Wael B. Hallaq, *Authority, Continuity, and Change in Islāmic Law* (Cambridge: Cambridge University Press, 2001), 129 [henceforth cited as Hallaq, *Authority*].

[149] Motzki, *The Origins of Islāmic Jurisprudence*, 81.

[150] Burton, *An Introduction to the Ḥadīth*, 175-176.

[151] Aisha Y. Musa, "The Sunnification of Ḥadīth and the Hadithification of Sunna," in *The Sunna and its Status in Islāmic Law: The Search for a Sound Hadith*, ed. Adis Duderija (New York: Palgrave Macmillan US, 2015), 77; Adam Gacek, *The Arabic Manuscript Tradition: A Glossary of Technical Terms and Bibliography* (Leiden: Brill, 2001), 140; Jamila Shaukat, "Classification of Ḥadīth Literature," *Islāmic Studies*, vol. 24, no. 3 (1985): 357-359.

[152] Alfred. F. L. Beeston et al., *Arabic Literature to the End of Ummayyad Period* (Cambridge, NY: Cambridge University Press, 1983), 290.

[153] Ibid., 272.

[154] Gregor Schoeler, "Oral Torah and Ḥadīth," in *Hadith Origins and Developments*, ed. Harald Motzki (New York: Routledge, 2016), 71; It is also worth mentioning Lowry's comparison of al-Shāfiʿī's *bayān* scheme [al-Shāfiʿī's theory of legal proof, which will be discussed in more detail in chapter 2] with Rabbinic Judaism. He notes: "[…] the intensely complementary nature of the relationship between *Quran* and *Sunnah*, as portrayed in the *bayān* scheme, recalls the relationship between the Written and Oral Torahs in Rabbinic Judaism." See Joseph Lowry, "Does Shāfiʿi have a Theory of Four Sources of Law?," in *Studies in Islāmic Legal Theory*, ed. Bernard G. Weiss, vol. 15 (Leiden: 2002, Brill), 47, n57.

utilized *isnād*, albeit only partially connected.[155] Likewise, Mālik's Muwaṭṭaʾ also narrates a substantial amount of *ḥadīth* with incomplete *isnād*.[156] The early use of *isnād* is also inferred from incidental reports by notable Muslim scholars, such as the following account by Ibn Sirīn (d. 728):

> "They did not ask about the *isnād*, but when civil strife (*fitna*) arose they said, 'Name to us your men.' Those who followed the *Sunna* were considered and their traditions were accepted; and innovators were considered and their traditions were not accepted."[157]

Scholars have long debated about which historical event ibn Sirīn's *fitna* is referring to.[158] Whereas Muslim scholars generally considered the *fitna* to refer to the murder of the third caliph ʿUthmān (d. 656), Western scholars variously placed it somewhere between the first and second Islamic century.[159] Alternatively, John Burton suggests the possibility of a longitudinal crisis which induced the awareness of division and generated an appeal for new-found unity.[160] It seems certainly plausible that the demand for *isnād* grew out of sectarian division and politicization of *ḥadīth*. However it may be, the onset of *isnād* seems to correlate with the earliest written compilations of *ḥadīth*.[161]

It was not until the second half of the eight century that the first systemized collections of *ḥadīth* appeared in so called *musannafāt* (sectional compilations; sing. *musannaf*).[162] The earliest of these were the *musannafāt* of ʿAbd al-Malik ibn Jurayj (d. 767), Maʿmar ibn Rāshid (d. 770), ʿAbd al-Razzāq al-Sanʿānī (d. 827) and, most notably, Mālik's Muwaṭṭaʾ.[163] Other, less relevant, formats which emerged during this period include the *muʿjam* (arranged by a variety of subjects with references to specific scholars, cities or clans), *amālī* (dictation by a *shaykh*; scholar), *jāmiʿ* (a subdivision of *musannaf*), *sunan* (organized by legal topics) and *musnad* (containing connected chains to the Prophet).[164] These early *ḥadīth* compilations signify the widespread circulation of *ḥadīth* and its early legal implementation. Additionally, these compilations also precipitated early manifestations of *ḥadīth* criticism. Already by the late eight century CE, were jurists issuing warnings against the acceptance of unscrupulous and unreliable narrators.[165] The concurrent rise of *isnād* triggered a specialistic demand for biographical

[155] Motzki, Boekhoff-van der Voort and Anthony, *Analysing Muslim Traditions*,13.
[156] Burton, *An Introduction to the Ḥadīth*, 116.
[157] Cited in James Robson, "The Isnād in Muslim Tradition," in *Hadith Origins and Developments*, ed. Harald Motzki (New York: Routledge, 2016), 163.
[158] Ibid., 169-170.
[159] Jamila Shaukat, "The Isnād in Ḥadīth Literature," *Islamic Studies*, vol. 24, no. 4 (1985): 446-447. Some western scholars considered the statement attributed to ibn Sirīn to be spurious. For example, Schacht discarded its authenticity and concluded that "the regular practice of using *isnāds*" did not exist before the second Islamic century. See Schacht, *Origins*, 36-7.
[160] Burton, *An Introduction to the Ḥadīth*, 117; See also Davidson, *Carrying on the Tradition*, 5.
[161] Beeston et al., *Arabic Literature To The End of Ummayyad Period*, 271-77.
[162] Ibid.
[163] Ibid. See also Motzki, "The Muṣannaf of ʿAbd al-Razzāq al-Sanʿānī," 1-21.
[164] Shaukat, "Classification of Ḥadīth Literature," 357-375.
[165] Beeston et al., *Arabic Literature To The End of Ummayyad Period*, 272; Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Ḥadīth* (1983; repr., Cambridge: Cambridge University Press, 1985), 134.

evaluations (*al-jarḥ wa al-taʿdīl*) of *ḥadīth* narrators in what would later developed into the subdiscipline of *ʿIlm al-Rijāl* (Knowledge of Men; referring to the transmitters of *ḥadīth*).[166] There was also widespread critique towards the legal implementation of *ḥadīth* which was instigated by its frequent contradictions with Qurʾānic narratives and normative praxes. In chapter 3 we shall return to this topic, once more, as we will discuss the legal authority of solitary *ḥadīth*. But first, we will examine the development of the proto-legal schools and the subsequent disputes that accompanied their rise in the next chapter.

[166] According to Motzki the principles and categories of Muslim *ḥadīth* criticism were worked out between the tenth- and thirteenth centuries. See Harald Motzki, *Ḥadīth: Origins and Developments* (2004; repr., New York: Routledge, 2016), xxxiii, n89. He furthermore points out that the first systemic treatises on Muslim *ḥadīth* criticism were al-Rāmhurmuzī's (d. 971) *al-Muḥaddith al-fāṣil* and al-Ḥākim al-Nayāsbūrī's (d. 1014) *al-Maʿrifa fī ʿulūm al-ḥadīth*; but the most sophisticated early work on *ḥadīth* criticism was, according to Motzki, ibn al-Ṣalāḥ's (d. 1245) *Muqaddima fī ʿulūm al-ḥadīth* [*ibid.*]. Melchert, on the other, hand identified al-Shāfiʿī's Risāla as the earliest extant theoretical discussion on *ḥadīth* criticism. See Christopher Melchert, "The Theory and Practice of Hadith Criticism in the Mid-Ninth Century," in *Islām at 250*: *Studies in Memory of G.H.A. Juynboll*, eds. Petra M. Sijpesteijn and Camilla Adang (Leiden: Brill, 2020), 76.

2. The Proto-Legal Schools and al-Shāfiʿī's Disengagement

By the second half of the eight century the activities of the *ḥalaqāt* progressed into distinguishable legal traditions that rallied around several leading scholars such as: Abū Ayyūb al-Sakhtiyāni (d. 748), Ibn Shubruma (d. 761), Ibn Abī Laylā (d. 765), Abū Ḥanīfa (d. 767), Ibn Jurayj (d. 768) ʿAbd al-Rahmān al-Awzaʿī (d. 774), Shuʿba ibn al-Ḥajjāj (d. 776), Sufyān al-Thawrī (d. 778), Ibrāhīm ibn Adam (d. 782), Al-Layth ibn Saʿd (d. 791), Ibn Abī Sharīk al-Nakhaʿī (d. 793), Mālik ibn Anas (d. 795), ʿAbd Allāh ibn al-Mubārak (d. 797), Abū Yūsuf (d.798), Muḥammad al-Shaybānī (d. 805) and Sufyān ibn ʿUyaynah (d. 814).[167] Operating as private specialists, these scholars emerged as the main representatives of the proto-schools of law, which Schacht identified as the "ancient schools".[168] According to Schacht the proto-schools did not exhibit "any noticeable disagreement on principles or methods" but were instead defined by their geographical distribution. [169] He subsequently identified Iraq (Basra and Kufa), Hijaz (Mecca and Medina) and Syria (Damascus) as the main geographical centres where independent legal activities concentrated, and furthermore noted that the jurists aligned themselves with the "generally agreed practice" (*ʿamal al-amr al-mujtamaʿ ʿalaih*) of either one of these regions.[170] In other words, it was not *ḥadīth*, but rather consensus, which defined the scope of legal authority within the proto-schools, or so Schacht would have us believe.[171] He notes: "the real basis of legal doctrine in the ancient schools was not a body of traditions handed down from the Prophet [i.e. *ḥadīth*, F.B.] or even from his Companions, but the 'living tradition' of the school as expressed in the consensus of the scholars." [172]

Schacht was right in so far that legal authority in the proto-schools was not defined by *ḥadīth* but rather by the "ideal or normative usage of the community".[173] However, as Hallaq and others have pointed out, his characterization of the proto-schools as mere regional phenomenon is grossly exaggerated and empirically unaccounted for.[174] While some exponents of the proto-schools indeed professed to follow the consensus within their region, in reality such consensus was rare, if not entirely absent.[175] Any normative practice, whether agreed upon or not, is at best a reflection of doctrinal conventions that subsisted on a local level (such as the Medinan doctrine of *ʿamal*, which will be discussed in more detail shortly). This explains why, according to some early sources at, or about, the

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[167] Hallaq, *Origins*, 166; Ousama Arabi, *Early Muslim Legal Philosophy: Identity and Difference in Islamic Jurisprudence*, G.E. von Grunebaum Center for Near Eastern Studies University of California (1999), 18.

[168] Schacht, *Introduction*, 28; George Makdisi, "The Significance of The Sunni Schools of Law in Islamic Religious History," *International Journal of Middle East Studies*, vol. 10, no. 1 (February 1979): 1-3.

[169] Schacht, *Origins*, 7; Idem, *Introduction*, 29.

[170] Schacht, *Origins*, 8.

[171] Schacht Origins, 11, 58;

[172] See Schacht, *Origins*, 11, 58, 98. See also Forte, "The Impact of Joseph Schacht," 9.

[173] He notes: "the real basis of legal doctrine in the ancient schools was not a body of traditions handed down from the Prophet or even from his Companions, but the 'living tradition' of the school as expressed in the consensus of the scholars." See Schacht, *Origins*, 11, 58, 98. See also Forte, "The Impact of Joseph Schacht," 9.

[174] Hallaq, "Reevaluation," 1-26.

[175] The Iraqi jurist in particular would frequently claim a regional consensus on various legal matters. See Ahmad Hasan, "Ijmāʿ in the Early Schools," *Islamic Studies*, vol. 6, no. 2 (1967): 121-2.

end of the ninth-century some five hundred schools of jurisprudence had ceased to exist.[176] It is simply inconceivable that such a large distribution of legal schools exhibited characteristics on a purely geographical basis while at the same time lacking "any noticeable disagreement on principles or methods".

In light of recent studies, it seems more likely that the proto-schools developed distinctive doctrinal positions and employed alternative juristic methods that were articulated and disseminated by their leading jurists (*riyāsa*).[177] The extensive role of individual jurists as well as the multivocality of legal doctrine is brushed aside by Schacht's generalizing delineation. Yet, while modern scholarship has largely distanced itself from such generic geographical delineations, it has not completely abandoned this tendency either. In the next section we will discuss how, yet another, geographical delineation, has obscured al-Shāfiʿī's doctrinal position.

The Rationalist-Traditionist Divide

Due to increased complexities within the religious and political domains, the demand for systemic law became more pertinent during the second half of the eight century CE.[178] But the search for the epistemic foundations of the sacred law coincided with a great controversy which saw the proponents of rationalism and traditionalism pitted against each other in a fierce epistemological dispute.[179] The main parties involved in this turbulent saga were the legal pragmatists (*ahl al-raʾy*), the speculative theologians (*ahl al- Kalām*[180]), and the traditionists (*ahl al-ḥadīth*).[181] The synoptic view is that the legal pragmatists (broadly representing the proto-schools) prioritized local doctrines and legal interpretation, while the traditionists (*ahl al-ḥadīth*) instead advocated the primacy of the *Qurʾān* and *ḥadīth*.[182]

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[176] Mentioned in Adam Mez, *The Renaissance of Islam*, trans. S. Khuda Bakhsh and D. S. Margoliouth (London: Luzac and Co., 1937), 212.

[177] George Makdisi, "Tabaqāt-Biography: Law and Orthodoxy in Classical Islam," Islamic Studies, Vol. 32, No. 4 (Winter 1993): 371-96; Christopher Melchert, How Ḥanafism came to Originate in Kufa and Traditionalism in Medina, 318-47; Hallaq, "Reevaluation," 1-26; idem, *Origins*, 182-184.

[178] Brown, *Rethinking Tradition*, 13.

[179] Melchert, *The Formation of the Sunni Schools*, 1.

[180] The term *Kalām* (lt. speech, word or utterance) is most likely derived from an eight century theological dispute on whether God's speech (i.e. the *kalām* of the *Qurʾān*), was created or uncreated. See Alexander Treiger, "Islamic Theologies during the Formative and the Early Middle period - Origins of Kalām," in *The Oxford Handbook of Islamic Theology,* ed. Sabine Schmidtke (Oxford: Oxford University Press, 2016), 27–43. The *ahl al-Kalām* were later identified by the term *Muʿtazila* which is most likely derived from the infinitive *ʾiʿtizāl*, meaning to 'retire' or 'withdraw' (-from). There is much obscurity about the origins of this term, but several Sunni sources suggest that the founder of the *ahl al-Kalām* movement (allegedly Wāṣil ibn ʿAṭāʾ) withdrew from the circles of al-Ḥasan al-Baṣrī due to a theological dispute on whether a grave sinner should be considered a believer or an unbeliever; hence his followers were called the *Muʿtazila* or 'those who withdrew' (from orthodoxy). See Alnoor Dhanani, *The physical theory of Kalām: Atoms, Space, and Void in Basrian Mu'tazilī Cosmology* (Leiden: Brill, 1993), 7. For a more elaborate discussion on this point see Racha el-Omari, "The Muʿtazilite Movement," in *The Oxford Handbook of Islamic Theology*, ed. Sabine Schmidtke (Oxford: Oxford University Press), 130-4.

[181] Brown, *Rethinking Tradition*, 13. Fazlur Rahman points out that the *ahl al- Kalām*, or rather *Muʿtazila*, were not only theologians but also lawyers and jurists. See Rahman, *Islam*, 61-2.

[182] Schacht, *Origins*, 58, 67; Melchert, *The Formation of the Sunni Schools*, 1-4; Hallaq, *Origins*, 74-80.

Although they did not see eye to eye, both agreed that the speculative theologians were farthest removed from the truth due to their fervent commitment to speculative philosophy. Unlike the legal pragmatists, the speculative theologians rejected *ḥadīth* altogether and instead prioritized rational inquiry and substantive reasoning in all matters that were not governed by the *Qurʾān*. [183] And it was because of their radical commitment to speculative philosophy, that these theologians were eventually ostracized into the heterodoxic fringes of Islām.[184] Within the orthodox spectrum the main battle over legal epistemology thus raged between the *ahl al-raʾy* and *ahl al-ḥadīth*.

One of the widely circulating postulates is that the juristic-epistemological chasm between the *ahl al-raʾy* and *ahl al-ḥadīth* manifested along geographical boundaries, effectively separating Iraqi *raʾy* from Hijazi *ḥadīth*.[185] Following this postulate many scholars have identified al-Shāfiʿī's Risāla as an alternative or middle position.[186] Yet the more fundamental question is how the *ahl al-raʾy* and *ahl al-ḥadīth* related to one another and whether their dispute was defined by geography. As it turns out, the ontology of the *ahl al-raʾy* and *ahl al-ḥadīth* is not clearly, nor consistently, defined in our historical records.[187] In fact, the terms *ahl al-raʾy* and *ahl al-ḥadīth* are in themselves highly misleading for the *ahl al-raʾy* did not reject *ḥadīth per se*, nor were the *ahl al-ḥadīth* immune to rationalist inquiry.[188] Furthermore, it is important to bear in mind that most of what we know about the *ahl al-raʾy* (and the *ahl al-kalām* for that matter) is derived from polemic works by their contesters, including many works of al-Shāfiʿī. As Hallaq observed, it is no coincidence that "association with *raʾy* was always a description by the 'other' while *ḥadīth* was often a self-description".[189] Moreover, as Melchert has clearly demonstrated, the *ahl al-raʾy* and *ahl al-ḥadīth* were more widely dispersed than was hitherto assumed.[190] Based on his observations, Melchert eventually concluded that the geographical dichotomy regarding Iraqi *raʾy* and Hijazi *ḥadīth* is no longer tenable.[191] Not only does his study abate the hitherto presumed geographical distribution of the two camps, but more importantly, it also indicates that

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[183] Brown, *Rethinking Tradition*, 13.

[184] Their commitment to speculative philosophy is exemplified by their principled stance on logical necessity. This led them to the theological position that God is in a state of 'permanent obligation' since He proscribed unto himself justice, he must always act accordingly, for otherwise He would not be The Utterly Just (*al-ʿAdl*). The Mu'tazila propagated this theological position so fervidly that they eventually identified themselves as the 'partisans of Justice' (*ahl al-ʿAdl). See* George F. Hourani, "Islamic and Non-Islamic Origins of Mu'tazilite Ethical Rationalism," *International Journal of Middle East Studies*, vol. 7, no. 1 (January 1976): 84.

[185] Melchert, "How Ḥanafism came to Originate," 346.

[186] For example, Schacht identified the Risāla as a middle position between the *ahl al-raʾy* and *ahl al-ḥadīth* [Schacht Origins, 36, 80], whereas Coulson and Hallaq considered it a synthesis between the two opposites [Noel J. Coulson, *A History of Islamic Law* (1964; repr., Edinburgh: Edinburgh University Press, 1978), 61; Hallaq, "Master Architect," 593. Initially Goldziher identified al-Shāfiʿī as the main vindicator of traditionalism [mentioned in ʿAbd-Allāh, *Mālik and Medina*, 509n6].

[187] See Makdisi, "The Significance of The Sunni Schools," 3; Melchert, "Traditionist-Jurisprudents," 383.

[188] Melchert, "Traditionist-Jurisprudents," 389-90.

[189] Hallaq, *Origins*, 74.

[190] Melchert's reconstruction of the rise of *Ḥanīfī*sm, shows that several early sources list members of the *ahl al-ḥadīth* in Iraq and the *ahl al-raʾy* in Hijaz. See Melchert, "How Hanafism came to Originate," 345.

[191] Ibid.

generalizing tendencies amongst historians have distorted our perception of early Islāmic legal development.

In short, while the rationalist-traditionist framework provides an insightful perspective on the doctrinal positions of the proto-schools, it fails to adequately reflect the true nature of early Islāmic legal development. The rationalist-traditionist divide is not only a reflection of doctrinal development but also, and perhaps more so, a reflection of the underpinning theological, philosophical and political upheavals of the late eight-century.[192] If we are to gain a better understanding of the doctrinal setting unto which al-Shāfiʿī pressed his legal theory, we must look beyond such generic frameworks and instead aim to unearth the apparent and subtle distinctions that existed amongst the early legal schools. For our purposes we shall focus on the doctrinal positions of Abū Ḥanīfa and Mālik ibn Anas, both of whom had a demonstrable impact upon al-Shāfiʿī juristic outlook.

The Context of Kufan- and Medinan Law

At about the same time when Abū Ḥanīfa (d. 767) became the main jurist of Kufa, his Medinan counterpart, Mālik ibn Anas (d.797), became the leading voice of the Medinan legal tradition. Over the course of several centuries, the eponymous Ḥanīfī- and Māliki schools of law would eventually rise to occupy prominent positions within the landscape of Sunni Islām. But during the eight century, both schools were still in their infancy stage; steadily progressing their juristic positions and negotiating their legitimacy amongst numerous rivalling traditions. Nevertheless, the doctrinal positions of both Abū Ḥanīfa and Mālik were highly influential during their time and would come to play a crucial role in al-Shāfiʿī's juristic development. Whereas Mālik's influence on al-Shāfiʿī was through direct apprenticeship, Abū Ḥanīfa's influence was largely mediated via his student Muḥammad al-Shaybānī (d. 805), with whom al-Shāfiʿī studies for some time.[193] The doctrinal positions of Abū Ḥanīfa and Mālik are thus indispensable in understanding al-Shāfiʿī's legalistic thinking.

The Origins of Kufan- and Medinan Law

Abū Ḥanīfa's[194] legal methodology is largely inherited from his main teacher Ḥammād ibn Abī Sulaymān, who in turn studied with the famous jurist and successor (*tabiʿī*), Ibrāhīm al-Nakhaʿī.[195] Al-Nakhaʿī had reportedly transmitted knowledge from several prominent companions including ʿAbd Allāh ibn Masʿūd, Anas ibn Mālik (not to be confused with the Medinan jurist Mālik ibn Anas) and

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[192] Makdisi, "The Juridical Theology of Shâfiʿî," 18-22. See also Melchert, "Traditionist-Jurisprudents," 386-7; and Schacht, *Origins*, 8.

[193] Ibid., 12-13; Lowry, *Risāla*, 6-7.

[194] Abū Ḥanīfa was merely his cognomen. His real name was al-Nuʿmān ibn Thābit (al-Kūfī). See Sahiron Syamsuddin, "Abū Ḥanīfah's Use of the Solitary Ḥadīth as a Source of Islamic Law," *Islamic Studies*, vol. 40, no. 2 (2001): 260.

[195] Arabi, *Early Muslim Legal Philosophy*, 77.

ʿĀʾisha bint Abū Bakr (daughter of the first caliph and wife of the Prophet).[196] Additionally, he also studied *ḥadīth* with several prominent scholars such as Salama ibn Kuhayl, Shaʿbī, ʿAwn ibn ʿAbdullāh, Aʿmash, Qatāda and Shuʿba.[197]

Mālik on the other hand was the main exponent of the Medinan tradition, which largely followed in the footsteps of the renowned 'Seven Jurists of Medina' (*al-fuqahāʾ al-sabʿa*).[198] These men were also part of the successive generation (*tābiʿīn*) that inherited knowledge directly from the companions, as well as from other Medinan scholars.[199] Some sources (including Saḥnūn's Mudawwana al-Kubrā) suggest that the 'Seven Jurists' consolidated a body of opinions that constituted an independent legal source.[200] Mālik's immediate teachers included, among others, the prominent successors: ʿAbdullāh ibn Yazīd ibn Hurmuz, Ibn Shihāb al-Zurhī, Rabīʿah ibn Abī ʿAbd al-Rahmān (commonly known as Rabīʿat al-Raʾy, meaning Rabīʿah of the 'opinion' due to his 'unhesitating expression of personal opinion'), Abū al-Zinād ibn Dhakwān and Yahyā ibn Saʿīd al-Ansārī.[201] More notably is Mālik's tutelage under Nāfiʿ Mawla ibn ʿUmar; the freed slave (*mawla*) of ʿAdullāh ibn ʿUmar (the son of the notable companion and second caliph ʿUmar ibn al-Khaṭṭāb) from whom he narrates several *aḥādīth*.[202] The chain of narration (*isnād*) from Mālik on Nāfiʿ on ibn ʿUmar is regarded by several scholars of *ḥadīth* (amongst them al-Buhkārī) as the strongest chain and is therefore honoured with the illustrious title: 'The Golden Chain' of Narration (*al-silsila al-dhahabiyya*).[203] Additionally, Mālik also studied with-, and transmitted *ḥadīth* from, notable descendants of the Prophet (*ahl al-bayt*) such as Muḥammad al-Bāqir (d. 732) and his son Jaʿfar al-Sādiq (d. 765); the latter was also a teacher of Abū Ḥanīfa.[204] Mālik's reputation as a scholar is highly exclaimed by both contemporaries and successors alike, including al-Shāfiʿī who remarked the following: "There is no one to whom I am more indebted than Mālik. I have made Mālik a definitive argument between me and Allāh, the Mighty and Majestic. I am just one of Mālik's servants. If the *ʿulamāʾ* are mentioned, Mālik is the piercing star. Nobody has reached Mālik's level of knowledge, with his memory, accuracy and retention." [205]

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[196] Ibid.

[197] Abū ʾl-Muntahā al-Maghnīsāwī, *Imām Abū Ḥanīfah's al-Fiqh al-Akbar Explained*, trans. Abdur-Rahman ibn Yusuf (London: White Thread Press, 2014), 44.

[198] The number of scholars listed under this rubric is reported with some numerical variations, ranging from seven to twelve, but the most frequently cited are: Saʿīd ibn al-Musayyab (d. 713), ʿUrwa ibn al-Zubayr (d. 712; the younger brother of ʿAbd-Allāh ibn al-Zubayr and nephew of ʿĀʾisha), Abū Bakr ibn ʿAbd al-Raḥmān ibn al-Ḥārith (d. 712), ʿUbayd-Allāh ibn ʿAbd-Allāh ibn ʿUtba (d. 716), Khārija ibn Zayd ibn Thābit (d. 718), Sulaymān ibn Yasār (d. 718; the freedman of the Prophet's wife Maymūna), and Al-Qāsim ibn Muḥammad (d. 724; grandson of the first caliph Abū Bakr and nephew of the Prophet's wife ʿĀʾisha). See ʿAbd-Allāh, *Mālik and Medina,* 42-3; Yasin Dutton, *The Origins of Islamic Law, The Quran, the Muwaṭṭa and Medinan ʿAmal* (New Delhi, Curzon Press, U.K., 1999), 12 [henceforth cited as Dutton, *Origins*].

[199] Ibid.

[200] Ibid; and ʿAbd-Allāh, *Mālik and Medina*, 43.

[201] Arabi, *Early Muslim Lega Philosophy*, 41n18.

[202] ʿAbd-Allāh, *Mālik and Medina*, 42.

[203] Ibid., 115; Dutton, *Origins*, 12.

[204] ʿAbd-Allāh, *Mālik and Medina*, 44.

[205] Cited in Dutton, *Original Islam*, 34. A shorter version is also mentioned in Aisha A. Bewley, "Translator's Introduction," in *Al- Muwaṭṭaʾ of Imam Mālik ibn Anas*, Mālik ibn Anas, xxxi-xxxii.

Both Abū Ḥanīfa and Mālik thus received their education from illustrious successors (*tābiʿīn*) who had first-hand knowledge of the companions. Furthermore, Mālik has bequeathed us one of the oldest surviving legal compendiums called Al-Muwaṭṭaʾ (The Well Trodden Path), which consists of about 1,720 *aḥādīth* of which the majority are in fact post-prophetic reports (*āthār*) that draw solely on the authority of the companions (this will be discussed in more detail in chapter 3).[206] Similar works of *ḥadīth* and law are also attributed to Abū Ḥanīfa, although these have likely originated from the penmanship of his student Muḥammad al-Shaybānī. The most influential works attributed to Abū Ḥanīfa are the *Kitāb-ul-Āthār* and *al-Fiqh al-Akbar*.[207] At first glance it would thus seem that both Mālik and Abū Ḥanīfa were heavily invested in *ḥadīth*-based jurisprudence; yet, this is only partially true as will become clear in the following section.

Legal Authority in Kufan- and Medinan Law

The common assumption is that Abū Ḥanīfa was a major exponent of juristic reasoning and personal judgement (*raʾy*).[208] This view arises in various classical sources and is furthermore perpetuated by the aforementioned competition between the *ahl al-raʾy* and *ahl al-ḥadīth*.[209] Yet despite his reputation as a major proponent of juristic reasoning, Abū Ḥanīfa relied heavily on *ḥadīth*, and more so did his pupil Muḥammad al-Shaybānī.[210] In fact, according to Schacht the Iraqi jurists in general, were more knowledgeable in *ḥadīth* than their counterparts in Syria and Hijaz. Schacht also pointed out that Abū Ḥanīfa and his students were more engaged in systemic collections of *ḥadīth* than Mālik.[211] How then are we to reconcile Abū Ḥanīfa's ranking as a prominent member of the *ahl al-raʾy* with his *ḥadīth*-centric inclination? Hallaq's observation that *raʾy* was always a description by the "other," is certainly helpful, yet it does not fully answer the question.[212] In order to understand Abū Ḥanīfa's outlook on *ḥadīth*, we must dig deeper into the core of his legal methodology. An excellent starting point, I would

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[206] Burton, *An Introduction to the Ḥadīth*, 116; ʿAbd-Allāh, *Mālik and Medina*, 58, 126, 194.

[207] The historicity of the works attributed to both Mālik and Abū Ḥanīfa is disputed by some scholars. For detailed discussions on this issue see ʿAbd-Allāh, *Mālik and Medina*, 52-7; and Behnam Sadeghi, "The Authenticity of Early Ḥanīfi Texts: Two books of al-Shaybanī," in *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition* (New York, Cambridge University Press, 2013), 177-99.

[208] This view was adopted early on by notable scholars including Goldziher, Schacht and Coulson. See Sahiron Syamsuddin, "Abū Ḥanīfah's Use of the Solitary Ḥadīth," *Islamic Studies*, vol. 40, no. 2 (2001) 258-9. See also Arabi, *Early Muslim Legal Philosophy*, 74.

[209] Tsafrir, "The Spread of the Ḥanīfi School," 4. Abū Ḥanīfa's association with *raʾy* is also reflected by the following statement that is attributed to al-Shāfiʿī by his disciple Ḥarmala (d. 857-8): "Whoever wants to master authentic *ḥadīth* should study with Mālik. Whoever wants to master debate (*jadāl*) should study with Abū Ḥanīfa." Yet Ḥarmala also presents the following statement of al-Shāfiʿī which suggests a more nuanced assessment of Abū Ḥanīfa's doctrine: [Al-Shāfiʿī] "Whoever wants to study *fiqh* thoroughly is dependent on Abū Ḥanīfa. He learned *fiqh* from Ḥammād b. Abī Sulaymān as transmitted by Ibrāhīm [al-Nakhaʿī]." Al of the aforementioned statements are cited in Hiroyuki Yanagihashi, "Abū Ḥanīfa," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, eds. Oussama Arabi, David S. Powers and Susan A. Spectorsky (Leiden: Brill, 2013), 15-6 [henceforth cited as Yanagihashi, "Abū Ḥanīfa"].

[210] ʿAbd-Allāh, *Mālik and Medina*, 12.

[211] Schacht, *Origins*, 27.

[212] Hallaq, *Origins*, 74.

suggest, is the following encounter between Abū Ḥanīfa and Muḥammad al-Bāqir (d. 732/35; great-grandson of the Prophet).[213] After he was informed of Abū Ḥanīfa's preference for *ra'y* over *ḥadīth*, al-Bāqir allegedly confronted Abū Ḥanīfa and the following conversation unfolded:

> [al-Bāqir] "So it is you who contradicts the *ḥadīth* of my grandfather [Prophet Muḥammad, F.B.] on the basis of juristic analogy:' Imam Abū Ḥanīfa replied: "I seek refuge in Allah. Who dare contradict the *ḥadīth* of the Messenger?" "After you sit down Sir, I shall explain my position." [Abū Ḥanīfa then proceeds] "Who is the weaker, the man or the woman?" Imam Baqir replied, "Woman." Abū Ḥanīfa then asked, "Which of them is entitled to the larger share in the inheritance?" Imam Baqir replied, "The man." Abū Ḥanīfa said, "If I had been making mere deductions through analogy, I should have said that the woman should get the larger share, because on the face of it, the weaker one is entitled to more consideration. But I have not said so. To take up another subject, which do you think is the higher duty, prayer or fasting?" Imam Baqir said, "prayer." Abū Ḥanīfa said, "That being the case, it should be permissible for a woman during her menstruation to postpone her prayers and not her fasts. But the ruling I give is that she must postpone her fasting and not her prayers."[214]

Reportedly, al-Bāqir was highly impressed by Abū Ḥanīfa's response and praised his love for the Prophet and firmness in faith.[215] More importantly, this narrative illustrates the fundamental and most distinctive principle of Abū Ḥanīfa's legal doctrine, which is known as *taʿmīm al-adilla*, or the 'principle of generalization of legal proofs'.[216] According to Wymann-Landgraf this principle "grants standard proof texts in the *Qur'ān* and well-known *ḥadīths* [sic] their fullest logical and reasonable application, conceding to them the broadest authority and treating them virtually as universal legal decrees".[217] More simply stated, the principle of *taʿmīm al-adilla* dictates that juristic reasoning is subject to normative legal proofs derived from either the *Qur'ān* or *ḥadīth*. Abū Ḥanīfa's application of juristic reasoning was thus limited by inference to Qur'ānic injunctions and selected *ḥadīth* (as the abovementioned encounter with al-Bāqir underscores). The latter was in sharp contrast with Mālik's considered opinion (see below) and (non-textual) Medinan praxis (*ʿamal ahl al-Madīna*), both of which categorically override *ḥadīth*.[218] In fact, Abū Ḥanīfa's utilization of *ḥadīth* shares more characteristics with al-Shāfiʿī's text-based approach than with Mālik's legal methodology.

Contrary to Abū Ḥanīfa, Mālik was highly exclaimed as an expert and major exponent of *ḥadīth*, as is reflected by the honorific title "commander of the faithful in *ḥadīth*" (*amīr al-mu'minīn fi al-hadīth*) that was posthumously conferred upon him by some traditionists.[219] Mālik's status as an expert of *ḥadīth* is also acknowledged by al-Shāfiʿī who is reported to have said: "if a *ḥadīth* of Mālik comes to you,

[213] Hoyland, *In God's Path*, 204-5.
[214] Cited from al-Maghnīsāwī, *Imām Abū Ḥanīfah's al-Fiqh al-Akbar*, 44-5.
[215] Ibid.
[216] ʿAbd-Allāh, *Mālik and Medina*, 12.
[217] Ibid., 89n13.
[218] Ibid., 12.
[219] Ibid., 47n54. See also Dutton, *Original Islam*, 54-5.

cling to it with all your might!"[220] Additionally, Scot Lucas points out that both [ʿAbd al-Rahmān] Ibn Mahdī (an early traditionist) and al-Shāfiʿī considered Mālik's Muwaṭṭaʾ the most authentic book after the *Qur'ān*.[221] Yet despite his illustrious status as a champion of *ḥadīth*, Mālik's jurisprudential position was far removed from the traditionists who (parallel to al-Shāfiʿī) assigned utmost legal authority to *ḥadīth*.[222] In fact, the most distinctive feature of Mālik's methodology, was his prioritization of praxis (*ʿamal*) over *ḥadīth*.[223] More particularly, it was Medinan praxis (*ʿamal ahl al-madīna*) which constituted the highest legislative authority and operated on a fully autonomous basis.[224] Mālik considered Medinan praxis to constitute a continuous and conclusive s*unna* (*al-sunna allatī lā ikhtilāfa fīhā ʿindanā*) that goes back to the Prophet and his companions through mass transmission (*bi al-naql al-mutawātir*).[225] Unlike solitary *ḥadīth*, Medinan praxis was thus authorized by generations upon generations of notable companions and successors, who had lived and died in Medina; The City of the Prophet (*madīnat al-nabī*).[226] And it is because of Medina's propinquity to the Prophet and his companions that Mālik (as well as his Medinan predecessors) conferred upon Medinan praxis the highest legislative order. As Mālik himself reportedly stated to a prospective student: "If you want knowledge, take up residence here [i.e. Medina, F.B], for the *Qurʾān* was not revealed on the Euphrates [i.e. Iraq, F.B]."[227] Mālik thus perceived the normative *sunna* as a socio-psychological reality that was incarnated in the collective spirit of the Medinan community.[228] *Ḥadīth* on the other hand was construed on the basis of single-source narratives which, even when authenticated, could not compete with the mass transmitted praxes of the Medinan community. As Rabīʿat al-Raʾy (Mālik's teacher) put it succinctly: "For me, one thousand [transmitting] from one thousand [i.e. Medinan praxis, F.B] is preferable to one [transmitting] from one [i.e. solitary *ḥadīth*, F.B.]. 'One [transmitting] from one' would tear the *Sunna* right out of our hands."[229] Consequently, in the early Medinan school solitary *ḥadīth* was only accepted when corroborated by normative traditions, as is confirmed by the following statement by the Medinan jurist ʿAbd al-Rahmān Ibn Qāsim (d. 806): […] "what was eliminated from practice is left aside and not regarded as authoritative, and only what is corroborated by practice is followed and so regarded."[230]

[220] Lucas, *Critics*, 144.
[221] Ibid.
[222] Ibid., 47; Dutton, "Sunna," 4-5.
[223] Ibid., 24.
[224] Ibid.
[225] Ibid., 19; and ʿAbd-Allāh, *Mālik and Medina*, 105, 122.
[226] This is supported by the following report that is attributed to Mālik in the *Mudawwana*: "The Messenger of Allah, may Allah bless him and grant him peace, came back after such-and-such a *ghzawa* [battle, F.B.] with so many thousands of the companions. Some ten thousand of them died in Madina and the rest of them spread out in various places. So which of them are more worthy of being followed and adhered to, those among whom the Prophet, may Allah bless him and grant him peace, and those companions whom I have just mentioned died, or those among whom one or two of the companions of the Prophet, may Allah bless him and grant him peace, died?" Cited in Dutton, "Sunna," 17-8.
[227] Cited from *ibid*., 15.
[228] ʿAbd-Allāh, *Mālik and Medina*, 122.
[229] Ibid., 118; also mentioned in Dutton, *Original Islam*, 15.
[230] Cited in Schacht, *Origins*, 63.

Upholding the Medinan position, Mālik thus judged *ḥadīth* against the criterion of praxis (*ʿamal*) and not the other way around.[231]

Mālik's commitment to Medinan praxis sets him apart from Abū Ḥanīfa as well as al-Shāfiʿī, both of whom questioned its validity and insisted on the precedency of textual evidence instead.[232] It should be noted, however, that Abū Ḥanīfa also relied on Kufan praxis in evaluating solitary *ḥadīth*, although his consideration of praxis was secondary to his principle of *taʿmīm al-adilla*.[233] Even al-Shaybānī, who was heavily inclined towards *ḥadīth* displayed some adherence to Kufan praxis, albeit marginally.[234] In fact, with the possible exception of the Damascus based ʿAbd al-Rahmān al-Awzāʿī (d. 774),[235] no jurist – to my knowledge – came close to Mālik's commitment to local praxis (leaving aside of course other Medinan scholars). Yet, despite their divergent approach to local praxes, none of the major jurists (except al-Shāfiʿī), rejected the normative authority of post-prophetic reports (*āthār*), which relayed praxes and opinions of the companions.[236] In fact, most jurists constituted the normative *sunna* through a combination of Prophetic authority (either though inherited praxes, doctrines or *ḥadīth*) and non-prophetic authority (either through inherited praxes or post-prophetic reports). This was of course the crux of al-Shāfiʿī's contention with the legal schools, to which we shall now turn.[237]

Al-Shāfiʿī's Opposition to Kufan Doctrine and Medinan Praxis

Al-Shāfiʿī was born into the Prophet's tribe of Quraysh in the year 767 CE (the same year that Abū Ḥanīfa had died) in Gaza, Palestine.[238] His legal career can be divided into three consecutive periods; beginning in Mecca and Medina, followed by his Iraqi period, where he formulated his first legal position, and finally, his period in Egypt where he articulated the Risāla. His education started with the Meccan luminary scholars Muslim ibn Khālid al-Zanjī (d. 796; grand mufti of Mecca) and Sufyān ibn ʿUyayna (d.813). At about the age of twenty he travelled to Medina where he studied law and *ḥadīth* under Mālik's supervision and became immersed into the Medinan tradition. At about the age of thirty he served a short-lived tenure as a public administrator in the Yemeni city of Najran (modern-day Saudi Arabia). After becoming entangled in local political intrigue, however, he was arrested on charges of

[231] Dutton, "Sunna," 24.
[232] Both Abū Ḥanīfah and al-Shāfiʿī would generally accept Medinan praxis when it was corroborated by textual evidence [ibid., 7].
[233] ʿAbd-Allāh, *Mālik and Medina*, 196
[234] Ibid. According to Fazlur Rahman, Sufyān al-Thawrī (Kufa) also adopted a more hadith-centric position. See Rahman, *Islam*, 82.
[235] Fazlur Rahman mentions that al-Awzāʿī's reliance on Damascene praxis superseded his reliance on *ḥadīth* [Rahman, *Islam*, 82]. He furthermore notes the following: "Mālik himself resembled al-Awzāʿī' in that at bottom he placed his reliance on the 'living tradition' (*Sunna*) of Medina, but was equally anxious to support or vindicate this tradition through *ḥadīth*. He collected a body of legal traditions and, testing them in the light of the living practice of Medina, constructed a system of juridical opinions into a famous work called *al-Muwaṭṭa* - 'the levelled path'." [ibid.].
[236] ʿAbd-Allāh, *Mālik and Medina*, 94.
[237] Ibid.
[238] Khadduri, "Introduction," 10-11.

conspiracy and deported to Bagdad (in chains).[239] Along with fellow indictees he was brought before the ʿAbbasid caliph Harūn al-Rashīd who, after hearing his most eloquent and persuasive defence, decided to acquit al-Shāfiʿī from all charges. Some sources indicate that Muḥammad al-Shaybānī was also present during these hearings and even aided al-Shāfiʿī's defence.[240] In any case, it would seem that shortly thereafter he settled in Bagdad and became the protégé of al-Shaybānī, at whose hands he learned Ḥanafi law, or at least al-Shaybānī's version of it. After some time he briefly travelled to Syria and went back to Mecca where he took up a temporary teaching position, before eventually returning to Bagdad once more.[241]

During his encounter with the Iraqi schools al-Shāfiʿī initially partook in defending the Medinan position against (mainly) Kufan criticism. But the unexpected shortcomings he witnessed in both traditions, eventually led him to devise his own jurisprudential position.[242] In Iraq, al-Shāfiʿī produced several works, although none of these have reached us; this includes his *Kitāb al- Ḥujja* and the Old Risāla (see below). During his latter days al-Shāfiʿī migrated to Egypt where he remained until his death in 820 CE.[243] It was in Egypt where his legal development fully matured and where he advanced his distinctive jurisprudential theory that is retained in the New Risāla.[244] It is upheld that the Risāla was originally composed in two treatises; the Old Risāla, written in Iraq (representing his 'old position' or *madhab al-qadīm*) and the New Risāla, composed in Egypt (representing his 'new position' or *madhab al-jadīd*).[245] The Old Risāla has not reached us but most likely contained a systemic study of the *Qurʾān*, and probably also discussions on *ḥadīth*, consensus and analogy.[246] Other works that are attributed to al-Shāfiʿī include the *Kitāb al-Umm* (a voluminous work on positive law), *ikhtilāf al ḥadīth*, and two shorter works titled *Jimāʿ al-ʿilm* and *Ibṭāl al-istiḥsān.*[247] It is noteworthy to mention that the *Kitāb al-Umm* includes two polemic treatises against his former teachers. These are titled *Kitāb ikthilāf Mālik wa al-Shāfiʿī* (The Dissent of Mālik and al-Shāfiʿī) and *Kitāb al-radd ʿalā Muḥammad ibn al-Ḥasan* [al-Shaybānī] (Refutation of Muḥammad ibn al-Ḥasan). These two treatises signify al-Shāfiʿī's radical departure from his former teachers, and by extension the major schools of Hijaz and Iraq.[248]

Unlike Abū Ḥanīfa and Mālik, al-Shāfiʿī traversed many lands throughout his career and it would seem that he was therefore not naturally bound to follow any particular local tradition. There is

[239] Ibid., 12-3.
[240] Ibid.
[241] Ibid.
[242] Schacht calls this al-Shāfiʿī's "middle period". See Schacht, *Origins*, 120; see also Khadduri, "Introduction," 13; and Coeli Fitzpatrick and Adam H. Walker, eds., *Muhammad in History, Thought, and Culture: An Encyclopedia of the Prophet of God*, Vol 1. (Santa Barbara, CA: ABC-CLIO, LLC., 2014), 549.
[243] *Risāla*, 8-16.
[244] Ibid., 8-16, 21-5.
[245] Ibid.
[246] Aḥmad ibn Ḥusayn al-Bayhaqī (an eleventh century Shāfiʿī scholar) suggested that the Old Risala already articulated the primacy of Prophetic *ḥadīth*. Mentioned in Khadduri, "Introduction," 23. For a more elaborate discussion on the Old Risala see *idem,* 21-5.
[247] For a more detailed discussion on these works see Lowry, *Risāla*, 7.
[248] See Fitzpatrick and Walker, *Muhammad in History*, 549; and ʿAbd-Allāh, *Mālik and Medina*, 136.

little doubt that his extensive travels made him aware of the idiosyncrasies that existed amongst the different legal schools. In his *Kitāb al-Umm* he gives an elaborate listing of some of the disagreements that he encountered throughout his travels:

> We knew that some of the people of Mecca followed the doctrine of ʿAṭāʾ [ibn Abī Rabāḥ] and that others chose differently. Then al-Zunji ibn Khālid [Muslim ibn Khālid al-Zanjī, F.B] issued rulings in Mecca, and some preferred him in jurisprudence, while others were inclined to the teaching of Saʿīd b. Salim [...] I knew that the people of Madina preferred to follow Saʿīd ibn al-Musayyib, while rejecting some of his teaching. Then in our time Mālik [ibn Anas] appeared amidst them, and many of them followed him, while others exaggerated in attacking his doctrines; I saw Ibn Abī al-Zinād exaggerate in attacking him. And I saw al-Mughīra and Ibn Abī Hāzim and al-Darāwardī support his doctrines, and others attacked them. In Kufa I saw some who, inclined to the teaching of Ibn Abī Laylā, were attacking the doctrines of Abū Yūsuf. There were others who, inclined to the teaching of Abū Yūsuf, were attacking the doctrines of Ibn Abī Laylā and what contravenes (the ruling of) Abū Yūsuf. Others followed the teaching of [Sufyān] al-Thawrī, and still others that of al-Ḥasan b. Ṣāliḥ. And what I gathered about other cities not mentioned here is similar to what I saw and described of the disagreement among the people of cities.[249]

Disconcerted with the multivocality within the legal community, al-Shāfiʿī saw the necessity to reconstitute the law on stronger foundations. In his assessment the legal schools invoked an inferior notion of legal authority which gave too much credence to the opinions of men; hence, he rebuked some Egyptian adherers of the Medinan school for "taking knowledge from the lowest source".[250] Instead, al-Shāfiʿī insisted that Muslims should align their legal epistemology with God and His Messenger. And while God's authority was derived directly from the *Qurʾān*, Prophetic authority was, in its purest form, represented by authentic *ḥadīth*. In al-Shāfiʿī's legal methodology *ḥadīth* thus became co-terminous with the Prophetic *Sunna* and as such served as an integrated and independent legal source.[251] This then constitutes al-Shāfiʿī's *ḥadīth* principle which he justified by referencing several Qurʾānic imperatives that dictate the primacy of Prophetic authority. He concludes: "In whatever form it may take, God made it clear that He imposed the duty of obedience to His Apostle, and has given none of mankind an excuse to reject any order he knows to be the order of the Apostle of God."[252] And because *ḥadīth* represents the Prophetic *Sunna*, it is incumbent upon us to follow it without question, that is, once we have established its soundness. He notes: "If a *ḥadīth* is authenticated as coming from the Prophet, we have to resign ourselves to it, and your talk and the talk of others about why and how, is a mistake."[253]

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[249] Cited in Arabi, *Early Muslim Legal Philosophy*, 19-20.
[250] Schacht, *Origins*, 69.
[251] Hasan, "Sunnah as a Source of Fiqh," 7; ʿAbd-Allāh, *Mālik and Medina*, 102-3
[252] *Risāla*, 121.
[253] Cited in *ibid*, 13.

And so where Prophetic authority operated under the aegis of ‘generalization of legal proof’ (*taʿmīm aladilla*) in the Kufan doctrine, and within the prerogative of Medinan praxis in Mālik’s methodology, it assumed a fully autonomous status under al-Shāfiʿī’s *ḥadīth* principle. It should be noted, however, that al-Shāfiʿī’s *ḥadīth* principle was not a vacuous theoretical proposition, nor was it even the main objective of the Risāla. On the contrary, the *ḥadīth* principle serves an integral function within the Risāla’s overarching discourse which is ultimately aimed at establishing a coherent and systemic source-centric legal epistemology. To this end al-Shāfiʿī introduces a theory of *bayān* (legal evidence) to predicate the foundations of the law on the dual revealed sources (*Qurʾān* and *ḥadīth*).[254] The *bayān* theory expounds the epistemic categories of legal knowledge, which in line with the textual sources, are defined by al-Shāfiʿī as follows: (1) Legal provisions specified by the *Qurʾān*; (2) legal provisions specified by the *Qurʾān* and the Prophet; (3) general Qurʾānic provisions that are specified by the Prophet; (4) legal provisions specified by the Prophet alone; and (5) unspecified legal provisions that are established through legal interpretation (*ijtihād*) of the revealed sources.[255] These categories function as permutational devises through which legal rulings can be deduced from either explicit or implicit indications within the revealed sources.

It is clear that by centring the revealed sources, al-Shāfiʿī aimed to counter the communal authority of the legal schools. However, unlike the traditionists, he was not intent on forswearing the interpretative devices of the legal schools altogether. More particularly, he found consensus (*ijmāʿ*) and analogy (*qiyās*) to be consistent with his *bayān* scheme (albeit after significant modifications), and incorporated both in his legal methodology. Eventually, al-Shāfiʿī settled on four sources from which legal rulings could be deduced. These are: *Qurʾān*, Prophetic *Sunna*/*ḥadīth*, consensus (*ijmāʿ*) and analogy (*qiyās*).[256] However, as Lowry rightly pointed out, the latter two sources are not independent but instead function within the parameters of the textual sources. In other words, al-Shāfiʿī did not consider consensus and analogy as autonomous sources but rather as interpretative mechanisms that were necessary to deduce rulings from the revealed sources. In the next chapter we will examine these sources in more detail and compare them with the methodologies of Abū Ḥanīfa and Mālik. It should be noted that the first source (*Qurʾān*) will not be covered in detail because it does not fit within the scope of this inquiry.

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[254] It is thanks to the works of Lowry that al-Shāfiʿī’s theory of *bayān* has been brought to the fore as the main architectural framework of the Risāla. See Joseph E. Lowry, “Does Shāfiʿī have a theory of "four sources" of law?,” in *Studies in Islamic Legal Theory,* ed. Bernard G. Weiss, vol. 15 (Leiden: 2002, Brill), 45-8; and Lowry, *Risāla*, 23-34.

[255] Khadduri, “Introduction,” 34; and Lowry, *Risāla*, 24.

[256] See *Risāla* 78, 289-90.

3. The Risāla Deconstructed

The grand dispute amongst the jurists of the late eight century was not about whether or not *ḥadīth* constituted valid legal proof in itself, for virtually all jurists were already adducing legal rulings from *ḥadīth* long before al-Shāfiʿī entered the stage.[257] However, while *ḥadīth* was widely accepted, few jurists were prepared to compromise their respective traditions by allowing *ḥadīth* an autonomous legal status. Because *ḥadīth* constituted isolated narrations (*ḥadīth al-āḥād*) by default, the jurists were naturally concerned about its evidential value (the exception to this was the infrequent "mass transmitted *ḥadīth*" or "*ḥadīth al-mutawātir*," that was conceptually accepted by all jurists).[258] Unlike the established traditions of the legal schools, solitary *aḥādīth* yielded probabilistic (*ẓannī*) knowledge at best, and were therefore easily cast aside as an inferior or ancillary source.[259] Nonetheless, *ḥadīth* had gained substantial terrain, not in the least due to the extensive efforts of the traditionists (*ahl al-ḥadīth*) who actively circulated *ḥadīth* and advocated its legalistic primacy.[260] The traditionists considered *ḥadīth* superior to the normative traditions of the jurists (*fuqahāʾ*), whom they ferociously attacked for evading Prophetic authority.[261] According to Schacht, al-Shāfiʿī was induced by the traditionist's thesis and subsequently devoted his legal-theoretical work in service of *ḥadīth*-centric jurisprudence.[262] Yet, while al-Shāfiʿī supported the traditionist's thesis, he was also disgruntled by their simplistic standards and lack of systemic reasoning.[263] Accordingly, al-Shāfiʿī's Risāla, along with his other works, were aimed at elevating the traditionist's thesis into a more consistent and compelling legal theory, more particularly, one that could compete with the sophisticated traditions of the jurists.[264] The distinctive feature of al-Shāfiʿī's legal-theoretical enterprise is thus marked by his relentless ambition to cement solitary *ḥadīth* into a comprehensive legal theory; a goal to which his extensive exposure to the jurisprudential traditions of Hijaz, Iraq and Egypt, undoubtedly, served him greatly. In the next sections we will examine how al-Shāfiʿī aimed to achieve this goal.

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[257] Al-Shāfiʿī himself enumerates several of the early jurists who were deducing legal rulings from *ḥadīth*. See *Risāla*, 269-72; and Schacht, *Origins*, 3.

[258] ʿAbd-Allāh, *Mālik and Medina,* 110.

[259] Ibid., 112; Dutton, "Sunna," 15; Schacht, *Origins*, 254.

[260] Ibid., 253-4.

[261] According to Schacht: "the greatest onslaught on the 'living tradition' of the ancient schools of law was made by the traditionists in the name of traditions [*ḥadīth*, F.B] going back to the Prophet.'' Cited from Schacht, *Origins*, 67. See also *ibid*., 253-4.

[262] Ibid., 67. Al-Shāfiʿī praised some of the traditionists and noted that "such people [traditionists, F.B] stand in the forefront of [the science of] tradition [*ḥadīth*, F.B]". Cited from *Risāla*, 245.

[263] Schacht, *Origins*, 254.

[264] On this point Schacht notes the following: "Shāfiʿī's legal theory is a magnificently consistent system and superior by far to the doctrines of the ancient schools. It is the achievement of a powerful individual mind, and at the same time the logical outcome of a process which started when traditions [*ḥadīth*, F.B] from the Prophet were first adduced as arguments in law". Cited from Schacht, *Origins*, 137.

Legal Authority of Solitary Ḥadīth

As mentioned earlier both Abū Ḥanīfa and Mālik accepted mass transmitted *ḥadīth* but were weary of solitary *ḥadīth* due to its evidential inadequacies.[265] They were even more suspicious, however, of solitary *ḥadīth* that related to matters of general experiences, such as the *adhān* (call to prayer) or rituals of prayer. Such general experiences (known as *amr al-nās* in the Medinan school) were considered to have been known by necessity by both scholars and laymen alike and therefore could not be established from solitary *ḥadīth* alone.[266] If a solitary *ḥadīth* conflicted with a general experience, it was categorically rejected by both Abū Ḥanīfa and Mālik. For example, in the following narrative Mālik is reported to have rejected a solitary *ḥadīth* which was brought to his attention by Abū Yūsuf:

> [Mālik's response]: I do not know anything about the *adhān* [call to prayer, F.B] of a day or a night. Here is the mosque of the Messenger of Allah, may Allah bless him and grant him peace, where the *adhān* has been called since his time without anyone ever recording any objection to how the *adhān* is called here.[267]

Another key issue with solitary *ḥadīth* was that it frequently constituted 'irregular' (*shādhdh*) and 'non-normative' traditions that, more often than less, contradicted with the *Qurʾān*, the established *sunna* (*al-sunna al-mashhūra*) and/or the consensus of the jurists. For this reason Abū Ḥanīfa stipulated that a solitary *ḥadīth* was to be rejected when it conflicted with stronger evidence (*dalīl*), such as the universal (*ʿāmm*) and clear (*ẓāhir*) verses of the *Qurʾān*, the well-known *sunna* (*al-sunna al-mashhūra*), the primary aims of legal rulings (*mawārid al-sharʿ*) and other authentic solitary *ḥadīth* (*ḥadīth al-āḥād al-musnad*).[268] Mālik also abided by these stipulations and further added the criterium of Medinan praxis, which was in fact his ultimate litmus test for the acceptance of any transmitted tradition, whether *ḥadīth* or otherwise.[269] However, when a solitary *ḥadīth* agreed with Medinan praxis, it constituted one of the most authoritative sources which is defined, by some scholars, as a "transmissional praxis" (*al-ʿamal al-naqlī*).[270] Furthermore, because of the aforementioned inadequacies, both Abū Ḥanīfa and Mālik would generally limit themselves to narrators from their respective localities.[271] Al-Shāfiʿī on the other

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265 ʿAbd-Allāh, *Mālik and Medina*, 197.

266 Abū Ḥanīfa considered matters of general experiences under the umbrella of 'general necessity' or *ʿumūm al-balwā*, a legal principle which aimed to ameliorate inconveniences or hardships caused by the apparent readings of *ḥadīth*. The assumption was that since matters of general experiences affected the public at large, they would have been known by the general public; hence these matters were known by 'general necessity' and could not be established on the basis of solitary *ḥadīth*. See ʿAbd-Allāh, *Mālik and Medina*, 124-6, 265'and Muhammad H. Fadel, "Schools of Jurisprudence," in *Medieval Islamic Civilization: An Encyclopedia*, ed. Josef W. Meri, vol. 1 (New York: Routledge, 2006), 703.

267 Cited in Dutton, "Sunna," 8-9.

268 Syamsuddin, "Abū Ḥanīfah's Use of the Solitary Ḥadīth," 264.

269 ʿAbd-Allāh, *Mālik and Medina*, 126.

270 Ibid.

271 Melchert, *The Formation of the Sunni Schools*, 3. Melchert also notes that al-Thawrī accepted *ḥadīth* from both Iraqi and Hijazi narrators, although he would also stipulate strict criteria for the acceptance of solitary *ḥadīth* [ibid].

hand, did not distinguish transmitters in terms of geography but instead evaluated each individual narrator on the basis of trustworthiness and merit (as did Abū Yūsuf).[272]

It goes without saying that al-Shāfiʿī was not impressed by the restrictive provisions of Abū Ḥanīfa and Mālik. When asked by his interlocutor in the Risāla, al-Shāfiʿī makes it plain: "For the proof of a single individual tradition is too strong to need the support of a parallel example [alluding to the conditions set by the other schools, F.B]; indeed it [*ḥadīth*, F.B] is an original source in itself."[273] By shifting the burden of proof, al-Shāfiʿī disconnected the validation of solitary *ḥadīth* from the limitative provisions and non-textual indicators of the jurists. He notes:

> "[…] the narrative [solitary *ḥadīth*; F.B] is to be accepted when it is confirmed, even though none of the imāms may ever have done anything similar to the narrative in question. This indicates also that if the action of one of the imams subsequently were found to be contrary to a narrative of the Prophet, the imām's action must be abandoned in favour of the Apostle's narrative."[274]

Al-Shāfiʿī considered solitary *ḥadīth*, or rather, 'soundly transmitted connected solitary *ḥadīth'* (*ḥadīth al-āḥād al-musnad*), self-sufficient and superior to the fallible doctrines and traditions of the jurists, simply because it derives its authority from the Prophet himself.[275] He notes:

> […] "a tradition from the Apostle is self-confirming and does not need to be confirmed by the action of anyone else after him. For the Muslims never said: " 'Umar acted differently [from the Prophet] in matters concerning the Muhājirīn and the Anṣār." Nor did you [interlocuter, F.B.[276]] or any other say anything about other men having acted differently; they accepted traditions from the Apostle as they were bound to do and they desisted from all acts contrary to them."[277]

Notwithstanding, al-Shāfiʿī was not oblivious of the fact that 'irregular' (*shādhdh*) solitary *ḥadīth* could contradict with the *Qurʾān* and/or well-known *sunna* (*al-sunna al-maʿrūfa*).[278] In fact, he devotes a substantial part of the Risāla to addressing such contradictions within the textual sources.[279] But unlike Abū Ḥanīfa and Mālik, al-Shāfiʿī assessed these contradictions in line with his overarching *bayān*

[272] ʿAbd-Allāh, *Mālik and Medina*, 114. Furthermore, it would appear that Abū Yūsuf only rejected *ḥadīth* that contradicted with the *Qurʾān*, as the following statement attributed to him indicates: "Ḥadīths shall be divulged from me in great numbers. Whatever comes down to you from me that is in accordance with the *Qurʾān* is from me, but whatever comes down to you from me that contradicts (*yukhālifu*) the *Qurʾān* is not from me." Cited in *ibid.*

[273] *Risāla*, 246.

[274] Ibid., 254.

[275] ʿAbd-Allāh, *Mālik and Medina*, 107-8.

[276] According to Khadurri, al-Shāfiʿī is addressing his interlocutor here, who was a follower of the Ḥanafī school of law. See *Risāla*, 262n45.

[277] Ibid., 262.

[278] ʿAbd-Allāh, *Mālik and Medina*, 119, 149.

[279] In fact, Burton and Lowry have argued that the main aim of the Risāla was to harmonize the apparent contradictions of the sacred sources. Mentioned in Lowry, *Risāla*, 16, 54.

theory. Subsequently, he identified the following three categories of valid contradictions: (1) Intra-Qurʾānic contradictions; (2) intra-Sunnaic (*ḥadīth*) contradictions; and (3) contradictions between the *Qurʾān* and Prophetic *ḥadīth*.[280] In line with the *bayān* paradigm, the other sources of the law (consensus and *qiyās*) are by default inferior to solitary *ḥadīth* and therefore do not give cause for contradiction. Ultimately, however, al-Shāfiʿī considered all contradictions to be secondary to the Qurʾānic imperative to 'follow the Prophet'.[281] As long as a *ḥadīth* is soundly transmitted and connected, it qualifies as *de facto* Prophetic authority which, according to the *Qurʾān*, demands absolute obedience. Soundly connected Prophetic *ḥadīth* is therefore by its very nature in harmony with both the *Qurʾān* and other soundly connected Prophetic *ḥadīth*. In al-Shāfiʿī's understanding all contradictions within the sacred sources are therefore only 'apparent' contradictions which can be resolved through specific hermeneutical techniques and procedures.[282]

Although al-Shāfiʿī was well aware of the inadequacies of solitary *aḥādīth*, he offers remarkably little substantiation for their epistemological endorsement. Aside from some technical bypasses and incidental Qurʾānic references, he does not elaborate any substantive remedy for these inadequacies, other than stipulating that *aḥādīth* should be handled with great caution and expertise.[283] Yet despite their inherent complication, al-Shāfiʿī maintains his overall position that solitary *aḥādīth* provide sufficient textual evidence (*aṣl fī nafsihi*) to enforce legal rulings.[284]

Post-Prophetic Reports (*āthār*) and Disconnected Ḥadīth (*al-ḥadīth al-mursal*)

In addition to solitary *ḥadīth*, there was also discord with regards to the authority of so called 'post-prophetic reports' (*āthār*) and 'disconnected *ḥadīth*' (*al-ḥadīth al-mursal*).[285] Unlike Prophetic *ḥadīth*, post-prophetic reports contained sayings, opinions and praxes of the companions (hence they are also called *āthār al-ṣaḥāba*).[286] It is important to note that the contention regarding post-prophetic reports was not prompted by any concerns about the trustworthiness (*thiqa*) of the companions; for as al-Shāfiʿī himself noted: […] "the Prophet's companions occupied a position of prominence that is not denied by any learned man".[287] Instead, the issue was concerned with whether or not the opinions and praxes of the companions constituted normative legal authority on their own, and if so, how this related to Prophetic *ḥadīth*.[288] Both Mālik and Abū Ḥanīfa accepted post-prophetic reports in conformity with their local traditions, while al-Shāfiʿī called for their marginalization.[289]

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[280] Ibid., 62.
[281] ʿAbd-Allāh, *Mālik and Medina*, 113-116.
[282] For a detailed discussion on these hermeneutical techniques see Lowry, *Risāla*, 62-3, 126.
[283] Ibid., 200-1.
[284] Ibid., 200-1.
[285] ʿAbd-Allāh, *Mālik and Medina*, 102.
[286] Ibid.
[287] *Risāla*, 256.
[288] ʿAbd-Allāh, *Mālik and Medina*, 103-4.
[289] Ibid., 102-3; Schacht, *Origins*, 3.

In the case of Mālik, post-prophetic reports were widely accepted within the prerogative of Medinan praxis. As stated earlier, Mālik considered Medinan praxis a mass transmitted source (*bi al-naql al-mutawātir*) because it was relayed by 'many unto many' (*al-jumhūr ʿan al-jumhūr*).[290] Medinan praxis therefore automatically precluded irregular reports from the Prophet (*ḥadīth*) and his companions (*āthār*).[291] Furthermore, according to Qāḍī ʿIyāḍ (d. 1149; a chief Māliki jurist from the Maghreb), solitary *aḥādīth,* post-prophetic reports (*āthār*), and judgements arrived at by analogy (*qiyās*) were all judged on the basis of Medinan praxis in Mālik's methodology.[292]

Abū Ḥanīfa on the other hand, accepted post-prophetic reports in line with his principle of 'generalization of legal proofs' (*taʿmīm al-adilla*), as the following statement by Sufyān al-Thawrī illustrates:

> I heard that he (Abū Ḥanīfah) said: 'I accept the Book of God. If I do not find anything in it, I accept the *Sunna* of the Messenger. If I do not find anything in the *Sunna*, I accept the opinion of his Companions; I will take of their opinions what I want, and leave what I want. I do not depart from their opinions and follow the opinions of others. But when a matter has to do with by Ibrāhīm, al-Shaʿbī, ibn Sīrīn, al-Ḥasan, ʿAṭāʾ, Saʿīd ibn al-Musayyab and the like [i.e. the successors, F.B.]: in such cases I will have recourse to *ijtihād*, as they did'.[293]

Abū Ḥanīfa thus selected post-prophetic reports in line with his 'generalization of legal proofs,' as well as his general understanding of the law (this will be discussed in more detail shortly). Evidently, this selection procedure does not apply to legal opinions of the successors, for in these instances Abū Ḥanīfa would reserve himself the right to follow his own discretionary opinion. Mālik had a similar view regarding the successors, although he would occasionally implore their opinions through his juristic device of 'prior analogies' (*al-qiyās ʿalā al-qiyās*).[294] Moreover, unlike Mālik, Abū Ḥanīfa accepted the opinions of the companions both on a consensual and individual basis.[295]

In addition to post-prophetic reports, both Abū Ḥanīfa and Mālik also accepted disconnected *ḥadīth* (*al-ḥadīth al-mursal*) as valid legal indicators.[296] Disconnected *aḥādīth* contain a generational gap in their chain (*isnād*) and are therefore not completely connected to the Prophet.[297] The transmitter's

[290] ʿAbd-Allāh, *Mālik and Medina*, 104-7.
[291] ʿAbd-Allāh, *Mālik and Medina*, 112.
[292] This was the view of Qāḍī ʿIyāḍ (d. 1149), the twelfth century master jurist of the Maghreb. Cited in Dutton, "Sunna," 8.
[293] Cited in Syamsuddin, "Abū Ḥanīfah's Use of the Solitary Ḥadīth," 263.
[294] ʿAbd-Allāh, *Mālik and Medina*,149.
[295] Syamsuddin, "Abū Ḥanīfah's Use of the Solitary Ḥadīth," 263.
[296] ʿAbd-Allāh, *Mālik and Medina*, 97.
[297] The categorization of disconnected *ḥadīth* varies from scholar to scholar, but generally speaking, a *ḥadīth* containing a gap of one generation was called *mursal* (disconnected). See Burton, *An Introduction to the Ḥadīth*, 112. Burton also points out that if a *ḥadīth* was transmitted by someone "not known to have been a contemporary of the Prophet, or known not to have been so," it was generally categorized as *munqaṭiʿ* (interrupted) [*ibid*].

reputation (usually a first-tier successor) determined whether or not any disconnected *ḥadīth* was acceptable. The most important criterium for the acceptance of a disconnected *ḥadīth*, amongst both Medinan and Kufan jurists, was that the final transmitter (*mursil*) in the chain had to be trustworthy (*thiqa*).[298] It is important to note that disconnected *ḥadīth* were ubiquitous prior, and after, al-Shāfiʿī. In fact, Susan Spectorsky argued that al-Shāfiʿī was the only jurist, amongst "the early authors of *fiqh* texts," who insisted on completely connected chains of transmission.[299] It is therefore not surprising that al-Shāfiʿī only accepted post-prophetic reports and disconnected *ḥadīth* in the absence of sound- and completely connected *ḥadīth*.[300] This is because al-Shāfiʿī regarded the companions and successors as uninspired individuals who, unlike the Prophet, were not recipients of divine revelation.[301] And since, as he noted, "no one else's order is on a par with that of the Apostle," it was necessary to subjugate post-prophetic reports and disconnected *ḥadīth* to the *Qurʾān* and soundly connected *ḥadīth*.[302] Nevertheless, as is evident from the Risāla, al-Shāfiʿī made extensive use of post-prophetic reports and disconnected *ḥadīth*, both as subsidiary legal arguments and rhetorical devices.[303] Interestingly, he invokes several post-prophetic reports and disconnected *ḥadīth* to argue his case for the primacy of solitary *ḥadīth.* On one such occasion he cites a post-prophetic report to show that the companions were already prioritizing solitary *ḥadīth* over expert opinion.[304] In short, although al-Shāfiʿī accepted post-Prophetic reports and disconnected *ḥadīth*, he severely restricted their application in conformity with his *bayān* scheme.

Consensus (*ijmāʿ*)

The third source of law which al-Shāfiʿī accommodates in the Risāla is the notion of *ijmāʿ* or consensus.[305] Often dubbed as the "third foundation" of Islām[306], *ijmāʿ* is widely considered a foundational and adhesive concept within the Sunnaic legal tradition.[307] Yet, just as the *sunna*, *ijmāʿ* is a complex notion that was used and defined differently by the early jurists. Ironically, the legal experts (*mujtahidūn*) never reached a consensus on what exactly constitutes a binding consensus.[308] Some jurists argued that the only binding *ijmāʿ* was that of the learned amongst the companions (*al-sahāba al-mujtahidūn*), while others included the *ijmāʿ* of the learned successors and later scholars (*al-ʿulamā al-*

[298] ʿAbd-Allāh, *Mālik and Medina*,100.
[299] Susan Spectorsky, "Sunnah in the Responses of Isḥāq b. Bāhwayh," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss, vol. 15 (Leiden: Brill, 2002), 54; Hasan, "Ijmāʿ in the Early Schools," 121-2.
[300] El Shamsy notes that in the Old Risāla (composed in Iraq), al-Shāfiʿī accepted post-prophetic reports as autonomous sources. See El Shamsy, *Canonization of Islamic Law*, 80.
[301] Ibid.
[302] *Risāla*, 263.
[303] ʿAbd-Allāh, *Mālik and Medina*,103; El Shamsy, *Canonization of Islamic Law*, 80.
[304] See *Risāla*, e.g., 252-84.
[305] Ibid., 285-87, 289-90.
[306] Literally, *ijmāʿ* means "collecting" or "assembling." See Thomas P. Hughes, *A Dictionary of Islam* (Chicago: Kazi Publications, 1994), 197 (s.v. "*ijmāʿ*").
[307] Coulson, *A History of Islamic Law*, 39-41.
[308] ʿAbd-Allāh, *Mālik and Medina*,130.

mujtahidūn).[309] As Fazlur Rahman rightly pointed out, *ijmāʿ* is "the most potent factor in expressing and shaping the complex belief and practice of Muslims, and at the same time the most elusive one in terms of its formation".[310] Nevertheless, it was the overwhelming agreement of the learned scholars which guaranteed the validity of the Sunnaic tradition on the whole.[311] It was their collective understanding of the law which safeguarded the fundamental tenets of the faith, sanctioned normative praxes and warded off stray opinions.[312] Approximating Schacht's notion of "living tradition," *ijmāʿ* thus served as a gravitational force of socio-religious unity which captured the *communis opinio* of the Sunnaic tradition.[313]

During the first two Islāmic centuries the concept of *ijmāʿ* was inextricably bound to- and virtually indistinguishable from Sunnaic praxis.[314] In the case of both Kufan- and Medinan law, the normative *sunna* was deeply imbedded into the notion of *ijmāʿ*. While there is some haziness surrounding Abū Ḥanīfa's notion of *ijmāʿ*,[315] it would seem that both he and Mālik gave legal precedence to the *ijmāʿ* of their socio-religious localities, and either approved or rejected praxes accordingly.[316] In any case, Medinan *ijmāʿ* was by far the most explicit and far-reaching articulation of consensus, which makes it therefore of utmost importance for our current discussion.[317] In fact, it was Medinan consensus with which al-Shāfiʿī was mainly concerned throughout his writings.[318] In order to understand the extent and purpose of al-Shāfiʿī's redefinition of *ijmāʿ*, it is thus imperative that we come to terms with Mālik's utilization of Medinan consensus.

While al-Shāfiʿī posited consensus as a tertiary and separate source, it played a most central role within Mālik's legal methodology. Not only did Mālik consider Medinan consensus[319] as the main qualifier of the normative *sunna*, but he also considered it superior to- and independent from *aḥādīth*.

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[309] Hourani, "The Basis of Authority of Consensus," 17-8; John. L. Esposito, *The Oxford Dictionary of Islam* (Oxford: Oxford University Press, 2003), 133 (s.v. "*ijmāʿ*").

[310] Rahman, *Islam*, 75.

[311] Coulson, *A History of Islamic Law*, 77.

[312] George Makdisi, *The Rise of Humanism in Classical Islam and the Christian West* (Edinburgh: Edinburgh University Press, 1990), 32–33. See also Rahman, *Islam*, 58; and ʿAbd-Allāh, *Mālik and Medina*, 130.

[313] Hourani, "The Basis of Authority of Consensus," 15-16.

[314] Hallaq, *Origins*, 110.

[315] Both Abū Yūsuf and al-Shaybānī frequently claimed *ijmāʿ* in reference to their master Abū Ḥanīfah. However, it is difficult to assess the authenticity of their claims, for as Schacht noted there was a particular tendency amongst the Iraqi's to retrospectively attribute their personal opinions to preceding authorities [see Schacht, *Origins*, 23, 238; and Coulson, *A History of Islamic Law*, 51-2]. It has also been suggested that Abū Yūsuf and al-Shaybānī departed from Abū Ḥanīfah on several accounts. For example, the Ḥanafite jurist Abū Layth al-Samarqandī (d. 1003) notes 481 cases in which Abū Yūsuf and al-Shaybānī deviated from Abū Ḥanīfah [mentioned in Yanagihashi, "Abū Ḥanīfa," 18]. For an additional discussion on Abū Ḥanīfah's conception of consensus see Hasan, "Ijmāʿ in the Early Schools," 130-36.

[316] Muhammad Abu Zahra, *The Four Imam: Their Lives, Works and Their Schools of Thought*, trans. Aisha Bewely (London: Dar Al Taqwa Ltd., 1999), 249-50; and ʿAbd-Allāh, *Mālik and Medina*,130-32.

[317] Hallaq, *Authority*, 31; Hasan, "Ijmāʿ in the Early Schools," 36.

[318] In his *Kitāb al-Umm*, al-Shāfiʿī engages in a lengthy discussion with his interlocuters concerning his contention with Medinan consensus. For a detailed discussion on this segment see Rahman, *Islam*, 72-5. Similar discussions of Medinan consensus also feature in the Risāla. See for example *Risāla*, 318.

[319] Instead of the term *ijmāʿ*, Mālik would commonly use the related word *ijtimāʿ,* meaning 'concurrence' [ʿAbd-Allāh, *Mālik and Medina*, 131]. Additionally, he also used alternative terms to denote normative or majority views including *al-sunna* and *al-amr* [Dutton, "Sunna," 13.].

In fact, Medinan consensus was one of the key mechanisms through which *aḥādīth* were judged.[320] It is important to stress that in Mālik's methodology consensus, *sunna* and praxis were all interrelated notions that reflected the 'generally agreed practice' of the Medinan community, which in itself echoed the Prophetic ideal.[321] This is reflected by Mālik's various expressions of consensual authority that he uses throughout his Muwaṭṭaʾ. For example, he frequently uses statements such as 'the *sunna* here' (*al-sunna ʿindanā*), 'the *sunna* about which there is no disagreement here' (*al-sunna al-latī la ikhtilāfa fī-hā ʿindanā*), 'the known practice here' (*al-amr ʿindanā*), the agreed practice here (*al-amr al-mujtamaʿ ʿalayhi ʿindanā*) and, 'the agreed practice about which there is no disagreement' (*al-amr al-ladhī lā ikhtilāfa fī-hi ʿindanā*).[322] These various articulations of consensus were classified by some classical jurists (amongst them Qādī ʿIyāḍ) as either manifestations of 'transmissional consensus' (*ijmāʿ al-naqli*) or 'interpretative consensus' (*ijmāʿ ijtihādī*).[323] Transmissional consensus represents the agreed upon praxis that is either directly-, or inferentially connected to the Prophet and is authorized by the majority of the companions, successors, Medinan jurists or – when pertaining to matters of common experiences – the general masses (*al-jumhūr*).[324] Interpretative consensus, on the other hand, although often originating from Prophetic praxes, always involved at least some element of legal interpretation (*ijtihād*).[325] Although both forms were authorized through concurrence (*ijtimāʿ*), Mālik ultimately attributed a higher authoritative degree to transmissional consensus because it represented the predominant Medinan praxis.[326] Nevertheless, both forms of consensus constituted 'definitive' (*qaṭʿī*) and 'conclusive evidence' (*ḥujja*) that outranked solitary *ḥadīth* or conclusions arrived at by analogy (*qiyās*).[327] This was of course in stark contrast with al-Shāfiʿī's insistence on the superiority of solitary *ḥadīth*.

According to Schacht, al-Shāfiʿī showed progressively less trust in consensus but never saw the means to completely reject the concept altogether.[328] This view is underscored by Lowry and others who

[320] Dutton, *Original Islam*, 18.
[321] ʿAbd-Allāh, *Mālik and Medina*, 122, 134.
[322] Dutton, "Sunna," 13.
[323] Some classical scholars, instead, categorized Mālik's expressions as either 'transmissional praxis' (*ʿamal al-naqli*) and 'interpretative praxis' (*ʿamal ijtihādī*). See Dutton, "Sunna," 13. This underscores that Mālik's notion of Medinan consensus was strongly related to Medinan praxis. Furthermore, there is some debate about whether Mālik distinguished between the terms *amr* and *sunna*. According to ʿUmar Faruq Abd-Allāh, Mālik's use of *sunna* referred to the *ʿamal* that was normatively based on Prophetic praxes, whereas *amr* was generally based on later legalistic interpretation (*ijtihād*). See ʿUmar Faruq ʿAbd-Allāh, "Mālik's Concept of ʿAmal in Light of Mālikī Legal Theory," (PhD diss., University of Chicago, 1978) 25-7, 300, 309, 419-33 [henceforth cited as ʿAbd-Allāh, "Mālik's Concept"]. See also Duttin, *Original Islam*, 78-80.
[324] ʿAbd-Allāh, *Mālik and Medina*, 231-38; Dutton, "Sunna," 8, 13-4.
[325] According to ʿAbd-Allāh interpretative consensus pertained to all statements where Mālik use the word *amr* (practice) as opposed to *Sunna*. See ʿAbd-Allāh, "Mālik's Concept," 25-7, 300, 309, 419-33.
[326] Dutton, "Sunna," 13-4.
[327] ʿAbd-Allāh, Mālik and Medina, 231-32. The scope of Medinan consensus also seems to have been the main topic of discussion in Mālik's correspondence with the Egyptian jurist al-Layth ibn Saʿd (d. 791) who, contrary to Mālik, distinguished between consensual Medinan praxis and non-consensual Medinan praxis. For more detailed discussions see ʿAbd-Allāh, *Mālik and Medina*, 220-27; and Dutton, "Sunna," 12-4.
[328] Schacht, *Origins*, 88–94.

argued that al-Shāfiʿī only reluctantly embraced *ijmāʿ* as a legal-theoretical concept.[329] However it may be, it is clear that al-Shāfiʿī was compelled by his own *bayān* scheme to endorse *ijmāʿ* as a binding legal mechanism, for both the *Qurʾān* and *ḥadīth* clearly, and repeatedly, emphasize its importance.[330] Yet, at the same time the *bayān* scheme also enabled al-Shāfiʿī to redefine the legalistic scope of *ijmāʿ* and to subject it to certain limitative provisions.[331] The most compelling limitations which al-Shāfiʿī introduced are as follows: Firstly, every consensus which contradicts with the *Qurʾān* or the Prophetic *Sunna* is to be categorically rejected: "[…] It would be unlawful for a Muslim who has known the Book [of God] and the *Sunna* [of the Prophet] to give an opinion at variance with either one."[332] Secondly, only when there is no textual indication in the sacred sources may we resort to accept the consensus of the 'public'.[333] Here al-Shāfiʿī is subjecting consensus to textual indicators, while at the same time expanding its scope by including the opinions of the entire Muslim community (*al-umma*).[334] Although seemingly impractical, al-Shāfiʿī's inclusion of the entire Muslim community is consistent with his threefold division of legal knowledge that is presented in the Risāla. The first category pertains to common knowledge that is widely accessible to the general public and relates to basic matters of the law, such as ritual prayer, fasting and alms. The second category involves matters that are not explicated by the textual sources and thus require interpretation by the generality of scholars (*ʿawāmm ahl al-ʿilm*). The third category pertains to the most complex and technical aspects of the law which are only accessible to a few legal specialists (*khāṣṣa*).[335] In line with his division of legal knowledge, al-Shāfiʿī identified two operable types of consensus namely, the consensus of the general public (*ijmāʿ al-umma*), which roughly covers the first form of legal knowledge; and secondly the consensus of legal authorities (*ijmāʿ al-aʾmma*), which covers the second and, ideally, third forms of legal knowledge.[336]

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[329] Lowry, *Risāla*, 319-20; Coulson, *A History of Islamic Law*, 78-9.

[330] In addition to some Qurʾānic verses, al-Shāfiʿī cites two *aḥādīth* in which the Prophet instructed his followers to abide by the majority [opinion] of the community [*Risāla*, 253, 286]. In the *Kitāb al-Umm* he further expounds on these *aḥādīth* and notes the following: "What is the proof for the authority of that on which men are agreed? A.: When the Prophet ordered men to hold fast to the community of Muslims, this could only mean that they were to accept the doctrine of the community; it is reasonable, too, to assume that the community cannot as a whole be ignorant of a ruling given by Allah and the Prophet. Such ignorance is possible only in individuals, whereas something on which all [Muslims] are agreed cannot be wrong and whosoever accepts such a doctrine does so in conformity with the sunna of the Prophet." Cited in Hourani, "The Basis of Authority," 23.

[331] Dutton, *Original*, 18.

[332] *Risāla*, 285.

[333] Ibid., 286.

[334] ʿAbd-Allāh, *Mālik and Medina*, 131.

[335] It should be noted that Lowry discerned only two categories of legal knowledge from al-Shāfiʿī's discussion in chapter V of the Risāla. He notes: "Shāfiʿī has two basic epistemological categories into which he divides all legal knowledge: the straightforward and the problematic. Straightforward legal knowledge is readily understandable by all and requires no intervention by scholars; disagreement about such matters is, moreover, prohibited. Problematic matters require scholarly intervention, one consequence of which is scholarly disagreement, as Shāfiʿī himself recognizes." [Lowry, *Risāla*, 105n77]. However, in the actual chapter on *Legal Knowledge* (chapter III), al-Shāfiʿī makes it clear to his interlocuter that there are, in fact, three categories of legal knowledge, and proceeds to demonstrate this latter category [See *Risāla*, 82]. For additional discussions on the categories of legal knowledge see *Risāla*, 81-4, 289-90; and also Schacht, *Origins*, 93-4.

[336] Schacht, and others after him, argued that al-Shāfiʿī moved away from the consensus of the jurists and aimed to redefine consensus on the basis of the entire Muslim community [Schacht, *Origins*, 88-94]. This view is contested by Lowry who rejects the idea that al-Shāfiʿī's notion of consensus appealed to the entire Muslim

Furthermore, contrary to the Kufans and Medinans, al-Shāfiʿī saw no legal basis for a local or selective consensus. He puts the matter in a rather straight forward fashion: "He who holds what the Muslim community holds shall be regarded as following the community, and he who holds differently shall be regarded as opposing the community he was ordered to follow [alluding to the Prophet's order to follow the majority of the community, F.B.]."[337] He consequently impugns the advocates of local consensus and points out the incessant disagreements that existed amongst them.[338] For example, regarding Medinan consensus he issues the following critique:

> You claim that the judges give judgment only in accordance with the opinion of the scholars, and you claim that the scholars do not disagree. But it is not so .... Where is the practice? ... We do not know what you mean by practice, and you do not know either, as far as we can see. We are forced to conclude that you call your own opinions practice and consensus, and speak of practice and consensus when you mean only your own opinions.[339]

Furthermore, in his Kitāb al-Umm, al-Shāfiʿī approvingly quotes Abū Yūsuf as saying that the Hijazis, "when asked for the authority for their doctrine, reply that it is the *Sunna*, whereas it is possibly only the decision of a market-inspector (*ʿāmil al-sūq*) or some provincial agent (*ʿāmilun mā min al-jihāt*)".[340] By attacking the consensus of the legal schools, al-Shāfiʿī relegated their doctrines to mere personal opinion without legal basis. Adherence to such doctrines amounts to what he calls *taqlīd* or 'blind following'.[341] Al-Shāfiʿī's staunch opposition to *taqlīd*, became a legal dictum amongst later Shāfiʿī'tes who defined *taqlīd* more narrowly as the "acceptance of a position without evidence" (*qubūl qawl bi-lā ḥujja*).[342]

In short, al-Shāfiʿī accepted consensus as a binding principle, however, his notion of consensus was, by necessity, limited to the most rudimentary aspects of the law. For as he himself argued, there was not even consensus amongst the scholars on a local level, let alone any meaningful consensus on a regional or universal level. Al-Shāfiʿī's redefinition and rather unenthusiastic endorsement of *ijmāʿ* striped it from the reflexive manoeuvrability it enjoyed in the Kufan- and Medinan schools, and arguably deprived it from having any substantial juristic utility.[343] It would seem that his redefinition of *ijmāʿ* was primarily motivated by his aim to counter the communal doctrines of the jurists by asserting the primacy

community. Instead, he argues that al-Shāfiʿī redefined consensus to represent the majority of opinions amongst the experts of the Muslim community [Lowry, *Risāla*, 319-20]. Instead, ʿAbd-Allāh holds that al-Shāfiʿī aimed to articulate a universal notion of consensus which was limited to the fundamentals of the faith [ʿAbd-Allāh, *Mālik and Medina*, 130-31]. In line with al-Shāfiʿī's threefold division of legal knowledge, it seems more plausible to me that he aimed to include both general/universal consensus and scholarly consensus within his limitative framework, which ultimately rendered consensus secondary to the textual sources.

[337] *Risāla*, 287.
[338] Jackson, "Setting the Record Straight," 122.
[339] Cited in Schacht, *Origins*, 69.
[340] Cited in Dutton, *Original Islam*, 14.
[341] Schacht, *Origins*, 7.
[342] See Ahmed El Shamsy, "Rethinking 'Taqlīd' in the Early Shāfiʿī School," *Journal of the American Oriental Society*, vol. 128, no. 1 (2008): 4.
[343] Lowry, *Risāla*, 319-20; Coulson, *A History of Islamic Law*, 78-9.

of solitary *ḥadīth.* For this purpose it was necessary to dismantle the consensual basis upon which their doctrines were predicated.

Analogical Reasoning (*qiyās*)

Until the middle of the eight century, juristic reasoning (*raʾy*) was the most important resource for legal adjudication, accounting for about two-thirds of legalistic doctrine.[344] Whenever the textual sources were silent, inconclusive or in conflict, jurists would commonly resort to various methods of juristic reasoning to provide an estimation of the law. Juristic reasoning broadly operated under the umbrella of legal interpretation (*ijtihād*) which played a central role in legal deliberation.[345] The only form of juristic reasoning that was unanimously accepted, however, was the method of *qiyās* or "analogical reasoning".[346] Yet, despite its universal acceptance, there was little agreement on the particularities and legalistic scope of *qiyās*.

In the Kufan- and Medinan traditions legal reasoning was strongly interlaced with the overarching 'intent of the law' (*ratio legis*).[347] Although both traditions interpreted the intent of the law from different perspectives, they nonetheless arrived at similar conclusions.[348] Abū Ḥanīfa adopted the view that the sacred law aimed to benefit mankind and therefore devoted his legal methodology to the removal of hardship.[349] Mālik on the other hand, understood that the ultimate intent of the law was to remove hardship and subsequently devoted his legal methodology to the attainment of public benefit (*maslaḥa*).[350] Both considered the intent of the law the highest legal demarcation, which, under specific circumstances, even allowed unlawful ends to become lawful through lawful means, that is, through legal interpretation.[351] In other words, any legal ruling must ultimately comply with the overarching intent of the law. For this purpose, both Abū Ḥanīfa and Mālik employed various juristic devices (*ḥiyal; sg. ḥīla*) that aimed to enact the intent of the law.

Consistent with his understanding, Abū Ḥanīfa developed so called *makhārij* (exits) to ameliorate potentially constraining legal outcomes.[352] For example, he used preferential judgements (*istiḥsān*) to select *aḥādīth* that were least harmful, and used analogical deductions (*qiyās*) to mitigate

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[344] Hallaq, *Origins*, 75.
[345] ʿAbd-Allāh, *Mālik and Medina*, 148.
[346] Generally speaking *qiyās* involved an intricate process of analogical reasoning by which new rulings were deduced from the operative cause (*ʿilla*) of a textual precedents (*naṣṣ*). See Robert Gleave, "Deriving Rules of Law," in *The Ashgate Research Companion to Islamic Law*, ed. Peri Bearman and Rudolph Peters (New York: Routledge, 2014), 62; Hallaq, *Origins*, 140-41; ʿAbd-Allāh, *Mālik and Medina*, 145-7.
[347] Satoe Horii, "Reconsideration of Legal Devices (Ḥiyal) in Islamic Jurisprudence: The Ḥanafīs and Their "Exits" (Makhārij)," *Islamic Law and Society*, vol. 9, no. 3 (2002) 357 [henceforth cited as Horii, "Devices"] .
[348] Ibid., 317; ʿAbd-Allāh, *Mālik and Medina*, 148.
[349] Horii, "Devices," 316-17.
[350] Ibid.
[351] Ibid., 312, 357.
[352] Ibid.

adverse outcomes of legal injunctions.[353] Similarly, Mālik employed various juristic devices to mitigate harmful outcomes of legal rulings. This was primarily achieved through his principle of 'preclusion of harm' (*sadd al-dharāʾiʿ*), but also involved other modes of juristic reasoning such as: 'analogical reasoning on the precepts or precedents of earlier analogies' (*al-qiyās ʿalā al-qawāʿid* and *al-qiyās ʿalā al-qiyās*); discretionary or preferential reasoning (*al-istiḥsān*[354]); the common good (*maslaḥa*); and the textually unregulated benefit (*al-maṣāliḥ al-mursala*).[355] Without going into the hypertechnicalities of these modes of juristic reasoning, it is important to note that they involved both textual, non-textual (interpretative) and conventional (praxes) legal indications. It was the latter two aspects, in particular, which provoked al-Shāfiʿī's polemic barrage against the Kufans and Medinans.

According to al-Shāfiʿī legal rulings must always follow either the explicit- (*naṣṣan*) or implicit indications (*jumlatan*) of the textual sources (*tanṣis*).[356] All forms of legal reasoning beyond the scope of the textual sources were discarded by al-Shāfiʿī as mere "human legislation".[357] The correct outcome (*ʿalam al-ḥaqq*) of legal interpretation must, at all times, be in conformity or analogy with the textual sources. Al-Shāfiʿī thereby limited the scope of legal interpretation (*ijtihād*) to text-based *qiyās*, and categorically rejected all forms of juristic reasoning that were not aligned with- or inspired by the sacred texts.[358] This is the reason why in his definition *ijtihād* becomes synonymous with *qiyās*.[359] He notes: "On all matters touching the [life of a] Muslim there is either a binding decision or an indication as to the right answer. If there is a decision, it should be followed; if there is no indication as to the right answer, it should be sought by *ijtihād*, and *ijtihād* is *qiyās* (analogy)."[360]

Moreover, al-Shāfiʿī categorically rejected the use of rational inquiry whenever it conflicted with a sound Prophetic *ḥadīth*. He notes: "To have given an opinion contrary to an authentic tradition [*ḥadīth*, F.B] from the Apostle is something, I hope, for which I shall never be reproached. Nor has anyone the right to give such an opinion."[361] Only when there is no clear indication in the textual sources, is one allowed to use interpretative methods, but even then must legal interpretation be based on the operative cause (*maʿna*) of a general similarity (*tashbīh*) within the textual sources.[362] For the purpose of *ijtihād* (i.e. *qiyās*) is, according to al-Shāfiʿī, to seek "[…] an unknown object by means of certain

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[353] For example, analogous with the requirement of four witnesses proscribed by the *Qur'ān*, Abū Ḥanīfa committed that corporal punishment for adultery required a fourfold confession of the culprit [Mentioned in Schacht, *Origins*, 106]. See also Majid Khadduri, *War and Peace in the Law of Islam* (1955; repr., Clark, NJ: The Lawbook Exchange, Ltd., 2007), 30.

[354] *Istiḥsān* was generally used to amend any irregularities of *qiyās*. See Mohammad H. Kamali, "Istiḥsān and the Renewal of Islamic Law," *Islamic Studies*, vol. 43, no. 4 (2004): 567.

[355] ʿAbd-Allāh, *Mālik and Medina*, 143-44.

[356] Ibid., 148; *Risāla*, 302; Khadduri, "Introduction," 31.

[357] ʿAbd-Allāh, *Mālik and Medina*, 144. See also Hallaq, *Origins*, 144; and *Risāla*, 78-9.

[358] Ibid., 302; ʿAbd-Allāh, *Mālik and Medina*, 148; Khadduri, "Introduction," 31.

[359] According to al-Shāfiʿī *ijtihād* and *qiyās* are two nouns that denote the same concept: "*humā ismān li-maʾnā wāḥid*." Cited in Lowry, *Risāla*, 145.

[360] *Risāla*, 288.

[361] Ibid., 183.

[362] Lowry, *Risāla*, 149-51.

indications".[363] Yet, while al-Shāfiʿī rejected all modalities of juristic reasoning that were not aligned with the textual sources, he was somewhat lenient towards rulings that were derived from the intent of the law (*ratio legis*).[364] Much like his predecessors, al-Shāfiʿī recognized the intent of the law as an important legal indicator, although he was wary of the unrestricted use of personal juristic reasoning that it engendered.[365] Nevertheless, whenever there was no clear indication in the *Qurʾān* or the *Sunna*, he would allow rulings in concordance with the intent of the law. He notes:

> The first is that God or His Apostle have either prohibited a certain act by an [explicit] text [in the *Qurʾān* and the *Sunna*] or permitted it by an [implied] reason. If such a reason is found in the absence of a specific text in the Book or the *Sunna*, the act should be prohibited or permitted in conformity with the [implied] reason of permission or prohibition.[366]

Yet unlike his predecessors, al-Shāfiʿī considered the intent of the law to be secondary to the explicit indications of the textual sources, as he candidly reminds his audience that disagreements with the explicit indications of the textual sources are unlawful:

> On all matters concerning which God provided clear textual evidence in His Book or [a *Sunna*] uttered by the Prophet's tongue, disagreement amongst those to whom these [texts] are known is unlawful. As to matters that are liable to different interpretations or derived from analogy, so that he who interprets or applies analogy arrives at a decision different from that arrived at by another, I do not hold that [disagreement] of this kind constitutes such strictness as that arising from textual [evidence].[367]

This is in sharp contrast with the views of Abū Ḥanīfa and Mālik who would frequently rule against explicit textual indications when the intent of the law was not satisfied. In fact, even the late Ḥanafites, Abū Yūsuf and al-Shaybānī, who were significantly more textually oriented than Abū Ḥanīfa, were not entirely dismissive of non-textual legal indicators (such as the intent of the law or the *makhārij*).[368]

In short, considering his tenacious persistence on textual validation of legal rulings, it is tempting to conclude, as others have done, that al-Shāfiʿī was vehemently opposed to rational jurisprudence.[369] However, a closer examination of the Risāla reveals a more nuanced approach that is

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[363] *Risāla*, 310.
[364] Ibid., 78-9. See also ʿAbd-Allāh, *Mālik and Medina*, 144.
[365] Khadduri, "Introduction," 38-9.
[366] *Risāla*, 79.
[367] Ibid., 288.
[368] Al-Shaybānī, in particular, was heavily inclined towards the use of (solitary) *ḥadīth*, whereas Abū Yūsuf was more inclined towards the centrality of Qurʾānic injunctions in matters of *qiyās*. See Horii, "Devices," 318-19; ʿAbd-Allāh, *Mālik and Medina*, 147; and Hallaq, *A History of Islamic Legal Theories*, 32. However, Horii also notes that some sources indicate that al-Shaybānī considered the use of *makhārij* to be legally reprehensible (*makrūh*) [Horii, "Devices," 338].
[369] The idea that al-Shāfiʿī was categorically opposed to rational jurisprudence was initially opted by Goldziher who argued that al-Shāfiʿī's textual approach was conciliatory to the literalist Ẓāhirī school of law, named after its founder Dāwud al-Ẓāhirī (d. 883/4). Mentioned in Makdisi, "The Juridical Theology of Shâfiʿî," 11.

consistent with al-Shāfiʿī's *bayān* paradigm. Al-Shāfiʿī's main concern was that unfettered juristic reasoning would ultimately weaken the foundations of the law.[370] As a preventative measure, he felt it therefore necessary to redefine the legalistic scope of juristic reasoning by excluding all modalities that were not aligned with the textual sources.[371] By forcing it into predefined and restricted pathways, al-Shāfiʿī aimed to narrowly align legal interpretation with the textual sources. To this end, he wholeheartedly embraced text-based *qiyās* as a natural constraint against the arbitrary application of juristic reasoning (*istiḥsān*).[372]

[370] Lowry, *Risāla*, 144.
[371] *Risāla*, 78-9; ʿAbd-Allāh, *Mālik and Medina*, 144.
[372] *Risāla*, 304-5.

Conclusion

It is abundantly clear that the Risāla was not the zenith-point of Islamic legal development that Schacht had envisioned.[373] Neither was it the unsophisticated and insignificant work which Hallaq deemed it to be.[374] Our analyses, instead, suggests that the Risāla propounded an important and unique legal-theoretical exposition in its time. Broadly speaking there are three interrelated qualities that make the Risāla stand out from previous and contemporary works. The first of these qualities is its extensive engagement with the epistemic foundations of the law. This is evident from al-Shāfiʿī's theory of *bayān* which predicated the entirety of the law on the primacy of the textual sources. And although its discourse might not entirely fit in with the later and more technical genre of *uṣūl*, it nevertheless propounds a theoretical discussion of the foundational principles of Islamic jurisprudence.[375] In that light, it would be appropriate to classify the Risāla as a proto-*uṣūlī* work. The second distinctive quality is al-Shāfiʿī's *ḥadīth* principle which cojoined the Prophetic *Sunna* and solitary *ḥadīth* into a coherent theoretical framework. The third and final unique quality is al-Shāfiʿī's redefinition of the parameters of legal interpretation (*ijtihād*). We shall now reflect on each of these qualities in more detail and examine how they distinguish al-Shāfiʿī's legalistic thinking from that of Abū Ḥanīfa and Mālik.

First Quality - Bayān Theory

At its core the *bayān* theory articulates al-Shāfiʿī's most fundamental argument which permeates throughout his late stage output, namely that the law revolves around the dual revealed sources (*Qurʾān* and Prophetic *Sunna*). Within the context of the Risāla the *bayān* theory achieved two primary objectives. Firstly, it provided the theoretical framework which allowed al-Shāfiʿī to engage with- and contest the doctrines of the jurists. This then paved the way for al-Shāfiʿī's second objective which was to exposit a source-centric jurisprudential theory, which could serve as an alternative to the doctrines of the jurists. Both objectives arise from al-Shāfiʿī's critical assessment of the epistemic foundations and legal methodologies of the proto-schools. Al-Shāfiʿī's main contention was that the jurists prioritized local traditions and doctrines over the revealed sources, and in doing so, failed to recognize *ḥadīth* as the textual embodiment of the Prophetic *Sunna*. In theory, however, neither Abū Ḥanīfa nor Mālik discarded the centrality of the textual sources but instead incorporated them into a broader interpretative framework and thereby allowed them to function alongside consensual authority, analogical reasoning, disconnected *ḥadīth* and post-prophetic reports. In other words, while Abū Ḥanīfa and Mālik considered the *Qurʾān* and Prophetic *Sunna* independent sources, they apprehended and

[373] Schacht, *Origins*, 287
[374] Hallaq, "Master Architect," 588-91.
[375] Hallaq argued that the Risāla does qualify as a work of *uṣūl* because it did not live up to the standards of the technically advanced genre of *uṣūl al-fiqh* which developed during the tenth century CE. See Hallaq, "Master Architect," 594-6.

filtered both through the prism of their local traditions and doctrines. And it was precisely this erosive impact upon the revealed sources which al-Shāfiʿī aimed to uproot with his *bayān* theory.

Contrary to his predecessors, al-Shāfiʿī considered the textual sources as fully autonomous gateways into a divinely ordained metaphysical reality, which provided unshakable epistemic knowledge that required neither support nor endorsement from anyone. By centring the textual sources al-Shāfiʿī aimed to steer legal authority away from local communal traditions and to reconnect it instead with God and His Messenger. Insofar, El Shamsy was right in pointing out that al-Shāfiʿī's reconstitution of the epistemic foundations of the law cleared the path for a "cannon-centric" legal framework.[376] However, there is no evidence, whatsoever, that al-Shāfiʿī aspired to establish an individualistic legal framework. While it is true that al-Shāfiʿī aimed to offset the communal authority of the proto-schools, he certainly did not intend to overwrite their 'collective authority' by instating himself as an alternative 'individual authority'. If anything, al-Shāfiʿī was wholeheartedly opposed to the excessive influence, which some individual jurists, exerted over matters of the law.[377] Moreover, to depict al-Shāfiʿī as the propagator of a 'personal doctrine' (as Schacht had done) goes against his most famous dictum: "If a *ḥadīth* is authentic, take my [contrary] school [position] and dash it against the wall."[378]

Contrary to what Schacht and El Shamsy had suggested, al-Shāfiʿī did not aim to personalize the law, but instead aspired to universalize it, to the extent that it became 'Islamic law' proper, as opposed to say Kufan- or Medinan offshoots. And there is furthermore little doubt that al-Shāfiʿī's universal outlook was, to a large extent, inspired by his extensive travels and interactions with various local traditions. Not only did these encounters raise his attention to the multivocality of the legal schools, but they also imprinted on him the extent and divisiveness of the disagreements that persisted amongst the jurists. The fact that the jurists disagreed on even the most rudimentary – and yet fundamental – aspects of the law (such as the *adhān* or rituals of prayer) was sufficient proof for al-Shāfiʿī that their methodologies were detached from the revealed sources and therefore flawed. For if Islam was the divinely ordained universal truth, as Muslims proclaimed, then certainly one should be able to travel across Muslim lands and find harmony in both praxes and rulings; yet this was not the case. Moreover, how can one truthfully claim to abide by God's law when the Kufans, Basrans, Meccans and Medinans all perceived and practiced the law differently.[379]

For al-Shāfiʿī the disunity amongst the jurists did not only undermine God's law, but more importantly, it threatened the very essence, continuity and validity of the Islamic faith. And in order to safeguard the ontology of Islam, al-Shāfiʿī deemed it necessary to device a universal and cannon-centric

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[376] El Shamsy, *Canonization of Islamic Law,* 167.

[377] Hence he unapprovingly remarked: "every capital of the Muslims is a seat of learning whose people follow the opinion of one of their countrymen in most of his teachings." Cited in Schacht, *Origins*, 7.

[378] Cited in ʿAbd-Allāh, *Mālik and Medina*, 116.

[379] This was partly the reason why al-Shāfiʿī insisted that general consensus should involve the entirety of the Muslim community (*al-umma*) as opposed to a regional or local consensus. See ʿAbd-Allāh, *Mālik and Medina*, 131.

legal epistemology; more particularly, one which could serve the Muslim community through time and space. And although he voiced this legal-epistemological vision in opposition to the communal authority of the legal schools, he certainly did not challenge them by claiming authority on his own behalf. Instead he challenged their collective authority by juxtaposing it with the superior and infallible authority of God (*Qurʾān*) and His Messenger (*ḥadīth*). In that sense it would be more accurate to qualify al-Shāfiʿī's doctrinal position as 'canon-centric universalism,' as opposed to El Shamsy's 'canon-centric individualism'.[380]

Second Quality - Ḥadīth Principle

The second distinctive quality is al-Shāfiʿī's *ḥadīth* principle which, as we have argued, interlocked the Prophetic *Sunna* and solitary *ḥadīth* into an integrated and autonomous legal source. However, we have also noted that al-Shāfiʿī was not the first to articulate the legislative primacy of solitary *ḥadīth*. In fact, both the Prophetic *Sunna* and solitary *ḥadīth* were already part and parcel of legal discourse long before al-Shāfiʿī got involved. Most notably was the contribution of the traditionists who fervently advocated the legislative centrality of solitary *ḥadīth*. Yet, while al-Shāfiʿī applauded their commitment to *ḥadīth*, he was also disgruntled by their lack of sophistication and indiscriminate endorsement of *ḥadīth*. He subsequently admonished the traditionists for taking *ḥadīth* from unreliable sources and reiterated that due diligence was a necessary pre-condition for the legislative application of *ḥadīth*. Among other things, he highlighted that the chain (*silsila*) must be fully connected while all of its narrators should be verified to be both trustworthy and scrupulous in their transmission. Contrary to the traditionists, al-Shāfiʿī thus insisted that only 'soundly transmitted connected solitary *ḥadīth*' (*ḥadīth al-āḥād al-musnad*) provided sufficient evidential strength to serve an independent legal cause (in addition to the infrequent mass transmitted *ḥadīth* or *ḥadīth al-mutawātir*).[381] As such, al-Shāfiʿī elevated the traditionist's thesis into a more methodical and theoretical framework which lived up to the standards of the jurists.

More than anything, it was his *ḥadīth* principle, which sat al-Shāfiʿī apart from Abū Ḥanīfa and Mālik. Altough *ḥadīth* was an important legal source within Abū Ḥanīfa's methodology, it never reached a fully autonomous status as it did under al-Shāfiʿī's *ḥadīth* principle. For as we have noted, Abū Ḥanīfa utilized *ḥadīth* selectively under his principle of *taʿmīm al-adilla*, and furthermore operated it alongside post-prophetic reports (*āthār*), general Kufan principles and discretionary interpretative methods. Even the late Ḥanafites, Abū Yūsuf and al-Shaybānī, who adopted a more *ḥadīth*-centric position, were not willing to concede to *ḥadīth* a fully autonomous status. Nevertheless, al-Shāfiʿī's main contention over the legislative status of *ḥadīth* was not with the Iraqi jurists, but instead concentrated on Mālik ibn Anas, who served as the main mouthpiece of the Medinan tradition, and was decidedly one of the most adamant

[380] El Shamsy, *Canonization of Islamic Law*, 167.
[381] ʿAbd-Allāh, *Mālik and Medina*, 108.

critics of *ḥadīth*-centric law. It is with Mālik that al-Shāfiʿī's disengagement with the jurists took a most dramatic turn, not in the least due to his former tutelage under Mālik.

Al-Shāfiʿī's contention with Mālik was mainly instigated by two fundamental aspects of Medinan law. Firstly, he was deeply embittered by Mālik's prioritization of Medinan praxis and consensus over solitary *ḥadīth*. Secondly, al-Shāfiʿī was disheartened by the fact that Mālik placed disconnected *ḥadīth* and post-prophetic reports on an equal footing with solitary *ḥadīth*, while subjugating both to Medinan praxis. As far as the first issue was concerned, al-Shāfiʿī countered the Medinans by producing Qurʾānic injunctions in support of the primacy and autonomy of Prophetic authority. He then supplemented these injunctions with several disconnected *aḥādīth* and post-prophetic reports to demonstrate that the companions and early successors prioritized *ḥadīth* and Prophetic authority over personal and collective opinions. Unlike Medinan praxis and Kufan doctrine, 'soundly connected solitary *ḥadīth*' offered direct and unmediated access to the Prophet's own words and actions and thereby constituted, in al-Shāfiʿī's mind, the purest representation of Prophetic authority. And it was because of this reason that al-Shāfiʿī insisted that 'soundly connected solitary *ḥadīth*' were normative, unrepealed, and universal.[382]

In short, whereas Abū Ḥanīfa utilized *aḥādīth* selectively (through his principle of *taʿmīm al-adilla*), Mālik instead assessed them in numerical terms by measuring them against (mass transmitted) Medinan praxes. Al-Shāfiʿī departed from both and instead saw the evidential strength of solitary *ḥadīth* arising from the fact that it derived its authority from the Prophet himself. Contrary to his predecessors, al-Shāfiʿī thus justified the evidential strength of solitary *ḥadīth* in purely qualitative terms by interlocking it with Prophet authority. And since Prophet authority was prescribed by the *Qurʾān*, it was only logical that 'soundly connected solitary *ḥadīth*' should take precedence over any doctrine, consensus or legal opinion.

Third Quality - Legal Interpretation (*ijtihād*)

Tantamount to the first two qualities, al-Shāfiʿī's redefinition of *ijtihād* brought him in direct opposition with his predecessors. As we have noted, both Abū Ḥanīfa and Mālik were heavily inclined towards juristic reasoning and employed various interpretative mechanisms accordingly. Furthermore, we have also noted that in both their methodologies legal reasoning was strongly interlaced with the overarching 'intent of the law' (*ratio legis*).[383] Not only did their apprehension of the intent of the law take into account the material outcome of legal arbitration, but it also rationalized potential conflicts between legal rulings and the textual sources. In practical terms, the intent of the law provided sufficient cause to either expand or compress the scope and applicability of the textual sources. This is evident from Abū Ḥanīfa's prioritization of preferential judgements (*istiḥsān*) as well as Malik's 'preclusion of harm'

[382] This was also the reason why al-Shāfiʿī devalued the legalistic status of disconnected *ḥadīth* and post-prophetic reports. See ʿAbd-Allāh, *Mālik and Medina*, 13, 205.

[383] Satoe Horii, "Legal Devices," 357.

(*sadd al-dharāʾiʿ*), both of which mediated between the textual sources and practical reality by taking into account the material outcome of legal rulings. It was this quasi-utilitarian approach which, in al-Shāfiʿī's assessment, transgressed the boundaries of the revealed sources. For al-Shāfiʿī it was crystal clear; the sacred law is a matter of divine decree from which no mere mortal may ever deviate. Hence he asserted that all forms of juristic reasoning that were not aligned with- or inspired by the sacred texts (*nuṣūṣ*) were to be categorically rejected.[384] Consequently, he identified text-based *qiyās* as the only valid aperture through which *ijtihād* could be legally pursued. And in doing so, he made text-based *qiyās* and *ijtihād* to become effectively coterminous in his legal theory. He notes: "They [*qiyās* and *ijtihād*, F.B] are two nouns with the same meaning (*humā ismān li-maʾnā wāḥid*)".[385]

In short, although al-Shāfiʿī's *ḥadīth* principle occupies a central position within the Risāla, it would be wrong to conclude that it was the ultimate aim of his legal-theoretical enterprise. Instead, our analysis suggests that al-Shāfiʿī aimed to advance an integrated and universal legal system that was fully emersed into the textual sources. In that regard, al-Shāfiʿī's *ḥadīth* principle served as an integral part of his encompassing canon-centric doctrine that was presided by the *bayān* scheme. Yet, while al-Shāfiʿī's canon-centric approach promoted a universal legal discourse, it also impeded upon the reflexive capabilities of the law. His text-based approach conflicts, for example, with the principle of 'original permissibility' (*al-ibāḥa al-aṣliyya*), which dictates that all things are by nature permissible, unless there is a clear contra-indication in the textual sources (or the established s*unna* in the Kufan and Medinan traditions).[386] Although al-Shāfiʿī does not directly address this issue, he offers various suggestive remarks which indicate that legal permissibility cannot be inferred from the absence of a contra-indication alone.[387] It would thus seem that while al-Shāfiʿī's text-based approach simplified and universalized the law in theory, it simultaneously also complicated its practical implementation by removing the socio-psychological particularities and leeway's that were offered by his predecessors; thereby opening the door to potentially more constricting legal outcomes. Clearly, his predecessors were more concerned with preventing the latter than upholding the former.

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[384] Ibid., 302; ʿAbd-Allāh, *Mālik and Medina*, 148; Khadduri, "Introduction," 31.

[385] Cited in Lowry, *Risāla*, 145.

[386] The principle of 'original permissibility' was particularly important in the methodology of Mālik. See ʿAbd-Allāh, *Mālik and Medina*, 144n196.

[387] See for example *Risāla*, 79.

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