The Evolution of the Rule of Law: The Origins and Function of Legal Theory

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Abstract

The thesis examines the origins and function of legal theory (*uṣūl al-fiqh*) within the context of the development of early Islamic law. I argue against the depiction of the development of law as a series of compromises between traditionalism and rationalism. Rather, by evading the demands of traditionalism, law evolved into a complex doctrinal entity rooted in the social structures of third-century Abbasid society. This revision of the development of law provides a context to evaluate early works of legal theory. Moreover, in context of my analysis of the development of law, I attempt to explain the emergence of legal theory as an independent discipline and its function within the greater structure of law.

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Résumé

Cette thèse analyse les origines et fonctions de la théorie juridique (*uṣūl al-fiqh*) dans le contexte du développement du début la loi Islamique. J'argumente contre la description du développement de la loi en tant que série de compromis entre le traditionalisme et le rationalisme. Au contraire, en éludant les demandes du traditionalisme, la loi évolue dans une entité doctrinale complexe enraciné dans les structures sociales de la société Abbasid du troisième siècle. Cette révision du développement de la loi apporte un contexte pour évaluer les travaux antérieurs de la théorie juridique. De plus, dans le contexte de mon analyse du développement de la loi, j'essaye d'expliquer l'émergence de la théorie juridique comme une discipline indépendante et ses fonctions dans une structure juridique générale.

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Introduction

Contemporary scholarship on Islamic law has viewed the role of legal theory as peripheral to the formation and development of positive law. Confirming the received wisdom of the field, Norman Calder states, "In fact, in broad terms and to a considerable extent in details, the norms of law were known prior to and independent of the tradition of *uṣūl*."[1] Just as the scriptural sources of law were adduced subsequent to the formation of legal norms, legal methodology was constructed with the benefit of hindsight. However, to state that legal theory is a theoretical construct is simply, perhaps speciously, to state the obvious. That is, it does little to explain the formation and function of legal theory *qua* a legal discipline. Calder acknowledges that, "[N]either a comprehensive history of *uṣūl*, nor a clear analysis of its function, has been provided by Western scholarship, although the dissertation of Aron Zysow (see *Bibl.*) goes a long way in this respect."[2]

Our dearth of knowledge has not, however, prevented modern scholarship from pronouncing on the nature and function of legal theory, particularly with respect to its social application. Calder states, "Modern scholars (notably Wael B. Hallaq), and some of the earlier exponents of the indigenous tradition (including al-Ghazālī), have tried to present *uṣūl* as an ongoing method for the discovery and the development of rules, implying that it points to a capacity for change and evolution in the juristic tradition...Chaumont (*Ijtihād et histoire*) has shown that the theory of *ijtihād* is not developmental: it is concerned with the discovery of

[1] Norman Calder, "Uṣūl al-Fiḳh," *EI*^{2}, CD-ROM (Leiden: Brill, 2003). See also, Joseph Schacht, *Origins of Muhammad Jurisprudence* (London: Oxford University Press, 1979), 6-10.
[2] Calder, "Uṣūl al-Fiḳh."

the law as an eternal and enduring truth."[3] Is this to mean that Islamic law was "discovered" in total abstraction from reality? Presumably not. Although Calder does cast a large net,[4] following Schacht, he quite likely meant that Islamic law was primarily concerned with the discovery of the eternal law of God *independently of* the needs of social practice.[5] Modern scholarship has, in this vein, tended to emphasize the relationship between legal theory and theology, hence Calder's reference to Zysow's work as a major advance.[6]

Although Calder locates a significant lacuna in the field of Islamic law, I doubt that Zysow's study, or other such approaches, is a step forward in understanding the history and function of legal theory, as opposed to merely understanding its contents. On the contrary, I argue that an analysis of the origins of legal theory in early fourth century is fundamental to understanding the historical context of the discipline, particularly its relationship to the structure of Islamic law in its classical form. Moreover, I contend that the history of legal theory cannot be understood without reference to the formation of law in the third century. Zysow's study deals almost exclusively with post-fourth century *uṣūl* texts, with a particular focus on what Ibn Khaldūn calls the *uṣūl* of the theologians. However, as Calder himself suggests, the *uṣūl* of the jurists is "prior to and

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[3] Calder, "Uṣūl al-Fiḳh."
[4] See ff. 5.
[5] Calder states, "The intrinsic delight of the juristic task drew them away from reality towards imaginary cases, ever curiouser and curiouser, and towards logical structures ever neater and more schematized. In effect, the system itself, irrespective of its relation to reality, became the object of attention." Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 222.
[6] Aron Zysow states, "The richness of *uṣūl al-fiqh* and its obvious dependence on other disciplines such as theology and grammar make it only too easy to despair of finding those intelligible structures that intellectual history requires." Aron Zysow, "The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory," diss., Harvard University, 1984, 2. See also Bernard Weiss, *The Search for God's law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (Salt Lake City: University of Utah Press, 1992).

productive of the theologians' tradition."[7] Zysow does little to explain the transition from a jurists' *uṣūl* to that of the theologians, much less provide a "framework within which the history of this discipline can be undertaken."[8]

To my mind, the question that has yet to be asked concerning the function of legal theory is one that is inextricably linked to its origins: If jurists produced *and* defended law without an independent discipline of legal theory in the third century, what conditions gave rise to it in the fourth?[9] What, if anything, does the genesis of this new discipline signal? I argue the answer to this question lies in our (re-)interpretation of legal developments in the third century, together with a contextual analysis of the early works of *uṣūl*.

To begin, let us consider the present view of the formation of law in the third century. Christopher Melchert provides a fair summary of the major developments:

> The traditionalists had separated out from *aṣḥāb al-ra'y* in the later eighth century. Traditionalism enjoyed a spectacular triumph when the caliph al-Mutawakkil rescinded every last measure of the

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[7] Calder, "Uṣūl al-Fiḳh."

[8] Zysow, "The Economy of Certainty," 2.

[9] Devin Stewart has suggested recently that the origins of legal theory are firmly rooted in the ninth century. Although I agree that Ibn Surayj and his students were not the progenitors of the genre, he has left me unconvinced that legal theory in the ninth century constituted a self-contained and independent discipline, which is what I am concerned with in this paper. As explained below, to determine the nature of early legal theory, we need to examine the content of legal works rather than mere titles, chapter headings and bibliographic references, approach that has dominated much of the few attempts at examining the origin of *uṣūl*. Although, as Stewart states, much of the material from this period is lost, I argue the recent publication of al-Jaṣṣāṣ's work (along with al-Shāshī's) has not been fully examined. To offset my emphasis on these select authors with respect to the function and origins of legal theory, my thesis will attempt to locate their works within the discipline of law as it developed generally. Thus, the first section of my study will (re-)examine the development of positive law in its broad outlines. The section on legal theory will locate al-Jaṣṣāṣ's work within the greater discipline of law. The aim is to provide a framework that will explain not just Jaṣṣāṣ's legal theory, but legal theory as an independent discipline. For Stewart's view on the origins of legal theory see his paper, "Muḥammad b. Dā'ūd al-Ẓāhirī's Manual of Jurisprudence, *al-Wuṣūl ilā Ma'rifat al-Uṣūl*," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden; Boston: Brill, 2002), 99-158.

> Inquisition, 237/853, and the intellectual descendants of *aṣḥāb al-ra'y* were able to win themselves a measure of acceptance only by imitating certain of the forms of the traditionalists. The form of jurisprudence that finally prevailed was a compromise between the two extremes, regulated by the institution of the guild school of law.[10]

This view of the formative period carries a number of significant implications for our discussion. First, the formative period witnessed a fundamental change in the hermeneutic structure of law that corresponded to its new source of content; more specifically, "the essential shift in the method of Islamic jurisprudence was from the independent exercise of reasoning to the interpretation of sacred texts (mainly prophetic *ḥadīth*)."[11] A corollary of this conclusion bears relevance to the nature of Islamic law with respect to social praxis; namely, the synthesis of legal approaches redirected the trajectory of the development of Islamic law from systematizing an organic or "living" law to an inherently conservative one that seeks to discover the divine will primarily by examining scriptural sources. In his seminal study of early Islamic law, Norman Calder states that the "stress throughout the formative and into the classical period is probably on schema at the expense of reality."[12] It is in this vein that, in the view of modern scholarship, the rational tools of Islamic law are relegated to a subsidiary position, which not only includes the formal sources of law, such as *qiyās*, but the entire discipline of *uṣūl al-fiqh*: "Re-creation, re-discovery, re-experience: it is concern with repetition and defence of the known law, not concern with development, that most

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[10] Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (Leiden: E.J. Brill, 1997), 1.
[11] Christopher Melchert, "Early History of Islamic Law," in *Method and Theory in the Study of Islamic Origins*, ed. Herbert Berg (Leiden: Brill, 2003), 307. This is from Melchert's summary of Calder's previously cited work. See n. 4.
[12] Calder, *Studies*, 200.

characterises –and most reveals the profound religious and cultural values of the legal sciences of Islam, both *furū'* and *uṣūl*." [13] Islamic law was, alas, so profoundly religious that it concerned itself less with practical life than with discovering the divine will.

I do not question that Islamic law constituted a sacred tradition and that it concerned the engagement of what is entailed by that tradition, be it by involvement in 'casuistry', *ḥiyal* or other mechanisms peculiar but fundamental to its structure. However, being a sacred tradition is neither a necessary nor sufficient condition for it's disengagement from reality. As Haim Gerber states, "It seems to me a serious fallacy to claim that Islamic law suffered from a deficiency *qua* law because it was also religious law."[14]

The notion of the stagnation of Islamic law stems, in part, from a superficial and fragmentary understanding of the development of law and legal theory.[15] Of particular importance in this respect is the notion of compromise between rationalists and traditionalists, which, as we are told, left little room for rational maneuvering or at least the type of maneuvering that had any relevance to social reality and change.[16]Although convinced of the practical import of Islamic law, particularly with respect to trade and transaction, Abraham Udovitch

[13] Calder, "Uṣūl al-Fiḳh."
[14] Haim Gerber, *Islamic Law and Culture: 1600-1840* (Leiden: Brill, 1999), 129.
[15] In terms of stagnation with respect to *ijtihād, taqlīd,* and doctrinal schools in the post-formative period, see, for a representative example of recent approaches: Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001); Wael B. Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies*, 16, 1 (1984): 3-41; Haim Gerber, *State, Society and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994); Gerber, *Islamic Law*; Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1998); Baber Johansen, "Casuistry: Between Legal Concepts and Social Praxis," *Islamic Law and Society*, 2, 2 (1995): 135-156.
[16] Norman Calder, "Law," in *History of Islamic Philosophy*, ed. Seyyed Hossein Nasr and Oliver Leaman, Routledge History of World Philosophies 1, 2 vols. (London: Routledge, 1996), 979-97.

nevertheless takes the basic assumptions of the field for granted, "The legal compilations of the eighth and ninth centuries antedate the rigidity and artificiality imposed by the *complete triumph of prophetic traditions as the foremost source* for Muslim law. They retain a measure of flexibility due to the extensive use of *ra'y* (independent personal judgment) and its specific manifestations in the Ḥanafī and Mālikī schools of *istiḥsān* (juristic preference) and *istiṣlāḥ* (regard for the public interest)."[17] Joseph Schacht, who perhaps most forcefully endorsed the idea of stagnation, states, "Islamic law, which until the early Abbasid period had been adaptable and growing, from then onwards became increasingly rigid and set in its final mold...It was not altogether immutable, but the changes which did take place were concerned more with legal theory and the systematic superstructure than with positive law...Taken as a whole, however, Islamic law reflects and fits the social and economic conditions of the early Abbasid period, but has become more and more out of touch with later developments of state and society."[18] In other words, after the relevant changes were made in the second century, Islamic law was no more than a search for God's law.

The debate over the theory and praxis of Islamic law is reflective not only of an outdated view of the development of law - e.g., the early dating of the formation of law and the rise of the traditionalist thesis, as we will see - but also a fundamental assumption that colors much of the research on the subject; that is, as stated, a law based on tradition, particularly a sacred one, precludes its

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[17] Abraham Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970), 13. Emphasis mine.

[18] Joseph Schacht, "The Schools of Law and Later Developments of Jurisprudence," *Law in the Middle East*, 1: 76-77, quoted in Udovitch, *Partnership and Profit*.

adaptability to the developing needs of society. This bias is reflected in Western scholarship's tendency to focus on particular aspects of Islamic law that is presumed to measure its practicality and potential for change. For example, the robustness of practical and rational tools - such as *maṣlaḥah*, *maqāṣid*, *makhārij* and *istiḥsān* - as suggested by Udovitch, are meant to indicate how much the monolith of divine law can budge for social interests, irrespective of how they functioned within the greater structure of law.[19] On the other hand, consensus (*ijmā'*) was represented, for many, the epitome of Islamic law's conservative nature, however minimal a role it played in reality.[20] H. A. R. Gibb states, "Since the formal legal doctrines and the definitions of these schools remained substantially unchanged through the later centuries, there is little to be gained by tracing down and discussing their formidable output of juristic works."[21] As Gibb's statement suggests, change and development in the history of Islamic law has largely been defined more by the preconceived notions of progress and rationality than an analysis of historical material.

New approaches concerning the relationship of Islamic law and practice have sought to overturn what was once taken as established fact. Professor Wael Hallaq, a major contributor to this new wave, states, "Recent scholarship on the history of Islamic law-especially in the United States, Canada, and Germany-has shown the impressive extent to which Islamic law was a working system that evolved in tandem with the developments that Islamic societies from Transoxania

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[19] This is by no means restricted to modern Western academics; many modernist Muslim reformers, not coincidentally, have approached Islamic law with the same prejudice.
[20] See Gerber, *Islamic Law*, 14-15.
[21] H.A.R, Gibb, *Mohammedanism* (Oxford: Oxford University Press, 1969), 71, quoted in Gerber, *Islamic Law*, 14.

to Andalusia and the Maghreb experienced over centuries. These relatively new findings stand in opposition to the discourse that dominated the field for decades, roughly from the middle of the nineteenth century until the seventies of the last."[22] In his study of later legal literature, Haim Gerber concludes: "The jurists are said to have cut themselves off from the world of reality and clung to their own closed intellectual world of *fiqh*. The importance of this point in evaluating the true nature of traditional Islamic society cannot be overestimated...But the point is that this malaise has been assumed rather than independently demonstrated. It is becoming increasingly clear today that this view was, and still is, greatly exaggerated."[23]

The study of formation of law in the third century, in this context, is extremely significant, for it can serve to indicate the origins and function of the "essential attributes" of classical Islamic law; particularly, those attributes essential to explaining the functional role of law in Muslim societies.[24] Professor Hallaq summarizes these attributes as follows:

1. the evolution of a complete judiciary;
2. the full elaboration of a positive legal doctrine;
3. the full emgergence of a science of legal theory and legal methodology;
4. the full emergence of legal scools. [25]

Pace Melchert, I argue that the development of law in the third and fourth century cannot simply be characterized as a compromise of two extremes. Rather, a

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[22] Wael B. Hallaq, "'Muslim Rage' and Islamic Law," *Hastings Law Journal*, 54 (August, 2003): 1710.
[23] Gerber, *Islamic Law*, 32.
[24] Particularly the role of the doctrinal schools. Brannon Wheeler correctly states, "[T]here has been little scholarly attention to the concept and history of *madhhab*." See Brannon Wheeler, "Theme Issue: The *Madhhab*," *Islamic Law and Society*, 10, 2, (2003): 165-67.
[25] Wael B. Hallaq, ed., *The Formation of Islamic Law* (Aldershot: Ashgate Variorum, 2004), xx-xxi.

ferment of social and legal factors set the stage for the local legal schools to evolve into a significantly more complex organism. To understand the nature of this evolution, we must expand our universe of discourse to consider the development of the essential attributes of the institution of Islamic law altogether, the doctrinal and theoretical aspects along with the practical and social. The following is a summary of my reconstruction of the development of law in third and early fourth centuries.

The rising status of *ḥadīth* as a primary and exclusive source of law by the end of the second century, as exemplified by the works of al-Shāfiʿī,[26] was taken to it logical conclusion in the third by the traditionalists. Armed with the innovative *hermeneutical* weapon of *ḥadīth* criticism, the traditionalists took aim at the ratiocinative superstructure[27] of *raʾy*-based law.[28] It was a "radical pruning exercise" that sought to streamline the hermeneutical excesses of rationalism and quell it discordant voices.[29] Presuming to be rationally neutral with respect to the content of scripture (*matn*), the tool of *ḥadīth* criticism would secure objective knowledge of the divine message by eliminating the relativism of *raʾy*-based

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[26] Below I discuss how al-Shāfiʿī's approach and objectives were very distinct from those of the traditionalists.

[27] I argue against the notion of *raʾy* being merely a use of common sense or independent reasoning, if 'independent' is intended to mean individualistic reasoning. Below I will examine how independent jurists, in the pre-*madhhab* period, began to reason in more collective and systematic ways in the third century. I argue, in this respect, social developments and the judicial role of the jurists are significant factors in construing *raʾy* as a process intricately connected to collective modes of reasoning.

[28] Patricia Crone, *God's Rule* (New York: Columbia University Press, 2004), 126-29; Eerik Dickinson, *The Development of Early Sunnite Ḥadīth Criticism: The Taqdima of Ibn Abī Ḥātim al-Rāzī (24/845-327/938)* (Leiden: Brill, 2001), 1-10. Christoper Melchert, "The Traditionist-Jurisprudents and the Framing of Islamic Law," *Islamic Law and Society*, 8, 3 (2001): 383-406.

[29] Dickinson states, "They felt that if consistency could be imposed in the way doctrines were arrived at, uniformity in the doctrines themselves would follow naturally." Dickinson, *Development*, 1.

law.[30] For traditionalism, the voice of scripture would reign only by eliminating the voice of the jurist and, *ipso facto*, any creative juristic activity.[31]

Contrary to Schacht's contention, however, Islamic law had only begun to formally adapt to judicial practice in the third century, as evidenced by a sudden upsurge in the production of 'practical' legal works geared specifically toward judicial administration; such as *kharāj*, *shurūṭ*, *waqf*, *adab al-qāḍī* and *makhārij*, to mention a few. This "bureaucratic initiative"[32] was undertaken exclusively by rationalists[33] since only they possessed the requisite legal hermeneutics to construct law that was: 1) systematic and predictable, 2) comprehensive. This creative activity was indicative of the general perception, beginning from the end of the second century, that Islamic law was a complete and "universally valid set of legal principles."[34] However, Islamic law's universal ambitions raised two conflicting concerns for its future: its scope (universality in the application of law) and its epistemic authority (universal validation). The former concern necessitated jurists to engage in the demands of the judicial administration so as to maintain

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[30] Dickinson, *Development*, 8.

[31] Dickinson states, "The (*ḥadīth*) critic was not to compromise his principles by resorting to *ra'y* even if his failure to give an answer to the question brought disappointment." Dickinson, *Development*, 8.

[32] Calder, *Studies*, 207.

[33] Rationalists include proto-Ḥanafites as well as proto-Mālikites as explained below. As for the prefix "proto", I will use it, but when it is clear from the context, I will normally drop it, e.g., if I am describing early third-century jurists.

[34] Paul L. Heck, *The Construction of Knowledge in the Islamic Civilization: Qudāma b. Ja'far and His Kitāb al-Kharāj wa-Ṣinā'at al-Kitāba* (Leiden: Brill, 2002), 146. See also, with discretion, Ira Lapidus's discussion of Sahl's movement and its connection to Ḥanbalism. He states, "Thus, Sahl's slogan embraces a conception of Islam in which every Muslim was obliged not only to obey the legal, moral, and ritual teachings of Islam, but also to prevent their gross violation by others. By employing this slogan Sahl sought to appeal to the populace of Baghdad on grounds even broader than self-protection...Sahl was appealing to a sentiment which reached beyond the boundaries of Caliphal government to an essentially communal conception of Islam." Ira Lapidus, "Separation of State and Religion in the Development of Early Islamic Society," *International Journal of Middle East Studies*, 6, 4 (1997): 376. Below we discuss the misconceptions of the relationship between state and law in early Islam, as expressed in the works of Lapidus as well others.

the applicability of law beyond the realm of, say, rituals; while the latter required law to ascribe to the universal values which united an increasingly cosmopolitan empire. Both concerns were fundamental to the development of law since the survival of a legal tradition "demanded not only cooperation towards order and predictability in the administration of local affairs, but also systematic public defense of their policies, consistent with the legitimizing norms of the age."[35]

The challenge, then, was to reconcile the judicial applicability of Islamic law, as represented by the uprooted[36] schools of *ra'y*, with the universal and "objective" base of legal authority epitomized by the scriptural approach of the traditionalists. The response to this challenge was starkly one-sided. Content with and limiting themselves to the collection and criticism of *ḥadīth*, the traditionalist movement failed entirely in providing a systematic and applicable corpus of law, much less a defense of it.[37] However, reconciliation was of high order for the rationalists since the rise of traditionalism not only challenged the method of law (rationalist hermeneutics), but it underscored a large disjunction between the legal corpus (rationalist law) and scripture.

Hence, in addition to providing a comprehensive and consistent body of law, the rationalists undertook various attempts to reconcile law with scripture. It was an endeavor to secure an interpretive paradigm that could sustain *both* the needs of judicial practice as well as its divine validity. Legal theory, then, was precisely that: a 'theory' demonstrating that the *uṣūl* of *ra'y*-based law was indeed scripture (a proposition that would seem superfluous, if not absurd, in the context

[35] Calder, *Studies*, 164-65.
[36] Below I discuss the notion of uprooting and delocalizing local judicial traditions.
[37] Compare our discussion below of traditionalism with Melchert, *Formation*, 1-31.

of traditionalism). Indeed, the genius of the earliest surviving works of legal theory was its ability to make *ra'y*-based law flow seamlessly from the "eternal and enduring truth" of scripture, even when the law brazenly contradicted it; moreover, it did so by manipulating the very premises of traditionalism to undermine their lean semantic approach to scripture. Legal theory was, in a sense, the greatest artifice (*ḥīla*) of the rationalists.

I proceed by first examining developments in the secondary literature that bear significantly upon our discussion. I then re-examine the disparate conclusions of recent literature in light of my own analysis of the primary sources, mainly of the third and fourth century. What emerges, I hope, is that the present state of knowledge demands precisely the reinterpretation of legal development that I advance, specifically with respect to the notion of compromise and the development of legal theory.

Challenges of the Third Century

Perhaps the most fundamental and overlooked aspect of the formation of Islamic law in the third century concerns the integration of jurists into the administrative infrastructure. Contemporary scholarship has largely neglected to go beyond the war of words and examine the complexity of legal culture in this period.[38] In his study of the later formative period, Norman Calder does however venture to examine the social dimensions of third-century law; he states: "Required is a set of social structures which match and account for literary

[38] For a fresh and comprehensive look at the formative period, see Wael Hallaq, *Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005).

structures."[39] He identifies a number of cultural factors that influenced the production of legal literature in the third century. Two significant points can be extracted from his analysis: 1) oral discourse in the second century was supplemented (rather than eclipsed) by written legal works in the third; 2) social developments implied the professionalization and bureaucratization of law (what we shall call the "administrative initiative").[40] The first point concerns our reading of third-century legal works in the context of an oral tradition. The latter point concerns the integration of jurists into local administration, which carried a number of important implications for the development of Islamic law. Calder states, "The governing authorities were the primary sources of reward and demanded not only co-operation towards *order and predictability* in the administration of local affairs, but also *systematic public defence* of their policies, consistent with the legitimizing norms of the age."[41] Calder observes that the administrative integration of jurists concerned both judicial competence as well as legal authority. Being the nucleus of the judicial system, jurists were inevitably required to produce and apply law in a consistent and authoritative manner.

However, Calder characterizes the relationship between jurists and caliphs in the third century as a collusion of elites, one which seemingly allowed for manipulation of the jurists' legal authority for political ends.[42] In this vein, jurists

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[39] Calder, *Studies*, 161.
[40] Calder, *Studies*, 161-97.
[41] Calder, *Studies*, 165. Emphasis mine.
[42] Calder does not suggest that jurists openly undermined the law for the advancement of personal interests, but that they formed a group that did not "represent" the sentiments of scholars in general, particularly with respect to dealing with practical administrative and judicial issues. Calder states, "[T]he need to make the law work in an inevitably imperfect human society required gross realism, tough consciences, **and compromise – above all compromise with government**." Calder, *Studies*, 222. Emphasis mine.

who produced administrative works and formed "alliances" with the ruling elite, such as al-Khaṣṣāf, "do not represent Islamic law; he represents one strand of the juristic tradition, a *powerful* strand, frequently called upon by jurists who *served* governments."[43] Though it is true that not all jurists produced administrative works, the characterization of such works as only partially representative of third-century law is artificial and, in fact, misrepresents a major factor in the development of law, one inextricably connected to the social structures of the period.[44]

Calder's depiction of administrative works is reflective of the long-standing view that caliphs stood above, and very often challenged, the jurist's legal authority until the failure of the Inquisition, an event which signaled the end of the illicit affair between state and religion.[45] Accordingly, subsequent political alliances are marked as non-representative of Islamic law since it deviates from the post-*Miḥna status quo*.[46] Recent research has however questioned this depiction of law and politics in the formative period.[47] With respect to the role of the caliphs prior to the Inquisition, Muhammad Qasim Zaman states:

> What emerges from a careful study of the pre-Mihna Abbasid period is not a struggle over religious authority, with the caliphs and the scholars as antagonists, but rather the effort, on the part of the Abbasid caliphs, to lay claim to the sort of competence the 'ulamā' were know to possess. This effort was not meant as a

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[43] Calder, *Studies*, 160. Emphasis mine.
[44] Calder, *Studies*, 157
[45] See, for example: Ira Lapidus, "*Separation of State and Religion in the Development of Early Islamic Society,*" International Journal of Middle East Studies, 6, 4 (1975): 363-85; Patricia Crone, *God's Caliph: Religious Authority in the First Centuries of Islam* (Cambridge: Cambridge University Press, 1986).
[46] See Melchert, *Formation*, 59; Lapidus, *Separation of State*.
[47] Heck aptly states, "Since the identity of state and religion was so imbricated in the Arabic language, it makes little sense to separate them into such misleading categories as the sacred and the profane." Heck, *Construction*, 2.

> challenge to the 'ulamā'...What is more, it signified the assertion of a public commitment to those fundamental sources of authority on which the 'ulamā''s expertise, and a slowly evolving Sunnism, were based.[48]

Zaman locates precisely where political interests lie with respect to jurists in the pre-*Miḥna* period: judicial competence and legal authority. That is, caliphs sought out the very same qualities that Calder locates at the core of the administrative initiative in the post-*Miḥna* period.[49] Calder, however, seems to neglect the importance of these elements in negotiating power, particularly with respect to the interests of the governed.

Rather than serving political interests, or pandering to the demands of caliphs, jurists represented the values and interests of the governed by dictating the terms of legal discourse, before *and* after the *Miḥna*. Jurists were, after all, representatives of local legal traditions, which in turn represented the moral and intellectual values of the masses. By addressing political and administrative needs in the language of local law, the jurists' *modus operandi* was, in a sense, defined by the interests of the governed. That very fact gave jurists great sway in the political realm, the consequences of which went far beyond matters of Islamic law proper. As Hallaq aptly states, "[T]he religious scholars in general and the legists in particular were often called upon to express the will and aspirations of those belonging to the non-elite classes. They not only intercede on their behalf at the higher reaches of power, but also represented for the masses the ideal of piety,

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[48] Muhammad Qasim Zaman, *Religion and Politics under the Early 'Abbāsids: The Emergence of the Proto-Sunnī Elite* (New York: E.J. Brill, 1997), 100.

[49] However, competence as we well see is relative, since the needs of the second century judiciary differ greatly from those of the third century.

rectitude and fine education... It was this reality – which made the approval of the men of law indispensable to the acts of politics – that gave formative Islam what we call today the rule of law."[50]

Rather than being the endeavor of a select few, the administrative initiative represented "a growing perception of Islamic law (from the second/eighth century) as a universally valid set of legal principles."[51] Islamic law represented the public conception of justice and, as such, was perceived to be applicable – at least in theory - to all aspects of human life, from marriage to taxation. Moreover, the representation of law in all areas of life was an implicit duty of the jurists' profession, for they represented the vanguard of the *sharī'ah*-minded. Marshall Hodgson pithily expresses the unique position of Islamic law as the arbiter of social practices and norms: "The Shariah law could not ignore social duties, even if it refused to legitimize any formal organization for carrying them out."[52] Contrary to Calder's portrayal of the administrative initiative, the process of Islamization issued from the core convictions of "*sharī'a*-consciousness,"[53] rather than from the periphery of political interests.

However, the realization of divine law, from abstract to concrete form, became an increasingly complex and crucial hermeneutical task considering the social *and* ideological developments of the third century. As Paul Heck states: "[T]he jurists and traditionists began to see that the vitality, if not survival, of

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[50] Hallaq, *Origins*, 205.
[51] Heck, *Construction*, 147.
[52] Marshall Hodgson, *The Venture of Islam: Conscience and history in a World Civilization*, vol. 1 (Chicago: The University of Chicago Press, 1974), 320.
[53] For an interesting discussion of the relationship between "*sharī'a*-consciousness" and "*kitāba*-consciousness," i.e., religious and administrative arms of the law, see Heck, *Construction*, 146-193.

Islamic law depended in some measure on its ability to 'universalize' and thus conform to some extent to the realities of Abbasid society."[54] Like an organism rooted in the social structures of the Abbasid society, the survival of Islamic law relied largely on its ability to adapt to the changing cultural realities of the time, which bringing us back to Calder's point about professionalization. That is, predictability in local administration and public defense of legal policies - two primary factors in the professionalization of law according to Calder – concerned the very survival of Islamic law as a functional institution in Muslim society. Moreover, survival laid directly in the hands of the jurists and not on political endorsements, for only the jurists possessed what would guarantee the survival of Islamic law in the long run: hermeneutic skills and legal authority.[55]

Legal authority was not, however, an intrinsic property of the jurist; rather, it supervened on the jurist's conformity with legitimizing norms of the age. The third century was particularly important in this respect since it witnessed the crystallization of *sunnī* norms, a process precipitated most acutely by the rise of traditionalism.[56] The "traditionalist movement" was informed by the sentiments of the *sharī'ah* -minded; most important, the notion of Islamic law as a universally valid set of moral and legal principles.[57] However, the traditionalists were extremely restrictive with respect to the source of legal principles and how they

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[54] Heck, *Construction*, 179.

[55] As we will see, Calder misses a major point in mapping social structures to literary ones: "A prerequisite for canonization is certainly the establishment of authority and that is likely to have been in many cases political, and to reflect alliances between the political and the scholarly elite."Calder, *Studies*, 163.

[56] Hodgson, "Far the most influential form of Jamā'ī piety, by the end of High Caliphal times, was that associated with the Hadith folk, the Ahl al-Hadith, a group for whom hadith reports about the prophet formed the chief source of religious authority. (They are sometimes regarded as the 'orhtodox' par excellence.) Hodgson, *Venture*, 387.

[57] See Hodgson, *Venture*, 387.

were to be derived. Rather than merely advocating *ḥadīth* as a legal source, as did their forebears in the second century, traditionalists in the third century were armed with the developing science of *ḥadīth* criticism.[58] Most strikingly for rationalism, the traditionalists took *ḥadīth* criticism as a hermeneutical tool and, moreover, the only valid one in the analysis of *ḥadīth*. Eerik Dickinson states, "Ḥadīth criticism was the practical embodiment of the philosophy of the critics. Their desire to avoid the arbitrariness inherent in the exercise of human reason led them to seek an objective method for authentication *ḥadīth* which would, as a consequence of it objectivity, yield completely consistent results."[59] However, *ḥadīth* criticism only developed fully as an "objective" method of verification independent of juristic opinions late into the third century, as we will see in further detail. Crucially for the history of the development of law, the effects of the traditionalist thesis on rationalist law would not truly be felt until the end of the third century.

The development of the method of *ḥadīth* criticism effected a great divide between rationalism and traditionalism. Dickinson relates an anecdote mentioned by the *ḥadīth* critic Ibn Abī Ḥātim; I relay it in full since, aside from being particularly illuminating, it will be a useful reference for subsequent discussions:

> A prominent and intelligent adherent of *ra'y* came to me [i.e. Abū Ḥātim] with a notebook [of ḥadīth] and submitted it to me for examination. I said about one of [the ḥadīth], "this is an erroneous (*khaṭa'*) ḥadīth into which its transmitter interpolated another ḥadīth." I said about another, "This is a spurious (*bāṭil*) ḥadīth." I said about another, "This is a false (*kadhib*) ḥadīth. The rest of them are sound ḥadīth." He said to me, "How do you know that

[58] Dickinson, *Development*, 9.
[59] Ibid.

> this one is erroneous, that one is spurious and the other is false? Did the transmitter of this book tell you that I erred or lied in such-and-such a ḥadīth?" I said, "No, I do not know who the transmitter of this volume is. However, I do know that this is erroneous and that is spurious and the other is false." He said, "Do you pretend to have supernatural power?" I said, "This is not pretense to any supernatural power." He said, "What is the proof for what you say?" I said, "Ask someone who is a proficient as me about what I said. If we agree, you know that we were not speaking randomly: we spoke only with understanding." He said, "Who is someone who is as proficient as you?" I said, "Abū Zur'a," He said, "Abū Zur'a will say what you said?" I said yes. [The adherent of *ra'y*] said, "This is strange." He took [his volume] and wrote my remarks about these ḥadīth on a sheet of paper. Then he retuned to me and he had written the remarks of Abū Zur'a about the ḥadīth. What I had called "spurious" Abū Zur'a called "false." I said, "'False' and 'spurious' are the same." What I had called "false" Abū Zur'a called "spurious." What I had called "rejected" he called "rejected," just as I had. What I called "sound" Abū Zur'a called "sound." [The adherent of *ra'y*] said, "How odd! Both of you are in agreement without there being any collusion between you." I said, "That shows you that we were not speaking at random. We spoke only from the knowledge and experience that were granted to us."[60]

Traditionalists did not criticize rationalists for rejecting *ḥadīth* altogether, since by the end of the second century rationalists used *ḥadīth* extensively[61] and were often traditionists themselves.[62] Indeed, rationalists were often criticized for their use of weak *ḥadīth*.[63] What really provoked traditionalist gall was the rationalists' habit of evading the normativity of *ḥadīth* by way of *ra'y*, particularly those *ḥadīth* which they took as authentic. By separating the derivation of legal norms from the

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[60] Dickinson, *Development*, 10.

[61] Melchert states, "As far back as the sources take us, on the contrary, it is plain that *aṣḥāb al-ra'y* did use hadith, at least to corroborate the results of their speculation." Melchert, "Traditionist-jurisprudents," 389.

[62] Nurit Tsafrir, *The History of an Islamic School of Law: The Early Spread of Hanafism* (Cambridge, Mass.: Islamic Legal Studies Program, Harvard Law School, 2004) 1-16.We will return to the issue of the tradition(al)ist-rationalist indeterminacy in the second century subsequently.

[63] See Abū Yūsuf, *al-Radd 'alā Siyar al-Awzā'ī*, ed. Abū al-Wafā' al-Afghānī (Hyderbad: *Lajnat iḥyā'al-ma'ārif al-nu'māniyyah*, 1938).

transmission of *ḥadīth* - that is, as Abū Yūsuf states below, legal norms are determined by the jurists regardless of what a *ḥadīth* states - rationalists were consistently able to undermine 'authentic' *ḥadīth*. The development of *ḥadīth* criticism, however, meant that rationalist would now have to respond to *ḥadīth*, or the legal norms implied by them, head on, since the validity of *ḥadīth* would now depend on the universal and objective method of *ḥadīth* and *isnād* criticism rather than on local *ra'y*. Abū Yūsuf, in his *al-Radd 'alā Siyar al-Awzā'ī*, provides a prime example of what, in the third century, could no longer be tolerated. He states:

> It is upon you to take *ḥadīth* that are widely known to people and beware of isolated (*shādhdh*) *ḥadīth* [...]The Prophet said: "Verily *ḥadīth* ascribed to me will multiply. So whatever comes to you agreeing with the Qur'ān is from me and whatever comes to you disagreeing with it is not from me"[...] 'Umar, may Allah be pleased with him, did not accept *ḥadīth* without two witnesses[...] 'Ali, may Allah be please with him, did not accept prophetic *ḥadīth* without an oath. The transmission of *ḥadīth* [*riwāyah*] exceedingly multiply and from it comes what is unknown and not known to the people of *fiqh* and does not agree with the Book nor the *sunnah* [...] so whatever disagrees with the Qur'ān then it is not from the Prophet even if came from [proper] narrations [*riwāyah*].[64]

Abū Yūsuf's statement is typical of an early rationalist response to *ḥadīth*.[65] First, overarching authorities are referenced to avoid the normativity of a report. Qur'ān and *sunnah* determine *ḥadīth* authenticity, not the soundness of *isnād*. As established in a number of studies, Mālikism was, not coincidentally, keen on

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[64] Abū Yūsuf, *al-Radd*, 24-31.

[65] Although the statement is not necessarily attributable to Abū Yūsuf, the work came into being long before the middle of the third century - considering the primitiveness of the terminology (such as *shādhdh*) and nature of the argument in general.

distinguishing between *sunnah* and *ḥadīth*, which is expressed, in particular, by the adoption of *'amal* as a legal source.[66]

The fundamental claim that could no longer be made in the face of *ḥadīth* criticism is expressed in Abū Yūsuf's last statement; that is, even if a *ḥadīth* is transmitted authentically, it is not attributable to the Prophet if it contravenes the norms determined by (local) legists, a claim endorsed equally by all rationalists. With the science of *ḥadīth* criticism, the authenticity of a report would now be determined by the *ḥadīth* critic and not the *ra'y* of "the people of *fiqh*". This raised a decisive hermeneutical problem for rationalism; that is, a method determining the authenticity of reports independently of rationalist law would entail an inflation of legal norms; or, at the least, it would accentuate the disjunction between *ra'y*-based norms and those expressed by *ḥadīth*.[67] This concern is clearly expressed by Abū Yūsuf's statement, "The transmission of *ḥadīth* [*riwāyah*] exceedingly multiply and from it comes what is unknown and not known to the people of *fiqh*...so it is incumbent upon you to take what is accepted by the collective and what the *fuqahā'* know."[68]

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[66] See Yasin Dutton, *The Origins of Islamic Law: The Quran, the Muwaṭṭa' and Madinan 'Amal* (Surrey, England: Curzon, 1999); Yasin Dutton, "*'Amal* v. *Ḥadīth* in Islamic Law: The Case of *Sadl al-Yadayn* (Holding One's Hand By One's Sides) When Doing the Prayer," *Islamic Law and Society*, 3, 1 (1996):13-40; Yasin Dutton, "'An Innovation from the Time of the Banī Hāshim': Some Reflections on *Taslīm* at the End of the Prayer," *Journal of Islamic Studies*, 16, 2 (2005): 147-76; Umar Faruq Abd-Allah, "Mālik's Concept of *'Amal* in Light of Mālikī Legal Theory," diss., University of Chicago, 1978.

[67] The prominence of this disjunction will be examined subsequently in our analysis of the works of al-Ṭaḥāwī.

[68] Abū Yūsuf, *al-Radd*, 31.

The traditionalist thesis is indeed what "unhinged" local law, as Melchert states.[69] However, rather than dislodging the regional schools - which, as we will see never existed in any tangible form[70] - traditionalism dislodged the locus of legal authority. That is, legal norms were no longer derivative of the personal and local *ra'y* of jurists;[71] rather, law was perceived to derive directly from divine sources, particularly discreet reports attributed to the Prophet.[72] But the growing disjunction between norms of *ḥadīth* and rationalist law posed a formidable epistemic challenge for rationalism, questioning its very base of legitimacy, for it inevitably pitted *ra'y* against scripture.

The Evolution of Rationalism

To understand the nature of the rationalist response, particularly whether it was a matter of compromise, we need to examine the development of the substance and method of law in third century; above all, legal method, since this is where the apparent shift is said have taken place.[73] According to Melchert: "In

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[69] Christopher Melchert, "The Formation of the Sunnī Schools of Law," *The Formation of Islamic Law*, ed. Wael B. Hallaq (Aldershot: Ashgate Variorum, 2004), 10, 13.

[70] See Wael B. Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," *Islamic Law and Society*, 8, 1 (2001): 1-26; Hallaq, *Origins*, 150-77.

[71] The local nature of law is discussed in further detail below as is the relevance of Professor Hallaq's reevaluation of the evolution of the schools of law.

[72] Although scriptural law transcending local forms of authority was first advanced by al-Shāfi'ī, traditionalism, particularly with the "science" of *ḥadīth* criticism, as we will see, forced rationalist legal discourse to approach *ḥadīth* on traditionalist terms.

[73] In fact, of five potential areas in the development of law in the third century, Melchert suggests, revising some of his previous views, that only two were directly influenced by traditionalism; namely:

1. Textual sources eclipsed rational speculation as the formal basis of law.
2. Experts sifted *ḥadīth* reports primarily by comparison of their *asānīd*, secondarily by examination of *rijāl*, the personal qualities of their transmitters.

The first concerns legal method, the implications of which we will now examine. The second is important as well, however only because of how little influence it had in the development of law and how rationalism undermined the need for jurists to really involve the science of *ḥadīth*

the later ninth century, rationalistic jurisprudents took up many of the forms formerly peculiar to the traditionalist-jurisprudents, especially formal dependence on hadith and *isnād* comparison to sort the sound from the unsound. Traditionist-jurisprudents in turn accepted the need for separate expertise in legal reasoning besides hadith criticism."[74] For rationalism, the compromise meant the reigning in of *ra'y*, from the exercise of independent reasoning to the interpretation of scriptural texts. Otherwise put, the legitimacy of rationalism required a compromise in its hermeneutic approach. The fundamental problem with this depiction of the development of law is that it considers only a part of the relevant data. That is, it focuses on works, and only aspects of those works, that represent the defense of rationalist law, interpreting them as evidence for compromise, while entirely neglecting the production of vast new areas of law and what that entailed; namely, the development and improvement of hermeneutic techniques independently of the methods of traditionalism.

As indicated previously, the formation – indeed survival – of Islamic law in the third century concerned not only ideological developments, specifically the rise of *ḥadīth*, but also the adaptation of law to the social realities of Abbasid society. Moreover, these two concerns were inextricably linked, for jurists were not only required to produce and administer a functional law but also defend its validity in the eyes of the masses. Both aspects of the development of law

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criticism in the interpretation of law, which we will also discuss subsequently. See Melchert, "Traditionist-jurisprudents," 399-405.

[74] Melchert, "Traditionist-jurisprudents," 1. Calder's characterization reflects a similar understanding of the development of law. He states the transition from a discursive tradition to a hermeneutic tradition required a shift in the method of law which primarily concerned the interpretation of scripture, especially *ḥadīth*. See Calder, *Studies*, 222-243.

concerned the jurist's hermeneutic skill, but in two very distinction ways. The former (i.e., the production of positive law) involved the construction of a systematic and comprehensive rational framework which addressed social and judicial needs. The latter concerned the reconciliation of those legal norms with scripture, with a particular focus on *ḥadīth*. Melchert's own analysis of how traditionalists and rationalists *used ḥadīth* suggests two distinct modes of discourse. He states: "[T]here were significant differences between the use of hadith by early Ḥanafiya and by traditionalist-jurisprudents. One is that the Ḥanafiya tended to use hadith only occasionally, in controversy with their opponents. In didactic works for internal, Ḥanafī consumption, hadith seldom appears."[75] Regrettably, Melchert pays little attention to this distinction when describing the development of law as a series of mutual compromises. To be sure, the dual hermeneutic concern of jurists, one practical the other epistemic, signaled a fundamental shift in the structure of law which corresponded to social and intellectual developments of the third century. We first turn to the nature of this distinction in the legal literature and then examine how it maps on to the social structures of the third century.

An overview of legal treatises authored in third century suggests that literary concerns cut directly (though not exhaustively) along these lines. On the one hand, there is a unprecedented surge in the production of practical administrative works on a wide range of subjects, including *waqf*, *kharāj*, *ḥiyal*, contracts (including *shurūṭ*, *wathā'iq* and *'uqūd* works), transaction (*buyū'*),

[75] Melchert, "Traditionist-jurisprudents," 390.

preemption (*shuf'ah*), penal law (*ḥudūd*), alimony (*nafaqāt*), *adab al-qāḍī, maḥāḍir wa sijillāt*, liability (*ḍamān*), rent (*ijārāt*), commenda (*muḍārabah*) and bequests (*waṣāya*), to mention a few.[76]

On the other hand, there were, presumably, works produced to reconcile law or, as Melchert states, "fit out" doctrines with *ḥadīth*.[77] These works presume the existence of legal doctrines and didactic works; that is, they did not concern deriving law as is apparent from their subject matter and content.[78] Although independent works that address this concern are few - such as *Kitāb Khabar al-Wāḥid, Tashīḥ al-Āthār, Ta'wīl al-Aḥādīth, Sharḥ Ma'ānī al-Āthār, Ta'wīl al-aḥādīth, Ithbāt al-Qiyās* and *al-Sunan fī al-Fiqh* - reconciling *ḥadīth* with rationalist law was undoubtedly a prominent concern on the rationalist agenda in this period, one that can be discerned from bibliographic sources as well as the substance of legal works.[79]

In terms of bibliographic sources, Melchert has shown that rationalists, particularly proto-Ḥanafites, have been described, for example, as responding to traditionalism by furnishing rationalist doctrines with prophetic reports.[80] Ibn al-Thaljī is a major contributor and is described as bolstering the doctrines of Abū Ḥanīfah with *ḥadīth*.[81] However, the substance of legal works suggests that other rationalists played a significant role, perhaps even a more important one in the

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[76] See Muḥammad Ibn al-Nadīm, *al-Fihrist* (Beirut: Dār al-Kutub al-'Ilmīyyah, 1996), 338-84.
[77] Melchert, *Formation*, 48.
[78] The content will be looked at below.
[79] Ibn al-Nadīm, *al-Fihrist*, 338-84.
[80] Melchert, *Formation*, 48-67.
[81] Ibn al-Nadīm, *al-Fihrist*, 348; Melchert, *Formation*, 51-3.

end. ʿĪsa b. Abān and al-Ṭaḥāwī[82] are others who, presumably, represent the developing interest of the Ḥanafite circle in combating the challenge of traditionalism. Although there are no extant works of ʿĪsa b. Abān,[83] a kernel of his legal doctrines can be culled from available sources, particularly from al-Jaṣṣāṣ's work on *uṣūl*.[84] Most important, ʿĪsa seems to confront *ḥadīth* criticism and suggests that the only way of verifying a solitary report [*khabar al-wāḥid*] is by examining its content [*matn*] and not merely by verifying it chain of transmission [*sanad*].[85] After Ibn al-Thaljī, al-Ṭaḥāwī is the greatest reconciler of *ḥadīth* and rationalist doctrines, as apparent from his multi-volume *ḥadīth-fiqh* works, *Sharḥ Māʿanī al-Āthār* and *Mushkil al-Āḥādīth*, the precise nature of which we will examine later.

That jurists were concerned with producing legal works as well as with responding to traditionalism is an obvious fact; however, what needs to be established more precisely in order to respond to the notion of compromise is that the two concerns constituted distinct modes of inquiry: applying/deriving law and defending law. Moreover, the derivation of law did not involve taking up the techniques of traditionalism in any form whatsoever; on the contrary, it required dodging the brunt of the traditionalist thesis by the development and elaboration of *ra'y*. Biographical sources, however, will not suffice here, for we need to trace

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[82] Melchert does not examine al-Ṭaḥāwī. However, since his primary teachers were early third-century jurists and judges, I include him here. Also, his works on law and *ḥadīth* are discussed later since he provides an important example of a transitional stage in the development of law as Calder states. See Calder, *Studies*, 244-46.

[83] Murteza Bedir, "An Early Response to Shāfiʿī: ʿĪsa b. Abān on the Prophetic Report (*Khabar*)," *Islamic Law and Society*, 9, 3 (2002) 290.

[84] Although Bedir is more willing to trust the sources than I am.

[85] Bedir, *Early Response*, 302.

the development of legal norms. I will, first, examine, in brief, recent research on the development of the content of legal literature and then suggest how it maps onto the social structures of the third century.

In his study on the formation of *waqf*, Peter Hennigan examines two early legal treatises by Hilāl al-Ra'y (d. 245) and al-Khaṣṣāf (d. 261). A number of his conclusions are important for our discussion. First, he finds that while the legal legitimacy of *waqf* depended upon its basis in prophetic reports, the substantive law of *waqf* was derived by means of rationalist discourse. In fact, a comparison of al-Khaṣṣāf's treatise with the earlier treatise by Hilāl reveals that, rather than a shift in discourse from rationalist principles to the exegesis of *ḥadīth*, one detects a bifurcation in hermeneutical concerns. Hennigan states that, "[F]or the vast majority of questions posed in the two works, the answers are *derived* through discursive rationalism rather than from an exegesis of the Prophet's practices and words...while the substantive law of *waqf* developed through rationalist discourse, the institution's cultural (hermeneutical) legitimacy rested upon the traditions of the Prophet and his Companions. This parallel hermeneutical discourse is found in many of the earliest writings on pious endowments."[86]

Another important conclusion concerns the nature and development of *ra'y*. Hennigan states that the two treatises are products of a discursive tradition which reflect the hermeneutic approach of an inchoate legal school.[87] That is, the rules of *waqf* exemplified in the mid-third century works were not produced *ex nihilo* by individual jurists, but constituted a multi-generational effort working

[86] Peter Hennigan, *The Birth of a Legal Institution: The Formation of Waqf in the Third-Century A.H. Ḥanafī Legal Discourse* (Leiden: Brill, 2004) 48-9. Emphasis mine.
[87] Hennigan, *Birth*, 48.

within loosely defined boundaries of a developing legal tradition. This multi-generational effort involved the development and honing of rationalist hermeneutics independently of arguments for scriptural legitimacy. Since the derivation of legal norms concerned improving methods and principles of previous authorities, not merely the search for scriptural validation, the development of law on the level of deriving norms involved enhancing and systemizing *ra'y*.[88]

Studies in a number of other areas of substantive law bear out, in general, similar conclusions, including transactions, property law, *kharāj* and *ḥiyal*. Paul Heck's study of Qudāmah b. Ja'far's analysis of taxation law suggests that jurists had two distinct concerns: 1) to develop hermeneutic skills relevant for applying and deriving law within the larger structure of local administration; 2) to legitimize the institution of taxation in accordance with legal sources, particularly with respect to the rules of taxation and charity as expounded in *ḥadīth*.[89] *Pace* Schacht, Satoe Horii's studies on legal stratagems demonstrate that, rather than being *ad hoc* devices employed to evade the severity and rigidity of the law, *ḥiyal* were informed by the greater principles of a particular legal approach. In other words, *ḥīyal* presumed a hermeneutic superstructure and, more specifically, one that operates independently of its justification on *ḥadīth* literature.[90] Moreover, both proto-Ḥanafites and proto-Mālikites shared similar concerns with respect to

[88] Regrettably, Hennigan fails to acknowledge the full implications of his own conclusions and implies that the Al-Khaṣṣāf's treatise is a sign of the encroachment of the "hermeneutic tradition" upon the discursive. Hennigan considers the rationalist component of Al-Khaṣṣāf's argument as previous to convergence of traditionalism and rationalism. See Hennigan, 48. I examine his claims in further detail below.

[89] Heck, *Construction*, 83-4, 146-93.

[90] Satoe Horii, "Reconsideration of Legal Devices (*Ḥīyal*) in Islamic Jurisprudence: The Ḥanafīs and their Exists (*Makhārij*)," *Islamic Law and Society*, 9,3 (2002).

the need and place of *ḥiyal* in the application of law. Horii states, "[*Ḥ*]*iyal* should be and were regarded as an integral part of legal doctrine. *Ḥiyal* were solution drawn from the materials of jurisprudence according to the spirit of the law, as interpreted by the jurists."[91] Most importantly, Horii describes the transitional period of law, mainly the third century which predated doctrinal associations, a matter we will take up shortly.[92]

Hiroyuki Yanagihashi's work on the development of property law suggests an early development of the dual concerns of law. He states, "Thus Abū Ḥanīfa and after him his two disciples successfully elaborated a system that met two requirements. First, their [legal] systems were consistent in themselves and with the existing [legal] systems. Second, their systems were in accordance with religious or ethical norms, many of which were already embodied in Prophetic *ḥadīth*s. The same appears to be true of Mālik..."[93]

The quest for internal consistency, independently of scriptural validation, concerned the construction and transmission of a coherent and comprehensive legal system. The operative term is 'system,' since the development of the substance of law did not entail the transmission of mere doctrines, but the inculcation of hermeneutic skills and principles that enabled jurists to understand, develop and apply the law. This concern was inextricably connected to the role of jurists in the application of law; that is, to dispense a systematic and predictable law in accordance with the demands of administration, jurists were required to transmit not merely doctrines but the requisite hermeneutic skills to extend and

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[91] Horii, "Reconsideration," 357.
[92] I examine the implications of this below.
[93] Hiroyuki Yanagihashi, *A History of the Early Law of Property* (Leiden: Brill, 2004), 300.

apply law, as we will see in the following section. The development of legal systems, which gained momentum in the later half of the third century,[94] entailed the eponymization of legal schools, a process that concerned, most fundamentally, the practical needs of the development and application of law.

The most important development in this respect is Hallaq's studies on the formation of legal schools which argue that the transition in the structure of the legal system was from its basis upon individual juristic doctrines, what he calls "personal schools," to doctrinal schools.[95] The crucial point Hallaq raises, which has hitherto been overlooked, is that rather than a shift from a certain type of school to another – i.e., regional to personal – the evolution of law in the third and fourth century entailed the crystallization of legal schools where none existed previously. Moreover, in his work on the development of legal authority and hermeneutics, Hallaq establishes that the classical schools are not *personal* in any significant sense; rather, they were doctrinal entities which encapsulated and systematized the legal contributions of numerous jurists who were, eventually, classified according to a hierarchical scheme of epistemic and hermeneutic authority.[96]

In this vein, the rise of polemical activity – such as *al-Radd 'alā Muḥammad b. al-Ḥasan, al-Radd 'alā Masā'il al-Muzanī, al-Radd 'alā al-Shāfi'ī* [97] - which are not attacks between individual jurists but adherents or

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[94] Hallaq, *Origins*, 157.
[95] Melchert has recently challenged this claim. See ff. 11.
[96] See Wael B. Hallaq, *Authority, Continuity, and Change in Islamic law* (Cambridge: Cambridge University Press, 2003).
[97] Ibn al-Nadīm records at least twelve such books which is certainly a partial list, since he does not mention, for example, Ibn 'Abd al-Ḥakam's refutation of al-Shāfi'ī.

representatives of previous authorities, is significant. This polemical activity not only indicates the growing self-perception of jurists as belonging to doctrinal entities which transcend individual legal approaches, but it also suggests the role of inter-school competition, a fundamental aspect of the development of law. An important point in determining whether the rationalists were forced to compromise in their hermeneutic method is to locate where the traditionalists fit into inter-school competition previous to the formation of doctrinal schools. Norman Calder provides an apt summary of the important developments with respect to the systemization of law and inter-school competition,

> The third century sees a movement from a jurisprudence which is a predominantly oral and socially diffuse informal process towards a jurisprudence which is a complex literary discipline, the prerogative of a highly trained and socially distinct elite. That movement...signaled by the terms professionalization and bureaucratization, was no doubt in part of a natural process but was also affected by school competition and by government policy. There was competition between the two major schools in the early and middle decades of the third century, and added competition from the Shāfiʿī school (and numerous local schools) later.[98]

Calder's account implies that developments in the third century signaled a new era in the method of jurisprudence, a shift from individual opinion to systematic reasoning, for previous to the third century competition was not between schools or legal methods, but individual jurists. This hermeneutic turn meant that the locus of hermeneutic authority no longer rested solely on the *ra'y* of individual scholars but on the *ra'y* of a legal tradition, a fledgling *madhhab*. This evolution of *ra'y* held profound implications for the development of law and, in particular, the role of *ḥadīth* in the derivation of law. That is, rather than a simple shift in the

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[98] Calder, *Studies*, 164.

method of law from the "independent exercise of reasoning to the interpretation of sacred texts (mainly prophetic *ḥadīth*),"[99] third-century law evolved a bivalent hermeneutic structure: a locus for the transmission and derivation of norms (intra-school hermeneutics) and another for the defense of legal technique (inter-school theoretics). To make better sense of the development of law, particularly in light of the conclusions of the numerous recent studies in very specific areas of the law as indicated, I will take a closer look at the social context of legal development and competition.

Inventing Judicial Traditions

The third and fourth century witnessed the extinction of scores of inchoate legal schools.[100] As suggested by Calder's hypothesis of the importance of political alliances, the extant schools owe their survival in large part to their integration into the administrative infrastructure. Recent research into the spread of legal schools seems to support Calder's contention.[101] Most important, Tsafrir establishes that Ḥanafism did not spread from Kufa, but from centre of the Islamic empire, Baghdad, to other areas, including Kufa.[102] Melchert raises an insightful paradox through his discovery of a rise in judicial appointments of rationalists when traditionalism was at its supposed height.[103] The link between the spread of legal schools and administrative integration is clear; however,

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[99] Melchert, "Early History," 307.
[100] Hallaq, *Origins*, 167-72.
[101] Tsafrir, *History*.
[102] Tsafrir, *History*, 17-53.
[103] Christopher Melchert, "Religious Policies of the Caliphs from al-Mutawakkil to al-Muqtadir, AH 232-295/AD 847-908," *Islamic Law and Society*, 3, 3 (1996): 316-42.

beyond this, I argue that the rising needs of administration required the development of the hermeneutic skills of rationalism, particularly the construction of a systematic and comprehensive law. This required rationalism to not only develop law largely unhindered by the rise of *ḥadīth*, it also forced rationalism to converge upon the doctrines of certain local authorities.

An anecdote related by Wakī' in his *Akhbār al-Quḍāt* illustrates a number of points about the logic of judicial appointments before the end of the second century:

> When Abū Ja'far summoned Sharīk to appoint him as judge...he said to Sharīk: I have commissioned you with the judgeship of Kufa. Sharīk said: O commander of the faithful, I judge (*anẓur*) in matters of ritual prayer and fasting. As for judicial practice (*qaḍā'*), I am not competent... Abū Ja'far said: Go, and administer what you know well and write to me about what you do not.[104]

Blatant deficiencies in judicial knowledge did not prevent the appointment of judges such as Sharīk in the second century. This suggests, first, that the demands of judiciary were minimal with respect to legal knowledge and method in the second century, at least relative to the third century as we will see. Second, legal method, particularly in terms of administrative law, was largely dependent upon the approach of the individual jurists, since many jurists, like Sharīk, were not trained in any particular form of law. The informality in the legal methods of judges appointed in the second century is evidenced in the apparent indeterminacy of juristic affiliation. Nūḥ b. Darrāj, Ḥafṣ b. Ghiyāth and Sharīk are just a few major judges that were characterized as following multiple approaches, the latter

[104] Muḥammad Wakī', *Akhbār al-quḍāt*, vol. 3 (Beirut: 'Ālam al-Kutub, n.d.), 150.

two characterized as both tradition(al)ist and rationalist.[105] As Nurit Tsafrir suggests, judicial appointments in the second century were largely influenced by the preferences of the local population rather than concerns over legal method or competence.[106]

In the first few decades of the third century, however, the nature of judicial appointments would change drastically. First, jurists with a comprehensive knowledge of the law as well as judicial skills were systematically sought out. For example, ʿĪsā b. Abān (d. 221), the deputy of the chief justice Yaḥyā b. Aktham, is reported to have made unprecedented advances in the methods of *qaḍā'* due to his mathematical skills and his ability to calculate dates and seasons. The development of practical, judicial skills not only concerned the efficient keeping of records, but, more importantly, it facilitated the application of law in a more consistent and systematic manner, particularly in areas such as inheritance and transactions.[107] Indeed, ʿĪsā is said to have written a didactic book on the calculation of inheritance for jurisconsults (*muftīs*), and was adept at *shurūṭ*.[108] That ʿĪsā instructed jurisconsults in matters of practical law suggests the predominance of judges in dictating law in the third century,[109] which is a stark contrast to later centuries where judges, *qua* judges, occupied a lower rank than *muftīs*. Moreover, judges normally consulted *muftīs* in difficult legal issues and not *vice versa*.[110]

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[105] Tsafrir, *History*, 1-16.
[106] Tsafrir, *History*, 19-24.
[107] Wakīʿ, *Akhbār*, vol. 2, 172.
[108] Wakīʿ, *Akhbār*, vol. 2, 172.
[109] Tasfrir has corroborates the importance of judges in this period; see Tsafrir, *History*, 117.
[110] See Hallaq, *Authority*.

After the death of ʿĪsā b. Abān, al-Muʿtaṣim requested his chief justice, Ibn Abī Duwād, to quickly find someone to fill ʿĪsā's post. Ibn Abī Duwād claimed he could not find an appropriate candidate on short notice. They finally settled on al-Ḥasan al-ʿAmbarī who had judicial experience as judge of a *maẓālim* court.[111] Early in the third century, caliphs and chief judges evidently began to appoint judges with greater concern over their judicial competence and experience. ʿĪsā b. Abān, in many ways, symbolized the required skills set that judges and jurists would need to effectively respond to the rising challenges of the third century.

Over the next two decades - that is, approximately by the middle of third century – judicial competence became a *sine qua non* for securing judicial posts. Judicial appointments even required interviewing potential candidates to determine their juristic aptitude. The chief justice, Jaʿfar b. ʿAbd al-Wāḥid, for example, tested a potential candidate for the judgeship of Egypt, ʿAbd al-Salām al-Wābiṣī, by inundating him with a barrage of questions (*'alqā 'alayhi mas'alatan ba'da mas'alah*). al-Wābiṣī ultimately answered incorrectly. The chief justice thereupon asked, "With what [skills] did you judge over the lands of Egypt and Baghdad?"[112] al-Wābiṣī replied, "With *fiqh*." Jaʿfar rhetorically replied, "And you make mistakes on these [simple] questions?"[113]

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[111] Wakīʿ, *Akhbār*, vol. 2, 174.
[112] Although al-Wābiṣī was previously judge of Baghdad, I could not verify whether, here, he was appointed previously and was being considered again.
[113] Wakīʿ, *Akhbār*, vol. 3, 278.

Previous to that incident, al-Wābiṣī was appointed judge of Baghdad's eastern side, largely due to popular demand.[114] However, the then chief justice, Yaḥyā b. Aktham, later dismissed him. When asked about why he did so, Yaḥyā stated that al-Wābiṣī was weak in his knowledge of *fiqh*. On another occasion, 'Abd al-Raḥmān b. Isḥāq was appointed judge of Baghdad's western side at the recommendation of the jurist 'Abd Allah b. Ṭāhir. 'Abd al-Raḥmān's knowledge of *fiqh* was, however, less than satisfactory in the view of the chief judges. He was, thus, sent the law books of *aṣḥāb al-ra'y* to redress his deficiencies in judicial matters.[115] Many judges in the later third century are recorded as being particularly adept at rationalist law; al-Khaṣṣāf,[116] Ibn al-Thaljī,[117] Qutaybah b. Ziyād,[118] Abū Khāzim,[119] Hilāl al-Ra'y,[120] Isma'īl b. Isḥāq,[121] Bakkār b. Qutaybah[122] are just a few major *qāḍī*-cum-jurists described in this manner. Many are also noted particularly for their skills in practical issues such as *shurūṭ*, calculations (in transactions and inheritance) and record keeping (*sijillāt,*

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[114] al-Khaṭīb al-Baghdādī, *Tarīkh Baghdād*, 14 vols. (Beirut: Maktabat al-Khānjī, 1931), vol. 11, 52.

[115] Wakī', *Akhbār*, vol. 3, p 283.

[116] Ibn Nadīm, *al-Fihrist*, 348; 'Abd al-Ḥayy al-Laknawī, *Kitāb al-Fawā'id al-Bahiyyah fī Tarājim al-Ḥanafiyya* (Beirut, 1906) 29: He was adept at inheritance and calculations and knowledgeable in the methods of [rationalist] masters.

[117] Ibn Nadīm, *al-Fihrist*, 348; al-Laknawī, *al-Fawā'id*, 181: Sources describe him as *faqīh* of the people of *ra'y*, vast in knowledge.

[118] Ibn Nadīm, *al-Fihrist*, 349; Muḥammad al-Kindī, *Akhbār Quḍāt Miṣr*, ed. R. Guest (Cairo: Mu'assasat Qurṭuba, n.d.), 149: He is reported to have excelled in the books of *shurūṭ* and was knowledgeable of the methods of the people of Iraq (rationalists).

[119] Ibn Nadīm, *al-Fihrist*, 350, al-Laknawī, *al-Fawā'id*, 86: Sources describe him to be knowledgable in the sciences of calculation, inheritance and judicial records and the knowledge of Basrīs [that is, 'Īsā and Hilāl].

[120] Ibn Nadīm, *al-Fihrist*, 346, al-Laknawī, *al-Fawā'id*, 223: Sources state he is knowledgeable in the methods of *ahl al-'Irāq*, vast in knowledge, acumen and produced *shurūṭ* and *waqf* works.

[121] al-Laknawī, *al-Fawā'id*, 340, Wakī', *Akhbār*, vol. 3, 280: He is knowledgeable in *fiqh* of Mālik, defended and propounded Mālik's doctrines...Abū Khāzim states that Basra has not produced a judge quicker and smarter [in judgment] than him and Bakkār b. Qutaybah.

[122] al-Kindī, *Akhbār*, 149; al-Laknawī, *al-Fawā'id*, 55: Sources state he is the most learned in the [rationalist] *mazhhab* and had vast knowledge of the law.

maḥāḍir), some of which quite likely involved techniques instituted by ʿĪsā b. Abān. The concomitance of practical skills (such as calculations (*ḥisāb*), record keeping and *shurūṭ*) and legal knowledge of a certain rationalist brand is no coincidence as we will see.

The development of judicial skills related directly to the judiciary's need to construct a systematic and comprehensive law which supported the needs of social practice. In this respect, both legal creativity and continuity was required to sustain the judiciary. With respect to creativity, we have mentioned the rise in the production of legal works in the last three quarters of the third century. Now, it should not be surprising that the vast majority of legal works were produced by judges, since, as we indicated, judges created and dictated law by virtue of their high rank as well as their firsthand knowledge of judicial needs. For example, as a close advisor to the caliph, al-Khaṣṣāf produced approximately fourteen legal treatises, the majority of which was on administrative subjects. That much of the production in this period constituted treatises and also ones that broached new subjects – rather than being commentaries of previous legal works as later tradition would have it - suggests the originality and individuality of legal material in this period.[123] Otherwise put, up until the third century, judges were seemingly in the business of creating law as *independent* jurists.

Along with creativity, however, the developing structure of the judiciary required continuity in the content and application of law. That is, although jurists had to address rising social needs, they also had to apply law in a predictable and

[123] This is not to state that commentary tradition is unoriginal, but that creativity in this period regarded the formalization of legal method.

systematic fashion, so that, say, a valid type of transaction one day would not be invalid another. Legal continuity is evidenced in the development of the substance of law as pointed out earlier in the works of Hennigan and Yanagihashi. To elaborate Hennigan's point, although the *waqf* treatises of Hilāl and al-Khaṣṣāf were highly original, they were created within the context of a legal tradition which had already defined, at least in broad strokes, the major branches of positive law.[124] Hennigan, however, understates the role of tradition or, more accurately, inventing tradition in the development of law, particularly with respect to deriving legal norms.[125]

Although both Hilāl and al-Khaṣṣāf would not identify themselves as "Ḥanafi" in the later sense of the word,[126] the structure of their treatises indicate a strong commitment to what can be called the proto-Ḥanafite tradition. Their language suggests deference, in particular, for the opinions of Abū Ḥanīfah and Abū Yūsuf. Indeed, it is a curious fact that although both jurists present themselves as independent authorities, they not only refer to Abū Ḥanīfah's opinions, who opposed nearly all forms of pious endowments, but they attempt to justify their own opinions in light of his legal legacy.[127] It would seem to have been much easier for Hilāl and al-Khaṣṣāf to omit Abū Ḥanīfah's opinions altogether or simply reject his legal authority on the matter.[128]

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[124] See Hennigan, *Birth*, 50; Hallaq, *Origins*, 153.

[125] He stresses Professor Hallaq's notion of individual authority at the expense of explaining how individual efforts fit into the greater legal tradition. As such, he does not examine the role of references to previous authorities in the legal arguments of both authors.

[126] In fact, Hilāl seems to take himself as an authority equal to that of Abū Ḥanīfah and Abū Yūsuf.

[127] Hennigan, *Birth*, xix; Hilāl al-Ra'y, *Aḥkām al-waqf* (Madīna: Maṭba'at Majlis Dā'irat al-Ma'ārif al-'Uthmāniyya, 1937), 2-11.

[128] This also suggests that other jurists had knowledge of Abū Ḥanīfah's opinion so that Hilāl and al-Khaṣṣāf could not simply put words into his mouth.

Hilāl's intent to locate himself in the proto-Ḥanafite tradition is demonstrated in the opening section of his treatise where he examines, in *qāla /qultu* format, the opinions of Abū Ḥanīfah on designating land for *waqf*. A number of points stand out in Hilāl's analysis. First, the *qāla /qultu* discourse is presented as occurring mainly between Hilāl and Abū Hanīfah, although the latter died before the birth of the former.[129] Moreover, in the legal dialogue, Hilāl is confronted with equivocal authority statements attributed to Abū Hanīfah, the significance of which is upon Hilāl to tease out.[130] Hilāl often presents his case by juxtaposing the opinions of Abū Hanīfah and Abū Yūsuf on a matter and selecting what he sees as the preponderant view. For example, in the case of whether the statement, 'This land of mine is inalienable charity (*ṣadaqah mawqūfah*),' effects a valid *waqf*, Hilāl sides with Abū Yūsuf and claims that Abū Hanīfah's rejection of the statement's validity is based upon a weak tradition. By appropriating Abū Yūsuf's voice, Hilāl is able to formulate a crucial legal definition, the legal significance of which may likely have never occurred to either Abū Yūsuf or Abū Hanīfah; namely, *waqf* is effected by the conjunction of the terms *ṣadaqah* and *mawqūfah*. In short, this formula permitted Hilāl to treat *waqf* as an *inter vivos* charitable gift, liberating it from the strictures of inheritance laws,[131] which, incidentally, was precisely the reason why Abū Hanīfah rejected *waqf*.[132] Moreover, to garner the full legal benefits of the *waqf* institution, both Hilāl and

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[129] Dialogue is also depicted as occurring between Abū Yūsuf and Hilāl, although they are not reported to have met.
[130] See Hilāl, *Aḥkām al-waqf*, 2-11.
[131] Inheritance laws controlled *post mortem* distribution of one's owned wealth. See Hennigan, *Birth*, 70-106.
[132] See Aḥmad al-Ṭaḥāwī, *Sharḥ Ma'ānī al-Āthār* (Cairo: Maktabat Dār al-Kitāb al-'Arabī, 1950) 95.

al-Khaṣṣāf, employ the rationalist method of "reverse *qiyās*" to differentiate *waqf* from bequests,[133] since the latter does not apply to certain heirs and is generally limited to one-third of the decedent's estate.[134] Lastly, as mentioned earlier, both Hilāl and al-Khaṣṣāf derive the rules of *waqf* independently of *ḥadīth* literature and the method of *ḥadīth* criticism. On the other hand, rational tool such as *qiyās* and *istiḥsān* are used extensively throughout both works.[135]

Although Hilāl frequently cites the Ḥanafite authorities, he creates the framework within which their opinions are assessed and validated. Indeed, Hilāl's construction of a fictional dialogue between him and Ḥanafite authorities suggests room for extensive interpolation. However, interpolative latitude is likely to have been extremely limited considering the predominance and canonization of Ḥanafite opinions by Hilāl's time, particularly the opinions of Abū Ḥanīfah. That is, any plausible argument for the legitimacy of *waqf* must work from within a fairly defined set of 'Ḥanafite' opinions and norms if Hilāl hoped for the approval of his peers, which explains why Hilāl cannot simply claim that Abū Ḥanīfah supported his opinion. Thus, Hilāl resorts to analyzing legal definitions and their logical implications.[136]

Rather than independently assessing the definition of *waqf*, al-Khaṣṣāf follows Hilāl's lead – i.e., takes his definition for granted – and proceeds to examine the ramifications of this definition; for example, its relation to previous

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[133] Hennigan, *Birth*, 33.
[134] Hennigan, *Birth*, 94.
[135] Hennigan, *Birth*, 33-42.
[136] Hennigan correctly states, "The distinction that Hilāl draws between a *ṣadaqa*, a *waqf*, and a *ṣadaqa mawqūfa* is more than a semantic game." See Hennigan, *Birth*, 78.

practice and rules of inheritance.[137] Moreover, al-Khaṣṣāf systemizes his predecessor's definitions and rules to better serve the practical concerns of the judiciary, as indicated in his extensive treatment of the proper conduct of *qāḍīs* in recording *waqf* contracts, resolving conflicts and so on.[138] Hennigan aptly describes the practical concern which informed, more generally, the juristic discourse on *waqf*: "[T]he problem confronting third-century jurists was one of 'too many trusts and too little law.' The remarkable phenomenon of the Arab conquests and the subsequent conversion to Islam of many conquered peoples unintentionally introduced into the Islamic world the cultural and legal practices of various Near Eastern civilizations. The task facing Hilāl and al-Khaṣṣāf was to bring order to what may have become–by the third Islamic century-a fairly diverse array of trust-like practices."[139] Our analysis makes clear *that* producing a systematic and comprehensive law, which sustained judicial and social needs, was inextricably connected with developing rationalist modes of inquiry. Moreover, we have established that the development of legal discourse was conducted independently of scriptural sources. This raises the question as to *why* scripture was only of peripheral interest and also *why* jurists working outside of a school framework, nevertheless, functioned within the limits of a rationalist approach.[140]

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[137] Abū Bakr al-Khaṣṣāf, *Kitāb Aḥkām al-Awqāf* (Cairo: Maktabat al-Thaqāfah al-Dīniyyah, 1904), 18.

[138] Hennigan states, "Although the *qāḍī* is not absent form Hilāl's work, the emphasis on the judges' role in al-Khaṣṣāf's work is evidence that he intended his treatise to be a guide-book for judges." Hennigan, *Birth*, 45.

[139] Hennigan, *Birth*, 105.

[140] The usage of *ḥadīth* in both treatises is sparse and do not differ much from previous rationalist usage of *ḥadīth*, that is, it supports a rationally predetermined norm rather than being the source of a legal norm. Although Hennigan admits this, he still assumes there to be a hermeneutic turn. See Hennigan, *Birth*, 88.

The answer to both questions is implied by our analysis of the two jurists' juristic approach. The most important consideration in the treatment of *waqf* – as we will see is the case with other areas of law – is its validity *and* location in the larger framework of Islamic law. That is, the validation of *waqf* did not merely concern the extension of law from established legal rules (e.g., *waqf* was not an extension of inheritance laws *via qiyās* nor was it based on *ḥadīth*,[141] both of which were generally conceived as legitimate legal moves); rather, it required the construction of an entirely new legal category which sought to evade a *bona fide* area of traditional law, i.e., inheritance.[142] Thus, the rising position of *waqf*s as an important financial institution in the third century required not merely the validation of *waqf*, but its independence from any potential restrictions stemming from the laws of inheritance, which, in turn, required a restructuring of law itself.

Hilāl's task is further complicated by scriptural sources which, at worst, repudiate *waqf* and, at best, provide no support for his legal definitions.[143] Thus, Hilāl had to create conceptual space to perform a number of legal maneuvers. Considering the tight theoretical spot Hilāl was in, not only does his approach seem effective, but one wonders how else he would have accomplished such an unlikely task. Hilāl demonstrates the validity of *waqf* and its independence from the rules of inheritance by merely drawing out the semantic implications of the opinions of the rationalist authorities. Moreover, by implicating the opinions of

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[141] The entry on ***waqf*** in *EI*^{2} mistakenly states that the legitimacy of *waqf* is based upon *ḥadīth*, which is a simplification of the sources since there were anti-*waqf ḥadīth* circulating at the time as well. See Hennigan, *Birth*, 107-112.

[142] I am not making an psychological assessment of the jurists position but a historical one. That is, it is inconceivable that Hilāl perceived himself as evading inheritance laws; rather, he was attempting to adapt law to rising social needs in manner he saw as consistent with the tradition.

[143] Hennigan, *Birth*, 107-112.

juristic authorities, he shifts the burden of proof from his individual shoulders to that of the collective rationalist tradition. Both scripture and individual authority become subsidiary to the 'doctrinal' discourse that Hilāl taps into, and perhaps to a large extent creates. Realizing the utility of Hilāl's definition, al-Khaṣṣāf adopts it wholesale and focuses on its practical applications. Thus, although both are independent jurists, their exigent practical concerns were better served by constructing and elaborating upon the existing rationalist framework.

By taking the thesis of legal compromise for granted, specifically the shift from independent reasoning to "hermeneutic discourse" on *ḥadīth*,[144] Hennigan misinterprets the development of *waqf* law. He argues, albeit very tentatively, that while Hilāl represents rationalist discourse in pure form, al-Khaṣṣāf's approach exhibits a concern for interpreting scriptural sources, specifically *ḥadīth*.[145] In addition to our previous analysis, Hennigan raises a number of questions of his own that casts serious doubts on this reading of the two treatises.[146] As indicated, what is most striking about both treatises is its convergence upon the opinion of rationalist authorities without paying the slightest consideration to *ḥadīth*; this when traditionalism was presumably at its peak.[147] As Hallaq argues with respect to Mālik's *Muwaṭṭa'*, the linear analysis of Islamic law, which sees *ḥadīth* as invariably eclipsing *ra'y*, has lead to the misinterpretation of third-century

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[144] Hennigan, *Birth*, 85.
[145] Hennigan, *Brith*, 86.
[146] See Hennigan, *Birth*, 85-90. Most important, Hennigan establishes that there is no qualitative difference between the two treatises in terms of interpreting *ḥadīth*. Indeed, both treatises list only one *ḥadīth* in the body of the text. As well, the list of *ḥadīth* introducing al-Khaṣṣāf's work is so tenuously connected to its content that, as Hennigan himself suggests, it could have been appended on later.
[147] Melchert, *Formation*, 3.

works.[148] To truly see whether *ra'y* was compromised or enhanced, we must examine how Hilāl and al-Khaṣṣāf's contribution were subsequently interpreted and adapted in the larger framework of law.

Little more than a generation after Hilāl and al-Khaṣṣāf, al-Ṭaḥāwī (d. 321) composed his legal compendium (*Mukhtaṣar*), representing the embryonic stages of the Ḥanafite doctrinal school.[149] As indicated in his introduction, al-Ṭaḥāwī proceeds by examining the views of three legal authorities: Abū Ḥanīfah, Muḥammad al-Shaybānī and Abū Yūsuf. However, the significance of al-Ṭaḥāwī's treatment of *waqf*, particularly in light of Hilāl and al-Khaṣṣāf's legacy, go far beyond the mere opinions of these authorities. His section on *waqf* begins:

> It is not valid for one to sequester (*taḥbīs*) one's house or land, or make either inalienable (*waqf*) or [sequester them as] charity (*ṣadaqah*), even if one intends the latter (i.e., *ṣadaqah*) to be solely for God, in the opinion of Abū Ḥanīfah; unless this is done in one's death-sickness (*maraḍ al-mawt*), which, then, will be equivalent to a bequest and, so, it is permitted as bequests are permitted. It is also related on the authority of Muḥammad b. al-Ḥasan from Abū Ḥanīfah that it is not permitted for one to do so even in death-sickness as it is not permitted while one is healthy, and so it is not [in this view] analogous to bequests and this is correct on Abū Ḥanīfah's *uṣūl*. Abū Yūsuf says if one sequesters it [i.e., by only using the term *ḥabs*] it is invalid, unless one makes it sequestered charity (*ḥabs ṣadaqah*) or inalienable charity (*ṣadaqah mawqūfah*)...and this opinion [i.e. Abū Yūsuf's] we take [as preponderant].[150]

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[148] Although Hennigan's analysis does not even suggest the rise of *ḥadīth*. See Wael B. Hallaq, "On Dating Mālik's *Muwaṭṭa'*," *UCLA Journal of Islamic and Near Eastern Law*, 1, 1 (2001-02): 47-65. In his important studies on early jurisprudence in Egypt, which has greatly expanded our universe of discourse, Jonathan Brockopp has, as well, questioned approaching the development of law in a linear fashion. See, his articles: "Early Islamic Jurisprudence in Egypt: Two Scholars and Their Mukhtasars," *International Journal of Middle East Studies*, 30, 2 (1998): 167-182; "The *Minor Compendium* of Ibn 'Abd al-Ḥakam (d. 214/829) and its Reception in the Early Mālikī School," *Islamic Law and Society*, 12, 2 (2005): 149-181.

[149] Calder, *Studies*, 245.

[150] Aḥmad al-Ṭaḥāwī, *Mukhtaṣar al-Ṭaḥāwī* (Cairo: Maktabat Dār al-Kitāb al-'Arabī, 1950), 138.

The *Mukhtaṣar* was intended to be a didactic tool; its aim was to educate rather than proselytize.[151] Thus, in contrast to Hilāl, al-Ṭaḥāwī is unconcerned with legitimizing or defining *waqf* as a legal category and, so, he presupposes the legitimacy of *waqf* and accepts Hilāl's definition as *prima facie* valid. al-Ṭaḥāwī, however, does not merely list juristic opinions; rather, he is concerned more with elucidating the principles that informed the opinions. Moreover, he presents conflicting opinions so as to draw out the logical consequences of the underlying principles upon which they are based. For example, he juxtaposes Abū Ḥanīfah's general rejection of *waqf* and his exception to this rule in cases of death-sicknesses to indicate that his reasoning is based on analogizing *waqf* with bequests, an analogy which Hilāl and al-Khaṣṣāf attempted to destroy by reverse analogy, as indicated previously. He introduces al-Shaybānī, who is conspicuously missing in the previous treatises, to suggest - quite conveniently - that Abū Ḥanīfah is reported to have rejected this analogy as well (which suggests the weakness of the method of reverse analogy). Moreover, al-Ṭaḥāwī suggests that Abū Ḥanīfah's latter opinion is verified by his own principles or "*uṣūl*". These *uṣūl*, as indicated by al-Ṭaḥāwī, establish Abū Ḥanīfah's opinion independently of al-Shaybānī's report (which suggests al-Ṭaḥāwī's lack of confidence in the report); that is, they constitute a hermeneutic framework within which reports and opinions can be evaluated. al-Ṭaḥāwī's approach to legal education suggests that learning law involved, even at the introductory level, much more than memorizing juristic opinions; it meant understanding and

[151] al-Ṭaḥāwī, *Mukhtaṣar*, 2.

evaluating the interconnections between principles and rules, i.e., it was the instruction of doctrinal discourse. Moreover, it is clear that, by the end to the third century, learning law had little to do with *ḥadīth* literature or criticism, both of which became external to legal discourse. Indeed, the rise of the *mukhtaṣar* signaled the dialectic doctrinal discourse between legal compendia and commentaries, which operated independently of the hermeneutic analysis of *ḥadīth*.[152]

Further, in opposition to the compromise thesis, which locates the increasing use of *ḥadīth* as subsequent to the use of *ra'y*, the *Mukhtaṣar* supports Hallaq's thesis of reverse development. For example, the opinion of Abū Ḥanīfah on *waqf*, which al-Ṭaḥāwī presents as based on analogy and more importantly Abū Ḥanīfah's overarching principles, is presented in Hilāl's treatise as simply based on a weak report.[153] That the *Mukhtaṣar* is a didactic, internal legal work fails to explain why *ḥadīth* is peripheral to the legal discourse, since the assertion was that internal law – i.e. rationalist discourse - shifted from independent reasoning to the interpretation of *ḥadīth*. Rather than restraining *ra'y*, however, the *Mukhtaṣar* displays an expansion of or evolution in rationalist legal discourse.

But what, precisely, is third-century *ra'y*? The answer to this question has eluded many, specifically because *ra'y* was equated almost exclusively with rational tools such as *istiḥsān*, *qiyās* and *ḥiyal*, the use of which presumably declined due to the rise of *ḥadīth*.[154] However, this approach only provides a

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[152] See Brannon Wheeler, *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Ḥanafī Scholarship* (Albany: State University of New York Press, 1996).
[153] Hilāl, *Aḥkām al-waqf*, 9.
[154] Melchert, "Formation," 12.

fragmented view of *ra'y*. Rational tools, in the narrow sense, make sense only within the larger context of "discursive" or doctrinal discourse, as indicated in our analysis of Hilāl, al-Khaṣṣāf, and al-Ṭaḥāwī. Hilāl, for example, did not validate *waqf* by simply invoking *istiḥsān*; his analysis of juristic opinions created the conceptual space that facilitated the use of rational tools, such as reverse *qiyās* and *istiḥsān*. Rational tools were built into a greater *ra'y*-based superstructure.

al-Khaṣṣāf and al-Ṭaḥāwī are able to pick up where Hilāl left off, expanding, revising and updating rational methods, but only by doing so within the context of doctrinal discourse. al-Ṭaḥāwī, for example, eliminates reverse *qiyās* by introducing Abū Ḥanīfah's alternative opinion and its implied principles. *Ra'y*, then, is simply the analysis of juristic doctrines independently of *ḥadīth*; that is, rather than (independently) confronting the legal norms of scripture, jurists based and developed law on established principles and modes of inquiry. Moreover, the citing of juristic authorities and opinions was neither an end in itself nor a means to access scripture. Juristic authorities were merely props for the construction of a larger interpretive paradigm which allowed jurists to address concerns that scripture did not.

At the most general level, what propelled the eponymization of legal discourse was the need for *both* doctrinal/methodological continuity and the need for conceptual space which sustained legal creativity.[155] By means of doctrinal discourse, Hilāl validates *waqf* practices, previously viewed as dubious within the

[155] Hallaq states, "The *madhhab*, in its most developed doctrinal sense, would never have come into being were it not for the need to control this thoroughly individualistic character of Islamic law. It did finally manage to control the effects of doctrinal plurality in the interest of relative uniformity, consistency and predictability, but it did not, nor did it intend to, eliminate this plurality in any way, shape, or form." Hallaq, "Regional," 26.

tradition, and specifies its location in the greater structure of law. al-Ṭaḥāwī, following suit, locates his chapter on *waqf* within a comprehensive work on law - specifically right after transactions and just before inheritance - and focuses on presenting a systematic and comprehensive approach to law. Hilāl's use of doctrinal discourse permitted al-Ṭaḥāwī to further develop and systemize the law.

The evolution of law in a number of areas – such as *kharāj*, transactions/property (*buyū'*), *ḥiyal*, contracts (including *shurūṭ*, *wathā'iq*, *'uqūd*, and *ruhūn*) - closely resembles the development of *waqf* law. The general trend is that social practices, which diverge sharply from scriptural and legal sources, are incorporated into law by means of doctrinal discourse. Calder's analysis of Abū Yūsuf's *Kitāb al-Kharāj* demonstrates – though incidentally - that practical concerns were addressed by doctrinal discourse, albeit in a more primitive form (for example, reconstructing a *munāẓarah* or legal debate). *Kitāb al-Kharāj*, as Calder argues, is concerned particularly with legitimizing the more practical (or administratively useful) proportional taxation system to the fixed-rate system; the latter being presumably endorsed by contemporary legal sources. [156] Yanagihashi's study of property law argues that internal doctrinal discourse developed early on in the Ḥanafite and Mālikite tradition. Whether or not Calder's re-dating of Ḥanafite materials are correct (for his re-dating of Mālikite material is clearly not[157]), our conclusion that the development of doctrinal discourse independently of scripture stands, since much of the substance of Abū

[156] Calder, *Studies*, 145.
[157] See Hallaq, "On Dating."

Yūsuf and al-Shaybānī's works necessarily predated al-Khaṣṣāf and certainly al-Ṭaḥāwī.

Moreover, Yanagihashi's analysis supports our assertion concerning the reverse chronological development of *ra'y* and *ḥadīth* in the internal legal works of rationalist authorities. Earlier legal works seems to consider prophetic reports more directly than later works which, like Hilāl and al-Khaṣṣāf, turn more and more to doctrinal discourse. As indicated, Hallaq has demonstrated that the Mālikite school, like the Ḥanafite, developed in reverse order.[158] What is most instructive about the Mālikite transition from *ḥadīth* to doctrinal discourse, from *Muwaṭṭa'* to *Mudawwanah*, is the practical and administrative concerns which informed *Mudawwanah*. Indeed, Saḥnūn, not surprisingly a *qāḍī*, in many respects resembles Hilāl in legal approach. Most important, like Hilāl, Saḥnūn appropriates the opinions of previous authorities to create conceptual space, which in turn enables him to directly and authoritatively address rising administrative concerns.[159] Indeed, it would be no exaggeration to state that the Mālikite school survived only by rationalizing the *Muwaṭṭa'*.

The construction of authority as well as retrospective doctrinal attribution is much more pronounced in the Mālikite tradition because of its singular authority base, i.e., Mālik. Thus, if Mālik endorsed an impractical or indefensible position, Saḥnūn, in most cases, had no recourse but to simply revise it under Mālik's name, as Hallaq demonstrates.[160] However, the development of a triadic discourse in the Ḥanafite tradition lead to the more gradual evolution of Abū

[158] Hallaq, "On Dating."
[159] See Horii, "Reconsideration."
[160] Hallaq, "On Dating," 61-3.

Ḥanīfah's authority. With respect to doctrinal attribution in the Ḥanafite tradition, I suspect interpolation lurked in mainly from Abū Ḥanīfah's companions, since it is their opinions that contrast and balance the master's view.[161] In any case, the triadic discourse eventually lead to the attribution of rationalist principles, *uṣūl*, to all three authorities, as indicated in al-Ṭaḥāwī's *Mukhtaṣar* and, thus, the *ex post facto* development of systematic reasoning.

Hallaq's study of the development of legal authority establishes that classical schools operated within a hermeneutic framework based upon the constructed authority of eponyms. Our analysis here, working backward from those conclusions, argues that third-century Ḥanafite and Mālikite works appropriated the authority of eponyms to address social needs in the formative period of law. That is, the construction of authority and the rationalization of law were rooted in the practical and social concerns of the third century.

Although the previous analysis, I believe, puts to rest the notion of compromise in the derivation of law, it raises a number of questions with respect to the nature of school development and the construction of authority. First, why did jurists, independent of school affiliation, begin to converge upon the doctrines of Abū Ḥanīfah and Mālik? We have demonstrated the value of doctrinal discourse - that is, appropriating opinions of past authorities as did Hilāl, Saḥnūn and al-Ṭaḥāwī - in addressing the need for continuity and creativity in law. However, this fails to explain why the doctrines of Abū Ḥanīfah and Mālik

[161] As indicated, al-Shaybānī's view is mentioned by al-Ṭaḥāwī to support his position on *waqf*, although earlier sources do not mention al-Shaybānī's opinion. As well, Abū Yūsuf's original position on *waqf*, which becomes the authoritative word in the Ḥanafite tradition, is unclear, which perhaps allowed jurists interpretive latitude. See Hennigan, *Birth*, 108-9.

developed independently, especially when neither jurists nor their substantive law represented local norms. Our analysis of both judicial and doctrinal developments suggests a preliminary solution which can explain the 'local' origins of law without positing the existence of geographic schools. It is precisely this problem that seems to have baffled a number of scholars with respect to Hallaq's contention about the non-existence of geographic schools.[162] That is, a number of studies have established the relative uniformity and peculiarity of doctrines in geographic regions, especially of Medinan and Iraqi doctrines. The geographical uniformity of doctrines does not, however, entail the existence of schools. Indeed, Hallaq's point concerning the doctrinal divergence of local authorities was not intended to deny the geographical uniformity of doctrines, but the existence of doctrinal or methodological schools.[163] At any rate, what needs to be explained is how local norms were independently appropriated outside the context of doctrinal schools or local judicial representation.[164]

As Calder suggested, the development of law and the jurists' involvement in the judiciary (i.e., the administrative initiative) were inextricably connected. However, our analysis suggests that the connection between law and the judiciary influenced the development of law antithetically to Calder's depiction: the administrative initiative lead to the rationalization rather traditionalization of law. Indeed, the rationalization of law was a direct consequence of the jurists' endeavor to incorporate social practices, which had no authoritative or scriptural basis in law, into the larger framework of Islamic law (as signified, in the

[162] See Melchert, "Early History"; Yanagihashi, *History*.
[163] Hallaq, "Regional," 19.
[164] Hallaq, "Regional," 19.

Ḥanafite tradition, in the transition from treatise writing to *mukhtaṣar*). Thus, legal discourse in the third century developed by expanding upon the doctrines of second-century *local* authorities. However, the incorporation of diverse social practices[165] - which often stood in contradiction to the known law[166] – required not merely expansion of juristic doctrines, but the reconstruction of law and the construction of authority. [167] This required, as demonstrated, not the mere extension of rules from a scriptural or legal foundation, but the construction of a legal framework which permitted the adaptation and systemization of law.

The transition from local law[168] to doctrinal rationalist law is evidenced in the development of the judiciary and the nature of judicial appointments. Tsafrir states, "*Qāḍīs* came to be less and less local scholars with influence in their community, who represented the legal tradition of their hometown...they were usually unfamiliar with the inhabitants of the place to which they were appointed; and they represented Hanafi law rather than any local legal tradition."[169] However, what Tsafrir does not explain is why jurists adopted "Ḥanafite," "Mālikite" or any other form of non-local law in this period. That is, in the third century, jurist were not trained in or bound to the doctrines and methodologies of a particular school. The classical doctrinal schools did not yet exist and, as such, there were no doctrinal or methodological boundaries that constrained jurists, theoretically or

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[165] Hennigan, *Birth*, 50-70.
[166] The prominence of this disjunction as well as its significance for traditionalism is examined below.
[167] This view of the development of law corroborates Hallaq's intuitions on the role of legal authority. He states, "The construction of the *madhhab* was therefore a process, an act, by which an equivalent form of authority is created to fill the gap the state had left behind." See Wael Hallaq, "Introduction" in *Formation.*
[168] Note: Local law not school.
[169] Tsafrir, *History*, 117.

professionally.[170] However, both bibliographic and substantive legal works suggests that, at least, from the first quarter of the third century, judges applied, for example, the doctrines of Abū Ḥanīfah.[171] If judges no longer represent local legal traditions, why did they seemingly adhere to the doctrines of local authorities? Moreover, if there were no guild schools that produced school-affiliated jurist, why do we see a steady increase in doctrinally affiliated judges, particularly Ḥanafite and Mālikite ones? Indeed, by the middle of the third century, students of law were known to attend the circles of numerous jurists.

A plausible answer suggested by our conclusions is that, by the late third century, rather being *adherents* of the doctrines of eponyms (since, for one, they present themselves as equals in legal works, e.g., Hilāl), jurists adopted a *judicial* tradition.[172] As suggested by the logic of judicial appointments and the production of administrative works, third-century jurists could not procure judicial posts merely by local popularity or influence as did Sharīk, nor could they supplement their deficiencies by reference to an external authority. Rather, judges were required to have systematic and comprehensive knowledge of law and judicial practices due to the social developments which became increasingly more complex to adjudicate and legislate. This was not only due to the growth of new institutions, but because the cosmopolitan nature of the Islamic empire served to dislodge local practices and disperse them throughout diverse lands.[173] Thus, jurists quickly needed to adapt by uprooting local laws and retrofitting them to

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[170] That is, either as a certified member of a guild school or merely as one trained in a particular legal approach.
[171] al-Kindī, 149.
[172] This is not to overstate the issue, since there were independent jurists as we will see.
[173] Hennigan, *Birth*, 50- 106.

meet the rising practical demands upon the judiciary, as illustrated by the approaches of Hilāl. Saḥnūn and others. It would seem that there indeed was too little law to suffice for the burgeoning societies of early Islam.

However, it should be noted that before the end of the second century the judiciary had come to full maturity.[174] By this time, judicial practices - such as *shurūṭ, ṣukūk, sijillāt* - as well as substantive law were broadly defined.[175] Consequently, the universalization and rationalization of law worked within the predefined boundaries of local judicial practices and legal approaches.[176] Thus, independent jurists aspiring for judicial positions were required to learn an (adapted) form of local law along with its judicial practices. This explains, in part, the compartmentalization of third-century legal discourse; that is, why, on a large scale, independent jurists restricted their views to particular local authorities. Indeed, the early sources, such as Wakī' and Kindī,[177] suggest that the rise in the appointments of judges who applied exclusively Ḥanafite and Mālikite doctrines had more to do with the consistent and systematic application of law, rather than local popularity or theological affiliation. For example, Wakī' relates that Aḥmad b. Yaḥyā, a grandson of Abū Yūsuf, was appointed judge of Madīnat al-Manṣūr when the previous judge was dismissed. However, Aḥmad differed in the doctrines (*madhhab*) he applied from the judges that preceded him and he

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[174] Hallaq, *Origins*, 79.

[175] By stating that he is deficient in matters of judicial law, Sharīk suggests that there was judicial law that needed to be learnt and properly applied. However, Sharīk's knowledge of ritual laws as opposed to administrative law suggests a fragmented and less systematic approach to law in the second century.

[176] Heck, *Construction*, 146-93.

[177] In contrast to later sources such as al-Baghdādī who may describe doctrinal affiliation in the context of later guild-school affiliation.

diverged (*inḥirāf*) from standard practice choosing his own individual preferences, and so he was removed from office.[178] Interestingly, from the beginning of the second century, every judge before Aḥmad applied Ḥanafite law and Aḥmad himself was also of Ḥanafite training.[179] This indicates the need for judges to adhere quite closely to a judicial tradition, so much so that it resembles, to large extent, the *modus operandi* of later doctrinal schools. What is more, after Aḥmad's dismissal, the famous Mālikite judge, Ismāʿīl b. Isḥāq was appointed in his place and after him a Ḥanafite, suggesting that Aḥmad was not dismissed merely because he was not being Ḥanafite. Rather, the concern was to apply law in a manner consistent with *a* particular judicial tradition, which was, in the third century, almost exclusively either Ḥanafite or Mālikite.

This view of the legal developments makes sense of the delocalization of law. That is, since Mālikism and Ḥanafism no longer represented local law – i.e., they were universalized by the middle of the third century – it did not really matter whether Ḥanafites judged in Egpyt or Mālikites in Baghdad. What mattered was that judges had to apply law authoritatively and systematically; this was particularly a concern in the third century since judges (and administration) were now dealing with social practices that seemed contradictory to the known law or, at the least, very tentatively connected to it. Thus, to rule authoritatively and systematically on often complex legal matters - such as *waqf, buyūʿ* (e.g., partnerships, *ḥuqūq wa ruhūn, shufʿah, ijārāt*), and *kharāj* – required one to work within a system that had an established and authoritative approach.

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[178] Wakīʿ, *Akhbār*, vol. 3, 28.
[179] Tsafrir, *History*, 42.

One suspects that, in the third century, the individual jurists who answered the common questions of people at the local mosque were less inclined to conform to a particular method of jurisprudence. Indeed, many such jurists, much like Sharīk, had partial and unsystematic knowledge of law, such as the traditionalists, often providing multiple and even contradictory opinions on standard issues such as marriage.[180] However, there were those that had a fairly comprehensive legal approach and at the same time failed to adhere to a particular judicial tradition. These approaches, however, remained largely theoretical for most of the third century, such as that of al-Shāfiʿī. As mentioned, there were few, if any, Shāfiʿite judges in the third century.[181] Moreover, the Shāfiʿite Ibn Khayrān's condemnation of Ibn Surayj's acceptance of judgeship suggests that Shāfiʿites, in contrast to other jurists, avoided the judiciary: "This matter did not use to be found among our comrades, but only the followers of Abū Ḥanīfah."[182] It was the lack of a developed judicial tradition that the Ḥanbalite and Shāfiʿite schools are a much better case of school and authority construction, as Hallaq's study demonstrates.[183]

The thoroughly judicial rather than doctrinal/methodological nature of legal association is further evidenced in the correspondence of the origins of legal doctrines and local judicial practices. For example, Satoe Horii has demonstrated that legal stratagems, being one of the most important legal tools in the

[180] Susan Specotorky's analysis of Aḥmad b. Ḥanbal in "Ahmad Ibn Hanbal's Fiqh," *Journal of the American Oriental Society*, 102, 3 (1982): 461-465. See also, Melchert, *Formation*, 22-31.
[181] That is, if there were any judges that applied the doctrines of al-Shāfiʿī as there were those who applied the doctrines of Abū Ḥanīfah and Mālik. Thus, the only potential candidate I could find was al-Marwazī (d. 294); however, he was undecided between the doctrines of all three of the aforementioned jurists. See Hallaq, *Origins*, 155.
[182] Quoted in Melchert, *Formation*, 89.
[183] See ff. 193.

application of law, were employed systematically in both the Ḥanafite and Mālikite judicial traditions. However, the form of legal stratagem developed exclusively within the context of a *particular* legal tradition. Thus, the practice of *ḥiyal*, which was of Iraqi origin, was largely rejected by the Mālikite tradition and a form of legal stratagem based on the local Madinese principles of *sadd al-dharā'i'* was constructed by Mālikites authorities, such as Ibn al-Qāsim and Saḥnūn.[184] Similarly, the *shurūṭ* tradition, although based on once local practice, developed exclusively along the lines of a particular judicial tradition, as evidenced in al-Ṭaḥāwī's works on *shurūṭ*.[185]

Although doctrinally and theoretically stratagems and contracts were consistent in both judicial systems, jurists developed these practical aspects of the law in tandem with the doctrines with which they associated. This suggests that jurists worked within a broadly predefined legal and judicial framework based on local systems. When law was delocalized, rather than amalgamating juristic doctrines - which would be consistent with the general aims of Abbasid administrative policy[186] - jurists converged upon judicial traditions or systems. However, they did so not merely to transmit legal norms, rather local law served as a springboard for jurists to construct a legal system that addressed the social practices of the third century. As indicated, local law was particularly useful since it permitted jurists to discourse on juristic opinions rather than discreet scriptural reports. It is no coincidence that although the Shāfi'ites produced no works on

[184] Horii, "Reconsideration," 343-57.
[185] Wael B. Hallaq, "Model *Shurūṭ* Works and the Dialectic of Doctrine and Practice," *Islamic Law and Society*, 2, 2 (1995): 109-34.
[186] Heck, *Construction.*

stratagems in the third century, after Ibn Surayj, the qāḍī, Shāfi'ites produced their own brand of stratagems. It was even named the *surayjiyyah* after Ibn Surayj himself. [187]

The transmission of knowledge, both doctrinal and practical, between third-century jurists (particularly those who later became school 'authorities') is illustrative of the *judicial* associations of jurists which stretched from Baghdad to Egypt. That is, while second-century judges, such as Sharīk, represented local law as individual authorities, third-century jurists (although individual authorities as well) acquired judicial skills by learning both doctrinal and practical skills from jurists of a particular tradition. For example, the major proto-Ḥanafite judges of the third century – e.g., al-Ṭaḥāwī, Abū Khāzim, Bakkār b. Qutaybah, al-Thaljī, al-Khaṣṣāf, Hilāl and 'Īsā b. Abān – were interconnected in both legal doctrine and practice. For example, after learning Ḥanafite doctrines with Ibn Abī 'Imrān, al-Ṭaḥāwī sought training in judicial matters under two prominent judges, namely Abū Khāzim (appointed in Baghdad as well as Kufa) and Bakkār (appointed in Egypt), both of whom not surprisingly endorsed Ḥanafite law. [188] Abū Khāzim and Bakkār are reported to have been particularly adept in judicial practices such as *ḥisāb*, *shurūṭ*, *maḥāḍir wa sijillāt* and *'ilm al-farā'iḍ*. Moreover, both Abū Khāzim and Bakkār are reported to have studied under the Basran judge, Hilāl al-Ra'y, author of the Ḥanafite *waqf* treatise. Bakkār is reported to have learnt *shurūṭ* practices, in particular, from Hilāl.[189] Abū Khāzim also studied under 'Īsā

[187] Horii, "Reconsideration," 320.
[188] Laknawī, 31-4
[189] Kindī, 149.

b. Abān, who instituted a number practices in the judiciary, as mentioned previously. Abū Khāzim was also an associate of the Ḥanafite Ibn al-Thaljī.[190] Sources also suggest connections between a number of other Ḥanafite authorities, such as between al-Khaṣṣāf, Hilāl and ʿĪsā. The same trend is indicated in the biographies of Mālikite authorities. For example, Saḥnūn, Ibn al-Qāsim and Asad b. al-Furāt, all major judges and authorities of the Mālikite tradition, transmitted legal doctrines as well as judicial practices.[191]

It is no coincidence that the alleged adherents of both Aḥmad b. Ḥanbal and al-Shāfiʿī are much more tenuously connected to the doctrines of a particular approach than are the third-century Ḥanafites and Mālikites.[192] The amorphous nature of traditionalism in the third century is clear, as Ibn Nadīm does not even assign an eponym to them and merely calls them traditionist-jurisprudents (*fuqahāʾ ahl al-ḥadīth*).[193] Hallaq has demonstrated that students of al-Shāfiʿī, although later perceived as authorities in the school, were, in fact, independent authorities and failed to adhere to one particular approach.[194] Students of Aḥmad and al-Shāfiʿī presumably *transmitted* their doctrines but did not adhere to them as jurists.[195] More importantly, they were not concerned with constructing doctrines around the opinions of their masters, as did Saḥnūn, Hilāl and Al-Khaṣṣāf; that is, not until major *qāḍī*-cum-jurists came along in the fourth century

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[190] Laknawī, 86.
[191] *EI*^{2}, "Saḥnūn," CD-ROM (Leiden: Brill, 2003); Horii, "Reconsideration."
[192] See Hallaq, *Authority*; Melchert, *Formation*.
[193] Hallaq states: "The later Ḥanbalite jurist Ṭūfī openly acknowledged that Ibn Ḥanbal 'did not transmit legal doctrine, for his entire concern was with *ḥadīth* and its collection.'...It would not be an exaggertation to argue that, had it not been for Khallāl's enterprise and ambition, the Ḥanbalite school would never have emerged as a legal entity." *Authority*, 40-1.
[194] For example, al-Muzanī, al-Marwazī.
[195] Melchert, *Formation*.

to remedy that, namely, al-Khallāl and Ibn Surayj. It is no coincidence that jurists not involved in the judiciary, such as traditionalists and the alleged followers al-Shāfiʿī, produced very few administrative legal works;[196] and, moreover, both condemned practices that Mālikites and Ḥanafites knew could not be dispense with, such as *ḥiyal*, *istiḥsān*, *kharāj* and *waqf*. That is, jurists who worked largely outside of a particular *judicial* tradition were free to throw stones.[197] However, since the survival of a school depended upon its integration into the administration, all would ultimately succumb to the process of rationalization, even the Ḥanbalites.

Although fully examining the role of al-Shāfiʿī is beyond the scope of this study, our conclusions permit us to venture a few suggestions. First, that al-Shāfiʿī could have possibly devised the presumed synthesis of traditionalism and rationalism is now out of the question.[198] Not only did his insistence on the supremacy of Prophetic report go largely unheeded for the first part of the third century,[199] his method did not resemble the techniques of traditionalists in the second half, particularly with respect to hermeneutic role of *ḥadīth* criticism.[200] Indeed, al-Shāfiʿī "was neither a loyal traditionalist nor an outstanding traditionist."[201] What, then, was al-Shāfiʿī in the history of Islamic law?

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[196] We will discuss the one exception, Yaḥyā b. Ādam's work, below.
[197] Melchert, *Formation*, 1-31.
[198] See Wael B. Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies*, 4 (November 1993): 587-605.
[199] Hallaq Origins, 109.
[200] Scot Lucas, *Constructive Critics, Ḥadīth Literature, and the Articulation of Sunnī Islam* (Leiden: Brill, 2004) 151-54.
[201] Hallaq, "Was al-Shafi'i" 593.

Defining al-Shāfiʿī in synchronic terms, such as "semi-rationalist," has helped little in understanding his role; particularly since it attributes to him knowledge of what would only become prominent half a century later.[202] That is, al-Shāfiʿī did not attempt to forge a middle route between traditionalism and rationalism since the ideals of traditionalism, particularly verifying *ḥadīth* independently of *raʾy* (as effectively illustrated by Abū Ḥātim's confrontation with the rationalist, previously quoted),[203] only came to full form when the method of *ḥadīth* criticism was effectively articulated as the sole hermeneutic tool for jurisprudence.

Scott Lucas may be correct in suggesting, *contra* Dickinson, that early *ḥadīth* transmitters, such as Mālik, practiced *ḥadīth* criticism and were not merely "imagined" to be critics by mid-third century traditionalists, such as Ibn Abī Ḥātim.[204] However, the more important aspect of the claims of mid-third century traditionalists, which was certainly imagined, was their depiction of previous jurists, such as Mālik and al-Awzāʿī, as *primarily ḥadīth* critics who were willing to alter their opinions for authentic *ḥadīth*.[205] Although Mālik transmitted *ḥadīth*,

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[202] Dickinson, *Development*, 7.
[203] See n. 75.
[204] Lucas admits Ibn Abī Ḥātim's evidence for al-Awzāʿī being a critic is very thin. Lucas, 115-18.
[205] See sources listed in n. 66. In an otherwise insightful work on early Islamic law, I could not disagree more with Wheeler's interpretation of Ibn Abī Ḥātim in his *Applying the Canon in Islam*. He claims that Ibn Abī Ḥātim shared the same concerns as al-Shāfiʿī and Ibn Qutaybah, particularly with respect to the role of local law in the interpretation of law. Contrary to Wheeler, I argue that Ibn Abī Ḥātim, a traditionalist not jurist and one that comes long after al-Shāfiʿī and Ibn Qutaybah, appropriates the biographies of certain jurists to pit them against others, namely rationalists. This project has stuck historically. That is, Mālik is seen as a jurist more loyal to ḥadīth than Abū Ḥanīfah, although, as I will show subsequently, they were very similar in their approach to ḥadīth. What Wheeler fails to notice is that, not unlike the *ṭabaqāt* literature of the jurists, Ibn Abī Ḥātim constructs a geneology of ḥadīth criticism that is just as fictitious. See Wheeler, *Applying*, 82-91.

as a jurist, he certainly did not take *ḥadīth* criticism seriously.[206] Wakī''s anecdote, where Abū Ḥanīfah's student, al-Ḥasan b. Ziyād, meets a Medinite jurist, Ibn Abī Zinād, is illustrative of the Medinan approach to *ḥadīth* transmission. al-Ḥasan states: "What is [the matter] with you [Medinite scholars], relating things from the Prophet and his Companions then you contradict them in your juristic opinions?" The Medinite replies: "Verily, we transmit what we take and what we do not, to know differences in opinion." al-Ḥasan replies: "If you fill your bag with falsehood, you will not find room in it for the truth."[207] al-Ḥasan, as a fellow rationalist (and, as a Kufan one, more concerned about the ramifications of *ḥadīth*), warns Ibn Abī Zinād about the dangers of *ḥadīth* with respect to law. Mālik, like his fellow Medinite jurists, transmitted *ḥadīth* but formulated juristic opinions independently of them. Indeed, as Yasin Dutton and Umar Faruq Abd-Allah have shown, it is likely that Mālik viewed the *ḥadīth* he related as authentic, but not normative. That is, contrary to what Ibn Abī Ḥātim hoped to show, Mālik viewed *ḥadīth* criticism subordinate to *ra'y*. Ibn Abī Ḥātim, however, was likely well aware of Mālik's contradiction of authentic *ḥadīth*; as such, he merely wanted to establish that Mālik was willing to change his opinion. It was another way for Ibn Abī Ḥātim to say: Had Mālik known what we *ḥadīth* critics *now* know, he would have changed his opinion.

Ibn Abī Ḥātim's *Taqdimah* is particularly important since it represents a traditionalist *argument* for the hermeneutical primacy of *ḥadīth* criticism.[208] That

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[206] See sources at n. 66.
[207] Wakī', vol. 3, 188.
[208] Dickinson, vii-10.

is, the vast majority of jurists until his time (i.e., middle of the third century) have entirely ignored *ḥadīth* that the *ḥadīth* critics have taken as authentic. Indeed, the various rationalists had their own ways of determining the normativity of a report as our analysis has demonstrated. Moreover, rationalists have accused *ḥadīth* criticism itself of inconsistency; most notably because critics differed amongst themselves on the methods of determining a reliable report, e.g. Abū Ḥātim considered Abū Zur'ah more reliable than al-Bukhārī.[209] Thus, as Dickinson describes his *Taqdimah*: "[It] is aimed at providing a defence of the techniques of the collectors of *ḥadīth* against the polemical attacks of their detractors."[210] It did so first by constructing a history of *ḥadīth* criticism which was purportedly shared by tradition(al)ists and jurists alike.[211] Traditionalists, moreover, knew it would not suffice to construct a genealogy of *ḥadīth* criticism, that is, merely legitimize it. Rather, they needed to present *ḥadīth* criticism as the *only* legitimate tool to in deriving legal norms, whether one is a traditionalist or jurist. Thus, Ibn Abī Ḥātim emphasizes the virtues of jurists who are humble enough to change their opinions for *ḥadīth* and shrewd enough to learn the science of *ḥadīth* criticism.[212] Moreover, Ibn Abī Ḥātim presents jurists, such as Mālik, as avoiding speculation in legal matters.[213] The traditionalists attempted to recast the skepticism of the generation of Aḥmad b. Ḥanbal in a more universal and convincing form, quite likely because jurists were not paying much attention to the independently developing science of *ḥadīth* criticism. Only well into the second half of the third

[209] Dickinson, 29-32.
[210] Dickinson, x.
[211] Dickinson, 41.
[212] Dickinson, 57-79.
[213] Dickinson, 58.

century – i.e., far enough from the generation of Mālik and al-Awzāʿī to make such claims about them - did the traditionalist thesis find articulation and self-representation, particularly with respect to its relationship with (rationalist) law.

Needless to say, al-Shāfiʿī had little to do with the promoting *ḥadīth* criticism in general, much less as the exclusive tool for deriving legal norms. As Schacht demonstrates, although al-Shāfiʿī argued staunchly for the supremacy of *ḥadīth*, he was quite capricious in his use of *ḥadīth*.[214] Indeed, Ibn Abī Ḥātim was better off making a traditionalist out of al-Awzāʿī than al-Shāfiʿī, whom he did not even attempt to cast as a traditionalist.[215] Seemingly, al-Shāfiʿī's primary concern was to replace local conceptions of *sunnah* with a more universal conception which related directly to divine sources.[216] His concern was in a sense theoretical, as was his doctrines for most of third century; since, as mentioned, his doctrines were not judicially prominent until the fourth century.[217]

Diachronically viewed, al-Shāfiʿī was a *neo*-rationalist. That is, as a jurist coming after and working outside of local legal traditions, al-Shāfiʿī perceived a disjunction between the universality of Islamic law and the provincialism of local approaches. As such, he sought to synthesize rational, local approaches in manner more consistent with the demands of scripture. However, in doing so, he largely built upon the rational foundations of his predecessors.[218] This sets him apart from traditionalists whose primary concern was to derive law from *ḥadīth* and do away

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[214] Schacht, *Origins*, Chapter 3 and 5.
[215] Lucas, 151-154; Dickinson, 49, and *passim*.
[216] See Wheeler's reading, which resembles mine quite closely without a providing a diachronic explanation. *Applying*, 43-66.
[217] Udovitch, *Partnership*, 16-39; Yanagihashi, 118-20.
[218] It would be more precise to say he approach law in reaction to his predecessors.

with *ra'y* entirely. As well, unlike traditionalists, he had opinions, indeed a relatively systematic approach, to a wide array of legal topics, since, rather than ignoring previous law, he renovated it.[219] Wheeler aptly describes the implications of al-Shāfiʿī's approach, "He allows for the equivalent authority of schools whose bases, although now *supposed* to be different interpretations of the same canonical sources, are the conflicting opinions of different local authorities."[220] In this sense, al-Shāfiʿī had a greater influence on the development of law in the early third century than the advocates of *ḥadīth*, as indicated by the number of polemical works directed at him by both proto-Mālikites and proto-Ḥanafites. Indeed, by defending against al-Shāfiʿī's claims to base law on universal scriptural authority, rationalists naturally uprooted local authorities and cast them as the universal interpreters of the Prophet's *sunnah*. Viewing al-Shāfiʿī as a *neo*-rationalist explains his intellectual creativity as well as his legal independence, which contrasts quite starkly with the traditionalist thesis, as we will see in further detail. Moreover, it explains why his legal norms are seemingly more congruous with *ḥadīth* than the local schools. That is, independent of local traditions, al-Shāfiʿī was free to formulate opinions that, when required, conformed to *ḥadīth* norms.

In terms of the traditionalist thesis and the development of law, although *ḥadīth* was presumably gaining ground as a 'source' of law well before the turn of the second century, it may be surprising that the two major developing rationalist schools in the third century, the Mālikite and Ḥanafite, paid very little attention to

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[219] See, in particular, his opinions of *waqf* and *shufʿah*; Hennigan, 112-13, Yanagihashi, 118-20, respectively.
[220] Wheeler, *Applying*, 65.

ḥadīth in the derivation of norms.[221] As Melchert states, the case of Mālikite schools is particularly surprising considering its apparent affinity with *ḥadīth*: "It would have been natural from such a basis for some later Mālikiya to stress the side of juristic acumen (*ra'y*), others to stress *ḥadīth*. Yet the rules propounded often seem fairly independent of the *ḥadīth*..."[222] However, one can only expect rationalists to pay closer attention to *ḥadīth*, especially on traditionalist terms, if we believe that traditionalists had a direct influence on the method of deriving law. The fact, however, is that they did not.

Traditionalists, in isolation from judicial and administrative matters, advocated a minimalist approach to law precisely when, as Hennigan suggests, there was too little law to go around. On the other hand, rationalists, who as judicial representatives bore the brunt of the administrative initiative, nurtured speculation and reasoning in legal matters so as to establish a functioning judicial legal system. Thus, the virtues of rationalism were, not incidentally, the vices of traditionalism. As Dickinson shows, Ibn Abī Ḥātim attempts to marshal on the traditionalist side Hijazian jurists, and pits them against the Kufan or 'Ḥanafite' jurists who are *ahl al-ra'y*. Indeed, appropriating the names of Mālik, al-Awzā'ī served to broaden traditionalism's support base in its fight against Iraqi jurists,[223] who were increasingly represented in the administration and judiciary, and, moreover, who were producing, particularly by the mid-third century, controversial laws on administrative and judicial issues. Melchert's analysis of

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[221] See Melchert, "Traditinist-jurisprudents."
[222] Melchert, "Traditinist-jurisprudents," 391.
[223] Although that also had its drawbacks as Dickinson demonstrates. See Dickinson, 127-30.

traditionalist discontent indicates how they were particularly concerned with rationalist judicial practices as much as belief.[224]

Because their own interests and methods were very narrow in scope – that is, law as presented in *ḥadīth* rather than judicial law- traditionalist had an extremely focused effect on legal discourse. As Professor Hallaq states, "The tradition(al)ists were not necessarily jurists or judges, and their impulses was derived more from religious ethic than from the demands and realities of legal practice."[225] In the third century, the scope of legal production on the part of traditionalists was absolutely paltry relative to the rationalists - with the exception of *Kitāb al-Kharāj* by Yaḥyā b. Ādam, which was itself of limited scope and importance in the *kharāj* tradition, [226] traditionalists produced no other administrative works in the third century. Rather, traditionalists focused on producing, quite prolifically, works on *ḥadīth*, which, like the *Sunan fī al-Fiqh* genre, represented their general approach to *fiqh.* [227]

al-Ṭabarī's (d. 310) account of traditionalist polemic against the reliability of Abū Yūsuf effectively expresses the traditionalist avoidance of ramifying legal questions for administrative purposes; most important, however, al-Ṭabari expresses the sentiments of later traditionalists like Ibn Abī Ḥātim rather than earlier ones, like Aḥmad b. Ḥanbal. al-Ṭabarī states, "A group of tradition(al)ist (*ahl al-ḥadīth*) avoided/rejected Abū Yūsuf's *ḥadīth* due to his tendency toward

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[224] Subsequently, we will take up other aspects of traditionalist discontent, which Melchert does not consider, that suggests it was not merely peculiar practices –such as, *ḥiyal* - but more general aspects of law.
[225] Hallaq, *Origins*, 108.
[226] Heck, 186; A. Ben Shemesh, *Taxation in Islam*, 3 vols (Leiden: E.J. Brill, 1965), vol. 2, 6.
[227] Melchert, *Formation*, 3-31.

ra'y and his ramifying legal categories (*furū'*) and problems (*masā'il*) while associating with the *sulṭān* and assuming judgeship."[228] However, the arch-proponent of traditionalism, Aḥmad b. Ḥanbal himself, recorded *ḥadīth* from Abū Yūsuf, although he knew very well Abū Yūsuf was influenced by *ra'y* and that he had been judge for five years before Aḥmad reported from him.[229] al-Ṭabarī's anecdote likely originates in later traditionalist polemics, such as Ibn Abī Ḥātim, against "Iraqi" jurists, such as Hilāl and al-Khaṣṣāf,[230] who, as we saw, utilized Abū Yūsuf as an authority on issues such as *waqf* and *kharāj*.[231]

The traditionalists' failure, indeed aversion, to produce applicable and systematic law had a devastating effect on their cause.[232] Although traditionalists did not care for judicial or administrative appointments, they certainly did want a say in administrative matters, such as *waqf* and taxation. Most important, traditionalists wanted scripture rather than juristic opinions to prevail in all areas of law. Unfortunately for traditionalism, those representing judicial systems had a greater influence on the nature of the development of law. Although Calder, like Tsafrir, fails to explain the judicial nature of doctrinal association and merely characterizes them as "schools", his hypothesis is correct in its broad outlines, again if one dismisses his characterization of judicial initiatives as political alliances:

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[228] Quoted in Melchert, *Formation*, 8.
[229] Aḥmad's endorsement of Yaḥyā b. Aktham for judgeship suggests he was not particularly against jurists representing judicial positions, although he would not prefer it for himself.
[230] Incidentally, al-Khaṣṣāf's library was ransacked by an angry mob when the caliph was deposed. He was clearly associated with the ruling elite.
[231] See Calder, *Studies*, chapter 6.
[232] Melchert deals effectively with the shortcomings of traditionalism. See Melchert, *Formation*, 3-31

> The importance of political alliances and consequent access to formal administrative posts as a factor promoting canonization is confirmed by the negative and uncertain cases. Where schools did not achieve political integration until a relatively late date (and then only partially, as was the case with the Shāfiʿīs) their institutional texts remained open and developing for a longer time. Where schools failed entirely in political integration and in institutional form (the Mālikis in Baghdad) their texts have disappeared.[233]

The role of traditionalism in terms of the substance and method of deriving law is best described as: too little, too late. That is, before the corpus of authenticated *ḥadīth* and the science of *ḥadīth* criticism could disrupt the substance and method of local law, rationalism constructed a hermeneutic superstructure that proved impervious to the traditionalist thesis. This explains, in part, the great disjunction between the corpus of *ḥadīth* and the legal rules and approaches of doctrinal schools; including the Ḥanbalite and Shāfiʿīte approaches which would eventually play catch up with rationalism by radically, rather than gradually, constructing schools of their own. According to the classical doctrinal schools, legal norms would not be provided directly by prophetic reports; rather, the legal tradition would predetermine the rules and methods that would assess the normativity of reports and scriptural injunctions. As Brannon Wheeler states, "This sort of 'historical' authority did not tie subsequent scholarship to the opinions themselves nor to the content of the sunnah, but allowed such subsequent scholarship to develop its own agenda using the opinions as tangible proof of its link to the prophetic past...The practice defined by each school was authoritative as an interpretation of the revelation, but only through the medium of the local

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[233] Calder, *Studies*, 163-64.

authorities' opinions..."[234] Calder's own description of how law functioned is particularly telling: "Neither Scripture nor common sense had (direct) authority. The interpretations of established figures stood firmly between the present and the sources. Tradition counted; and knowledge and learning (of tradition)."[235]

To appreciate the significance of the disjunction between *ḥadīth* and doctrinal law, we need to go little further than Taqī al-Dīn al-Subkī's treatise, entitled *The Meaning of al-Imām al-Muṭṭalibī's Saying: If the Ḥadīth is Sound, Then it is My Position.*[236] The treatise examines, or rather attempts to explain away, Shāfi'ite doctrines that explicitly contradict *ḥadīth* in light of the alleged words of the school founder that suggest strict adherence to *ḥadīth* norms. What is most interesting here is that even the Shāfi'ites, who are seen as particularly loyal to *ḥadīth*, had ultimately to defend against the normativity of *ḥadīth* reports. al-Subkī attempts to gloss over this embarrassing situation: "Not every report that is an apparent proof can serve to be the source of law...and so there are those Shāfi'ites that advertently discarded a report knowing all well that there may be a subtle reason that may have escaped him..."[237] It seems that the great "synthesizers" of law are, after all, not much different from the rationalists.[238]

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[234] Wheeler, *Applying*, 65.
[235] Norman Calder, "The *'Uqūd Rasm al-Muftī* of Ibn 'Ābidīn," *Bulletin of the School of Oriental and African Studies*, 63 (2000): 216.
[236] Taqī al-Dīn al-Subkī, "*Ma'na Qawl al-Imām al-Muṭṭalibī: Idhā Ṣaḥḥa al-Ḥadīth fa Huwa Madhhabī*," in *Majmū'at al-Rasā'il al-Munīriyyah*, ed. Muḥammad Amīn Damj (Beirut: Idārat al-Ṭibā'ah al-Munīriyyah, 1978), 98-114.
[237] al-Subkī, 101.
[238] Not different since, as stated, they forme themselves in the image of the rationalists.

Having discussed the intra-school development of law, the first locus of legal activity and development, we now turn to discuss the second: the locus of inter-school polemics, or legal theory.

Law and Scripture

We have seen that in the third century the derivation of law entailed the engagement of an internal logic which addressed the doctrines and methods of a particular (judicial) tradition. Although the internal development of norms did not rule out external influence in a number of forms – particularly, polemical activity between judicial traditions – traditionalism was clearly not a primary concern. Indeed, the way law ought to be done in the eyes of the traditionalists entailed the wholesale restructuring of law as practiced by the rationalists, a restructuring which could not be sustained by the demands of judicial practice. Contrary to Melchert, Eric Chaumont has, indeed quite sensibly, argued against the claim that traditionalism had a great influence in the development of law, whether it is in terms of the eponymization of schools or development of legal reasoning. He states, "[L]e conflit entre les sunna-s régionales aurait eu plus d'importance que celui entre *ashab al-ḥadīth* et *ashab al-ra'y* pour ce qui est de l'évolution de l'order légal musulman."[239] As well, considering the early works of Abū Yūsuf and al-Shaybānī, which contains a considerable amount of *ḥadīth* (as indicated previously), Chaumont has also questioned the traditionalization of the Ḥanafite

[239] Eric Chaumont, review of Melchert, *Formation*, in *Bulletin critique des Annales islamologiques* 16 (2000) 69.

school.[240] As suggested by our findings, the nascent Ḥanafite school, like the Mālikite, seems to have increasingly distanced itself from addressing *ḥadīth* directly and focused on taking local authorities as interpreters of the *sunnah*; thus, the reverse process of rationalization rather than traditionalization.

However, as Melchert's studies on the traditionalism suggest, it seems unlikely that the traditionalist thesis failed to effect the development of law entirely. Indeed, we have not considered the responses that traditionalism presumably elicited from the rationalist camp. With respect to the proto-Ḥanafites - who were, at least by the middle of third century, clear targets of traditionalist attack – we have mentioned a number of works which responded to *ḥadīth*. In light of our analysis, ʿĪsā b. Abān's works on *ḥadīth*, at least what we could make of it, seems more likely to be a theoretical work responding to al-Shāfiʿī than to *ḥadīth* criticism.[241] ʿĪsā is recorded to have written a refutation of al-Shāfiʿī and was likely one of the early proto-Ḥanafites who contributed to the delocalization of Ḥanafite law. Indeed, he is reputed to have produced a number of theoretical as well as substantive legal works, and his involvement in judicial administration has been partly mentioned. Hilāl is reported to have said that there is no jurist more knowledgeable (*afqah*) than ʿĪsā.

That ʿĪsā b. Abān did not specifically defend Ḥanafite doctrines against *ḥadīth* is not surprising considering that *ḥadīth* criticism gained ascendancy only by the last half of second century (not to mention the amorphous nature of judicial traditions). Indeed, only by the second half of the third century do we find

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[240] Chaumont, 69-70.
[241] Bedir, *Early Response*.

Ḥanafites seriously taking up the challenge of *ḥadīth*, such as Ibn al-Thaljī and al-Ṭaḥāwī. This raises an obvious question. Early Ḥanafites utilized *ḥadīth* and even defended doctrines from those who used *ḥadīth* against them. So, what distinguishes the later attempts from the former? First, the former attempts cannot be considered a defense of 'Ḥanafite' doctrines from traditionalism. Indeed, there are no Ḥanafite works which specifically seek to bolster doctrines with *ḥadīth*, rather *ḥadīth*, as indicated by Melchert, are cited in polemical contexts, most importantly, between rival local traditions - such as, al-Shaybānī's use of *ḥadīth* in *Kitāb al-Hujjah 'alā' Ahl al-Madīnah* and Abū Yūsuf's in *al-Radd 'alā Siyar al-Awzā'ī*. Moreover, these works use *ḥadīth* quite capriciously by later traditionalist standards – for example, Abū Yūsuf explicitly controverts what he himself considers an authentic *ḥadīth* report solely on the basis of Abū Ḥanīfah's *ra'y*.[242] The early polemical works reveal the explicit local character of *ḥadīth* usage and, in general, legal method.

By the mid-third century, however, jurists, such as Ibn al-Thaljī, were not concerned with regional polemics. Rather, he wanted to defend Ḥanafite doctrines and base its legitimacy on *ḥadīth*. Although Ibn al-Thaljī's works are no longer extant, his approach is described as bolstering the law of Abū Ḥanīfah with *ḥadīth*. Presumably, Ibn al-Thaljī was addressing traditionalists and hoping to appease them. However, his approach was severely repudiated by traditionalists and it seems as though his attempts helped the Ḥanafite tradition little. On the contrary, he is reported to have raised traditionalist pique by devising methods to

[242] Abū Yūsuf, *al-Radd*, 10.

undermine Prophetic reports.[243] Aḥmad b. Ḥanbal is reported to have called Ibn al-Thaljī a capricious innovator and, when solicited by Mutawakkil, preferred the Ḥanafite Yaḥyā b. Aktham as a candidate for judgeship.[244] Clearly, Ḥanafites were better off avoiding traditionalist territory, which is precisely what the majority of Ḥanafites did, quite comfortably, for the greater part of the third century. Ultimately, Ibn al-Thaljī represents an unsuccessful attempt at "fitting out" doctrines with *ḥadīth*, rather than a step toward adopting the methods of traditionalism. He plays a minimal role in the development of Ḥanafite law.[245] Also, he seems to have had little contact with his Ḥanafite contemporaries, and was the subject of attacks from multiples ends.

By the end of the third century, traditionalism had developed the tool of *ḥadīth* criticism in direct opposition to *ra'y*. Thus, a corpus of authenticated *ḥadīth* presumed to be the source of legal norms[246] and only those trained in the methods of authenticating *ḥadīth* could presume to base law on *ḥadīth*. al-Ṭaḥāwī presumed to do just that; that is, in his *Sharḥ Ma'ānī al-Āthār*, he ventured to prove that divine law, or his conception of it, did not contradict the *ḥadīth* corpus. However, unlike Ibn al-Thaljī, al-Ṭaḥāwī was an Egyptian trained by numerous *ḥadīth* experts. Indeed, his training is clearly reflected in the *Sharḥ*, since rather than ignoring the corpus of authenticated *ḥadīth*, he cites them even when contradicting Ḥanafite opinions (as expected, to a significant extent, the 'authentic' *ḥadīth* contracts the Ḥanafite doctrine). However, he also cites what

[243] Laknawī, 171.
[244] al-Khaṭīb, *Tarīkh*, vol. 11, 53.
[245] Later Ḥanafite tradition certainly minimized his role.
[246] Although this is conceding too much to traditionalism, since the canonical sources did not yet gain authority.

was, to later and most probably contemporary *ḥadīth* critics, weak *ḥadīth*. By rational analysis, al-Ṭaḥāwī attempts to reconcile authenticated *ḥadīth* with weaker *ḥadīth* that support Ḥanafite doctrines. Thus, the *sharḥ* (commentary) and *ma'ānī* (meanings) aspect of the work - which was foreign to traditionalist criticism - plays an important role. Although al-Ṭaḥāwī did not incite traditionalist attack like his predecessor Ibn al-Thaljī, his *Sharḥ* was criticized for its reliance on rational methods.

Sharḥ Ma'ānī al-Āthār point up two aspects of the development law. First, unlike Abū Yūsuf, by the end of the third century, Ḥanafites had accepted the authenticity of reports on the criteria of *ḥadīth* critics (i.e., they cannot be outright rejected by reference to dominant practice, as stated by Abū Yūsuf above). Consequently, the normativity of a report had to be finessed and interpreted within the context of Ḥanafite law by use of hermeneutic skill. The differences in the approaches of Abū Yūsuf and al-Ṭaḥāwī are subtle but significant. While Abū Yūsuf doubts the authenticity of reports that contradict Ḥanafite opinion *even when transmitted by reliable sources*, al-Ṭaḥāwī takes them as attributable to the Prophet, but attempts to provide an external reason why they are not legally normative, much like the aforementioned al-Subkī. This is even clearer in al-Ṭaḥāwī's *Mushkil al-Āthār* where he deals with general problems raised by the *ḥadīth* corpus, be they legal, theological or ethical.

Second, it would seem that traditionalism, to some extent, had achieved its goal. They had authenticated a body of *ḥadīth* independently of juristic methods or local assumptions and, so, as suggested by Abū Ḥātim's story, they believed

they had done so objectively. The consequences of their achievements, however, proved to outlive their cause. Although the "traditionalist movement"[247] did not have a direct impact on law, it would seem the fruits of their endeavor, namely a corpus of authenticated *ḥadīth*, continued, posthumously, so to speak, to haunt rationalism.

Before presuming, as Calder has, that al-Ṭaḥāwī produced works specifically in defense of the Ḥanafite school, we need to situate each work within the historical context of the development of law. Calder pays little attention to al-Ṭaḥāwī's differing objectives in writing his *Mukhtaṣar*, *Sharḥ Ma'ānī al-Āthār* and *Mushkil al-Āthār*. Rather, on the one hand, he assumes that al-Ṭaḥāwī's *ḥadīth* works are "intended to resolve contradiction and to demonstrate that the principles of Hanafi law can be established by reference to Prophetic *ḥadīth*."[248] As such, al-Ṭaḥāwī's *ḥadīth* works are written to base Ḥanafite law, as summarized in his *Mukhtaṣar*, on *ḥadīth*. Although al-Ṭaḥāwī certainly had some common concerns in writing each work, Calder conflates genres, ignores the author's larger objectives, and overstates al-Ṭaḥāwī's doctrinal affiliation.

First, contrary to what Calder states, the *Sharḥ* and *Mushkil* are, in fact, quite different. The *Mushkil* does not treat legal issues in particular, much less attempt to reconcile Ḥanafite doctrines with *ḥadīth*. For example, in the section on *nikāḥ*, al-Ṭaḥāwī devotes a chapter on the ethical implications of the *ḥadīth*

[247] I think this is an apt characterization of traditionalism, because they were less established and more amorphous than developing legal traditions.
[248] Calder, *Studies*, 235.

that states, "The illegitimate child is the evil (product) of three."[249] He treats strictly ethical issues, such as how the sin of two people, who incurred it by performing the act of fornication, is transferred to a third that was not involved. In many such issues, al-Ṭaḥāwī does not invoke Ḥanafite authorities or refer to Ḥanafite opinions at all. Moreover, the *Mushkil* includes such topics as the description of the last day, while, on the other hand, it omits major areas of law, such as *waqf* and inheritance. The *Mushkil* is clearly what the author describes it to be in his introduction: an explanation (*tibyānan*) for (general) problems raised in the authentic *ḥadīth* corpus that might escape the understanding of people in general. Calder makes no noted of that fact that al-Ṭaḥāwī was a specialist in law, creed, *ḥadīth*, exegesis, and judicial practices[250] and as such he ought to viewed concerned with more than defending Ḥanafism.[251] Moreover, in a period where scholars did not represent guild schools, al-Ṭaḥāwī played multiple roles that were less strictly defined by his association to Ḥanafism than Calder assumes. In short, we need to consider that al-Ṭaḥāwī, as an expert in various fields of knowledge, served the interest of the people of Egypt *qua* scholar, rather than more narrowly a Ḥanafite.

In the *Sharḥ Ma'ānī al-Āthār*, al-Ṭaḥāwī intended to address, presumably at the behest of his companions, a specific problem that would become quite prominent by the time of al-Ṭaḥāwī. In his introduction to the *Sharḥ*, al-Ṭaḥāwī states: "Some of my associates from the people of knowledge requested that I

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[249] Aḥmad al-Ṭaḥāwī, *Mushkil al-Āthār* (Cairo, 1914), 95.
[250] al-Ṭaḥāwī, *Mushkil*, 2.
[251] Indeed, from our analysis, we cannot assume that al-Ṭaḥāwī consciously promoted Hanafism *qua* Ḥanafite. Rather, he could have merely produced works that are only biased by his training.

compose a book concerning prophetic reports relating to legal rulings that the people of disbelief and the weak of faith believe contradict one another, due to the paucity of their knowledge."[252] He states that he organized the book into (legal) chapters to cover all potential problems by considering the opinions of the scholars on an issue. Unlike in his introduction to the *Mukhtaṣar*, he makes no mention of explaining or supporting the doctrines of the three Ḥanafite authorities. His interpretation of *ḥadīth* is not intended to support school-affiliated doctrines but to reconcile law, as he conceived it, with what is assumed to be authentic *ḥadīth*. Moreover, this was done to address, in specific, a general religious and sectarian problem: the rejecters of *ḥadīth*.[253] At a more general level, he was responding to the apparent and contradictory disjunction between law and *ḥadīth*, which was quite prominent by this time for the aforementioned reasons.

We can read al-Ṭaḥāwī's *Sharḥ* as advancing a specific argument: assuming any law, call it Ḥanafite, I will prove that it is consistent with any *ḥadīth* that can be considered authentic. Rather than defending Ḥanafite law from traditionalist attack, al-Ṭaḥāwī speaks as a proponent of *ḥadīth* and, as indicated by his tone, is clearly on the offensive. al-Ṭaḥāwī only had good things to say of *ḥadīth* critics and called Ibn Abī Ḥātim and Abū Zur'ah two of the greatest *ḥadīth* scholars of the time.[254] On the other hand, in the *Mukhtaṣar*, al-Ṭaḥāwī makes clear his intentions to build his legal solutions on the opinions of Abū Ḥanīfah, Abū Yūsuf and al-Shaybānī.[255] His approach in the *Sharḥ* is to state *ḥadīth* then

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[252] Aḥmad al-Ṭaḥāwī, *Sharḥ Ma'ānī al-Āthār*, 4 vols. (Beirut: *'Ālam al-Kutub*, 1914), vol. 1, 11.
[253] al-Ṭaḥāwī, *Sharḥ*, 11.
[254] Dickinson, 17.
[255] al-Ṭaḥāwī, *Mukhtaṣar*, 15.

the opinions of scholars, sometimes without reference to names (simply: *dhahab qawm ilā*...), and then reconcile the juristic opinions. Most important, he does not present a systematic approach to the legal rules and opinions of Ḥanafite authorities. For example, in contrast to our analysis of *waqf* as presented in the *Mukhtaṣar*, in the *Sharḥ*, al-Ṭaḥāwī focuses on reconciling opinions that stem from authenticated *ḥadīth*. Moreover, in the *Sharḥ*, al-Ṭaḥāwī makes no mention of inter-school, commentarial catchwords, such as *uṣūl*, or reports of differing views to make Ḥanafite law systematic in itself. Although both works concern the law, only the *Mukhtaṣar*, perhaps like his lost commentaries on al-Shaybānī's works, is specifically interested in constructing a systematic approach to Ḥanafite law.

As ambitious as al-Ṭaḥāwī's *ḥadīth*/law reconciliation was, it proved unsuccessful in the end.[256] Its failure to catch on, however, was certainly not because of the sudden appearance of al-Shāfi'ī's *Risālah* which made it seem "amateurish," as Calder would have us believe.[257] Rather, the general effect of the *Sharḥ* seems to have worked in direct opposition to the author's objectives, as evidenced in the reaction of traditionalists and jurists alike. That is, rather than closing the disjunction between law and *ḥadīth*, it served only to highlight it.

It would seem that in the third century the jurists and traditionalists performed their task quite effectively. That is, jurists constructed a systematic and

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[256] Indeed, a similar project would not be seen until *al-'Aynī*'s rationalization of al-Bukhārī's *ḥadīth* collection. This, however, was a reconciliation between Ḥanafite law proper and the now canonized corpus of *ḥadīth*, which al-Bukhārī represented the most authoritative. al-'Aynī also wrote a defense of al-Ṭaḥāwī's *Ma'ānī al-Āthār*, entitled Maghānī al-Akhyār fī Sharḥ Asāmī Rijāl Ma'ānī al-Āthār fī al-Imam Abī Ja'far al-Ṭaḥāwī.

[257] Calder, *Studies*, 229.

applicable law unfettered by the strictures of a rising corpus of *ḥadīth*, while the traditionalists devised a method to separate scriptural validation from the subjective methods of human juristic reasoning. However, that they did so independently was quite apparent from the resultant disjunction between law and *ḥadīth*. This disjunction, however, was only so prominent because the traditionalists, although failed in influencing juristic practice, had a profound effect upon people in general, including jurists themselves. Professor Hallaq aptly expresses the popular power of *ḥadīth*,

> The power of formal *ḥadīth* to captivate the minds of Muslims can be explained in at least two ways: First, unlike the sunnaic practices, which had no objectively defined pedigree, *ḥadīth documented*, or *attempted to document*, the Sunna as a historical event, attested by persons who had themselves engaged in transmitting it....Second, the *ḥadīth* was a universal body of knowledge, borne and worked out by a large and mobile class of scholars who, on the whole, had no particular loyalty to a regionally based practice. It is no coincidence that the rise of *ḥadīth* occurred simultaneously with the evolution of Muslim communities in the vast, non-Arab regions of the empire, especially in the eastern provinces of the Iranian world.[258]

Even jurists, then, firmly believed in authority of *ḥadīth*. They were only able to dissociate legal practice from *ḥadīth* due to the late development of *ḥadīth* criticism and the traditionalist's distance from the practical judicial tradition, as we have illustrated. However, after the dust had settled – that is, from the stir and activity in third century – it was the onus of the school-affiliated jurists, who represented the fulcrum of proto-*sunnī* orthodoxy, to address the intellectual problem presented by the disjunction of law and *ḥadīth*.

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[258] Hallaq, *Origins*, 108.

By the fourth century, jurists had developed a systematic and comprehensive approach to law, which functioned dynamically with the judiciary and social administration. Moreover, legal approaches became independent systems, which carried with it a corpus of doctrines as well as an approach to interpreting the body of law. However, the law was perceived, in the collective psyche of most Muslims including jurists, to derive directly from Qur'ān and *sunnah*.[259] Thus, the disjunction needed to be addressed, particularly when law - as embodied, for example, in *mukhtaṣar*s - stood directly in contrast to corpus of *ḥadīth*. This, however, was not merely an intellectual problem, for as suggested by al-Ṭaḥāwī's associates, the blatant disjunction had larger social consequences, such as the legitimacy of orthodox law which by now served as a fundamental institution in regulating and sustaining social order. Indeed, as indicated previously, the need to reconcile law with scripture would be of little urgency if Islamic law did not play a fundamental role in administering the affairs of people. The resolution of this tension carried great costs since it challenged the nature of Islamic law as a "jurists' law" - that is, one that which represented the interests and values of the Muslim peoples.

Joseph Lowry's study on the relationship between the *Risālah* and Ibn Qutaybah's *Ta'wīl Mukhtalaf al-Ḥadīth* suggests a route of development for the reconciliation of law and scripture. *Contra* Calder, he argues that the *Ta'wīl* can, in theory, be considered closer to later *uṣūl* literature than the *Risālah*.[260] As

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[259] Only the jurist perhaps perceived it as a matter of authorities interpreting the sunna, while more and more people simply began to think law corresponded directly to legal sources.

[260] Joseph Lowry, "The Legal Hermeneutics of al-Shāfi'ī and Ibn Qutayba: A Reconsideration," *Islamic Law and Society*, 11, 1 (2004): 2-41.

suggested earlier, al-Shāfi'ī attempted to base law in a universal rather than local source; his thesis was not specifically aimed at the reconciliation of law and *ḥadīth*. However, Lowry finds that the *Ta'wīl*, unlike the *Risālah*, is concerned more with dogma than legal doctrine. That is, Ibn Qutaybah's approach is, as Lowry suggests, closer to the later genre of *uṣūl al-fiqh* than the *Risālah*. The *Ta'wīl* is, nonetheless, the generalist work of a litterateur, and, as such, not a precursor to *uṣūl*, as Lowry admits. However, as Calder claims, there are considerable similarities between the *Ta'wīl* and al-Ṭaḥāwī's *Sharḥ Ma'ānī al-Āthār*.[261] Indeed, at a general level, both are informed by a concern to resolve the conflict between sources of normative injunctions. While the *Ta'wīl* was a product of intellectual play and, perhaps, third-century debate culture, as Cook suggests, the *Sharḥ* is not.[262] That is, the conflict between normative sources, now between legal systems and the corpus of *ḥadīth*, had become a real and practical problem. Although clearly not a work of *uṣūl*, al-Ṭaḥāwī's *Sharḥ* was informed by the need to establish the connection between law and its *uṣūl*. However, it failed because al-Ṭaḥāwī was mapping law, in one-to-one correspondence, with scripture. This was bound to fail, since, as indicated, Islamic law had become much more than discreet injunctions or a logical extension of scripture, it was an interpretative paradigm that had synthesized not only legal norms, but numerous social practices and institutions of the third century.

Qudāmah b. Ja'far's work on *kharāj* is a particularly useful guide to understanding the nature of the problem, since, as an administrative official

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[261] Calder, *Studies*, 228.
[262] Michael Cook, "Ibn Qutayba and the Monkeys," *Studia Islamica*, 89 (1999): 43-74.

versed in Ḥanafite law, he reports as an apt observer of developing social and legal issues. As Paul Heck states, Qudāmah was concerned with the legal legitimacy of administrative practices, particularly taxation. Qudāmah attempts to construct a legal framework that harmonizes the various forms of tax laws by relating the more legally established practice with the disputed ones.[263] Although Heck's view of Qudāmah's work as "state literature" is highly controversial,[264] his analysis of the conflict between administrative practice and law effectively captures the significance of the development of this aspect of legal literature. He sates:

> The land-tax never attained the prestige of divine command, but was considered human interpretation (*ijtihād*) at best, and its existence in Islam was largely associated with administrative practice, not revelation...In order to integrate it with Islamic legal theory, he [Qudāmah] claims that such an administrative ruling actually originates in Islamic law or, more specifically, the science of jurisprudence (*ḥukm kitābī mardūd ilā uṣūl al-fiqh*)."[265]

Qudāmah's reference to legal theory as an interface to reconcile issues of legal legitimacy and social practice point precisely to the function and origins of legal theory as we will see. In the next section, we will examine how the first available sources of legal theory are concerned particularly with reconciling legal practices associated with the judiciary/administration and the scriptural sources of law.

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[263] Heck, 146-178.
[264] See Elton L. Daniel, Review of Heck, *Construction*, in *Journal of Islamic Studies*, 14 (2003): 377-79.
[265] Heck, *Construction*, 159-161.

Early Legal Theory and Judicial Law

Although legal theory has enjoyed considerable attention by contemporary scholarship, the early works of this genre have largely been ignored. As Ibn Khaldūn's description indicates, the early works, or *uṣūl al-fuqahā'*, are considerably more practical and exhibit little concern for issues of theological import. Indeed, the works of al-Shāshī and al-Jaṣṣāṣ do not even attempt to locate itself within what would later be considered the mother subject of *uṣūl*, theology. Compared to later works, where a significant amount of theological material is examined, the early works remarkably eschew discussion of theological doctrines, except, as we will see, where they have a direct and practical relevance to the law.

Although the practical nature of the early works is self-evident, the emergence of legal theory as a legal discipline, and its function within the greater structure of law, needs further examination. An important consideration in this respect is the apparent disjunction between the derivation of law and the discipline of legal theory. Sherman A. Jackson has effectively exposed the fiction of the traditional view that "legal theory is the exclusive and causative source of legal conclusions."[266] Moreover, Jackson suggests that the function of legal theory is not the derivation of rules but it "provides the parameters within which practical, religious, ideological or other views can be validated *as law*."[267] Although I agree with Jackson, he fails to account for the direct relationship

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[266] Sherman A. Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-Fiqh*," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden; Boston: Brill, 2002), 177-201. See also Mohammad Fadel, "'*Istiḥsān is Nine-tenths of the Law': The Puzzling Relationship of Uṣūl to Furū' in the Mālikī Madhhab*", in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Ledien; Boston: Brill, 2002), 161-76.

[267] Jackson, "Fiction," 200.

between al-Jaṣṣāṣ's work on *uṣūl* and the large body of *furū'* in his *Kitāb Aḥkām al-Qur'ān*, a relationship which I establish subsequently. As well, describing exclusively post-fourth century legal theory, Jackson's analysis of its function fails to explain the emergence of such a discipline.[268]

In short, although Jackson's conclusions are correct, they are not completely justified. My analysis of early legal theory attempts to provide a solution to the apparently "puzzling" nature of the discipline and its origins. However, such an inquiry can only be undertaken by examining the contents of the early legal works, not mere biographical sources or chapter headings. Unfortunately, we only have two such works available, the works of al-Jaṣṣāṣ and al-Shāshī. However, situating these works within our interpretation of the development of law, and juxtaposing the relevant views expressed in these works with those of later works, will enable me to provide general conclusions about the nature and origins of legal theory that apply equally to all (potentially available) *uṣūl* works of this time.

I argue, in particular, that the primary concern of early *uṣūl*, as captured in the works of al-Jaṣṣāṣ and al-Shāshī,[269] is to reconcile Ḥanafite law and the notion of scripture as a legal source, particularly *ḥadīth*. That is, rather than actually mapping legal rules to scripture, as al-Ṭaḥāwī attempted to do, the Ḥanafites constructed a theory that made the relationship between the basic semantic notions of *'umūm* (generality) and *khuṣūṣ* (specificity) govern all

[268] That is, why a discipline that delimited the parameters of legal discourse was required.
[269] Although al-Shāshī is an important source in corroborating our conclusions about al-Jaṣṣāṣ, I make scarce mention of his work since it's short nature permits the reader to verify quite easily, while it adds little in substance.

interpretive avenues to the scriptural sources, setting legal hermeneutics atop the structure of scripture. Fundamental to the early approach, is defining a relationship between epistemic and normative categories that sanction only a *systematic, interpretive* approach to scriptural sources. That is, mapping general (*'āmm*) principles to an epistemically certain source, primarily the Qur'ān, permits the interpreter to reject particular (*khāṣṣ*) normative rulings stemming from epistemically weaker sources, specifically unitary reports (*khabar al-āḥād*). General principles were made theoretically immune from the vast and unpredictable corpus of *ḥadīth*. More important, however, I will argue that legal-theoretic concerns related directly and primarily to reconciling the laws of judicial and administrative practice with scripture.

Although there have been a number of studies of al-Jaṣṣāṣ's *Fuṣul fī al-Uṣūl*, none effectively examine the notions of *'umūm* and *khuṣūṣ*, which, as I will show, is fundamental to understanding his general approach. Dealing with a number of issues in one, fairly short article, Marie Bernard considers only a few aspects of generality and specificity.[270] She fails to provide a comprehensive account of al-Jaṣṣāṣ's hermeneutic approach. Nabil Shehaby's study primarily concerns analogical reasoning (*qiyās*) and does not consider the semantic and hermeneutic aspects of legal theory.[271] Zysow examines aspects of his

[270] Marie Bernard, "Hanafi Usul al-Fiqh through a Manuscript of al-Gassas," *Journal of theAmerican Oriental Society*, 105, 4 (1985): 623-35.
[271] Nabil Shehaby, "Illa and Qiyas in Early Islamic Legal Theory," *Journal of theAmerican Oriental Society*, 102, 1 (1982): 27-46.

hermeneutic theory, but, as we will see, largely in the context of later, theologized legal theory.[272]

al-Jaṣṣāṣ begins by examining the semantic notions of generality (*'umūm*) and specificity (*khuṣūṣ*), which is unique with respect to later tradition.[273] *'Umūm* and *khuṣūṣ* is one of a number of semantic categories that determine the rules of scriptural interpretation - that is, they are hermeneutic categories in contrast to methods of inference, such as *qiyās*.[274] Other important definitions that relate to the interpretation of terms and phrases are: *naṣṣ* (univocal), *mushtarak* (equivocal), *mujmal* (ambiguous), *mubayyan* (clear), *mufassar* (explained), *muṭlaq* (categorical), *muqayyad* (delimited), and *ẓāhir* (apparent).[275] In the non-Ḥanafite tradition,[276] the general term is normatively ineffectual unless its denotation (*mā tanāwulahu*) is specified by an external indicant (*dalīl*).[277] That is, although the meaning of a general term is apparent (*ẓāhir*),[278] one must first determine its referent for it to effect a ruling (*ḥukm*). This view expresses a hermeneutic approach to scripture consonant with traditionalism and the *zeitgeist* of orthodoxy in general. That is, the Qur'ān was elucidated by prophetic practice now preserved

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[272] Zsyow, "Economy."

[273] There are variations, but I have yet to come across a work that begins with *'umūm* and *khuṣūṣ*. More comprehensive works in the later period begin with theological/logical and linguistic postulates, while most works begin with the classification of legal norms.

[274] See Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), 36-82.

[275] Hallaq, *History*, 42-58.

[276] Hallaq, *History*, 45.

[277] Abū Isḥāq al-Shīrāzī, *al-Tabṣirah fī Uṣūl al-Fiqh*, ed. Muḥammad Ḥasan Hītū (Beirut: Dār al-Fikr, 1983), 119; Abū Ya'lā Ibn al-Farrā', *al-'Uddah fī Uṣūl al-Fiqh*, 3 vols. (Beirut: Mu'assasat al-Risālah, 1980), vol.1, 140; Abū al-Ma'ālī al-Juwaynī, *al-Talkhīṣ fī Uṣūl al-Fiqh*, 2 vols. (Beirut: Maktabat Dār al-Bāz, 1996), vol.1, 11-12; Abū Ḥāmid al-Ghazālī, *al-Mankhūl min Ta'līqāt al-Uṣūl*, ed. Muḥammad Ḥasan Hītū (Damascus: Dār al-Fikr, 1980), 165-6.

[278] Abū Ya'lā (d. 458) states, "All general terms are apparent, but not all apparent terms are general." See Abū Ya'lā , *al-'Uddah*, vol.1, 141.

in the corpus of authenticated *ḥadīth*. Thus, the Prophet, rather than the jurist, has priority in interpreting the meanings of the Qur'ān. The great Shāfi'ite jurist, Abū Isḥāq al-Shīrāzī (d. 476), explains the proper procedure in interpreting general terms: "If a general expression is stated, it is not permitted to assume its generality until one examines the sources (*uṣūl*), and if one does not find a source particularizing the general term, then one may assume its generality, in the view of Abū al-'Abbās [Ibn Surayj], or, as Abū Bakr al-Ṣayrafī states: 'One may *provisionally* assume its generality.'" [279] al-Shīrāzī goes on to explain the importance of seeking out further clarification in scriptural sources when confronted with general terms. This view reduces the normativity of general terms; that is, it precludes general terms from being normative text (*naṣṣ*) *prima facie*.[280] As a corollary, this approach gives precedence to specific injunctions.[281]

Al-Jaṣṣāṣ, on the other hand, takes the general term to be the primary and basic hermeneutic category. In the first chapters of the *Fuṣūl*, which are devoted to the hermeneutic categories in general, al-Jaṣṣāṣ focuses on the general term, its scope and normativity. His objectives can be summarized as follows:

1. To extend the range of the normative application of a general term.
2. To prevent, as much as possible, modes of restricting the general term.
3. To reduce all other relevant hermeneutic categories to *'umum*.

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[279] al-Shīrāzī, *al-Tabṣirah*, 119. Assuming generality means that it is applies generally as a rule.
[280] al-Shīrāzī states, "The general term only effects a ruling on a provisional (*iḥtimāl*) basis." See al-Shīrāzī, *al-Tabṣirah*, 151. Abū Ya'lā states, "The *naṣṣ* is what is explicit or effective in its rulings." See Abū Ya'lā, *al-'Uddah*, 155.
[281] See al-Shīrāzī's discussion on conflict between *'āmm* and *khāṣṣ* terms. al-Shīrāzī, *al-Tabṣirah*, 151.

al-Jaṣṣāṣ begins by examining the general term's apparent implications (*ẓāhir*) which, he states, one must cognizant of.[282] Contrary to non-Ḥanafites, al-Jaṣṣāṣ assumes the general to be normative and argues that related injunctions – those connected by conjunctions or purport to be clarifications (*bayān*) – fail to restrict the scope or normativity of a general term.[283] Moreover, he argues that the apparent meaning of a term is assumed unless an indicant supports a metaphorical interpretation. Consequently, neither external references nor internal factors of interpretation can encroach upon the hermeneutic territory of a general term. In this chapter, al-Jaṣṣāṣ shrewdly defines the implications of a general term, anticipating any potential counterarguments.

The next chapter, although entitled *naṣṣ* (explicit text),[284] primarily concerns the normativity of the general term. al-Jaṣṣāṣ merely assumed, in the first chapter, that the general term *is* normative. In the chapter on *naṣṣ*, he establishes a relationship that makes the general term normative by definition. That is, al-Jaṣṣāṣ equates the general term with the explicit (*naṣṣ*), a controversial claim given the status legal theory accords to explicit texts.[285] There is no distinction, he claims, between what an explicit and general text denote and no distinction in the nature of the ruling effected by either term.[286] Moreover, al-Jaṣṣāṣ states, "And the permissibility of an exception (*istithnā'*) or specification

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[282]al-Shīrāzī, *al-Tabṣirah*, 151.

[283] Abū Bakr al-Jaṣṣāṣ, *Fuṣūl fī al-Uṣūl*, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000), vol. 1, 3-16.

[284] In later legal theory, *naṣṣ* describes statements (which may include individual terms), while *'āmm* describes only individual terms. *al-Jaṣṣāṣ* is either unaware of this distinction or pays little attention to it since it is of minor significance to his approach.

[285] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 17.

[286] Except that, as he states, "The general term signifies everything that it denotes, while what is denoted by an explicit text is referred to (specifically) by its name." al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 17.

(*khuṣūṣ*) qualifying a general term does not prevent it from being explicit (*naṣṣ*), as long as no (textual) indicant is established for its specification (or exception)."[287] al-Jaṣṣāṣ anticipates the objection that an explicit text, unlike a general term, does not permit specification. al-Jaṣṣāṣ suggests the general term, when not specified, is equivalent to the explicit text. As we will see, he strategically closes all avenues to restricting the general term, particularly modes of specification (*takhṣīṣ*).

In addition to reducing the general term to the explicit, al-Jaṣṣāṣ equates the former with the ambiguous term (*mujmal*). He invokes the authority of ʿĪsā b. Abān who states than the general term is named *mujmal* in various contexts.[288] However, al-Jaṣṣāṣ is careful to distinguish between the ambiguous (*ibhām*) and general aspects of the *mujmal* term. Where the *mujmal* term is, in itself, ambiguous and there exists no clarifying indicant (*bayān*), it cannot be equated with the general term. But, with a clarifying indicant (or when one is not needed), the *mujmal* is equivalent to the general term and the normative ruling of the *mujmal* term applies generally. By equating the *mujmal* term with the general, al-Jaṣṣāṣ not only extends the applicability of the general term, but he also finds an alternate route for specifying a general term. That is, as we will see in further detail, al-Jaṣṣāṣ sets the requirements of specifying a general term very high, which is precisely what he needs to do to construct overriding principles that can controvert discreet prophetic reports. However, al-Jaṣṣāṣ nevertheless needs to restrict general terms without contradicting his own approach. For example, the

[287] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 17.
[288] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 19.

verse stipulating, in general terms, the amputation of the arm of a thief needs to be specified to exclude petty theft, theft of unguarded goods, the insane, children, and so on. The Ḥanafites were particularly keen on placing restrictions on punishments. Thus, although he used the same verse as an example of a general text in the first chapter, al-Jaṣṣāṣ states that the verse is, in fact, *mujmal* since it resembles the commandment to pray or fast, and so needs further clarification.[289] What is most remarkable about al-Jaṣṣāṣ's treatment, in general, is that it deals less with defining and explaining individual hermeneutic terms than with establishing a relationship between the general term and all other categories. Even the equivocal term (*mushtarak*) is defined by reference to its generality.[290]

After discussing the major hermeneutic terms, al-Jaṣṣāṣ devotes a entire chapter specifically to issues concerning the normative judgment (*ḥukm*) of a general term devoid of any specifying indicant (*mukhaṣṣiṣ*). al-Jaṣṣāṣ exaggerates by claiming that the majority of scholars declare that: "The normative ruling of a general vocable in declarative or imperative statements is not altered by specification, nor does one abstain (*tawaqquf*) on its (ruling), without evidence."[291] As indicated previously, the majority of non-Ḥanafite scholars held exactly the opposite; that is, they did abstain until the sources provided a specifying indicant. Moreover, as is apparent from al-Jaṣṣāṣ's discussion, even the Ḥanafites were divided amongst themselves about the matter, specifically with respect to its theological implications. In particular, Abū Ḥanīfah's theological

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[289] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 23. The commandments of prayer and fasting in the Qur'ān do not mention fundamental aspects of the validity of those rituals. The verses merely order one to pray or fast. Thus one must seek further clarification.
[290] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 26.
[291] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 40.

position on abstaining from judgment on the punishment of a sinner would seem to contradict al-Jaṣṣāṣ's position since it suggests general verses, that do not particularize the length or nature of punishment, cannot be taken as applying absolutely. al-Jaṣṣāṣ presents an exhaustive response, which, in brief, argues that the indicant for particularization, in this case, is clear and justifiable. More important, however, is why al-Jaṣṣāṣ would embroil himself in volatile theological matters to advance his hermeneutic agenda, especially considering he, by and large, steers clear of the theology and matters related to it. Interpreting al-Nasafī's disagreement with al-Jaṣṣāṣ, Zysow aptly observes, "For al-Jaṣṣāṣ did not argue from the correctness of a theological dogma to a particular exegetical position. Rather, he tried to show that even those Hanafis that had taken a theological stance different from his own had not done so on the basis of a deviant view of the general term. al-Jaṣṣāṣ, in short, is ready to sacrifice theology to hermeneutics."[292] However, by reading early legal theory through the spectacles of the Samarqand tradition, Zysow tends to theologize the debate over the particularization of generality (*takhṣīṣ al-'umūm*). Zysow overlooks the origins and hermeneutic significance of this debate. Although later tradition would refine al-Jaṣṣaṣ's argument, the hermeneutic and epistemic basis of Ḥanafite law, as Zysow effectively explicates, was built firmly upon al-Jaṣṣāṣ's theory.

In the next few chapters, al-Jaṣṣāṣ discusses the general term when it is intended to refer to something specific. Again, eager to forestall potential objections, al-Jaṣṣāṣ repudiates the generality of such terms and claims, in this

[292] Zysow, "Certainty," 139.

case, the specification is equivalent to an exception (*istithnā'*) attached to the sentence. That is, such terms are not genuinely general, although the word may purport to be general.[293] His response is meant to inform the opponent: Do not attempt to particularize genuine general terms by reference to hidden intentions or motives. Other chapters and discussions in the first section of the book – such as the chapter on connectives – adhere closely to al-Jaṣṣāṣ's approach in the previously discussed chapters.[294]

The first chapters lead up to the most crucial hermeneutic problem that al-Jaṣṣāṣ's confronts, the particularization of the general by a unitary report.[295] Indeed, the principle of particularization of the general is the conceptual linchpin that binds the various epistemic and hermeneutic concerns of al-Jaṣṣāṣ's theory. Most important is the general term which now serves as an epistemic as well as normative category. That is, by the general term, al-Jaṣṣāṣ actually means statements or principles that are based in the Qur'ān or established *sunnah* (*al-sunnah al-thābitah*), sources that impart certain knowledge. The unitary report, by contrast, engenders only probable knowledge. Although the majority of schools permit the specialization of the general by unitary reports, al-Jaṣṣāṣ's position, as indicated by his lead up, is a foregone conclusion: due to their epistemic weakness, specific injunctions raised by unitary reports fail to particularize general injunctions.[296]

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[293] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 65.
[294] My brief summary of al-Jaṣṣāṣ's arguments should not suggest to the reader that he is a facile reasoner. His arguments are significantly more involved. However, I attempt to extract the most significants aspects of his arguments.
[295] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 74-109.
[296] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 74.

What makes this principle so useful to al-Jaṣṣāṣ is – perhaps ironically - the paucity of epistemically certain sources. That is, the Qur'ān provides very few legal injunctions and many are stated in general and ambiguous terms. This makes the Qur'ān a malleable source of legal principles, since, prior to interpretation, the Qur'ān is largely silent on specific issues. In the introduction to the *Fuṣūl*, al-Jaṣṣāṣ states, "[The book] covers methods of deriving meanings from the Qur'ān, and extracting its indicants and the rulings of its terms."[297] Significantly, he makes no mention of the other sources of law: *sunnah*, *ḥadīth*, *ijmā'*, or *qiyās*. In al-Jaṣṣāṣ's view, the Qur'ān is much more than a source of legal principles; it provides a hermeneutic framework within which *all* sources of law are interpreted. In a chapter discussing the conditions of accepting a unitary report, al-Jaṣṣāṣ states that a unitary report that contradicts any of the established meanings of the Qur'ān is to be rejected categorically.[298] Moreover, in opposition to those who claim that general injunctions are based upon specific ones, al-Jaṣṣāṣ states that general verses of the Qur'ān have precedence over all specific injunctions, even if the latter are verses from Qur'ān. The Qur'ān is to serve primarily as a source of overarching principles; it is an overarching constitution rather than a source of specific rules.

While al-Jaṣṣāṣ enhances the hermeneutic role of the Qur'ān, he (further) restricts the role of unitary reports by raising a number of conditions that determine their admissibility. al-Jaṣṣāṣ, however, is not interested in the verification methods of *ḥadīth* criticism; rather, his conditions are related to the

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[297] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 74-109.
[298] al-Jaṣṣāṣ, *Fuṣūl*, vol.2, 3.

content of unitary reports. Thus, if unitary reports contradict the Qur'ān, established practice or even suggest norms unfamiliar to the masses, they are to be rejected.[299] It may seem peculiar that as a Ḥanafite, rather than relaxing the rules of the admissibility of reports, al-Jaṣṣāṣ seeks further restrictions. al-Taḥāwī, for example, was criticized for his reliance on weak *ḥadīth*. Although his methods are unique, al-Jaṣṣāṣ's concerns in the *Fuṣūl*, as we suggested, are not entirely different from al-Taḥāwī's aims in the *Sharḥ Ma'ānī al-Āthār*. That is, the general term, particularly with respect to the principle of particularization of the general, and the conditions of acceptance of unitary reports are ways of obstructing normative *ḥadīth* material which are epistemically validated by the methods of *ḥadīth* criticism. As indicated throughout the various chapters on hermeneutic terms, al-Jaṣṣāṣ is concerned with the inflation of legal norms entailed by an independently verified *ḥadīth* corpus. His primary aim is, thus, to construct a hermeneutic method that permits the analysis of *ḥadīth* on the jurists' terms, particularly the terms of the Ḥanafite jurist.

However, *ḥadīth* criticism can be, at once, too permissive and too restrictive. That is, Ḥanafite rules are often based upon questionable *ḥadīth* and juristic practices in view of *ḥadīth* criticism, as exemplified in al-Taḥāwī. Thus, al-Jaṣṣāṣ permits various types of reports that are normally rejected by *ḥadīth* criticism. For example, he permits *mursal ḥadīth* (a transmission missing a Companion),[300] the reports and practices of the Companions and, perhaps most controversially, the reports of a *mudallis* (one who reports from those he has not

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[299] al-Jaṣṣāṣ, *Fuṣul*, vol.2, 3.
[300] Lucas, *Constructive*, 30.

met).[301] Thus, while restricting acceptance of *ḥadīth* in terms of its content, al-Jaṣṣāṣ loosens the conditions of acceptable transmission.

That al-Jaṣṣāṣ's main hermeneutic concern is to reconcile law with *ḥadīth* is made clearer in the numerous examples he provides. A few examples, particularly from his *Kitāb Aḥkām al-Qur'ān*, aptly illustrate how his legal theory directly served the justification of the practical and administrative aspects of Ḥanafite law. In his discussion on the inheritance of apostates, al-Jaṣṣāṣ responds to those who contradict the Ḥanafite view and claim the apostate does not inherit from his Muslim ascendants. al-Jaṣṣāṣ first invokes the general verse of inheritance, "Allah advises you as regards your children's [inheritance],"[302] which he interprets as establishing the primary rule concerning inheritance; that is, children *generally* inherit their father's wealth.[303] As suggested earlier, the vague and general nature of the verse is precisely what enables al-Jaṣṣāṣ to construct his overarching principles. Arguing against the Ḥanafite position, the objectors cite a *ḥadīth* which prescribes that the disbeliever does not inherit from the believer, nor *vice versa*. al-Jaṣṣāṣ, invoking his well-established rule, states that this unitary report cannot specify the general ruling of a verse from the Qur'ān.

In examining issues of commercial transactions (*bay'*), al-Jaṣṣāṣ adduces a verse that states God has made transactions lawful.[304] He takes the verse to be a general statement and thus its ruling applies to all transactions until appropriate

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[301] Lucas, *Constructive*, 30.
[302] Qur'ān (4:11).
[303] Abū Bakr al-Jaṣṣāṣ, *Kitāb Aḥkām al-Qur'ān*, 3 vols. (Beirut: Dār al-Kitāb al-'Arabī, 1916), vol. 2, 102.
[304] al-Jaṣṣāṣ, *Aḥkām*, vol. 1, 469.

evidence suggests otherwise.[305] al-Jaṣṣāṣ argues against al-Shāfi'ī's opinion that the verse is ambiguous and thus requires one to forgo judgment until further clarification. This general principle of legal transaction established by al-Jaṣṣāṣ is later used to justify a number of Ḥanafite rules concerning commercial transactions, including the validity of the transaction of illicit goods.[306]

The number of practical administrative legal problems discussed in both the *Fuṣūl* and *Kitāb Aḥkām al-Qur'ān* are staggering in comparison to issues that concern ritual practice. Major topics which are discussed include: inheritance, debt contracts, various types of commercial transactions, usury, alimony and spousal sustenance, witnessing, liability (*ḍamān*), preemption, [307] penal punishment, and taxation. In addition to the number of issues discussed, administrative issues are treated extensively in the *Aḥkām al-Qur'ān.* al-Shāshī devotes an entire chapter – of his work on *uṣūl* – to argue that acceptance (*qubūl*) is an integral condition (*rukn*) for a transaction and another chapter to clarify that gems are not taxable. In an individual chapter in the *Fuṣūl*, al-Jaṣṣāṣ examines whether false conditions invalidate contracts and transactions.

More important, however, is the content of these discussions. That is, from a survey of the first two volumes of *Aḥkām al-Qur'ān*, over seventy percent of administrative issues discussed significantly involve the notions of *'umūm* and *khuṣūṣ.* Moreover, the validity of the Ḥanafite position, like our previous examples, rely on the interplay of these principles as expounded in al-Jaṣṣāṣ's work on *uṣūl.* Issues of ritual practice, on the other hand, are discussed quite

[305] al-Jaṣṣāṣ, *Aḥkām*, vol 1., 4.
[306] al-Jaṣṣāṣ, *Aḥkām*, vol 1., 470.
[307] al-Jaṣṣāṣ, *Aḥkām*, vol 1.,131.

briefly and rarely (less than thirty percent in the first two volumes) invoke principles of *uṣūl*.

In context of our previous discussion, al-Jaṣṣāṣ's discussion of the legitimacy of administrative taxation, in both his works, indicates the close relationship between theory and judicial practice, as foreshadowed by the work of Qudāmah b. Ja'far. In the *Fuṣūl*, al-Jaṣṣāṣ cites a number of verses that apply generally to taxation and charity, such as the verse which commands to take charity from the wealth of people.[308] He argues that all solitary reports, which concern taxation and charity, are clarifications of those general injunctions. However, whether a report or a verse from the Qur'ān, the generally established rule cannot be delimited. For example, objectors state that the verse that provides an option to give charity voluntarily implies that the ruler does not have a right to take taxes (forcibly) from private wealth.[309] He argues that one can have the option to give, and do so, while the rule takes charity as well, only that they are two separate instances of giving charity. Thus, the verse fails to override the primary general injunction. al-Jaṣṣāṣ considers the generality of the verses of taxation and charity in over six separate chapters, approaching it from various angles - for example, how a report can be a clarification of the verses but not restrict its ruling.[310] Also, al-Jaṣṣāṣ explains how a report that contradicts restricting the tithe (*'ushr*), which is itself based upon a report, is to be rejected since the report supporting the tithe is more general and authoritative.[311]

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[308] See Qur'ān (9:103) and (6:141); al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 251.
[309] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 12.
[310] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 241.
[311] al-Jaṣṣāṣ, *Fuṣūl*, vol. 1, 232.

In the *Aḥkām al-Qur'ān*, al-Jaṣṣas deals with taxation in a more systematic fashion and devotes a chapter to the major issues.[312] He discusses the various reports that pertain to the topic, and even examines legal minutia such as whether honey is considered taxable.[313] In addition to this, he examines taxation in a number of other chapters, such as on giving charity to polytheists. al-Jaṣṣāṣ argues that a general verse[314] permits it and since charity is given to the ruler, its distribution to the polytheists is under his discretion, regardless of whether the taxpayer approves.[315] In the chapter on transaction, al-Jaṣṣāṣ forcibly argues against tax-evaders and those who impose taxes without the authority of the ruler.[316] He declares them to be worse than those who take usury.

Our analysis suggests that al-Jaṣṣāṣ's hermeneutic theory was concerned, quite specifically, with reconciling the scriptural sources with the practical application of law in the complex context of the judiciary and administration. However, it would seem that judicial practice is a central concern throughout his work, not just in hermeneutic analysis. In his examination of al-Jaṣṣāṣ's theory of *qiyās*, Nabil Shehaby states, "This striving for harmony, as mirrored in al-Jaṣṣāṣ's work on legal theory, is not just a natural outcome of a certain intellectual temperament. Nor is it merely the result of some doctrinal commitment or other. It is primarily motivated by the practical aim of showing that the constantly emerging legal problems could be solved without violating the basic Islamic

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[312] al-Jaṣṣāṣ, *Aḥkām*, vol. 3, 153.
[313] al-Jaṣṣāṣ, *Aḥkām*, vol. 3, 153.
[314] Qur'ān (2:270).
[315] al-Jaṣṣāṣ, *Aḥkām*, vol. 1, 463.
[316] al-Jaṣṣāṣ, *Aḥkām*, vol. 1, 472.

tenets that are at the root of Muslim society."[317] I consider the larger implications of my analysis, particularly with respect to the origins and function of legal theory, in the conclusion.

Conclusion

The most important results of our reinterpretation of the notion of legal compromise relates to the relationship between revelation and law. Precisely because of the absence of legal compromise – or, alternatively, because jurists advanced a self-contained and delocalized form of *judicial law* – the substance of law developed independently of scriptural norms, particularly with respect to the later verified corpus of *hadīth*. This disjunction between law and scripture lead to an intellectual dilemma that had immediate practical import. That is, the apparent split between scripture and law questioned the validity of Islamic law as an institution which preserved social order since it questioned its *systematic* and *comprehensive* nature.

Ibn Nujaym states that the genre of *qawā'id fiqhiyyah* are the "real" *uṣūl al-fiqh*.[318] Rather than determining the rules which *actually* derive legal norms, legal theory delimits the methods and possibilities of legal discourse, as Jackson suggests. But why? Legal theory serves two important and interrelated purposes that fulfilled the needs of law as it evolved by the end of third century. First, it reconciled law with scripture without positing a one-to-one correspondence. That is, theory interfaced between law and scripture, preserving the notion of law as

[317] Shehaby, Illa, 45

[318] Quoted in Wolfhart Heinrichs, "Structuring the Law: Remarks on the *Furūq* Literature," in *Hunter of the East: Arabic and Semetic Studies* (Leiden; Boston: Brill, 2000), vol. 1, 368.

deriving directly from scripture. Second, legal theory operated concomitantly with the constructed authority of the school founders by purporting to describe an actual confrontation with scriptural texts on the part of the founders. After the establishment of legal theory as an independent discipline, deriving legal norms from scripture became a matter restricted to those endowed with the requisite epistemic authority.

The importance of the function of legal theory, I believe, cannot be overstated. Rather than restricting the gates of *ijtihād* to the school founder, legal theory in fact ensured the survival of systematic legal reasoning and the construction of a comprehensive and applicable law. That is, scripture was in the fourth century, as much as in the second and third, the primary obstacle to constructing a valid and systematic law. With the birth of legal theory, no longer could external sources of law disrupt the *ra'y*-based superstructure of law. Legal theory ensured the survival of the rational tradition of law and set the hermeneutics of law atop the structure of scripture.

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