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Peter C. Hennigan

The Birth of a Legal Institution

The Formation of the Waqf in Third-Century A.H. Ḥanafī Legal Discourse

Brill

THE BIRTH OF A LEGAL INSTITUTION

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The Formation of the Waqf in Third-Century A.H. Ḥanafī Legal Discourse

BY

PETER C. HENNIGAN

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ABBREVIATIONS

BSOAS	*Bulletin of the School of Oriental and African Studies*
EI[1]	*Encyclopaedia of Islam* (Leiden: Brill, 1st edition, 1913–1936)
EI[2]	*Encyclopaedia of Islam* (Leiden: Brill, 2d edition, 1960–)
EJ	*Encyclopaedia Judaica* (New York: The Macmillian Company, 1971–1972)
JAOS	*Journal of the American Oriental Society*
JESHO	*Journal of the Economic and Social History of the Orient*
JNES	*Journal of Near Eastern Studies*
JSAI	*Jerusalem Studies in Arabic and Islam*
IJMES	*International Journal of Middle East Studies*
ILS	*Islamic Law and Society*
ZDMG	*Zeitschrift Der Deutschen Morgenländischen Gesellschaft*

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INTRODUCTION

It is not an exaggeration to claim that the *waqf*, or pious endowment created in perpetuity, has provided the foundation for much of what is considered "Islamic civilization." The importance of the *waqf* has not gone unnoticed. Turn-of-the-century Orientalists undertook some of the earliest Western historical studies of the *waqf*,[1] while the survival of *waqf* deeds (*waqfiyya*s) from the Mamlūk dynasty and Ottoman empire has contributed to a sizable body of scholarship on the *waqf* in more recent times.[2] What has not been studied, however, are the earliest extant treatises on the *waqf*—the *Aḥkām al-Waqf* of Hilāl al-Raʾy (d. 245/859) and the *Aḥkām al-Awqāf* of al-Khaṣṣāf (d. 261/874).

By definition, a *waqf* is an inalienable trust. In creating the *waqf*, the founder/settlor[3] (*wāqif*) makes the principal (*aṣl*) of a revenue-producing property inalienable in perpetuity and assigns the usufruct or yields (*manfaʿa*) of the property to specified persons or institutions. The property is placed in possession of a fiduciary (*wālī* or *mutawallī*) who administers the trust for the benefit of a third party. Islamic law requires that the remainder interest be a charitable purpose. Although greatly curtailed in the twentieth century by both colonial and post-colonial governments, the *waqf* (pl. *awqāf*, and in North Africa, s. *ḥubs/ḥabs/ḥubus*,[4] pl. *ḥabūs/aḥbā*s) still continues to exist within Islamic society.

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[1] David S. Powers' article "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India," *Comparative Studies in Society and History*, 31/3 (1989), 535–71, provides a nice survey of turn-of-the-century Orientalist scholarship on the *waqf*.

[2] The bibliography contains references to many of these works.

[3] The terms "founder" and "settlor" are synonymous with one another. I have used "founder" throughout this book since this term is more common in studies of the *waqf*.

[4] In modern usage, the word "*ḥubs*" signifies a pious endowment (*i.e.*, a *waqf*), while the word "*ḥabs*" refers to the act of sequestration. The *Lisān al-ʿArab* reveals, however, that during the early period of Islamic history these semantic differences were not drawn as sharply. As a result, it is not uncommon for modern historians of the *waqf* to use the term "*ḥabs*" to refer to a pious endowment. Jamāl al-Dīn Muḥammad b. Mukarram al-Anṣarī b. Manẓūr, *Lisān al-ʿArab* (Beirut: Dār Ṣādir, 1375/1956), 6: 44–46.

The most compelling form of the *waqf*, and the one most easily recognized, is the public endowment (*waqf khayrī*) in which the founder designates as the beneficiary of the usufruct an institution or the general Muslim community. Historically, *waqf*s *khayrī* were established for mosques, *madrasa*s, Qur'ān reciters, hospitals, and the acquisition of weapons for the Holy War. Many of the most compelling architectural structures within Islamic society—the towering minarets of the Friday mosques, the great *khānqāh-madrasa*s, and the crowded markets—owe their origin to this form of privately-initiated pious endowment.

The establishment of *waqf*s was not limited to the domain of large, public works, however. The *waqf* also permeated the private sphere by means of founders who transformed agricultural lands, small estates, and even single buildings or solitary date groves into what came to be called familial endowments (*waqf ahlī* or *waqf dhurrī*).[5] In contrast to the public *waqf*, the beneficiaries of the familial *waqf* generally consisted of individuals who had a lineal or personal relationship to the founder as well as the future descendants of these beneficiaries for as long as subsequent generations continued to exist. If the line of beneficiaries became extinct, then the usufruct reverted to the poor, the destitute, the Holy War, or some other charitable purpose or institution, in perpetuity.

The familial *waqf* became a preferred means of inter-generational wealth transmission because it conferred several advantages. Some

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[5] It is important to note that the early Muslim community did *not* make a distinction between public and familial *waqf*s. In the *waqf* treatises of Hilāl al-Ra'y and al-Khaṣṣāf, no terminological distinction is made between a *waqf* dedicated to a mosque and one made for a family. Likewise, in the *Mudawwana* of Saḥnūn, Mālik b. Anas uses the term "*ḥubs*" to refer to endowments designated for the Holy War and those created for family members or slaves. Hilāl b. Yaḥyā b. Muslim al-Ra'y al-Baṣrī, *Aḥkām al-Waqf* (Madīna: Maṭba'at Majlis Dā'irat al-Ma'ārif al-'Uthmāniyya, 1355/1937), 13; Abū Bakr Aḥmad b. 'Amr al-Shaybānī al-Ma'rūf bi'l-Khaṣṣāf, *Kitāb Aḥkām al-Awqāf* (Cairo: Maktabat al-Thaqāfa al-Dīniyya, 1322/1904), 18; 'Abd al-Salām b. Sa'īd al-Tanūkhī (known as Saḥnūn), *Al-Mudawwana al-Kubrā* (Cairo: Maṭba'at al-Sa'āda, 1323–1342 A.H.), 15: 98–100. According to J. N. D. Anderson, the eventual differentiation between the *waqf ahlī* and *waqf khayrī* was "the result of a growing dissatisfaction with the *Waqf* system as it [had] developed." Monica M. Gaudiosi asserts that the emergence of these terms is relatively recent: "While the concepts of both religious and family endowments existed in the medieval period, the terminology distinguishing the two appears to be modern." Anderson, "The Religious Element in *Waqf* Endowments," *Journal of the Royal Central Asian Society* 38/4 (1951), 297; Gaudiosi, "The Influence of the Islamic *Waqf* on the Development of the Trust in England: The Case of Merton College," *University of Pennsylvania Law Review* 136 (1988), 1233, n. 13.

founders established *waqf*s believing that the endowment might make their property immune—in theory, at least—from unscrupulous rulers.[6] Others used the *waqf* as a legal fiction to prevent the revocation of a sale or to secure property whose ownership was contested.[7] More commonly, founders created familial endowments in order to retain a measure of control over their estates that was denied to them under the default rules for inheritance set forth in the Qur'ān. Under the rules of the Islamic inheritance system, upon entering one's final death-sickness, any property that a person owns is subject to the Qur'ānic *'ilm al-farā'iḍ*, or "science of shares." Although a dying person is entitled to make a bequest of one-third of his property, the remaining two-thirds is divided and distributed according to the Qur'ānic forced-share system unless the heirs consent to a larger bequest. This forced-share system stipulates which relatives are entitled to shares and mandates that male heirs are to receive twice the share of their female counterparts. Experience showed that the application of this forced-share system tended to atomize land into small, economically unworkable tracts that were insufficient for the support of one's spouse or children.[8] With the *waqf*, founders could keep their property intact as well as define a descent strategy denied to them under the *'ilm al-farā'iḍ*.[9] The establishment of a *waqf* permitted founders to designate as beneficiaries categories of relations excluded under the *'ilm al-farā'iḍ*: distant kin relations (*qawm, qarāba,*

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[6] "Jurist," "*Waqf*," *Muslim World* 4 (1914), 180; *EI*[1], *s.v.* "*Wakf*," W. Heffening, 4: 1100; Martha Mundy, "The Family, Inheritance and Islam: A Re-examination of the Sociology of *Farā'iḍ* Law," in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh (New York: Routledge, 1988), 47; Powers, "Orientalism, Colonialism, and Legal History," 536.

[7] David S. Powers, "The Mālikī Family Endowment: Legal Norms and Social Practices," *IJMES* 25 (1993), 384.

[8] William F. Fratcher, "The Islamic *Wakf*," *The Missouri Law Review* 36 (1971), 161. See also Powers, "Orientalism, Colonialism, and Legal History," 536 (observing that the *'ilm al-farā'iḍ* "tends to fragment property into large numbers of small and awkward shares"); idem, "The Mālikī Family Endowment, 384–86; Christian Décobert, *Le mendiant et le combattant* (Paris: Éditions du Seuil, 1991), 22.

[9] S. E. Mohamed Aly Pacha, "Le *wakf* est-il une institution religieuse? Les conséquences des *wakf*s *ahli* sur l'intérêt général, les motifs de ces *wakf*s," *L'Égypte contemporaine* 18 (1927), 398–99; David S. Powers, "The Islamic Inheritance System: A Socio-Historical Approach," in *Islamic Family Law*, ed. Chibli Mallat and Jane Conners (London and Boston: Graham and Trotman, 1990), 22. Powers' article can also be found (without the author's permission) in *Arab Law Quarterly* 8 (1993), 13–29, esp. 23.

banūn), clients (*mawālī*), slaves (*riqāq*), and even neighbors (*jīrān*). And while the establishment of a *waqf* required founders to relinquish possession and control of the endowed properties during their mortal lives,[10] founders acquired *de facto* "dead hand" control over the distribution of the *waqf*'s yields "until God inherits the Earth and those on it."[11] Founders could specify that certain individuals should receive more than others, concentrate all the usufruct in the hands of a sole beneficiary, stipulate that males and females receive equally from the *waqf*, or conversely, remove one of the genders (usually the female)[12] from the endowment entirely. Although it is tempting to view the *waqf* as a cynical means for evading the *'ilm al-farā'iḍ*, it is clear that the Muslim community considered these endowments to be acts of piety, or at the very least, believed that the pious motives of the founders' actions justified circumventing the Qur'ānic inheritance verses.[13]

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[10] Muslim jurists never reached a consensus as to whom these endowed properties were conveyed. Some jurists contended that the *waqf* properties passed into the possession of God, while other jurists held that they were ownerless. In either case, the net result was the same—the founder was not considered to be the owner of these properties, rendering the properties not subject to the *'ilm al-farā'iḍ*.

[11] Qur'ān 19.40. This Qur'ānic expression is frequently mentioned in *waqf* deeds. For example, it is found in a fourth-century A.H. *waqf* inscription from Ramla, the *waqf* deed in the *Kitāb al-Umm* of al-Shāfi'ī, and two *waqf* deeds mentioned in the *Aḥkām al-Awqāf* of al-Khaṣṣāf. Moshe Sharon, "*Waqf* inscription from Ramla, *c.* 300/912–13," *BSOAS* 60/1 (1997), 100; Muḥammad b. Idrīs al-Shāfi'ī, *Kitāb al-Umm*, ed. Muḥammad Zuhrī al-Najjār (Cairo: Maktabat al-Kulliyyāt al-Azhariyya, 1961), 4: 59; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 14–15.

[12] It is a widely held assumption that *waqf*s were used to privilege agnatic relations over cognates. See, *e.g.*, Christian Décobert, *Le mendiant et le combattant*, 22, where the author asserts that founders employed the *waqf* as a means to "pass over cognates" and "disinherit women." Likewise, Aharon Layish, in his article on Mālikī family *waqf*s alleges that familial endowments were created primarily for a selected group of agnatic descendants in order to establish "a kind of '*patrimoine familial intangible*' for descendants of the male line." Layish, "The Mālikī Family *Waqf* According to Wills and *Waqfiyyāt*," *BSOAS* 46 (1983), 21–31, esp. 30–31. In his own study of Mālikī family endowments, however, Powers has reached the opposite conclusion. Based upon his examination of 101 *fatwā*s from the *Kitāb al-Mi'yār* of Aḥmad al-Wansharīsī (1430–1508 C.E.), Powers contends that Mālikī *waqf*s "frequently supplemented the rights of females," rather than subverted their inheritance shares. Powers, "The Mālikī Family Endowment," 385.

[13] The founder of a *waqf* existed within a social and moral economy in which there existed multiple claims on his wealth. In a world circumscribed by obligations to one's fellow human beings, the *waqf* emerged as the principal—and perhaps best—means for fulfilling these charitable duties. The relationship of the *waqf* to charity was discussed in more detail in the dissertation that preceded this book. See Peter Charles Hennigan, "The Birth of a Legal Institution: The Formation of

Due to the advantages of the *waqf vis-à-vis* the Qur'ān's forced-share system, the *waqf* became the dominant form of inter-generational wealth transmission in the Near East. By the beginning of the nineteenth century it was estimated that three-fourths of the real property within the Ottoman empire had been sequestered as *waqf* land,[14] and that one-half of the land in Algeria[15] and one-third in Tunisia[16] had been set aside as pious endowments.[17] Yacoub Hanki, an Egyptian lawyer in the early twentieth century, lamented that Egyptian land was rapidly reverting to *waqf* after a series of land reforms in the nineteenth century. Hanki observed that one-third of Cairo was already a *waqf*,[18] while new types of *waqf* deeds were accelerating the process of *waqf* formation. These new *waqf* deeds—in which the founder stipulated that a percentage of the *waqf* revenues were to be reinvested to purchase more *waqf* land—led Hanki to predict that "une portion très considérable de la fortune du pays" would soon be tied up in inalienable pious endowments.[19]

A Question of Legitimacy

Because the *waqf* became so ubiquitous, the question of its legitimacy seems unnecessary. But imagine, for a moment, the following exchange, *circa* 150/767, in which a learned jurist poses the following question to his aspiring students:

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the *Waqf* in Third-Century A.H. Ḥanafī Discourse," (Ph.D. diss., Cornell University, 1999), 232–47.

[14] Heuschling, *L'Empire de Turquie*, 105. Cited in "Jurist," "*Waqf*," 173.

[15] Eugène Clavel, *Droit musulman. Le waqf ou habous d'après la doctrine et la jurisprudence (rites hanafite et malékite)* (Cairo: Diemer, 1896), 1: 3. Cited in "Jurist," "*Waqf*," 173.

[16] Clavel, *Droit musulman*, 1: 3. Cited in "Jurist," "*Waqf*," 173.

[17] John Robert Barnes, *An Introduction to Religious Foundations in the Ottoman Empire* (Leiden: E. J. Brill, 1986), 43–44, 83; Fuad Köprülü, "L'institution du *Vakouf*: Sa nature juridique et son évolution historique," *Vakiflar Dergisi* 2/3 (1942), French section; Powers, "Orientalism, Colonialism, and Legal History," 537.

[18] Aziz Bey Hanki, *Du wakf: Recueil de jurisprudence des tribunaux mixtes, indigènes et mehkémehs chariehs*, trans. from Arabic by Yacoub Hanki (Cairo: Imprimerie Menikidis Frères, 1914), 9.

[19] Hanki, *Du wakf*, 15; Powers, "Orientalism, Colonialism, and Legal History," 537–38. As Powers notes in his article, "[w]ere it not for Nasser's nationalization of public endowments and abolition of family endowments, Hanki's worst fears might have materialized." Powers, "Orientalism, Colonialism, and Legal History," 538, n. 11.

> We know that God has set forth a detailed forced-share system of inheritance in the Qurʾān that is binding on all believers. What then, do we make of a believer who establishes a pious endowment (*i.e.*, *waqf*) of all his property for his family, neighbors, slaves and the local mosque, but he does so in a manner that precludes application of the forced-share system that God has revealed in the Qurʾān? Can he do this?

Although the preceding narrative is fictional, the tension it addresses is not. With the benefit of hindsight we know that this question was ultimately answered in the affirmative, but the historical record indicates that there was no initial consensus on the question "Can he do this?"

That the legal status of pious endowments remained an open question within early Islamic law is evidenced in a *ḥadīth* from Shurayḥ b. al-Ḥārith (d. 78–99/697–717)[20] in which he asserted that the *waqf* (or *ḥubs*) constituted an evasion of the Qurʾānic *ʿilm al-farāʾiḍ*: "There is no *ḥubs* in circumvention of the shares of God, the Exalted" (*lā ḥubs ʿan farāʾiḍ Allāh taʿālā*).[21] A *ḥadīth* present in the *Aḥkām al-Awqāf* of al-Khaṣṣāf reiterates Shurayḥ's concern that the establishment of *waqf*s interfered with the proper application of the inheritance verses. The *ḥadīth* relates that later Muslims—in contrast to the pious motivations of the Prophet's Companions—had begun to use *waqf*s (*ṣadaqa*s) as a means for disinheriting those who would have received shares under the *ʿilm al-farāʾiḍ*:

> ʿAbd Allāh b. Jaʿfar—Umm Bakr bt. al-Miswar (sp.?)—[al-Miswar], her father, who said: I was present when ʿUmar b. al-Khaṭṭāb read the document of his *ṣadaqāt* with the Emigrants around him. I kept quiet, but I wanted to say, "O Commander of the Believers!" You are doing things for the sake of good, and this is what you intend, but I fear that there will come men (belonging to the people) who do not do things out of the same desire for a reward in the world to come as you do, and who do not have the same intentions. They will adduce you as an example, and inheritances will be cut off. I was ashamed

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[20] Aḥmad b. ʿAlī b. Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb* (Hyderabad: Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1325/1906), 4: 327. The longevity of Shurayḥ's life appears to have taken on mythic proportions. One report in his biographical entry (*tarjama*) alleges that he was 120 years old when he died, while another tradition claims that he lived to be a truly remarkable 180 (!) years old. E. Kohlberg has argued that this latter claim is a typographical error and should read "108." *EI*², *s.v.* "Shurayḥ," E. Kohlberg, 9: 509.

[21] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 5–6; al-Shāfiʿī, *Kitāb al-Umm*, 4: 53.

> to give a legal opinion to the Emigrants, but if I had said it, I do not think that he [ʿUmar b. al-Khaṭṭāb] would have made any of it a *ṣadaqa*.[22]

Opponents of the *waqf* could also point to *ḥadīth*s in which the Prophet reportedly stated that there would be "no *ḥubs* after *sūrat al-nisā*'"[23] and that "*ḥubs* is forbidden" (*nahā ʿan al-ḥubs*).[24]

Equally problematic for jurists such as Hilāl and al-Khaṣṣāf was the opposition of their school's "founder,"[25] Abū Ḥanīfa (d. 150/767), to almost all pious endowments. Abū Ḥanīfa disagreed with *waqf* proponents that the creation of a pious endowment created an "ownerless property." Citing another *ḥadīth* from Shurayḥ, in which it was reported that the Prophet allowed *ḥubs* to be sold, Abū Ḥanīfa contended that pious endowments remained in the control of their owners and were subject to the laws of inheritance and bequest upon their death.[26] Abū Ḥanīfa made an exception for mosques, presumably on the ground that ownership had passed to God.

If the arguments of those opposed to pious endowments had prevailed, there would have been no *waqf* and (presumably) no *waqf* treatises. Although the question of legitimacy dogged the earliest discussions of the *waqf*, these debates are largely absent from the two treatises discussed here. This absence is not altogether surprising. The resolution of fundamental questions—such as legitimacy—generally precede the production of legal treatises. Treatises emerge at a stage in the legal culture when the broad outlines of branches of law have stabilized and become recognizable, but the substantive law remains somewhat ill-defined. Thus, it would be incorrect to view Hilāl and al-Khaṣṣāf as *inventing* the law of *waqf*. Rather, their treatises were the product/culmination of a multi-generational effort to define the substantive law of this institution, and there is evidence that their legal reasoning was at least partially built on the shoulders

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[22] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 7–8.

[23] Abū Bakr Aḥmad b. al-Ḥusayn b. ʿAlī al-Bayhaqī, "*Kitāb al-Waqf*" in *Kitāb al-Sunan al-Kubrā* (Hyderabad: Dār Ṣādir, 1352 A.H.), 6: 162. *Sūrat al-nisā'* is the chapter of the Qurʾān in which the inheritance verses (Qurʾān 4.8, 4.11–12, 4.176) were revealed.

[24] Abū Jaʿfar Aḥmad b. Muḥammad al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār* (Cairo: Maṭbaʿat al-Anwār al-Muḥammadiyya, 1968–?), 4: 97.

[25] Whether Hilāl or al-Khaṣṣāf viewed themselves as members of a Ḥanafī "school" and followers of Abū Ḥanīfa will be discussed in chapter one.

[26] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 1–16, esp. 5, 7, 12–13.

of earlier jurists.[27] Where the line between their original legal ideas and those of earlier jurists should be drawn may never be known, but external evidence indicates that the reason we call the institution a "*waqf*" is related to the terminological efforts of these treatise writers.

That said, the "birth" of the *waqf* as a legal institution required more than the explication of the substantive law in the legal treatises. It also required a legitmating superstructure. The *waqf* treatises provide evidence of a bifurcation between substantive law and legal legitimacy. While the substantive law of *waqf* was derived through what Norman Calder has termed the "discursive tradition"—non-exegetical legal reasoning often characterized by the *qultu/qāla* dialectic—the legitimacy of the institution depended on an exegetical, or "hermeneutic" superstructure that developed parallel to, and independent of, the discursive legal reasoning in the *waqf* treatises.[28] The emergence of the *waqf* as a legal institution was therefore dependent on these two different conceptions of legal authority, a somewhat ironic footnote to the tensions that typified the relationship between rationalist (non-exegetical) and traditionalist (exegetical) jurisprudents.

The Plan of This Study

It is perhaps best to begin with stating what this study is not—it is not a comprehensive survey/analysis of the substantive law of *waqf* as presented in the *waqf* treatises of Hilāl and al-Khaṣṣāf. Such a study remains for another day. Instead, this study uses the *waqf* treatises to inform various debates and analyses within the study of Islamic law and society, including the nature of third-century A.H. legal culture, the role of treatises within that culture, the establishment of legal legitimacy, the development of the Islamic inheritance system, literary styles and conventions within early Islamic legal discourse, and the relationship between law and society as expressed through the law of *waqf*.

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[27] For example, Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804) reportedly authored a treatise on the *waqf*—the *Kitāb al-Wuqūf wa'l-Ṣadaqāt*—and the *waqf* treatises of Hilāl and al-Khaṣṣāf also relate the opinions of Abū Ḥanīfa (d. 150/767) and Abū Yūsuf (d. 182/798), among others.

[28] Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 7–8.

The conclusions drawn in this work have been hampered, to some extent, by the current state of scholarship on the third century A.H. Until the publication of Wael Hallaq's 1993 article on al-Shāfiʿī,[29] it was generally assumed that al-Shāfiʿī's legal theory, as articulated in his *Risāla*, had a substantial impact on third-century legal discourse. By demonstrating that al-Shāfiʿī's theory had little impact until the fourth century,[30] Hallaq showed that we know very little about third-century legal culture. If it was not the age of al-Shāfiʿī, then what was it? This limited study of two *waqf* treatises and their authors cannot hope to answer to this broad question. Rather, similar to Jonathan Brockopp's work on early Mālikī law, this study seeks to illuminate a corner of third-century Islamic law in order to advance our knowledge of this era and inform debates within the field.

Chapter One examines the biographies of the treatise authors and argues for a reconceptualization of the values and norms of third-century Islamic legal culture. In contrast to the "scholars" model of this legal culture, al-Khaṣṣāf's life, in particular, suggests that jurists pursued political and administrative appointments in the ʿAbbāsid bureaucracy, and that the production of legal texts may have been a means of distinguishing oneself within this legal culture. The biographies also seem to provide support for the recent arguments of Hallaq and Brockopp that the third century was a "highly individualistic venture"[31] in which jurists sought to distinguish themselves as "Great Shaykhs" rather than as mere followers of older authorities.[32]

Chapters Two and Three turn to the texts of the *waqf* treatises. Chapter Two examines the attributes of third-century (proto)-Ḥanafī[33] discourse, focusing on literary conventions, forms of legal argumentation and the nature of legal authority among rationalists. Chapter Three examines aspects of substantive law addressed in the treatises.

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[29] Wael B. Hallaq, "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?" *IJMES* 25 (1993), 587–606.

[30] Hallaq, "Was al-Shāfiʿī the Master Architect?" 600.

[31] Wael B. Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," *ILS* 8 (2001), 1–26.

[32] Jonathan E. Brockopp, "Competing Theories of Authority in Early Mālikī Texts," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 3–22.

[33] For the problem of using the term "Ḥanafī" to describe third-century legal discourse, see the introduction to chapter one.

This chapter begins, however, with the question of whether the law of *waqf* might be derived from a foreign legal system. After examining the arguments for and against the various claims of foreign influence, I offer an alternative approach to the question of foreign borrowing. Instead of trying to identify "foreign" elements in *waqf* law, I argue that the question of foreign influence may be better explained by considering the development of *waqf* law from the perspective of the treatise writers. By the third-century A.H., Islamic society had become increasingly heterogeneous through both conversion and inter-marriage. Because Islamic law had not fully developed, it must be assumed that converts to Islam retained some of their former practices. Thus, the task confronting jurists such as Hilāl and al-Khaṣṣāf was how to bring order to what had become a wide range of trust practices and terminologies. That some of these practices likely had antecedents in non-Arabian legal systems may explain why so many theories for the origins of the *waqf* have been proposed. But their presence does not make the *waqf* a "borrowed" institution. Rather, I argue that the *waqf* is a distinctly Islamic institution that developed organically within an increasingly heterogeneous Muslim community.

The remaining two sections of Chapter Three examine the terminological birth of the signifier "*waqf*" as a distinct form of property conveyance within Islamic law. Section Two explores the terminological confusion surrounding pious endowments and how the signifier "*waqf*"—or, more correctly, the juxtaposition of "*ṣadaqa*" and "*mawqūfa*"—was used to differentiate pious endowments from other forms of charitable giving and simple gifts. Section Three examines how the treatise writers created a legal space for the *waqf* within the Islamic inheritance system. In this section I argue that the *waqf* constitutes the last piece of the puzzle that is the Islamic inheritance system, since the *waqf*'s substantive law is dependent on, and subordinate to, the doctrines of intestacy, testacy and death-sickness.

The final chapter of the book takes the reader outside the *waqf* treatises to examine the *waqf*'s legitimating hermeneutical superstructure. This movement away from substantive law and into the question of the *waqf*'s exegetical legitimacy is presaged by the collection of *ḥadīth*s that foreground al-Khaṣṣāf's treatise. This introductory collection of *ḥadīth*s highlights the bifurcated legal construction of the *waqf* within Islamic law: while the treatise writers would develop the substantive law of *waqf* from within a legal discourse

that paid scant attention to the past, the institution's legitimacy ultimately hinged on establishing exegetical/hermeneutical links to the Prophet and the early Muslim community. Relying on G. H. A. Juynboll's *isnād* analysis, I demonstrate that while these traditions cannot be considered historically authentic, they were nonetheless sufficiently "convincing" to confer legal legitimacy to the institution.

The threads that bind this wide-ranging discussion are both the treatises and the questions of (il)legitimacy that haunted the earliest discussions of pious endowments within Islamic legal discourse. The issues addressed in this book, however, have relevance beyond the narrow confines of trust law, for they touch upon styles of legal writing and argumentation, the values and norms of legal cultures, and the development of Islamic law in the third century. Of course, I am also mindful of Christopher Melchert's admonition in his review of Brockopp's *Early Mālikī Law* that writing on one or two texts raises the "inherent danger of . . . distortion of [their] place in history, [and] presenting as important and original what was actually commonplace of its time."[34] Melchert's concern is well-founded, but I also believe that narrowly focused studies can provide the building blocks for larger synthetic surveys of this period. The fact that there are meaningful differences between the *waqf* treatises discussed here and the Mālikī texts examined by Brockopp indicates that we still have much to learn about third-century legal discourse and culture.

[34] Christopher Melchert, "Review of *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and His Major Compendium of Jurisprudence*," by Jonathan E. Brockopp, *ILS* 9 (2002), 273.

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CHAPTER ONE

THE BIOGRAPHIES OF HILĀL AL-RA'Y AND AL-KHAṢṢĀF

Making sense of the biographies of Hilāl and al-Khaṣṣāf is complicated by the limited state of our current understanding of early Islamic legal culture and its development during the second and third centuries A.H. Until recently, it was generally assumed that Hilāl and al-Khaṣṣāf were "Ḥanafīs"—an assumption supported by the Islamic tradition's recollection of this period. For example, Nurit Tsafrir classified Hilāl as an "unquestionable" Ḥanafī,[1] while Christopher Melchert asserted that the incorporation of earlier "Ḥanafī" jurists' opinions into works such as the *waqf* treatises was indicative of school consciousness: "Such works as these imply a specifically Ḥanafī school, both inasmuch as they collect the doctrine (*madhhab*) of one jurisprudent (and a few close to him) and inasmuch as they suggest that his doctrine (and theirs) is all one need know."[2]

The conclusion that second- and third-century jurists such as Hilāl and al-Khaṣṣāf were "Ḥanafīs" has been called into question in recent years. Wael Hallaq has argued that the typology of authority presented in the four schools of law—with legal authority descending from a single master-jurisprudent—was an *ex post facto* phenomenon, and that Abū Ḥanīfa was not even the most logical choice for the school that now bears his name.[3] Hallaq and Nimrod Hurvitz have also questioned long-held assumptions about the development of the schools of law in the second and third centuries. Both historians have challenged Schacht's (and more recently, Melchert's) conclusions that

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[1] Nurit Tsafrir, "Semi-Ḥanafīs and Ḥanafī Biographical Sources," *Studia Islamica* 84 (1996), 68 (defining "unquestionable" Ḥanafīs as those who "both studied under Ḥanafī teachers and had Ḥanafī students, and also those of whom we know that they wrote Ḥanafī law books.").

[2] Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries C.E.* (New York and Leiden: Brill, 1997), 33.

[3] Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 30–31.

the "ancient schools"[4] of law evolved from regional to personal schools, arguing instead that the early schools were distinctly personal and that master-disciple relationships provided the organizing framework.[5] For example, Hallaq has argued that legal scholarship was "a *highly individualistic venture* and one which rested on personal-*ijtihādic* effort" (emphasis in original).[6] This conclusion regarding the individualistic nature of early Islamic legal culture has been given support in a recent article by Jonathan Brockopp in which he argues that legal authority during the formative period was seen as residing in "Great Shaykhs"—individuals whose knowledge of the religious sources, wisdom and lineage gave their words legal authority.[7]

Given these recent historical revaluations of the schools of law it is not entirely clear that either Hilāl or al-Khaṣṣāf would have labeled themselves as "Ḥanafīs." And yet, the *waqf* treatises also reveal that Hilāl or al-Khaṣṣāf were operating within an intellectual milieu in which prominent "Ḥanafīs"—Abū Ḥanīfa, Abū Yūsuf, and Muḥammad b. al-Ḥasan al-Shaybānī—were considered legal authorities. In consideration of these historical debates, the use of the term "Ḥanafī" in this work implies something different than the traditional understanding of the term as a "follower of Abū Ḥanīfa." For the purposes of the period under study in this work, the term does not imply the hierarchy of legal authority traditionally associated with this term, but rather defines a legal culture in which an identifiable group of jurists—who were later (re)contextualized as "Ḥanafīs"—cited to and disputed with one another.

Hilāl al-Ra'y

Of the two men, we know the least about Hilāl al-Ra'y. According to the sources, Hilāl's full name was Hilāl b. Yaḥyā b. Muslim al-Baṣrī.[8]

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[4] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 6.

[5] Hallaq, "From Regional to Personal Schools of Law?" 37–64; Nimrod Hurvitz, "Schools of Law and Historical Context: Re-Examining the Formation of the Ḥanbalī *Madhhab*," *ILS* 7 (2000), 37–64.

[6] Hallaq, "From Regional to Personal Schools of Law?" 26.

[7] Brockopp, "Competing Theories of Authority in Early Mālikī Texts," 3–22.

[8] Abū Muḥammad 'Abd al-Qādir Ibn Abī al-Wafā', *Al-Ǧawāhir al-Muḍiyya fī Ṭabaqāt al-Ḥanafiyya* (Hyderabad: Dā'irat al-Ma'ārif al-Niẓāmiyya, 1332/1914), 2: 207; Khayr al-Dīn al-Ziriklī, *Al-A'lām*, 2d ed. (Cairo, 1954–59), 9: 95; Carl

His *kunya* (surname) was Abū Bakr,[9] but he acquired the eponym "al-Ra'y" due to his great knowledge (*'ilm*),[10] and/or his reliance on independent reasoning (*ra'y*),[11] and/or his use of analogical reasoning (*qiyās*).[12] He received his training from Zufar b. al-Hudhayl (d. 158/774) and Abū Yūsuf (d. 182/798),[13] two of Abū Ḥanīfa's most important students.[14] The initial encounter between Abū Yūsuf and Hilāl is described in the *Akhbār Abī Ḥanīfa wa-Aṣḥābihi* of al-Ṣaymarī (d. 436/1044). According to the report, Abū Yūsuf came to Baṣra and asked the *aṣḥāb al-ḥadīth* (traditionalists) and the *aṣḥāb al-ra'y* (rationalists) a legal question concerning compensation for destruction of a seal. When the *aṣḥāb al-ḥadīth* were unable to reach a single answer, Hilāl stood up from among the *aṣḥāb al-ra'y*, answered correctly, and received the praise of his future teacher.[15] In addition to writing the *Aḥkām al-Waqf*, Hilāl is credited with writing the first work on commercial transactions and contracts (*Kitāb Tafsīr al-Shurūṭ*),[16] a treatise on legal punishments (*Kitāb al-Ḥudūd*),[17] as well as a work on pleading at court (*Kitāb al-Muḥādara*).[18] Hilāl was also the teacher of Abū Khāzim (d. 292/905), and Bakkār b. Qutayba (d. 270/884),

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Brockelmann, *Geschichte der arabischen Litteratur*, original edition (Leiden: E. J. Brill, 1943–49), 1: 180.

[9] Muḥammad b. Isḥāq Ibn al-Nadīm, *Al-Fihrist li-Ibn al-Nadīm* (Cairo: Dār al-'Arabī li'l-Nashr wa'l-Tawzī', 1991), 1: 426.

[10] Ibn Abī al-Wafā', *Al-Jawāhir*, 2: 207; al-Ziriklī, *Al-A'lām*, 9: 95.

[11] Brockelmann, *Geschichte*, 1: 180; Fuat Sezgin, *Geschichte des arabischen Schrifttums* (Leiden: E. J. Brill, 1967–in progress), 1: 435–36.

[12] Al-Ziriklī, *Al-A'lām*, 9: 95.

[13] Ibn Abī al-Wafā', *Al-Jawāhir*, 2: 207.

[14] Zufar b. al-Hudhayl was the immediate successor to the "personal school" that coalesced around Abū Ḥanīfa. He was followed by Abū Yūsuf, who was then succeeded by Muḥammad b. al-Ḥasan al-Shaybānī. Melchert, *The Formation of the Sunni Schools of Law*, 34.

[15] Al-Ṣaymarī, *Akhbār Abī Ḥanīfa wa-Aṣḥābihi* (Beirut, 1985), 103.

[16] Ḥajjī Khalīfa (= Kâtib Çelebi), *Kashf al-Ẓunūn 'an Asāmī al-Kutub wa'l-Funūn*, ed. Gustav Flügel (New York and London: Johnson Reprint Corporation, 1964), 4: 45; al-Ziriklī, *Al-A'lām*, 9: 95.

[17] Ibn al-Nadīm, *Al-Fihrist*, 1: 426.

[18] There exists some confusion over the title of this book. The Arabic text of the *Fihrist* of Ibn al-Nadīm gives the title as *Kitāb al-Muḥāfira*, or the "*Book of Digging*." Ibn al-Nadīm, *Al-Fihrist*, 1: 426. Bayard Dodge, in his translation of the *Fihrist*, contends that "*al-muḥāfira*" is a scribal error and substitutes the word "*al-muḥādara*" (pleading). See Ibn al-Nadīm, *The Fihrist of al-Nadīm*, ed. and trans. Bayard Dodge (New York: Columbia University Press, 1970), 1: 507, n. 38. The *Kashf al-Ẓunūn* of Ḥajjī Khalīfa, however, states that the title of this work is the *Kitāb al-Muḥāwara*, or the "*Book of Disputation*." Ḥajjī Khalīfa, *Kashf al-Ẓunūn*, 5: 147.

both of whom later taught jurisprudence to Abū Jaʿfar al-Ṭaḥāwī (d. 321/933).[19] Hilāl was not reported to have been a transmitter of *ḥadīth*. To the contrary, there is a story relating that Hilāl was inattentive to the transmission of traditions because he could not provide an *isnād* for the *shahāda*.[20] Hilāl reportedly died in Baṣra during the year 245/859 or 249/863.[21]

Al-Khaṣṣāf

By comparison, the person known as "al-Khaṣṣāf" appears to have been a more prominent figure within Ḥanafī legal circles and the ʿAbbāsid administrative bureaucracy. Born Aḥmad b. ʿUmar (or ʿAmr) b. Muhayr al-Shaybānī, he was more commonly known as Abū Bakr al-Khaṣṣāf, or simply al-Khaṣṣāf.[22] There appears to be some confusion over how he acquired the eponym "al-Khaṣṣāf." One report suggests that "al-Khaṣṣāf" might have been a family name since his father was known as ʿAmr b. Muhayr al-Khaṣṣāf.[23] Other reports allege that he received this appellation because he lived a life of piety and asceticism and ate only from the meager earnings he attained from repairing sandals (*yakhṣifu al-naʿl*).[24] In addition to writing legal treatises, al-Khaṣṣāf apparently was a *qāḍī* in Baghdād as the following (unflattering) tradition attests:

> He [Ibn al-Najjā?] said: I heard Abū Sahl Muḥammad b. ʿUmar, a *shaykh* from Balkh, say: When I came to Baghdād, there was a man on the bridge shouting for three days. The *qāḍī* Aḥmad b. ʿAmr al-Khaṣṣāf was asked for a responsum on such and such question and

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[19] Melchert, *The Formation of the Sunni Schools of Law*, 116, 118, 123 (citing al-Kaffawī, *Katāʾib aʿlām al-akhyār min fuqahāʾ madhhab al-Nuʿmān al-mukhtār* (East Efendi, Istanbul, 548 A.H.), 65b; al-Khaṭīb al-Baghdādī, *Taʾrīkh Baghdād aw madīnat al-salām* (Cairo: Maktabat al-Khānjī, 1931), 11: 63). Melchert has argued that either al-Ṭaḥāwī or Abū Khāzim could be considered the founders of the classical Ḥanafī school that formed in the fourth/tenth century.

[20] Melchert, *The Formation of the Sunni Schools of Law*, 11, 43 (citing al-Baghdādī, *Taʾrīkh*, 5: 409).

[21] Ḥajjī Khalīfa gives the common era dates of Hilāl's death as April 8, 859 or February 24, 863. Ḥajjī Khalīfa, *Kashf al-Ẓunūn*, 1: 175, 4: 46.

[22] Al-Ziriklī, *Al-Aʿlām*, 1: 178; Ibn al-Nadīm, *Al-Fihrist*, 1: 428; Ḥajjī Khalīfa, *Kashf al-Ẓunūn*, 1: 175.

[23] Al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, ed. Farḥāt Ziyāda (Cairo: The American University in Cairo Press, 1978), 3.

[24] Al-Khaṣṣāf, *Kitāb al-Nafaqāt*, ed. Abū al-Wafāʾ al-Afghānī (Beirut: Dār al-Kutub al-ʿArabī, 1404/1984), 8; al-Ziriklī, *Al-Aʿlām*, 1: 178.

> gave such and such answer, but that is wrong! The answer is such and such, may God have mercy on whoever reports it to one who ought to know it.[25]

Unfortunately, nothing else is known about the length of al-Khaṣṣāf's tenure as *qāḍī* or the level of his position. Based upon these sources, it does not appear that al-Khaṣṣāf ever attained the position of "chief *qāḍī*" (*qāḍī al-quḍāt*) as the title page to the *Aḥkām al-Awqāf* alleges.[26]

As a jurist, al-Khaṣṣāf was known for his expertise in the calculation and division of inheritance shares (*kāna faqīhan fāriḍan*—or *farḍiyyan*—*ḥāsiban*),[27] and as a prolific author of legal texts. Of the fourteen books he allegedly produced, only five remain extant: the *Aḥkām al-Awqāf*, a treatise on the decorum and practices of jurists (*Kitāb Adab al-Qāḍī*), a discussion of legal fictions (*Kitāb al-Ḥiyal*), a work on expenditures and maintenance (*Kitāb al-Nafaqāt*), and a treatise on wet-nurses and foster relationships (*Kitāb al-Riḍāʿ*).[28] The nine works which no longer exist covered areas of bequest law (*Kitāb al-Waṣāyā*), inheritance law (*Kitāb Iqrār al-Waratha*), taxation (*Kitāb al-Kharāj*), the maintenance provided for close relations (*Kitāb al-Nafaqāt ʿalā al-Aqārib*), contracts (*Kitāb al-Shurūṭ al-Kabīr* and *Kitāb al-Shurūṭ al-Ṣaghīr*), court documents and records (*Kitāb al-Maḥāḍir waʾl-Sijillāt*), the rules for prayer (*Kitāb al-ʿAṣr*[29] *wa-Aḥkāmihi wa-Ḥisābihi*), and a discussion of the holy sites in Mecca and Madīna (*Kitāb Dharʿ al-Kaʿba waʾl-Masjid waʾl-Qabr*).[30]

The few records that mention al-Khaṣṣāf suggest that his life ended in disgrace and failure. Unlike Hilāl, who seems to have remained on the periphery of political power (perhaps voluntarily), al-Khaṣṣāf

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[25] Ibn Abī al-Wafāʾ, *Al-Ǧawāhir* (Hyderabad, second printing, 1408/1988), 1: 142; Taqī al-Dīn b. ʿAbd al-Qādir al-Tamīmī, *Al-Ṭabaqāt al-Saniyya fī Tarājim al-Ḥanafiyya*, ed. ʿAbd al-Fattāḥ Muḥammad Aḥmad al-Ḥilw (Riyad, 1983), 1: 419. Credit should be given to Patricia Crone for bringing these sources to my attention and providing me with their translation.

[26] Not only do none of the biographical entries make this claim, but al-Khaṣṣāf is also absent from the list of *qāḍī al-quḍāh* in the *Akhbār al-Quḍāh* of Wakīʿ, 3: 294–324.

[27] Al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, 3; idem, *Al-Nafaqāt*, 7; al-Ziriklī, *Al-Aʿlām*, 1: 178; Ibn al-Nadīm, *Al-Fihrist*, 1: 428.

[28] These five works are the only ones mentioned in Sezgin, *Geschichte*, 1: 436–38.

[29] The *Fihrist* gives the spelling of this word as "*al-ʿAṣīr*" which refers to the juice that is extracted from a grape. It is difficult to see how this meaning could pertain to the remainder of the book's title. The word "*al-ʿAṣr*," on the other hand, provides a meaning more consistent with the rest of the title.

[30] Ibn al-Nadīm, *Al-Fihrist*, 1: 428.

became entangled in the turmoil of the ʿAbbāsid caliphate. Although al-Khaṣṣāf apparently became a *qāḍī* at some point in his life, the first recorded intersection of al-Khaṣṣāf's life with the ʿAbbāsid regime occurred during the caliphate of al-Muʿtazz (r. 252–55/866–69) when he failed to secure a judgeship. According to the account in the *Taʾrīkh* of al-Ṭabarī, Muḥammad b. ʿImrān al-Ḍabbī—al-Muʿtazz's teacher (*muʾaddib*)—had appointed al-Khaṣṣāf and seven other men as *qāḍī*s.[31] The letters of appointment had already been written when three of al-Muʿtazz's advisors warned the caliph that the eight men were followers of Ibn Abī Duʾād (d. 240/854)—the Muʿtazilī *qāḍī* who had persuaded al-Maʾmūn to enforce acceptance of the createdness of the Qurʾān during the *miḥna*—and members of various heterodox and Shīʿī groups: "Verily, they are among the followers of Ibn Abī Duʾād, and they are Rāfiḍa,[32] Qadariyya,[33] Zaydiyya,[34] and Jahmiyya."[35] Apparently afraid of appointing *qāḍī*s with allegedly

[31] Abū Jaʿfar Muḥammad b. Jarīr al-Ṭabarī, *Taʾrīkh al-Rusul waʾl-Mulūk*, ed. Muḥammad Abū al-Faḍl Ibrāhīm (Cairo: Dār al-Maʿārif, 1960–69), 9: 371.

[32] Christopher Melchert, in his gloss of this passage, writes that the term "Rāfiḍa" probably indicates those Shīʿa who preferred ʿAlī b. Abī Ṭālib to Abū Bakr and ʿUmar b. al-Khaṭṭāb. The term appears to have originated with the uprising of Zayd b. ʿAlī against the ʿUmayyads in 122/740. Some of the Kūfans who had joined Zayd's uprising eventually deserted (*rafaḍa*) him when Zayd refused to reject Abū Bakr and ʿUmar. Melchert, "Religious Policies of the Caliphs from al-Mutawakkil to al-Muqtadir, A.H. 232–295/A.D. 847–908," *ILS* 3/3 (1996), 332, n. 89; idem, "The Adversaries of Aḥmad Ibn Ḥanbal," *Arabica* 44 (1997), 236–37; *EI*², *s.v.* "*Al-Rāfiḍa*," E. Kohlberg, 8: 386–89.

[33] The term "Qadariyya" is commonly used to denote a group of theologians who advocated the principle of free will during the late first and second centuries A.H. They are considered precursors to the Muʿtazila of the third century A.H. *EI*², *s.v.* "*Ḳadariyya*," J. van Ess, 4: 368–72.

[34] Melchert states that the Zaydiyya consisted of those Shīʿa who preferred ʿAlī to ʿUthmān. The Zaydiyya were also reported to have believed in the created Qurʾān. The term "Zaydiyya" appears to have emerged in connection with the Rāfiḍa split from Zayd's uprising. Melchert, "Religious Policies of the Caliphs," 332, n. 89; idem, "The Adversaries of Aḥmad Ibn Ḥanbal," 238; *EI*², *s.v.* "*Al-Rāfiḍa*," E. Kohlberg, 8: 386–87.

[35] Al-Ṭabarī, *Taʾrīkh*, 9: 371. The chief view associated with the Jahmiyya was a belief in the createdness of the Qurʾān. Montgomery Watt, however, has concluded that the term "Jahmite" was a purely vituperative term meaning something like 'renegade' or 'quisling' and that there never was a body of men who were followers of Jahm b. Ṣafwān (d. 128/746) or who professed to be such. Rather, Watt argues that the "Jahmiyya" sect was a creation of heresiographers. Watt speculates that the doctrine of the createdness of the Qurʾān was placed on the sect's "founder," Jahm b. Ṣafwān, in order to dissociate the Ḥanafīs from the doctrine. W. Montgomery Watt, *The Formative Period of Islamic Thought* (Edinburgh: Edinburgh University Press, 1973), 147–48.

unorthodox viewpoints, al-Muʿtazz rescinded the appointments, demoted al-Ḍabbī, and ordered that the eight men be expelled from Sāmarrā and exiled to Baghdād. The appointment of al-Khaṣṣāf, in particular, seems to have enraged the populace of Sāmarrā, who reportedly attacked him while the others were able to flee to Baghdād unscathed.[36]

There may have been some truth to this polemical description of al-Khaṣṣāf. He was reportedly affiliated with the "Jahmiyya" sect,[37] and, according to Ibn al-Nadīm (d. 380/990), the people of ʿIrāq later associated al-Khaṣṣāf's appointment under the subsequent caliph al-Muhtadī (discussed below) with a revival of Ibn Abī Duʾād and, by extension, the *miḥna*.[38]

Al-Khaṣṣāf's hopes for advancement into the ʿAbbāsid elite were not entirely finished, however. His second brush with power came during the brief caliphate of al-Muhtadī (r. 255–56/869–70), when he apparently served in the caliph's administration. Ibn al-Nadīm reports that it was at the behest of al-Muhtadī that he wrote his no longer extant *Kitāb al-Kharāj*.[39] Al-Khaṣṣāf's brief interlude of success soon ended, however, when the Turkish military overthrew and assassinated al-Muhtadī in 256/870. The historical record provides indications that it was al-Muhtadī's vigorous promotion of rationalism and his hostility to the traditionalists that contributed to his downfall.[40] Al-Khaṣṣāf, perhaps on account of his strong association with the rationalists and/or the caliph, also appears to have been a target of this coup. It is reported that his home was ransacked following the assassination of al-Muhtadī, resulting in the loss of some of his books.[41] Whatever future hopes al-Khaṣṣāf might have had of returning to the inner administration of the ʿAbbāsid dynasty were cut short by his death four years later in 261/874.[42]

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[36] Al-Ṭabarī, *Taʾrīkh*, 9: 371.

[37] Ibn al-Nadīm, *Al-Fihrist*, 1: 428; Al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, 4. See prior discussion on the lack of any true adherents to the Jahmiyya sect, *supra*.

[38] Ibn al-Nadīm, *Al-Fihrist*, 1: 428.

[39] Ibn al-Nadīm, *Al-Fihrist*, 1: 428.

[40] Melchert, "Religious Policies of the Caliphs," 338; al-Ṭabarī, *Taʾrīkh*, 9: 392–93, 459–61, 467.

[41] Ibn al-Nadīm, *Al-Fihrist*, 1: 428; al-Ziriklī, *Al-Aʿlām*, 1: 178. The ransacking of al-Khaṣṣāf's home may also account for the nine missing texts.

[42] Ḥajjī Khalīfa gives the common era date of al-Khaṣṣāf's death as October 16, 874. Ḥajjī Khalīfa, *Kashf al-Ẓunūn*, 1: 175.

Early Islamic Legal Culture

As observed in the introduction to this chapter, the current state of the discipline indicates that we are still at the beginning stages of understanding the values of the legal culture in which Hilāl and al-Khaṣṣāf worked and lived, and what may have motivated them to pursue different career choices, such as seeking appointments in the ʿAbbāsid administration, writing legal treatises, memorizing *ḥadīth*s, etc.[43] This lacuna in our knowledge is partly the result of the hagiographical quality of the Islamic sources, which present these great authorities as motivated by little more than a pious and sincere love for God. This hagiographical presentation, however, has obscured the competitive nature of early Islamic legal culture both by downplaying the types of emotions present in any competitive arena (prestige, power, respect, jealousy, narcissism, a desire for immortality, etc.),[44] and concealing the means by which jurists ranked and measured themselves.[45] Although the Islamic sources provide very little

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[43] Our knowledge about the third century has been limited by the fact that most historical studies of the schools of law have tended to skip over the era in which they were formed and begin in the fourth century A.H. See Hallaq *Authority, Continuity, and Change in Islamic Law*, xii, 171, n. 21; Hurvitz, "Schools of Law and Historical Context," 40. Melchert has observed that the Islamic tradition itself views the beginning of the fourth Islamic century "as a watershed, the dividing line between the ancients and the moderns." Melchert, "Traditionist-Jurisprudents and the Framing of Islamic Law," *ILS* 8 (2001), 406. We do, however, know something about the motivations and values of a later Islamic legal culture from the work of Michael Chamberlain on the learned elite of Damascus during the period 1190–1350 C.E. Chamberlain discusses how the acquisition of *ʿilm* (knowledge) led to monetary gain and granted a form of social honor known as *ḥurma*. Chamberlain argues that prestige itself became the "elusive prize" of the competitive struggle within the *ʿulamāʾ* class. Michael Chamberlain, *Knowledge and Social Practice in Medieval Damascus, 1190–1350* (Cambridge: Cambridge University Press, 1994), 64–66, 92, 153–56, 175–78.

[44] Consider, for example, the modern, printed editions al-Ṭabarī's two monumental works—his thirty volume *tafsīr* of the Qurʾān and his ten volume history of the world. The enormity of these works suggests an ego that sought to create a form of immortality for itself. And, to a large extent, al-Ṭabarī succeeded. His *tafsīr* is so enormous, and so all-encompassing, that no one has ever attempted to write anything similar to it. Likewise, the breadth of his *Taʾrīkh* not only brought to a close a genre of historical writing on the early Muslim community, but also appears to have discouraged the writing of universal histories for several centuries. As Claude Cahen observed, the *Taʾrīkh* could be described as a "swan-song" because "it was impossible for it to be pursued further." Cahen, "History and Historians," in *Religion, Learning and Science in the ʿAbbāsid Period*, eds. M. J. L. Young, J. D. Latham, and R. B. Serjeant (Cambridge: Cambridge University Press, 1990), 199.

[45] Zaman and Hurvitz are among the few scholars to see through the hagio-

information on this issue, it is unrealistic to assume that in a hierarchical legal culture,[46] where the rewards of the system would have correlated to one's position within the hierarchy, that jurists did not develop systems for ranking themselves and competed (fiercely) for prestige, patronage and prized positions.

The lacuna in our knowledge has also been shaped by a tendency to conceive of these early legal figures as "scholars"[47] instead of jurists and/or jurisprudents.[48] Although seemingly innocuous, the labeling of these jurists as "scholars" could be construed in a manner that inaccurately conveys the contours of this legal culture. First, the designation "scholars" suggests a certain disinterestedness with the political world. Second, this designation implies that the principal professional aspiration of these men was to be independent legal scholars as opposed to judges, administrators, advisors or other political functionaries. Thus, for example, when Brockopp observes that ʿAbd Allāh b. ʿAbd al-Ḥakam (d. 214/829), in the final years of his life, served as an advisor to the governor and to the chief judge of Egypt, Brockopp describes this political involvement not as the attainment of a prized position, but rather as "perpetuat[ing] a pattern

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graphical shroud that has been placed over early Muslim jurists. Zaman has argued that jurists may have been motivated to seek employment in government bureaus "by purely economic exigencies, by some taste for prestige and power in society." Muhammad Qasim Zaman, *Religion and Politics Under the Early ʿAbbāsids: The Emergence of the Proto-Sunnī Elite* (Leiden: E. J. Brill, 1997), 153, 161. Hurvitz has observed that masters desired "status" within their circles, and that relationships with the caliphal court may have attracted disciples. Hurvitz, "Schools of Law and Historical Context," 46. *Cf.* David S. Powers, *Law, Society and Culture in the Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002), 54, 92 (remarking that the "mocking jurist" Mūsā b. Yamwīn al-Haskūrī "climb[ed] the ladder of scholarly success" and that he may have been a victim of a plot hatched by "jealous colleagues").

[46] It is an interesting question whether legal cultures are more hierarchically oriented than other professional cultures. Certainly, the nature of legal authority places a great emphasis on hierarchy. Hierarchy grants some courts jurisdiction to review the decisions of other courts, and the opinions of certain judges will carry more weight (and in some cultures will act as binding precedents on lower court judges) simply by virtue of the judge's position within the hierarchy.

[47] See, *e.g.*, Jonathan E. Brockopp, *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and his Major Compendium of Jurisprudence* (Leiden: Brill, 2000), 64.

[48] There is some overlap between the terms "jurist" and "jurisprudent." Jurisprudents generally take a philosophical approach to the law, whereas jurists are typically more interested in the law's practical and concrete details. Although both jurists and jurisprudents can be scholars, the term "jurist" encompasses a broader range of avocations—judging, the writing of legal manuals, and employment in government bureaus.

of civil service found among legal scholars of this time."[49] Although Brockopp may be correct in his assessment of Ibn ʿAbd al-Ḥakam, it seems equally plausible that Ibn ʿAbd al-Ḥakam viewed these political appointments as the culmination of his career and that his legal scholarship was—in part—a means to acquiring these highly-valued political positions. The assumption that Ibn ʿAbd al-Ḥakam was first and foremost a "scholar" implicitly privileges a hierarchy of values that may not be representative of the legal culture.

The reluctance to view these early jurists as motivated by a desire for political and administrative appointments is partly a reflection of developments and changes in the values of Islamic legal culture that transpired over several centuries. It is certainly true that later Islamic legal culture did not view the attainment of a judgeship as the culmination of, or even necessary for, a successful legal career.[50] Additionally, the "classical model" of religion and politics posits a separation of the religious establishment from the state,[51] a separation that is neatly encapsulated in Aḥmad b. Ḥanbal's (d. 241/859) legendary resistance to the caliphs during the *miḥna*, and Sufyān al-Thawrī's (d. 161/778) refusal to serve in the judicial administration or have anything to do with the caliphs.[52] While it is true that Islamic legal culture ultimately came to view the political realm as distinct and in conflict with the legal realm—as evidenced by the numerous accounts of *ʿulamāʾ* who refused to take judicial positions or caliphal patronage[53]—Muhammad Zaman has argued that this separation was not representative of third-century A.H. legal culture. Instead, Zaman contends that jurists followed the lead of Ibn al-Muqaffaʿ (d. *ca.* 139/756) and Abū Yūsuf and actively pursued judicial/political appointments and caliphal patronage.[54] Although the biographies of

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[49] Brockopp, *Early Mālikī Law*, 32.

[50] Hallaq, *Authority, Continuity, and Change in Islamic Law*, 168–69.

[51] See I. M. Lapidus, "The Separation of State and Religion in the Development of Early Islamic Society," *IJMES* 6 (1975), 365–85; idem, "The Evolution of Muslim Urban Society," *Comparative Studies in Society and History*, 15 (1973), 21–50; *idem*, *A History of Islamic Societies* (Cambridge: Cambridge University Press, 1988), 120ff. Crone has reached a similar conclusion regarding the separation of religion from the state, albeit on different grounds, in *Slaves on Horses: The Evolution of the Islamic Polity* (Cambridge: Cambridge University Press, 1980), 61–91.

[52] For Sufyān al-Thawrī, see Zaman, *Religion and Politics Under the Early ʿAbbāsids*, 79.

[53] Zaman, *Religion and Politics Under the Early ʿAbbāsids*, 79, 158.

[54] Zaman, *Religion and Politics Under the Early ʿAbbāsids*, 149–59, 211; idem, "The Caliphs, the *ʿUlamāʾ*, and the Law: Defining the Role and Function of the Caliph in the Early ʿAbbāsid Period," *ILS* 4/1 (1997), 5, 19.

Hilāl and al-Khaṣṣāf are far from complete, al-Khaṣṣāf's life, in particular, indicates that his scholarly interests were equally matched by a desire to attain appointments within the ʿAbbāsid administration. In addition to authoring fourteen legal treatises, al-Khaṣṣāf was a *qāḍī* and ultimately served in the caliph's administration, suggesting that judicial and administrative appointments within the ʿAbbāsid regime were highly prized positions for at least a subset of third-century jurists.

But if such judicial and administrative positions were at the top of the hierarchy of values in this legal culture, how did jurists distinguish themselves to attain these prized positions? One possible explanation is through the production of legal texts.[55] Instead of viewing al-Khaṣṣāf's scholarship as simply an end to itself, it is worth considering whether the production of legal texts defined the arena in which jurists competed against and ranked one another, and whether the production of these texts opened the door to judicial and administrative appointments.[56] Al-Khaṣṣāf's substantial output of legal material may explain his relative success in attaining these prized appointments in comparison to Hilāl. Admittedly, since we know almost nothing about Hilāl's aspirations, his lack of advancement in the ʿAbbāsid administration may have also been a voluntary decision not to pursue this career path. It is also possible—even likely—that other factors unrelated to the production of legal texts, such as political ideology and personal connections, affected the trajectory of each man's professional life.

Clearly, these conclusions about the values and standards of early Islamic legal culture are speculative. Whether the sources for this period will provide enough details to fill out this picture remains an

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[55] If Zaman is correct that the production and "publication" of books in the early Islamic period required substantial monetary resources, then there may have been a symbiotic relationship between the production of legal texts and the securing of patrons and political appointments. Zaman, *Religion and Politics Under the Early ʿAbbāsids*, 163.

[56] The "arenas" within which this competition occurred were not static, but changed as Islamic legal culture evolved. For example, in his examination of the classical *madrasa*s, George Makdisi observed that *ḥadīth* memorization, disputations between students, and stipend allotments all provided arenas in which aspiring law students could rank themselves. Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981), 75–187, esp. 91–98, 133–40, 171–75. By contrast, the *waqf* treatises suggest that the legal culture in which al-Khaṣṣāf and Hilāl competed placed little emphasis on *ḥadīth* memorization (see chapters two and three).

open question. Nevertheless, al-Khaṣṣāf's biography hints at a more competitive and politically-minded legal culture than that presented in the traditional "scholastic" model of early Islamic law.

Historical Memory

In consideration of al-Khaṣṣāf's sizeable literary production and his political appointments, it is an intriguing question whether al-Khaṣṣāf was a major figure in the development of Ḥanafī law. By any objective standard, al-Khaṣṣāf's prolific literary production makes him one of the preeminent Ḥanafī jurists of the third century. He produced a great number of administrative and legal treatises, and he served under a (short-lived) caliph. His *Kītāb Adab al-Qāḍī* also suggests that al-Khaṣṣāf perceived himself as a learned judge who could offer advice and guidance to aspiring judges, and his work on court records and documents is evidence of an interest in judicial administration. The content of al-Khaṣṣāf's *waqf* treatise provides some indication that al-Khaṣṣāf should be reconceived along the lines formulated by Hallaq and Brockopp—as an individualistic jurist/Great Shaykh rather than a mere follower of earlier "Ḥanafīs." For example, while al-Khaṣṣāf adheres to the general parameters of the debates set forth by Abū Ḥanīfa, Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī, he is neither reluctant to disagree with his teachers nor to offer his own opinion, suggesting that he did not see his legal scholarship as merely following in the footsteps of these earlier jurists. A similar attempt by third-century jurists to surpass their masters has been noted by Brockopp in his study of two Mālikī jurists, Ibn ʿAbd al-Ḥakam (d. 214/829) and Ismāʿīl b. Yaḥyā al-Muzanī (d. 264/877).[57]

But if al-Khaṣṣāf saw himself as transcending the preceding generation of Ḥanafī jurists, this perception was not shared by later jurists within the Ḥanafī school. Melchert has observed that by the fourth Islamic century Ḥanafī commentaries had canonized the work of Abū Ḥanīfa and his two disciples as the basis of the school.[58] In the fifth century *Mabsūṭ* of al-Sarakhsī, al-Khaṣṣāf (and Hilāl) are marginalized as followers of Abū Ḥanīfa, Abū Yūsuf, Muḥammad

[57] Brockopp, "Early Islamic Jurisprudence in Egypt: Two Scholars and their *Mukhtaṣar*s," *IJMES* 30 (1998), 172–73, 177.

[58] Melchert, *The Formation of the Sunni Schools of Law*, 60.

b. al-Ḥasan al-Shaybānī, and even Mālik b. Anas.[59] The nineteenth century *Rasā'il* of Ibn ʿĀbidīn (d. 1888), also reflects this typology of authority.[60] In the *Rasā'il*, jurists are classified into seven ranks based upon their capacity to engage in independent reasoning, or *ijtihād*.[61] The highest rank belongs to the founders of the four schools of law who were said to be jurists capable of exercising *ijtihād* on any subject. For the Ḥanafīs, this founding *mujtahid* was Abū Ḥanīfa. The second rank, by contrast, consists of *mujtahid*s who were capable of exercising *ijtihād* only within the framework of the principles set down by the school's founder. To this second rank belongs Abū Ḥanīfa's closest disciples, Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī. Ibn ʿĀbidīn's third class consists of *mujtahid*s whose independent reasoning was limited to cases not ruled upon by the school's founder, and this is where al-Khaṣṣāf and other prominent fourth- and fifth-century jurists such as al-Ṭaḥāwī (d. 321/933), al-Bazdawī (d. 482/1089), and al-Sarakhsī (d. *ca.* 483/1090) are ranked. The remaining rankings consist of those jurists who lacked the capacity to conduct *ijtihād* and were permitted to make only basic inferences (*takhrīj*)[62] from, or simple discriminations between, the opinions of *mujtahid*s. The (re)conceptualization of al-Khaṣṣāf as literally a "third tier" jurist and follower of Abū Ḥanīfa is indicative of changes that swept across Islamic legal culture in the third and fourth Islamic centuries. For reasons that are not entirely clear,[63] the construction of legal authority

[59] Abū Bakr Muḥammad b. Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūṭ* (Cairo: Maṭbaʿat al-Saʿāda, 1906–13), 12: 27–47. For example, in a section on *waqf*s, al-Sarakhsī mentions that al-Khaṣṣāf and Hilāl each wrote one work on the subject, but he never refers to their opinions when citing authority statements. Instead, al-Sarakhsī refers to the opinions of Abū Ḥanīfa, Abū Yūsuf, Muḥammad b. al-Ḥasan al-Shaybānī, and Mālik b. Anas.

[60] This seven-tier typology of authority, and its origins, is discussed in more detail in Hallaq's *Authority, Continuity, and Change in Islamic Law*, 14–17.

[61] Muḥammad Amīn b. ʿUmar b. ʿĀbidīn, *Rasā'il* (Beirut: Mu'assasat Fu'ād, 1978), 1: 11–13; ʿAbd Allāh al-Ma'mūn Suhrawardy, "The *Waqf* of Moveables," *Journal and Proceedings of the Asiatic Society of Bengal*, 7 n.s. (1911), 330–31.

[62] The Granadan theorist Abū Isḥāq al-Shāṭibī (d. 790/1388) defined *takhrīj* as investigating the texts in order to extract what is otherwise an unspecified *ratio legis*, or legal inference. See Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 201.

[63] See Hallaq, *Authority, Continuity, and Change in Islamic Law*, 30–31. At one time Melchert believed that traditionist-jurisprudents had provoked Ḥanafīs to "traditionaliz[e] their own jurisprudence" by assigning their doctrines to venerable jurisprudents such as Abū Ḥanīfa instead of local opinion or practice. Melchert, *The Formation*

within the Ḥanafī school (as well as the other schools of law) became fixated on the school's earliest founders—Abū Ḥanīfa, Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī—transforming al-Khaṣṣāf and Hilāl into mere footnotes in the development of the school.

The current state of historical scholarship on the third century A.H. reveals that the study of this period is still at the stage of developing competing theories and it may be some time before any convincing conclusions can be drawn about the contours of this early legal culture, the development of the schools of law, and the aspirations and motivations of the juristic and jurisprudential classes.[64] As Brockopp has observed, however, the study of "second-rank" jurists during the formative era "helps to deepen and complicate our understanding of this important period."[65] The biographies of al-Khaṣṣāf and Hilāl support the wisdom of Brockopp's approach, not so much for what they can tell us about early Islamic legal culture—the information is too sketchy to draw firm conclusions—but rather for raising new questions about the norms and values of jurists during this formative period of Islamic law.

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of the Sunni Schools of Law, 48. Melchert has since retracted this claim. Melchert, "Traditionist-Jurisprudents and the Framing of Islamic Law," *ILS* 8 (2001), 400–01. It is also interesting to note than an opponent of the *aṣḥāb al-raʾy*, Ibn Qutayba (213–276/828–889), seemingly adopted this typology prior to the canonization of Abū Ḥanīfa and his two disciples in the fourth-century Ḥanafī school commentaries. In his list of rationalists, Ibn Qutayba omits al-Khaṣṣāf and Hilāl, even though the literary output of the former was formidable and almost certainly known to Ibn Qutayba. Instead, Ibn Qutayba's list of rationalists is limited to a mere nine second-century figures: Ibn Abī Laylā, Abū Ḥanīfa, Rabīʿa al-Raʾy, Zufar b. al-Hudhayl, al-Awzāʿī, Sufyān al-Thawrī, Mālik b. Anas, Abū Yūsuf, and Muḥammad b. al-Ḥasan al-Shaybānī. Ibn Qutayba, *Kītāb al-Maʿārif* (Cairo: Dār al-Maʿārif bi-Miṣr, 1969), 676–77.

[64] As Michael Cook has observed, "We know how to *maintain* rival theories; but we can do little to decide *between* them." Cook, *Early Muslim Dogma* (Cambridge: Cambridge University Press, 1981), 155 (emphasis in original).

[65] Brockopp, *Early Mālikī Law*, 63.

CHAPTER TWO

THE *WAQF* TREATISES AND THIRD-CENTURY A.H. ḤANAFĪ DISCOURSE

I. *The Two Treatises*

Any discussion of the two *waqf* treatises must be prefaced by the acknowledgment that present-day historians do not possess the original manuscripts for either the *Aḥkām al-Waqf* of Hilāl or the *Aḥkām al-Awqāf* of al-Khaṣṣāf. Without them, the conclusions about the structure, content, and literary presentation of the *waqf* treatises must be considered somewhat speculative because it is possible that the two treatises underwent a series of redactions and only reached their final form decades, perhaps even a century, after the deaths of their authors. But with one possible exception, the texts are stable in the surviving manuscripts.

According to the editorial epilogue in the *Aḥkām al-Waqf* of Hilāl, the editors began their work with a single copy from the Treasury of al-Rāmfūriyya, India.[1] Later, however, two more copies were discovered—one in the Treasury of al-Āṣfiyya in Hyderabad, India, and another in the private possession of an eminent man from Madīna.[2] In the opinion of our unnamed editors, the Āṣfiyya text was the oldest copy of the *waqf* treatise, but it had become so effaced and faded in some parts that "even with the effort of those eloquent in the Arabic language it was not possible for us to read it."[3] The Madīna copy was well preserved, and more complete.[4] With these three texts in hand, the editors undertook a comparison and improved upon the Rāmfūriyya version of the treatise. The editors found the number of discrepancies to be limited to "differences in the orthography of letters and words,"[5] and judging from the editorial apparatus used

[1] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 341.
[2] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 341.
[3] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 341.
[4] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 341.
[5] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 341.

in the treatises, these differences are indeed quite minimal. Whether the lack of discrepancies indicates that we possess the "original" version of the *Aḥkām al-Waqf* is another question that can only be answered by laboriously comparing the various manuscripts that are known to exist.[6]

The *Aḥkām al-Awqāf* of al-Khaṣṣāf is extant in a fourteenth-century C.E. manuscript in the British Library.[7] A comparison of a small portion of this manuscript with the 1904 Cairo edition of the *Aḥkām al-Awqāf*, reveals no significant discrepancies between the two texts. Most of these differences amount to no more than the absence of a word or short phrase, or an alternative spelling of a word. The seventy-eight chapter headings are almost identical and appear in the same order (see Appendix B).[8] The one major discrepancy between the manuscript and the 1904 Cairo edition concerns the introduction to the *waqf* treatise. Although both versions contain the same introductory collection of *ḥadīth*s, the manuscript copy does not refer to these *ḥadīth*s in its table of contents. This omission raises the question of whether the *ḥadīth*s formed part of the original *waqf* treatise or were added by a later redactor. The possibility that this collection of *ḥadīth*s was grafted onto the *Aḥkām al-Awqāf* at a later time is addressed in chapter three.

Two pieces of evidence suggest that the *waqf* treatises did not undergo extensive redactions following their creation. The first is stylistic unity as reflected in the consistency of the writing styles. Within their respective treatises, each author employs the same vocabulary, expressions and formulae from beginning to end. Second, there is evidence of conscious "ordering" within each work—a scheme of presentation that would have been disrupted had the *waqf* treatises

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[6] Sezgin, *Geschichte*, 1: 435–37.

[7] Thanks is owed to Professor Gilbert P. Verbit for making available to me a photocopy of the introduction to the *Aḥkām al-Awqāf* from the British Library's fourteenth-century C.E. manuscript (Or. 9143).

[8] It should be noted that there is a slight discrepancy between the chapters of the two editions. Of the seventy-eight chapters listed in the manuscript copy, all but three—chapters 13, 18, and 75—are found in the 1904 Cairo version of the *Aḥkām al-Awqāf* (see Appendix B). Whether this difference in the table of contents is reflected in the actual text of the 1904 Cairo edition is not known—the portion of the *Aḥkām al-Awqāf* that Professor Verbit sent me did not cover the chapters in question. Nevertheless, in spite of these discrepancies, the similarities between the two texts outweigh their smaller differences.

undergone significant textual changes following their creation. For example, the following passage from pages 224–25 of Hilāl's treatise discusses the amounts to be disbursed when a founder stipulates that his endowment is "for my poor kin, in order of priority of relationship" (*'alā fuqarā' qarābatī al-aqrab fa'l-aqrab*). Hilāl relates that 200 *dirham*s is the maximum amount that a relative can receive:

> I said: What is your opinion if a man says, "This land of mine is a *ṣadaqa mawqūfa*, for my poor kin, in order of priority of relationship"?
> He said: This is permitted.
> I said: And how are the yields disbursed?
> He said: Begin with the one who is in closest relation to the founder. He is given 200 *dirham*s from it. Then give 200 *dirham*s from the yields to the one who is next in relation until you reach the last of them.
> I said: What is your opinion if the yields are insufficient to provide for all of them?
> He said: Give to the first among them 200 *dirham*s, and then to the one who is next in relation until the donator exhausts the yields.
> I said: And if the yields only amount to 200 *dirham*s?
> He said: Give [the *dirham*s] to the closest relative of the founder if he is poor.
> I said: And if the yields amount to 400 or 300 *dirham*s?
> He said: Give 200 *dirham*s to the closest relative of the founder if he is poor, and then after this give 200 *dirham*s to the next closest kin relation from among the kin relations if there still remains 200 *dirham*s. But if there remains less than 200 *dirham*s[9] then give what remains. And if there is more than this, then give 200 *dirham*s—and do not add to this—and then give the excess to those who are next closest in terms of kinship.[10]

The 200 *dirham* limit that Hilāl draws in this discussion is not arbitrary. Rather, it references an earlier discussion in the *waqf* treatise where Hilāl reports that Abū Ḥanīfa had held that possession of 200 *dirham*s demarcated the line between penury and the ability to provide for oneself.[11] Consistent with this prior discussion, Hilāl's responses to the questions of the *qultu* ("I said") figure assume that the 200 *dirham* limit in a *waqf* restricted to poor beneficiaries will be self-evident to the reader.

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[9] The text reads "100 *dirham*s," but this is almost certainly a typographical error.
[10] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 224–25. Other instances of conscious ordering can be found on pages 139, 166, 277, 298, and 307.
[11] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 66.

Al-Khaṣṣāf's *waqf* treatise also provides evidence of conscious ordering:

> I said: What is your opinion if one of the two witnesses testifies that he [the founder] established a sound *waqf* for the poor and destitute; or for specified people and then, after them, for the destitute, while he was in a state of sound health. But the other witness testifies that he made [the property] a *waqf* in a manner similar to what his companion had testified, except that he said 'he made it during his death sickness (*fī maraḍihi*).'
>
> He said: The testimony is permitted. And if this land [which was established as a *waqf*] was taken from the permitted one-third of his property, then all of it is a *waqf* according to what the two witnesses testified in this matter. But if he had no other property belonging to him other than that which he endowed as a *waqf*, then only a third of it is made *waqf* according to what the two witnesses testified, and the remaining two-thirds of [the property] is left as an inheritance (*mīrāth*).[12]

Al-Khaṣṣāf's conclusion, that only one-third of the property constitutes a *waqf* and that the remaining two-thirds is an inheritance subject to the Qur'ān's forced-share system, presupposes the reader's knowledge of a prior discussion concerning *waqf*s made during a person's death-sickness.[13] Al-Khaṣṣāf considers a *waqf* made during a person's death sickness to be valid, but subjects it to the restrictions imposed on bequests, which limit them to one-third of the estate and exclude as legatees those who receive inheritance shares according to the *'ilm al-farā'iḍ*.

In spite of the consistency of writing styles and the evidence of ordering within each text, there are passages that suggest later redactions. At different points in the *Aḥkām al-Waqf* of Hilāl, there are instances where the response of the *qāla* ("He said") figure is omitted, makes no sense, or seems out of place.[14] Likewise, in the *waqf* treatise of al-Khaṣṣāf there is a section where the discussion repeats an earlier portion of the text.[15] Al-Khaṣṣāf's work also includes sec-

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[12] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 280–81. Page 125 provides another instance where conscious ordering occurs.

[13] This chapter is found on pages 245–64 of the *Aḥkām al-Awqāf* of al-Khaṣṣāf.

[14] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 222, 279. For example, the *qāla* figure answers "Yes" to the following question: "What is your opinion if it were the case that [the founder] said, '*Ṣadaqa mawqūfa* for my kin relations,' and the distribution of the yields began with those nearest to the founder and then the next closest in relation?"

[15] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 212. Some parts of this section are repeated on pages 278–80.

tions where interpolation may have occurred. As the following example illustrates, some of the chapters begin with the statement, "Abū Bakr [*i.e.*, al-Khaṣṣāf] said," followed by a response from the *qāla* figure, who is generally accepted to be al-Khaṣṣāf. This redundancy creates some confusion over both the identity of the *qāla* figure and the purported question to which this figure is responding:

> "Chapter pertaining to the man who makes his house '*mawqūfa*' so that specified members of a group may reside in it, and, after them, its yields are for the poor."
> Abū Bakr said: What if it were the case that a man said, "My house is a *ṣadaqa mawqūfa* for God the Exalted in perpetuity, on the condition that my children, my grandchildren, and my descendants are permitted to live in it in perpetuity, so long as they produce descendants. And if they die out, its yields are for the destitute in perpetuity."
> He said: This *waqf* is permitted and his children and his children's children may live in it in perpetuity so long as one of them remains. And if they die out, the house is leased and its yields are for the destitute.
> I said: And what if there is only one child, grandchild, [or descendant]?
> He said: The right to reside in it belongs to this single [descendant] so long as he or she remains [alive].[16]

A couple of explanations can be proffered to account for this confusion in the dialogue. It is possible that al-Khaṣṣāf intended to start this chapter with a self-referential question that then provided the context for the questions of the *qultu* ("I said") figure. This conclusion, however, fails to explain why al-Khaṣṣāf would choose to begin other chapters with the *qultu* figure.[17] A second possibility is that this redundancy arose from a later interpolation. For reasons that are not entirely clear, a later redactor may have thought it necessary to begin chapters with al-Khaṣṣāf's voice or else genuinely believed that al-Khaṣṣāf was the *qultu* figure. In either case, the chapters that begin with this apparent redundancy quickly settle into the normal *qultu*/*qāla* dialectical interplay that typifies the remainder of the treatise. If interpolation occurred in al-Khaṣṣāf's treatise it appears to have been limited to the opening question of a small number of chapters.

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[16] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 64.

[17] See, *e.g.*, the chapters beginning on pages 52, 61, 90, 93, 97 and 104 of al-Khaṣṣāf's treatise.

II. *Literary Conventions in Ḥanafī Legal Discourse*

Regardless of whether one considers the two *waqf* treatises authentic reproductions of the original sources or the products of subsequent redactions, the two works employ the same literary styles, argumentative techniques, and forms of legal exposition. In the treatises Hilāl and al-Khaṣṣāf use three different "voices" to convey their ideas: the *qultu/qāla* dialectic, an expository style, and the past authority of early Muslims and Ḥanafī jurists.

In *Early Mālikī Law*, Brockopp identified five stylistic elements in early Mālikī legal writing: (i) narrative *ḥadīth*s; (ii) authority *ḥadīth*s (legal rules without a narrative context, but with an *isnād*); (iii) juristic dicta (authority statements directly attributed to the speaker without an *isnād*); (iv) dialogue (presumably, the *qultu/qāla* dialectic); and (v) abstract cases and rules (legal arguments and rules without any reference to an external authority).[18] The latter two stylistic forms, Brockopp notes, are "often marked by the absence of any named authority, although the identity of the author may be strongly implied."[19]

Although mindful of the need to develop uniform technical terms,[20] I have decided against applying Brockopp's stylistic framework to the *waqf* treatises discussed here for two reasons. First, Brockopp's fourth stylistic category, the "dialogue form", does not adequately distinguish between two distinct forms of dialogue found in the *waqf* treatises—the *qultu/qāla* dialectic and an expository style. The expository style is a form of interior monologue by the treatise author, which seemingly makes it distinct from Brockopp's fifth category, "abstract cases and rules," in which there is no identifiable external authority.[21] Second, Brockopp's first three categories draw distinctions between types of past authorities that may not have been relevant to the authors of the *waqf* treatises. Although all three of these stylistic forms are readily identifiable in the *waqf* treatises (and the distinctions between them grew in importance as Islamic law became

[18] Brockopp, *Early Mālikī Law*, 90–92.
[19] Brockopp, *Early Mālikī Law*, 91.
[20] See, *e.g.*, Melchert, "Review of *Early Mālikī Law*," 273 ("Students of Islamic law need to develop uniform technical terms, and we should probably all test Brockopp's terminology on our own data.").
[21] Brockopp, *Early Mālikī Law*, 92.

infused with the traditionalist conception of legal authority), neither Hilāl nor al-Khaṣṣāf draws a distinction between whether a legal rule constitutes the juristic dicta of an earlier Ḥanafī authority or possesses an *isnād* stretching back to the Prophet or a member of the early Islamic community. All these past authorities are treated equally (the one exception being the hierarchically-ordered *ḥadīth* collection that begins al-Khaṣṣāf's treatise). Thus, I am concerned that distinguishing between these forms may be creating distinctions in legal authority that were neither recognized nor appreciated by the authors of the *waqf* treatises. Obviously, more work will need to be done before we can assess whether third-century A.H. Ḥanafī jurists gave more legal weight to some forms of past authority than others, but for the moment, I am inclined to conflate Brockopp's first three categories into a general discussion of past authorities.

Qultu/Qāla *Dialectic*

The dominant literary convention used in both works is the dialectical interplay between the "I said" (*qultu*) and "He said" (*qāla*) figures. The *qultu/qāla* form of literary presentation is common to Ḥanafī and Mālikī legal texts from the second and third Islamic centuries.[22] Frequently, the dialectic is used in conjunction with the phrase "What is your opinion?" (*a-ra'ayta*) which serves to introduce and extend the dialectical conversation:

> I said: What is your opinion (*a-ra'ayta*) of a man who says, "This land of mine is a *ṣadaqa mawqūfa* to God the Exalted in perpetuity for 'Abd Allāh and Zayd"?
> He said: The yields are between the two of them in halves.
> I said: What is your opinion (*a-ra'ayta*) if one of them dies?
> He said: The one who remains is entitled to one-half of the yields. And the remaining [one-half] is for the poor and the destitute.
> I said: And likewise if he named a group and some of them die?
> He said: Yes.
> I said: What is your opinion (*a-ra'ayta*) if it were the case that he had said, "This land belonging to me is a *ṣadaqa mawqūfa* for the children of 'Abd Allāh and they are so-and-so and so-and-so."
> He said: Then the yields are between the two of them in their entirety.[23]

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[22] Calder, *Studies*, 10; Brockopp, "Early Islamic Jurisprudence in Egypt," 171.
[23] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 273–74.

In recent years, some effort has been exerted in attempting to ascertain whether the *qultu* and *qāla* figures refer to real people.[24] As a general rule, it is reasonable to assume that the *qāla* figure refers to the authors of the *waqf* treatises unless otherwise stated.[25] For example, the introduction to Hilāl's treatise begins with the phrase "*qāla* Abū Ḥanīfa,"[26] indicating that the resulting statement is from Abū Ḥanīfa, not Hilāl. Yet, while the resulting *qultu/qāla* dialectic suggests that the *qāla* figure remains Abū Ḥanīfa, the subsequent *qāla* voice is in fact Hilāl. The realization that a change-over has occurred becomes evident when the *qultu* figure subsequently asks the *qāla* figure, "And what is the proof of those who disagree with you *and* Abū Ḥanīfa?" (emphasis added).[27] Presumably, the question is directed at Hilāl, although the previous *qultu/qāla* interplay provides no indication that a transition from Abū Ḥanīfa to Hilāl has taken place. In his analysis of this section, Calder mistakenly claimed that the *qāla* figure remained Abū Ḥanīfa even though the aforementioned question from the *qultu* figure contradicts this assertion.[28]

In the *qultu/qāla* dialectic, the *qultu* figure emerges as the questioning, even argumentative, student who provides the platform from which the master—the *qāla* figure—can explicate the law. The *qultu* figure also serves as the reader's conscience, continually asking the *qāla* figure to specify his conclusions. The Socratic quality of the questioning, however, is too stylized to represent real conversation, assuming that historians have correctly identified the *qāla* figure as the teacher and the *qultu* figure as the student. As anyone who has

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[24] See Calder, *Studies*, 9–10, 50–51, 146; Brockopp, "Early Islamic Jurisprudence in Egypt," 167–82, esp. 171–72.

[25] In his study of the *Mukhtaṣar* of Ibn ʿAbd al-Ḥakam, Brockopp has discussed a passage in which the appellation of the *qāla* figure is rather ambiguous. In such cases, Brockopp has suggested that the *qāla* figure might refer to either the author of the text, the previous authority cited—in Brockopp's case, Mālik b. Anas—, or an unspecified third source. Brockopp further speculates that this ambiguous use of the *qāla* figure could "merely be a literary device." Brockopp, "Early Islamic Jurisprudence in Egypt," 171.

[26] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 2.

[27] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 3.

[28] Calder, *Studies*, 50. Paradoxically, in a later section of his book, Calder implies that the use of phrases such as "*qāla* Abū Ḥanīfa" are little more than literary devices: "The use of formulaic phrases of the type *qāla* Abū Yūsuf, *qāla* Mālik, or *qāla* al-Shāfiʿī is of no significance in assessing the authenticity of attributions. In fact, they are likely to signal redaction posterior to the life of the named authority." Ibid., 146.

taught (or been subject to) a Socratic form of teaching knows, the questioner controls the discussion. That is why in contemporary law schools the professor, not the students, asks the questions. If the situation were reversed (as it is in the *waqf* treatises), one would expect a transcript of the classroom to be digressive and disjointed as students pursued tangential and unrelated issues in the course of their questioning. The dialogues in the *waqf* treatises, by contrast, are never digressive, suggesting that either the *qultu* figure was an amazingly gifted student who always asked the next logical question, or that the conversations were "literary technique[s] for the presentation of the law" rather than the record of actual exchanges between a master and his student(s).[29] Given the nature of teacher-student interactions, the conclusion that the *qultu* figure is a literary device rather than a real person[30] seems more correct. Unless of course, historians have got it backwards and the *qultu* figure is the teacher. The *waqf* treatises do not support this revisionist position, but it is an intriguing observation.

Expository Voice

The expository voice is used in the *waqf* treatises to explicate the subtle distinctions and principles underlying the *qāla* figure's responses. In contrast to the standard *qultu/qāla* exchange in which the *qāla* figure merely provides a (terse) answer to the question posed, the expository voice is used to explain the *qāla* figure's legal reasoning. For example, in the following passage Hilāl employs the expository voice—and an analogy (*qiyās*) to bequest law—to explicate the principle

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[29] Calder, *Studies*, 10. Calder is careful to note that while the *qultu/qāla* dialogue may not be authentic, it may "reflect a discursive *Sitz im Leben*." At a later point in his work, however, he argues that it is possible to identify the *qultu* figure in some parts of Hilāl's treatise: "A small number of *ikhtilāf* passages, again mostly near the beginning, give expression to the usual tripartite division of opinion in the Ḥanafī tradition with third-person reference to Abū Ḥanīfa and Abū Yūsuf, together with a first-person reference, *qawlu-nā*. In this formulation the *qultu*-figure is understood as Muḥammad b. al-Ḥasan [al-Shaybānī]." Calder bases this assertion on the widespread influence of al-Shaybānī on third-century Ḥanafī texts. Calder, *Studies*, 49–50.

[30] Calder, *Studies*, 10. Calder writes, "It is possible, however, that the *qultu* figure was never intended to be a historical person, but was from the beginning a drafting device; it certainly functions as such."

that any indeterminacy in a *waqf* with invalid elements, invalidates the entire *waqf*:

> [*Qultu/qāla* section]:
> I said: What is your opinion if a man says, "This land of mine is a *ṣadaqa mawqūfa* for myself and for so-and-so the son of so-and-so"?
> He said: Half of the *waqf* is permitted and half of it is invalid. And the [invalid] half is that which he made a *waqf* for himself. . . .[31]
> I said: What is your opinion if it were the case that he says, "This land of mine is a *ṣadaqa mawqūfa* for me, my grandchildren and my [future] descendants"?
> He said: All of the *waqf* is invalid and not permitted.
> I said: But why do you not permit the share of his children from this, just as you did [for so-and-so the son of so-and-so] in the previous example?
> He said: Because in the first example that which he made a *waqf* for himself was specified (*maʿlūm*) and that which he made a *waqf* for other than him was also specified (*maʿlūm*).[32] So I permitted that which he made a *waqf* for other than him, and I invalidated that which he made a *waqf* for himself. However, as for this example, that which he made a *waqf* for himself was not specified (*laysa bi-maʿlūm*),[33] so I invalidated the entire *waqf*.
> [*Beginning of expository section*]:
> Do you not see that our opinion is [analogous to] the man who says, "I have bequeathed a third of my property to so-and-so and so-and-so," and one of them dies before the death of the testator. The remaining one is entitled to one-half of the third. And if it were the case that he had said, "I have bequeathed a third of my property for so-and-so and his children," and his children die prior to the death of the testator, then those that remain are entitled to the third. Likewise the *waqf*: if he made a partner with himself a specified number of people, then I invalidate from this that which he made a *waqf* for himself and I permit the rest.[34]

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[31] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 78. This is the beginning of a long *qultu/qāla* dialogue that culminates in the principle revealed on pages 80–81.

[32] In the first example, Hilāl knew how many people were involved so it was easy to say, "half the *waqf* for so-and-so the son of so-and-so, and the other half is invalid." In the second case, however, the number of descendants is indeterminate.

[33] *I.e.*, Hilāl cannot determine how much of the *waqf* should be invalidated without knowing the exact number of grandchildren and progeny.

[34] Implicit within this discussion is the principle that individuals cannot make a bequest (*waṣiyya*) for themselves. Consequently, if a *waqf* is analogous to a bequest, then it cannot be made for oneself.

> And if [the founder of the *waqf*] made himself a partner with an indeterminate number of people, then I invalidate the entire *waqf*.[35]

In other dialogues, the use of the expository voice is quite subtle and the *qāla* figure does little more than elaborate on his prior answers. For example, in the following passage, the "argumentative *qultu*" provides a forum for the *qāla* figure to expound upon the semantic intricacies that differentiate two *waqf*s which initially appear quite similar:

> I said: What is your opinion of a man who says, "This land of mine is a *ṣadaqa mawqūfa* for my children who have already come into existence (*al-makhlūqīn*) and my descendants (*naslī*)." Do you think that the founder's children (*al-walad li-ṣulbihi*) who subsequently come into existence (*yuḥdathu*) are entitled to anything?
>
> He said: Yes.
>
> I said: And why do you say this?
>
> He said: On account of his words, "my descendants." Any one of the founder's children who subsequently comes into existence (*ḥadatha*) is among his descendants.
>
> I said: And likewise the grandchildren (*walad al-walad*)?
>
> He said: Yes, I include them due to the fact that he said, "and my descendants," because they are among the descendants (*min al-nasl*).
>
> I said: What is your opinion if it were the case that he said, "for my children who have already come into existence (*al-makhlūqīn*) and *their* descendants (*naslihim*)"?
>
> He said: This is permitted.
>
> I said: And as for his children who subsequently come into existence [after the founding of the *waqf*], are they given anything?
>
> He said: No.
>
> I said [argumentative *qultu*]: And why not? You gave to them in the first case.
>
> He said: [*Response with expository elements*] Because he said in the first case, "for my children who have already come into existence and *my* descendants" so that his children who [subsequently] come into existence are among his "descendants." And as for this [second] case, when he said, "for my children who have already come into existence and *their* descendants" he only included the descendants of the children [who had already come into existence]. And his words "*their* descendants" was more restricted because they

[35] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 80–81. Hilāl's use of an analogy (*qiyās*) drawn from bequest law is a common argumentative technique found in both *waqf* treatises and will be discussed in more detail below.

> specifically referred to the [descendants] of the founder's children who have already come into existence [at the time of the founding of the *waqf*].
>
> I said: And in your opinion this does not resemble the previous example?
>
> He said: These are distinct and differentiated according to what I have described to you because when he said, "*their* descendants," his words "*their* descendants" meant only those of his children who had already come into existence.[36]

The use of the expository voice by Hilāl and al-Khaṣṣāf can vary considerably in length. As the previous passage illustrates, sometimes the use of this voice amounts to little more than a paragraph and the *qultu/qāla* dialectic is hardly disrupted. However, both *waqf* treatises contain expository sections which encompass three pages,[37] while Hilāl's contains one that stretches to a full seven pages.[38] What differentiates these extended expository sections from the *qultu/qāla* format is the complete abandonment of the dialectical interplay. Although an anonymous "objector" (*qā'il*) may be mentioned, the *qā'il* figure is clearly meant to be part of an interior monologue that the author is maintaining with himself.

Past Authorities

The third type of voice present in the *waqf* treatises is that belonging to second-century A.H. Ḥanafī jurisprudents or members of the early Islamic community. In some contexts, these voices appear as *ikhtilāf*, or statements of dispute, which contrast the opinions of Abū Ḥanīfa, Abū Yūsuf, Muḥammad b. al-Ḥasan al-Shaybānī, and "Baṣran jurists" on areas of *waqf* law. According to Calder, al-Khaṣṣāf's *waqf* treatise contains "no *ikhtilāf*."[39] Although *ikhtilāf*s in al-Khaṣṣāf's *waqf* treatise are not as prevalent as in Hilāl's work,[40] there are several

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[36] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 47.

[37] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 233–35; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 149–51.

[38] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 72–78.

[39] Calder, *Studies*, 50. Melchert was aware that *ikhtilāf*s are present in the *Aḥkām al-Awqāf* of al-Khaṣṣāf, but he did not connect this observation back to Calder's erroneous conclusion. Melchert, "Religious Policies of the Caliphs," 336.

[40] In the *Aḥkām al-Waqf* of Hilāl, the most concentrated area of *ikhtilāf*s occurs in the introductory section which stretches from pages 2–17. An additional *ikhtilāf* between Abū Yūsuf and Abū Ḥanīfa can be found on page 212, and an *ikhtilāf*

instances in which statements of dispute are present. For example, the following passage from al-Khaṣṣāf's treatise contrasts the opinions of Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī on the special case of a wife who dies after her share of the *waqf*'s yields has come into existence:

> I said: And what if this founder made a *waqf* during his death-sickness, and a wife from among [the beneficiaries of the *waqf*] died after the emergence of the yields and she left [only] her husband and her brother.
>
> He said: Abū Yūsuf said: Her husband is entitled to half of her share, and her offspring are entitled to the remaining half. Her brother is not entitled to anything from this. This applies if the brother is among the beneficiaries of the *waqf* because this is only a bequest (*waṣiyya*) [from the founder] and he has no right to take [twice].[41] And Muḥammad b. al-Ḥasan said: This is exclusively an inheritance (*mīrāth*) and not a bequest (*waṣiyya*). So, the husband is entitled to one-half, and the brother is entitled to the remaining half.[42]

In other contexts, the voices of the earliest Muslims are heard in authority statements, called *akhbār* or *āthār*. In contrast to a full *ḥadīth* which contains both a narrative (*matn*) and a chain of transmitters (*isnād*), these *akhbār/āthār* traditions only contain the former. In the *Aḥkām al-Waqf* of Hilāl, the author mentions the practices of important Companions such as ʿUmar b. al-Khaṭṭāb, ʿAlī b. Abī Ṭālib, and al-Zubayr b. al-ʿAwwām to support the legality of the *waqf*.[43] For example, the following *khabar* report provides the *matn* of a *ḥadīth* in which the Prophet set forth the legal foundation for the *waqf*'s division of principal and usufruct:

> ʿUmar said to the Messenger of God, "I have acquired land in Khaybar, and I have never acquired property more precious to me than it. What

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between Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī is located on page 222. Furthermore, on pages 198–99, 292, and 298 Hilāl states his disagreements with the opinions of Abū Ḥanīfa.

[41] Abū Yūsuf is pointing out that the "no bequest to an heir" maxim (*lā waṣiyya li-wārith*) prevents the brother from receiving his sister's share of the *waqf* yields as an inheritance because the yields are the result of a "bequest" from the founder.

[42] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 72–73. See pages 21 and 150 for additional *ikhtilāf*s between Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī; pages 155, 201 and 207 for *ikhtilāf*s between Abū Yūsuf and Abū Ḥanīfa; and page 149 for an *ikhtilāf* between al-Khaṣṣāf and the "Baṣran jurists."

[43] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 6.

> do you command me to do with it?" He [the Prophet] said: "If you want, sequester its principal and give away (the yields) as alms" (*in shi'ta ḥabbasta aṣlahā wa-taṣaddaqta bi-hā*).[44]

Al-Khaṣṣāf's treatise likewise contains *akhbār* reports and *āthār* which refer to Prophetic statements and the practices of Muḥammad's Companions.[45] Al-Khaṣṣāf's treatise also contains complete *ḥadīth*s, all but one of which[46] are located in the introduction to the treatise.[47] The organization of this introductory collection of *ḥadīth*s adheres to a hierarchical conception of authority based not on the chain of authorities (*isnād*), but rather on the content of the narrative (*matn*). Consequently, under this schema the previous *ḥadīth* is an "'Umar *ḥadīth*" because it concerns 'Umar's property, while a "Prophetic *ḥadīth*" is one that relates information about a Prophetic *waqf/ṣadaqa/ḥubs*. In al-Khaṣṣāf's introduction, *ḥadīth*s concerning the "*ṣadaqāt*" of the Prophet come first, then those of prominent Companions. This initial set of Companion *ḥadīth*s comprises the four *Rāshidūn* caliphs, ranked sequentially, followed by *ḥadīth*s concerning the "*ṣadaqa*s" of al-Zubayr, Mu'ādh b. Jabal and Zayd b. Thābit. The next set gathers reports of the pious endowments of five of the Prophet's wives—'Ā'isha, Asmā' bt. Abī Bakr, Umm Salama, Umm Ḥabība, and Ṣafiyya bt. Ḥuyayy. This set of women is followed by an assortment of less prominent Companions—Sa'd b. Abī Waqqāṣ, Khālid b. al-Walīd, Abū Arwā (sp.?) al-Dūsī, Jābir b. 'Abd Allāh, Sa'd b. 'Ubāda, and 'Uqba b. 'Āmir. And lastly, a small number of *ḥadīth*s is collected under the rubric, "What was transmitted in the matter of the *ṣadaqa*s of the Successors and those who came after them."

It is possible that these three voices—the *qultu/qāla* dialectic, the expository style and the reliance on past authority—emerged from different redactional approaches. In his analysis of early Ḥanafī texts, Calder claimed that the *qultu/qāla* dialectic was the authentic format of Ḥanafī legal works from the second and third Islamic centuries,[48] and that authority statements—*āthār* and *ikhtilāf*—constituted secondary materials that accumulated through successive redactions and

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[44] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 72.
[45] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 21, 38–40, 113–14, 149, 151.
[46] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 151.
[47] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 1–18.
[48] Calder, *Studies*, 40.

interpolations.[49] Calder's privileging of the *qultu/qāla* dialectic is too sweeping. While the *qultu/qāla* dialectic is the predominant literary convention in both *waqf* treatises, it is not the only literary convention. Moreover, it seems reasonable to assume that Ḥanafī jurists used a diversity of argumentative approaches and styles. Until more research is done on these texts, it is premature to postulate that everything deviating from the "stringent *qultu/qāla* format"[50] is interpolated.[51]

Oral/Written Culture

Both *waqf* treatises appear to reflect a transition from an oral to a written culture. Although this transformation had begun in the second Islamic century, it was in the subsequent century that it began to gather speed. Regardless of whether one views the *qultu/qāla* dialogues as representative of actual conversations or mere literary conventions, the format of these dialogues suggests a desire to replicate the orality of Islamic legal culture. The stylized replication of an "orally voiced presence"[52] may reflect an initial uneasiness with granting authority to written texts. As William Graham,[53] Michael Cook,[54] and Brinkley Messick[55] have observed in their respective studies of the Qur'ān, *ḥadīth*s, and Yemeni law, the need to construct written texts as oral texts attests to the continued privileging of oral culture

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[49] Calder, *Studies*, 40–52, esp. 40, 49.

[50] Calder, *Studies*, 40.

[51] Support for this conclusion can be garnered from Brockopp's examination of a third-century Mālikī text, the *Mukhtaṣar al-Kabīr* of Ibn ʿAbd al-Ḥakam. In the appendices to his dissertation and *Early Mālikī Law*, Brockopp includes a portion of the *Mukhtaṣar* in both Arabic and English. The selection highlights the use of the *qultu/qāla* dialectic within the Mālikī tradition, includes unattributed disputes on points of law that resemble *ikhtilāf*, and legal analyses that might be characterized as expository. Jonathan Brockopp, "Slavery in Islamic Law: An Examination of Early Mālikī Jurisprudence," (Ph.D. diss., Yale University, 1995), A1–A87; idem, *Early Mālikī Law*, Appendix A, 227–83.

[52] Brinkley Messick, *The Calligraphic State: Textual Domination and History in Muslim Society* (Berkeley: University of California Press, 1993), 25.

[53] William A. Graham, *Beyond the Written Word: Oral Aspects of Scripture in the History of Religion* (Cambridge: Cambridge University Press, 1987), *passim*.

[54] Cook, "The Opponents of the Writing of Tradition in Early Islam," *Arabica* 46/4 (1997), *passim*.

[55] Messick, *The Calligraphic State*, 25–28.

over written culture in the Islamic world.[56] The self-conscious attempt in the *waqf* treatises to create an oral milieu for a written text reflects this underlying tension between oral and written culture. While oral transmission was still considered more authoritative, there was an increasing need and/or desire to commit legal arguments to writing.

There is probably no single explanation for this transition from an oral to a written culture during the formative period. The transition may have been connected to developments in the written form of the Arabic language which made the possibility of a written legal culture more feasible. There also appears to have been an underlying self-consciousness with regards to the past. By the third century A.H. there no longer existed any human links to the time of the Prophet. The growth and codification of the *ḥadīth* collections as well as the stabilization of the written Qur'ān may have been responses to the need to preserve the recollections (and vocalizations) of this unique, albeit increasingly distant, Prophetic period. The presence of authority statements in the *waqf* treatises from second-century jurists/jurisprudents such as Abū Ḥanīfa, Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī also indicates a growing recognition that earlier generations of scholars had attained a level of expertise worth remembering. Pragmatic considerations may have also factored into the decision to write down previously "oral" texts. As Cook has observed in his discussion of why Muslims chose to write down *ḥadīth*s, the immense growth in the number of *ḥadīth*s over the course of the second century made it virtually impossible for human beings to memorize them all.[57] Although Muslim traditionists theoretically could have maintained an oral culture of *ḥadīth* transmission, the "antipathy of early Islam towards academic regimentation" prevented Muslim traditionists from dividing their labors in a way that would have made oral transmission possible.[58] A similar process may have impacted the evolution of legal treatises. The fact that both Hilāl

[56] Cook, "The Opponents of the Writing of Tradition," 438 ("For it was on the oral continuity of transmission that the very authenticity of Tradition was seen to rest; mere literary transmission, and *a fortiori* literary finds, could carry no such authority."). According to Messick, written and recitational forms coexisted, but only oral recitation provided proof of authenticity by "replicating an originally voiced presence." Messick, *The Calligraphic State*, 25–26.

[57] Cook, "The Opponents of the Writing of Tradition," 523.

[58] Cook, "The Opponents of the Writing of Tradition," 523.

and al-Khaṣṣāf wrote treatises on several different branches of law is evidence that third-century jurists had not organized themselves into specialized areas. Just as the *ḥadīth* collections became too voluminous to be preserved by individual traditionists, it defies credibility to suggest that either Hilāl, al-Khaṣṣāf, or any of their disciples, could have maintained an oral recollection of their entire corpus of legal treatises. And lastly, the transition from an oral to a written environment may have served the interests of the juristic class by defining, and then cartelizing, the legal profession. The emergence of written texts allowed the *ʿulamāʾ* to coalesce into a learned elite whose professionalization was "intimately related to their dexterity in controlling written materials,"[59] thus restricting entry and access into the profession to a narrow band of literate elite who alone possessed the skills to interpret and produce legal texts.[60]

III. *Legal Argumentation in Ḥanafī Legal Discourse*

In their efforts to define the law of *waqf*, Hilāl and al-Khaṣṣāf utilized a number of argumentative techniques. Some of these techniques, such as the use of *qiyās*, have already been mentioned, while others include the use of stock figures, appeals to authority, reductive reasoning, and a reliance on *istiḥsān*, or judicial preference. The commonality of these techniques in both *waqf* treatises provides an indication of the forms of legal argumentation present within Ḥanafī circles during the middle of the third century and a benchmark for measuring how these forms of argumentation—especially *qiyās* and *istiḥsān*—evolved over the course of subsequent centuries.

Appeals to Authorities

The voices of past authorities are employed in different ways throughout the *waqf* treatises in order to advance legal arguments. For example, in this quotation from the *Aḥkām al-Waqf*, Hilāl relies on the founder of the Ḥanafī school to bolster his conclusion regarding a founder's right to distribute and consume the yields of a *waqf*: "This

[59] Calder, *Studies*, 185.
[60] Calder, *Studies*, 184–85.

is the opinion of Abū Ḥanīfa, God's mercy be upon him, and it is our opinion."[61] In other circumstances, past authorities supplant the treatise authors and provide the response to the *qultu* figure's questions. In certain cases, this reliance results in multiple answers if the earlier authorities had disagreed with one another on an issue:[62]

> I said: What is your opinion if the founder says, "I have entrusted the administration of my *ṣadaqa* to so-and-so during my life, and after my death it is for my son when he comes of age. And when he comes of age he is a partner of so-and-so in its administration during my life and after my death."
>
> [He said]: Verily, al-Ḥasan b. Ziyād transmitted on the authority of Abū Ḥanīfa, God's mercy be upon both of them, that he said: "That which he entrusted to his son from this is not permitted." Abū Yūsuf said: "It is permitted according to what he designated."[63]

These appeals to past authorities were not limited solely to Abū Ḥanīfa[64] and Abū Yūsuf.[65] In the *Aḥkām al-Waqf*, Hilāl also invokes the authority of Muḥammad b. al-Ḥasan al-Shaybānī,[66] the "people of Baṣra,"[67] and "the *fuqahā'*."[68] Such appeals to earlier jurists are indicative of the differing notions of authority between rationalists (*aṣḥāb al-ra'y*) and traditionalists (*aṣḥāb al-ḥadīth*). Whereas traditionalists would have seen the traditions of the early Muslim community as most persuasive, rationalists such as Hilāl instinctively cited the opinions of their teachers and other learned jurists within their legal community.

Stock Figures

Another argumentative technique found in both works concerns the use of stock figures—nicknamed ʿAbd Allāh, Zayd and ʿAmr.[69] In this passage from Hilāl's treatise, the three names are used to examine how the yields of a *waqf* are to be divided:

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[61] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 291–92 (in two places).
[62] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 20–21, 73, 155, 177, 201, 207.
[63] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 201.
[64] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 4–5, 8–9, 43–44, 46, 148, 291–92, 299.
[65] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 6, 14, 148, 212.
[66] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 222.
[67] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 14.
[68] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 2, 285.
[69] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 43–45, 125–26, 137–40, 145–48, 153, 160–61,

I said: What is your opinion of a man who says, "This land of mine is a *ṣadaqa mawqūfa* to God the Exalted in perpetuity for ʿAbd Allāh and Zayd"?
He said: The yields are between the two of them in halves. . . .
I said: And if he had said, "for Zayd and ʿAmr and ʿAbd Allāh, and Zayd is entitled to one-third and ʿAmr is entitled to one-half"?
He said: Then each one of them is entitled to what he stipulated, and ʿAbd Allāh is entitled to the one-sixth which remains. . . .
I said: What is your opinion if he says, "This land of mine is a *ṣadaqa mawqūfa* for Zayd and ʿAmr, and Zayd is entitled to 100 *dirham*s from it each year"?
He said: Then Zayd is entitled to what he stipulated. And ʿAmr is entitled to that which remains—whether it be a little or a lot.[70]

The utilization of these stock figures permits the dialogues in the *waqf* treatises to extend into uncharted—albeit, hypothetical—areas of *waqf* law. Had the *waqf* treatises constrained themselves to discussions of real cases, the scope of the argumentation would have been quite limited and many potential problematic areas of *waqf* law would have remained unexplored. The use of the stock figures is therefore consistent with the overall ethos underlying the *qultu/qāla* dialectic—the derivation of *waqf* law principles through a comprehensive rational discourse.

Reductive Reasoning

In addition to using stock figures, several of the hypothetical discussions in the *waqf* treatises engage in "reductive reasoning" to illuminate and define the outer edges of the law. Unlike *reductio ad absurdum* in which an argument is pushed to its furthest extremity in order to prove that its conclusion is absurd, in reductive reasoning an argument is pushed to its extremes in order to establish that the principle applies in all cases. For example, in the following *qultu/qāla* dialogue, Hilāl invalidates a *waqf* because it violates the principle that founders may not establish *waqf*s in favor of themselves. Hilāl affirms the inviolability of this principle through reductive reasoning when he holds that a proposed *waqf* is invalid even if the founder partakes of a trivial amount of the yields—0.01% to be exact:

168–69, 215–20, 247–51, 258–61, 281–83; Hilāl al-Raʾy, *Aḥkām al-Waqf*, 48–49, 54–56, 273–83.

[70] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 273–74.

I said: What is your opinion if it were the case that he said, "*ṣadaqa mawqūfa* on the condition that I have the right [to take] from its yields 200 *dirham*s each year. And what remains after this is for the poor and destitute."
He said: The *waqf* is invalid and not permitted.
I said: Even if it was known that its yields were 10,000 [*dirham*s]?
He said: Even if this was known, it is still according to what I have described to you. . . .
I said: And likewise if it were the case that he imposed the condition [that he was to receive only] one *dirham* from the yields?
He said: Yes.[71]

Qiyās *and* Istiḥsān

In comparison to reductive reasoning, which appears to have been a minor argumentative strategy, the use of *qiyās* and *istiḥsān* figures prominently in both *waqf* treatises. In fact, it is not uncommon for Hilāl and al-Khaṣṣāf to present two different solutions to a problem—one derived through *qiyās* and the other through *istiḥsān*.[72] For instance, in the case of a *waqf* where witness testimony failed to establish the precise dimensions of the endowment, al-Khaṣṣāf held that "[t]he testimony with respect to *qiyās* is invalid, but with respect to *istiḥsān*, the testimony is permitted."[73] Although it is common to refer to *qiyās* as analogical reasoning and *istiḥsān* as juristic preference, neither of these definitions completely captures the variegated uses of these terms in the *waqf* treatises.

In both treatises *qiyās* is used primarily to establish linkages between bequest law and *waqf* law. In some cases, reference to *qiyās* is made explicit, as when Hilāl sates, "[T]his is the opinion of our companions in the matter of the bequest, whereas the *waqf* [is derived] from *qiyās*" (*hādhā qawlu aṣḥābinā fī'l-waṣiyyati wa'l-waqfi ʿalā qiyās*).[74]

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[71] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 82.

[72] The comparison/contrast between *qiyās* and *istiḥsān* was a common form of legal argumentation among second- and third-century Ḥanafī scholars. For example, in the *Kitāb al-Aṣl*, Muḥammad b. al-Ḥasan al-Shaybānī often states, "We part with *qiyās* and follow *istiḥsān*," or "*qiyās* would be . . . but we do not follow it." Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Aṣl* (Cairo: Maṭbaʿat Jāmiʿat al-Qāhira, 1954), 1: 23, 81–182, 218, 222. Also cited in Aḥmad Ḥasan, "Early Modes of *Ijtihād*," *Islamic Studies* 6 (1967), 67.

[73] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 217.

[74] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 199. For other places where Hilāl makes explicit reference to *qiyās* between bequest and *waqf* law, see pages 22, 225, 265, 276, 292,

In most cases, however, the connection between bequest and *waqf* law is implicit:

> I said: Likewise if it were the case that he said, "for the children of ʿAbd Allāh and the children of Zayd," and Zayd had no children?
>
> He said: The children of ʿAbd Allāh are entitled to the yields. Do you not see that if a man says, "I have bequeathed (*awṣaytu*) a third of my property to the children of ʿAbd Allāh and to the children of Zayd," and Zayd had no children, then all of the third is for the children of ʿAbd Allāh. Likewise in the matter of the *waqf*.[75]

In this dialogue Hilāl does not employ the term *qiyās*, although it is clearly bequest law that informs and justifies his ruling that the yields should be distributed only to the children of ʿAbd Allāh.

Analogies are also drawn from the law of slavery and marriage. In the following expository passage Hilāl relies upon the semantics of manumission and marriage statements to promote his position that founders cannot administer their own *waqf*s, and simultaneously uses these analogies to refute interpretations of a statement by ʿUmar b. al-Khaṭṭāb to the contrary:

> [He said]: And he said to them, "What do you say in the matter of a man who says to his slave, 'Free whichever of my slaves you want,' and he freed himself?" And if they reply, "He [the slave to whom the man uttered this statement] does not have the right to do this because the meaning was only for the [freeing] of someone other than him from among the slaves," then say to them, "And likewise when [ʿUmar] said, It will not be held against the one who administers [the *waqf*] if he eats from it.' The meaning was [that administration of the *waqf* was] only for someone other than him [*i.e.*, the founder] from among the administrators. So, why do you deny our assertion that its meaning is for someone other than him? And he said to them, "What do you say in the matter of the woman who said to a man, 'Marry me to a man,' and the man married her to himself?" If they say, "No, he is not permitted [to marry her] because the reference is only to someone other than him from among men," respond to them, "And likewise the *waqf*, the meaning is 'other than him.'"[76]

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299. A similar use of *qiyās* occurs in al-Khaṣṣāf, *Aḥkām al-Awqāf*, 134, 154, 217, 219, 233, 238, 281.

[75] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 54–55. For other instances where *qiyās* is implied rather than stated, see pages 19, 43–44, 53, 72, 80, 133, 166–67, 277–78, 280–81, 292–93, 304–05; Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 71, 215, 245, 278.

[76] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 73. See also al-Khaṣṣāf, *Aḥkām al-Awqāf*, 34–35, 217, 241–42, 247–48, 292, for analogies drawn from slave law.

In recent decades several scholars have attempted to document the different types of analogical reasoning employed in Islamic legal texts. Hallaq, for example has identified seven types of *qiyās*.[77] Additionally, historians have observed that Muslim jurists expounded upon the components of *qiyās*—particularly the *ʿilla*—that permitted valid analogical reasoning.[78] Determining the *ʿilla, i.e.*, the commonality between the precedent (*aṣl*) and the new case (*farʿ*), became crucial because it was through this shared essence that established *sharīʿa* law could be extended into new areas.[79] There appears to be a consensus amongst scholars of Islamic legal theory—including Hallaq—that most of these developments in legal reasoning did not occur until the fourth and fifth Islamic centuries,[80] and that second- and third-century analogical reasoning "lacked a coherent logical basis,"[81] and was "simple and unsophisticated."[82] Historians have also noted that the term *ʿilla* is generally not found in early discussions of *qiyās*, and where it is found, it has a meaning considerably wider than that used by later jurists.[83]

The use of *qiyās* in the *waqf* treatises is consistent with these assessments. Nowhere in either text is the term *ʿilla* cited, nor do the authors express any interest in assessing whether the similarities with bequest, slave and marriage law are truly analogous to the *waqf* cases at hand. This lack of theoretical concern suggests that the *qiyās* employed in the *waqf* treatises is merely *argumentum a simile*, or analogy based solely on the similarity of two cases. Evidence for this

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[77] Hallaq, *A History of Islamic Legal Theories*, 101–05, 126, 217, 228–29. The seven types of *qiyās* are: *qiyās dalāla, qiyās ijmālī wāsiʿ, qiyās ʿilla, qiyās jalī, qiyās khafī, qiyās maṣlaḥa mursala*, and *qiyās shabah*.

[78] Wael B. Hallaq, "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law," *Cleveland State Law Review* 34 (1985–86), 94. Hallaq notes that Ibn Taymiyya claimed that analogical argument had four components: (i) the *aṣl*; (ii) the *farʿ*; (iii) the *ʿilla*; and (iv) the *ḥukm*, or rule, which was transferred from the *aṣl* to the *farʿ*.

[79] Wael B. Hallaq, "The Development of Logical Structure in Sunnī Legal Theory," *Der Islam* 64 (1987), 43–44.

[80] Schacht, *Origins*, 110; Ḥasan, "Early Modes of *Ijtihād*," 64, 70; Zafar Ishaq Ansari, "Islamic Juristic Terminology Before Šāfiʿī: A Semantic Analysis with Special Reference to Kūfa," *Arabica* 19 (1972), 292; Hallaq, "The Development of Logical Structure," 44–46, 65; idem, *A History of Islamic Legal Theories*, 2.

[81] Wael B. Hallaq, "Considerations on the Function and Character of Sunnī Legal Theory," *JAOS* 104 (1984), 681.

[82] Ḥasan, "Early Modes of *Ijtihād*," 64.

[83] Ḥasan, "Early Modes of *Ijtihād*," 70.

assumption can be garnered from Hilāl's and al-Khaṣṣāf's use of the terms *bi-manzila* (equivalent), *mithāl* and *mathal* (likeness) to convey the similarity between the cases. As Aḥmad Ḥasan remarked in his discussion of *qiyās*, such expressions "indicate the simple nature and wide scope of *qiyās*" prior to the development of a more sophisticated understanding of the *ʿilla*.[84]

It is also possible that Hilāl and al-Khaṣṣāf intended their use of *qiyās* to be a form of *a fortiori* argumentation. Unlike standard analogies, in which the original and assimilated cases are considered to have parity with another, in *a fortiori* argumentation, the original case contains a "greater" or "lesser" dimension than the assimilated case.[85] This type of argumentation would have been familiar to Hilāl and al-Khaṣṣāf, since prominent Ḥanafī jurists such as Abū Ḥanīfa and Abū Yūsuf were alleged to have used *a fortiori* analogies.[86] Although neither Hilāl nor al-Khaṣṣāf describe their reasoning in these terms, the analogies drawn to bequest law—the dominant precedent in both *waqf* treatises—contain some of the attributes of *a fortiori* argumentation.

The use of *qiyās* by Hilāl and al-Khaṣṣāf is not limited solely to *argumentum a simile* and *a fortiori* analogy, however. In certain circumstances a judgment reached through *qiyās* is contrasted with one attained by *istiḥsān*. In such cases *qiyās* appears to be equated with "a strict literalist or formalistic application of the law,"[87] while *istiḥsān* seems to convey the spirit of the law or the preference of the jurist.[88] As the following *qultu/qāla* dialogue concerning imperfect testimony illustrates, the letter of the law (*i.e., qiyās*) requires that ambiguity nullify the testimony, but through the application of *istiḥsān* the testimony is permitted:

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[84] Ḥasan, "Early Modes of *Ijtihād*," 70. Schacht observed that al-Shāfiʿī labeled the Ḥanafīs "*ahl al-qiyās*" on account of their frequent exercise of analogical reasoning. Schacht, *Origins*, 109.

[85] Wael B. Hallaq, "Non-Analogical Arguments in Sunnī Juridical *Qiyās*," *Arabica* 36 (1989), 301; J. Gregorowicz, "L'argument *a maiori ad minus* et le problème de la logique juridique," *Logique et Analyse* 17–18 (1962), 69–75.

[86] Schacht, *Origins*, 110–11.

[87] Émile Tyan, "Méthodologie et sources du droit en Islam," *Studia Islamica* 10 (1959), 84; Ansari, "Islamic Juristic Terminology Before Šāfiʿī," 292; Ḥasan, "Early Modes of *Ijtihād*," 74.

[88] Ḥasan, "Early Modes of *Ijtihād*," 74.

> I said: What is your opinion if the two [witnesses] say, "We testify that he endowed his share from this house" and [then] they say, "We do not know the [quantity] of his share."
>
> He said: The testimony, according to *qiyās*, is invalid, but according to *istiḥsān*, the testimony is permitted.[89]

As the preceding dialogue indicates, *istiḥsān* is used in the *waqf* treatises as a safety valve when the application of *qiyās* would create an unsatisfactory or unjust result. For example, Hilāl discusses the case of a founder who has established a *waqf* "for my nearest kin relation who is poor and then for those next closest in relation who are poor." According to *qiyās*, the entire yields of the *waqf* should be given to the nearest poor kin relation even if that means that the remaining poor relatives receive nothing. Perhaps sensing that such a result would be unjust and/or inconsistent with the founder's intent, Hilāl turns to the doctrine of *istiḥsān* to argue that when a *waqf* is designated for the poor, it is better to give not more than 200 *dirham*s (*i.e.*, the amount that delimits poverty) to the nearest kin relation until all the other poor relatives have been lifted out of poverty.[90]

The use of *istiḥsān*, like *qiyās*, is not entirely uniform in meaning throughout the two *waqf* treatises. The most common usage is that described in the passage above—a reliance on juristic preference and an appeal to the spirit of the law.[91] In some cases, however, the use of *istiḥsān* resembles *ad hoc* reasoning without any reference to social or religious norms. For example, al-Khaṣṣāf recounts the case of two groups of beneficiaries who lay claim to the same *waqf*. In the absence of any living witness or legal records, al-Khaṣṣāf bases his judgment on his own independent assessment of the situation: "And if they make a case for taking it, and there are no legal records in the *qāḍī*'s *dīwān* (*laysa la-hum rasm fī dīwān*) to be used as a basis for a decision, then I rely on *istiḥsān* to execute this for them, and I divide the yields between them."[92] Hilāl's treatise presents two additional uses of *istiḥsān*, both of which imply that *istiḥsān* constitutes a less preferred, albeit permitted, way of doing something. In one case, Hilāl discusses a *waqf* established "for the poor and the destitute,"

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[89] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 217.
[90] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 225.
[91] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 225, 289–90, 299, 306; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 134, 217, 219, 281.
[92] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 134.

but where the founder has failed to specify anything for his kin relations, some of whom happen to be poor. Hilāl contends that the founder should first ameliorate the poverty of his kin relations, because "they have a greater claim to [the yields of the *waqf*] than the destitute because the *ṣadaqa* of a man for his poor kin relations is a greater recompense [*ṣadaqa*] than for strangers."[93] Nonetheless, Hilāl concedes that if the founder ignores his poor kin relations and distributes the yields to the poor and destitute, then "he is permitted [to do this], and this is *istiḥsān*" (*fa-huwa jā'iz wa-hādhā istiḥsān*).[94] Clearly, Hilāl believes that the founder should favor his poor kin relations, but he is compelled to admit that *istiḥsān* allows the founder to do what is less preferred. In another part of his *waqf* treatise, *istiḥsān* takes on the meaning of "as a last resort." This usage occurs in a discussion of *waqf*s established for clients. Hilāl argues that clients who were emancipated slaves, and the children of these clients, should receive the yields of a *waqf* ahead of any clients under a contract of clientage.[95] If, however, there exist only clients under a contract of clientage, then they should receive the yields of *waqf* "as a last resort" (i.e., by virtue of *istiḥsān*):

> I said: What is your opinion if the founder has neither a client who is an emancipated slave, nor children from this client, but he does have a client who is under a contract of clientage?
> He said: By virtue of *istiḥsān* I would give him the yields.[96]

Partly due to these various uses, it is often difficult to identify one definition of *istiḥsān.* In his *Mabsūṭ*, al-Sarakhsī (d. *ca.* 483/1090), alternatively defined *istiḥsān* as a form of common law and a safety valve: "analogy abandoned in favor of custom" (*al-qiyās yutrak bi'l-ʿurf*); "the renunciation of analogy and the adoption of what is more fitting for people" (*al-istiḥsānu tarku al-qiyāsi wa'l-akhdhu bi-mā awfaqu li'l-nāsi*); and/or that which provides "more lenience in laws" (*al-istiḥsānu ṭalabu al-suhūla fi'l-aḥkāmi*).[97] Because *istiḥsān* seems to have been used as

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[93] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 148.
[94] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 148.
[95] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 188–89.
[96] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 189.
[97] Al-Sarakhsī, *Al-Mabsūṭ*, 10: 145, 15: 90. The translation and transliteration of these passages are borrowed from Gideon Libson, "On the Development of Custom as a Source of Law in Islamic Law," *ILS* 4 (1997), 151.

a means for ameliorating the negative effects of *qiyās* and fulfilling the spirit of the law, some legal scholars have contended that *istiḥsān* bears a strong resemblance to reasoning based on equity[98] in which laws are decided by appeals to fairness and justice rather than the strictly formulated rules of law.[99] This point of view, however, has not met with universal acceptance. John Makdisi has countered that the comparison is inadequate because *istiḥsān*, unlike equity, must be grounded in the Qur'ān and *sunna*: "[E]quity derives its legitimacy from the belief in a natural right or justice beyond positive law. This concept contradicts one of the basic premises of Islamic law, the total reliance on the revealed Word of God in the Koran and *sunna* as the only primary source of law."[100] More recently, Haim Gerber has attempted to rehabilitate the equity conception of *istiḥsān* by claiming that it functions as a form of "Islamic equity" in which the needs of society are "read into the legal sources."[101] The result is equity wrapped in the legitimizing structure of the Qur'ān and the *sunna.*

The meaning of *istiḥsān* may not be as confused as these differing conceptions suggest. The use of *istiḥsān* in the *waqf* treatises does not seem to support Makdisi's contention that *istiḥsān* is based upon the Qur'ān or *sunna.* Not only is the Qur'ān not invoked in the *waqf* treatises, but neither Hilāl nor al-Khaṣṣāf articulates a great concern with grounding their reasoning in Prophetic practice. Al-Shāfiʿī's polemics in the *Risāla*[102] and the *Kītāb al-Umm*[103] against those who

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[98] Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (1911; reprint, Lahore, Pakistan: The Punjab Educational Press, 1963), 163–66; David de Santillana, *Istituzioni di diritto musulmano malichita* (Rome: Istituto per l'Oriente, 1925–38), 1: 71–72; *EI*[1], *s.v.* "*Istiḥsān*," Th. W. Juynboll, 2: 561; Tyan, "Méthodologie et sources," 79–91, esp. 84–89; Chafik Chehata, "L'équité en tant que source de droit hanafite," *Studia Islamica* 25 (1966), 123–38, esp. 136; Anwār Aḥmad Qadrī, *Islamic Jurisprudence in the Modern World* (Lahore, Pakistan: Sh. Muhammad Ashraf, 1973), 222–24.

[99] *Black's Law Dictionary*, 5th ed., 484.

[100] John Makdisi, "Legal Logic and Equity in Islamic Law," *The American Journal of Comparative Law* 33 (1985), 67. As Makdisi notes in his article, Schacht and Paret had already begun to question the analogy between *istiḥsān* and equity. See *EI*[2], *s.v.* "*Istiḥsān and Istiṣlāḥ*," R. Paret, 4: 256; Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 204.

[101] Haim Gerber, "Rigidity Versus Openness in Late Classical Islamic Law: The Case of the Seventeenth-Century Palestinian Muftī Khayr al-Dīn al-Ramlī," *ILS* 5 (1998), 186–87.

[102] Al-Shāfiʿī, *Al-Risāla*, ed. Aḥmad Muḥammad Shākir (Cairo: Maktabat Dār al-Turāth, 1979), 503–59.

[103] Al-Shāfiʿī, "Kitāb Ibṭāl al-Istiḥsān," *Kītāb al-Umm*, 7: 293–304.

used *istiḥsān* as a form of unprincipled equity (*i.e., ad hoc*, independent legal reasoning not grounded in the Qurʾān and *sunna*) is further evidence that third-century jurists did not ground their reasoning in these "fundamental sources." Nevertheless, these observations do not mean that Makdisi's conclusions are incorrect. With the ascent of traditionalism over the course of the third and fourth Islamic centuries, the independent reasoning which characterizes the *istiḥsān* in the *waqf* treatises became more difficult to defend. Simply rejecting the use of *istiḥsān*, however, would have been difficult for later Ḥanafī jurists because it would have called into question the legal reasoning of the school's founders. In order to resolve this tension, fifth-century Ḥanafī jurists such as al-Bazdawī (d. 482/1089) and al-Sarakhsī (d. *ca.* 483/1090) began to rehabilitate *istiḥsān* by arguing that it constituted a form of legal reasoning based on recognized sources of law—Qurʾān,[104] *sunna*[105] and *qiyās*.[106] It is this rehabilitated, hermeneutically-based, *istiḥsān* which forms the basis for Makdisi's contention that *istiḥsān* is not a form of equity, but rather, "a method for choosing between two possible legal solutions to a particular case—legal solutions which are obtained within the context of the recognized sources of Islamic law."[107]

These differing conceptions of *istiḥsān* reflect the evolution of this doctrine over the course of the third, fourth and fifth Islamic centuries. Through most of the third century, it is probably correct to view *istiḥsān*—as it was used by Ḥanafī jurists such as Hilāl and al-Khaṣṣāf—as a safety valve to achieve just and equitable results when

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[104] The Qurʾānic basis for *istiḥsān* was believed to have originated from two Qurʾānic verses in which God urged his servants to "listen to the word and follow what is best in it" (*alladhīna yastamiʿūn al-qawla fa-yattabiʿūn aḥsanahu*) and to "follow the best of what was sent down to you by your Lord" (*waʾttabiʿū aḥsana mā unzila ilaykum min rabbikum*). Qurʾān 39.18 and 39.55, respectively.

[105] The Prophet reportedly supported the use of *istiḥsān* when he asserted, "That which is considered good by the Muslim community is likewise considered good in the opinion of God (*mā raʾāhu al-muslimūna ḥasanan fa-huwa ʿinda Allāhī ḥasan*). ʿAlī b. Abī ʿAlī al-Āmidī (d. 631/1233), *Al-Iḥkām fī Uṣūl al-Aḥkām* (Cairo: Maṭbaʿat al-Maʿārif, 1914), 4: 214.

[106] Al-Sarakhsī, *Uṣūl al-Sarakhsī*, ed. Abū al-Wafāʾ al-Afghānī (Beirut: Dār al-Maʿarifa, 1973), 199–215, esp. 202–04; Fakhr al-Islām al-Bazdawī, in al-Bukhārī, *Kashf al-Asrār* (Beirut: Dār al-Kitāb al-ʿArabī, 1974), 4: 2–14. See also Makdisi, "Legal Logic and Equity in Islamic Law," 75–78; Bernard Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihād*," *The American Journal of Comparative Law* 26 (1978), 202.

[107] Makdisi, "Legal Logic and Equity in Islamic Law," 78.

rationalist discourse might have demanded a less desirable or even unjust result. This use of *istiḥsān* seems unprincipled, but it is likely that rationalists such as Hilāl and al-Khaṣṣāf viewed its use as appealing to a general common law and/or to meta-principles within *waqf* law and Islamic law. Such principles might include fulfillment of the founder's intent, as well as the more abstract principles of fairness, justice, and charity. However, as al-Shāfiʿī's criticisms of *istiḥsān* began to have a greater impact in the fourth century,[108] this earlier *raʾy*-based form of *istiḥsān* was displaced by a hermeneutically-derived version that restricted the potential for juristic preference and independent reasoning. By the fifth century, the doctrine had acquired exegetical legitimacy, but it had also lost some of its flexibility as a means of fashioning equitable results.[109]

IV. *Differences Between the Two Treatises*

Highlighting the similarities between the *waqf* treatises of Hilāl and al-Khaṣṣāf may convey the incorrect impression that the two treatises are virtually identical. While it is true that they possess many common attributes, and generally share the same outlook on *waqf* law, they nonetheless exhibit important differences in tone and legal reasoning.

Tone

Both *waqf* treatises contain theoretical and prescriptive elements, but the overall tone of the two works differs. Hilāl's treatise is more theoretical, while al-Khaṣṣāf's is more prescriptive. The theoretical quality of Hilāl's discussions is emphasized by the extended *qultu/qāla*

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[108] Although the *Risāla* of al-Shāfiʿī existed at the beginning of the third century A.H., Hallaq has persuasively argued that it had "very little, if any, effect during most of the [third] century." Instead, Hallaq contends that al-Shāfiʿī's ideas did not begin to exert their effect on Islamic law and legal reasoning until the next century. Hallaq, "Was al-Shāfiʿī the Master Architect?" 587–88.

[109] Melchert has observed a similar transformational "loss" with the harmonization of traditionalist and rationalist jurisprudence in the fourth century A.H.: "What [the traditionist-jurisprudents] lost was the purity and power of simply letting hadith speak for itself; also, on the other side, [rationalist-jurisprudents lost] a certain frankness about the importance of local tradition and personal speculation in the development of Islamic law." Melchert, "Traditionist-Jurisprudents," 406.

dialogues present in his treatise. Although both treatises use this dialectical form of legal reasoning, al-Khaṣṣāf frequently cuts the discussions short by drawing out the principles underlying the responses of the *qāla* figure. Hilāl, by contrast, permits the dialogues to explore every conceivable permutation of the issue at hand long after the principles have become readily apparent.[110] These differences in tone may be attributable to the fact that the authors were targeting different audiences in their respective works.

The theoretical and, to some extent, didactic quality of Hilāl's treatise suggests that students were the intended audience for his work. Both Calder and Hallaq have pointed out that early Islamic legal works have a didactic quality because they emerged either as textbooks for teaching students or as student lecture notes (*taʿlīqāt*) compiled on the authority of their teacher.[111] Calder has also argued that extended *qultu/qāla* dialectics constitute a form of "virtuoso display" by the teacher/author.[112] If these conceptions are true, then Hilāl's treatise may reflect the didactic quality of teacher-student interactions within early Islamic legal education circles.

By contrast, the more pragmatic and prescriptive nature of al-Khaṣṣāf's treatise suggests that *qāḍī*s were his intended audience. Not only are the *qultu/qāla* dialogues more direct and less hypothetical, but al-Khaṣṣāf focuses on the role of the *qāḍī* and *ḥākim*[113] in the administration and proper application of *waqf* law. He positions the office of *qāḍī* as a mediating and arbitrating institution within Islamic society,[114] describing the *qāḍī*'s responsibilities for

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[110] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 54–58, 221–24, 273–75, 276–83, for examples of these prolonged *qultu/qāla* dialogues.

[111] Calder, *Studies*, 180; Wael B. Hallaq, "*Uṣūl al-Fiqh*: Beyond Tradition," *Journal of Islamic Studies* 3 (1992), 185–86.

[112] Calder, *Studies*, 200.

[113] It is not entirely clear whether al-Khaṣṣāf viewed the term "*ḥākim*" as a synonym for "*qāḍī*" or whether he intended this term to convey another meaning. Edward Lane's *Arabic-English Lexicon* states that "*ḥākim*" could mean both a "judge" and "a man advanced in age." Lane, *Arabic-English Lexicon* (London and Edinburgh: Williams and Norgate, 1863; reprint Lahore, Pakistan: Islamic Book Centre, 1978), 2: 617. The sixth-century A.H. Mālikī jurist, Ibn Rushd (d. 520/1126) used the terms "*qāḍī*" and "*ḥākim*" synonymously. Ibn Rushd, *Al-Bayān waʾl-Taḥṣīl waʾl-Sharḥ waʾl-Tawjīh waʾl-Taʿlīl fī Masāʾil al-Mustakhraja*, ed. Muḥammad Ḥajjī (1st ed., Beirut: Dār al-Gharb al-Islāmī, 1404–06/1984–86), 6: 26. Cited in Hiroyuki Yanagihashi, "The Judicial Functions of the *Sulṭān* in Civil Cases According to the Mālikīs up to the Sixth/Twelfth Century," *ILS* 3 (1996), 44.

[114] Powers, *Law, Society, and Culture in the Maghrib*, 137; *cf.* Lawrence Rosen, *The*

determining if the endowment is being managed properly,[115] which kin relations are to be included in a familial *waqf*,[116] and whether or not an individual is poor and/or moral where the *waqf* deed limits the beneficiaries to poor and/or upright kin relations.[117] Likewise, al-Khaṣṣāf delineates circumstances in which the *qāḍī* may be asked to intervene in the administration of a *waqf*,[118] resolve conflicts in witness testimony,[119] or even seize control of the endowment. In this latter case, the *qāḍī* would assume responsibility for determining the eligibility of the endowment's beneficiaries, the distribution of its yields, and the payment of any outstanding debts.[120] Al-Khaṣṣāf also outlines the administration of *waqf* properties by successive judges, describing how *qāḍī*s should keep records of *waqf*s in their offices so that subsequent *qāḍī*s can consult these documents when questions arise as to the administration, or even validity, of these endowments.[121] Although the *qāḍī* is not absent from Hilāl's work, the emphasis on the judge's role in al-Khaṣṣāf' work is evidence that he intended his treatise to be a guide-book for judges.

Another indication of the centrality of the *qāḍī* in the *Aḥkām al-Awqāf* concerns the personal tone with which al-Khaṣṣāf discusses the role of this official. At different points in the *waqf* treatise, al-Khaṣṣāf employs the pronoun "we" or "I" when referring to the actions of the *qāḍī*:

> I said: And how is a *waqf* determined to be legally valid (*ṣaḥīḥ*) if it is in the possession of one who says, "It belongs to me"?
>
> He said: If the witnesses testify that "so-and-so made a legal acknowledgment in our presence that he was endowing this land as a legally valid *waqf*, that he specified its borders, and that he was its owner at the time that he endowed it," then we rule (*qaḍaynā*) that it is a *waqf* [established] by the founder. And we would remove it from the possession of the one who had it in his possession. . . .

Anthropology of Justice: Law as Culture in Islamic Society (Cambridge: Cambridge University Press, 1989).

[115] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 201–04.
[116] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 57.
[117] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 61, 270–71.
[118] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 268.
[119] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 232, 281–83.
[120] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 237–38, 261–62.
[121] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 134.

> I said: And what is your opinion if, while the founder was alive, he disavowed the *waqf*, and the beneficiaries brought witnesses who testified that he had endowed this land for them as a legally valid *waqf*?
>
> He said: If it is land in his possession, then I would judge it to be a *waqf* and I would remove it from his possession.
>
> I said: And what is your opinion if another man brings him forward and alleges, "This man endowed this land for the destitute in perpetuity," but he [the founder] disavows this. And he [the other man] brings evidence that he [the founder] acknowledged it as a *waqf*?
>
> He said: I would rule that it is a *waqf* for the destitute, and I would remove the land from his possession.[122]

The effect of these pronouns "we" and "I" is to subvert the strong pedagogical tone of the dialectic. Instead of maintaining a strict distinction between teacher and student, al-Khaṣṣāf transforms the *qultu/qāla* dialogue into what might be described as a seminar amongst *qāḍī*s. In this imagined seminar, al-Khaṣṣāf emerges as an experienced *qāḍī* who offers advice to those less learned in the subtleties of *waqf* law and *waqf* administration.

These differences in tone between the two *waqf* treatises may be a consequence of the differing livelihoods of the authors. Al-Khaṣṣāf's identification with, and interest in, the role of the *qāḍī* appears to be an extension of how he perceived himself, and his role in the ʿAbbāsid administrative bureaucracy. The inclusive, mentoring tone of the *Aḥkām al-Awqāf* is consistent with a man who was a *qāḍī* and who wrote an extensive work on the decorum and actions of judges (*Kitāb Adab al-Qāḍī*),[123] and a treatise on court documents and records (*Kitāb al-Maḥāḍir wa'l-Sijillāt*). Admittedly, much less is known about the personal and professional aspirations of Hilāl, although he was remembered as a teacher of prominent figures in the Ḥanafī school. Thus, the theoretical and didactic/pedantic quality of Hilāl's *waqf* treatise may reflect a more academic/scholarly approach to the law rather than a concern with its practical application.

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[122] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 210–11.

[123] The *Kitāb Adab al-Qāḍī* contains a brief section on the *waqf*. In this section, al-Khaṣṣāf focuses on the steps a *qāḍī* should undertake to ensure the creation of a valid endowment. Al-Khaṣṣāf, *Adab al-Qāḍī*, 75–76.

Legal Reasoning

Calder defined the "discursive tradition" as "dominated by (1) generalizing activity, the search for categories and (2) analogical reflection, the search for parallels within the known juristic structure."[124] By contrast, the "hermeneutic tradition" purported to derive law exegetically from Prophetic sources.[125] According to Calder, second-century A.H. Islamic legal thinking was primarily discursive, but hermeneutical legal reasoning gradually supplanted the discursive tradition over the course of the third and fourth Islamic centuries. The different uses of past authorities in the two *waqf* treatises is evidence that the two works represent distinct stages in this evolution towards a hermeneutically-derived *sharīʿa*.

Application of Calder's two categories of legal reasoning to the *Aḥkām al-Waqf* of Hilāl reveals that Hilāl's legal reasoning is almost exclusively discursive. Hilāl makes explicit reference to analogical reasoning (*qiyās*),[126] and, as analyzed in chapter three, the dominant concern in the introduction of his treatise is with the creation and clarification of legal categories. Even Hilāl's use of Prophetic and Companion precedents is consistent with the discursive tradition. According to Calder, early discursive legal literature exhibits two major types of juristic exposition: the dialogue and exempla.[127] The former, characterized by the use of the *qultu/qāla* dialectic[128] and the term *raʾy* (*a-raʾayta*, *arā*, *yarā*, etc.) "presents the law in a manner which emphasizes the dynamic, reflective, and productive capacities of legal thinking."[129] Exempla, by contrast, serve to prove or justify the law, but do not act as exegetical sources for the law.[130] While Hilāl does make reference to the "*waqf*s" of the early Islamic community (see chapter three), he does not use these references to derive the law, but rather, to confirm the categorical distinctions created by his own independent reasoning (*raʾy*).

If Hilāl's *waqf* treatise constitutes a clear example of the discursive tradition, the legal reasoning in al-Khaṣṣāf's work shows signs

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[124] Calder, *Studies*, 7.
[125] Calder, *Studies*, 8.
[126] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 22, 199, 225, 265, 276, 292, 299.
[127] Calder, *Studies*, 53.
[128] Calder, *Studies*, 8.
[129] Calder, *Studies*, 53.
[130] Calder, *Studies*, 54.

of incorporating elements of hermeneutical exegesis. On the one hand, it is apparent that al-Khaṣṣāf's text exhibits much of the same discursive legal thinking as Hilāl's: its primary concern is to define categories of valid and invalid *waqf*s through a "dialogue and exempla" schema. On the other hand, some aspects of al-Khaṣṣāf's legal thinking are derived hermeneutically. For instance, while both Hilāl and al-Khaṣṣāf discuss the level of wealth at which a person ceases to be considered poor and so becomes ineligible for a *waqf* dedicated to the "poor and destitute," they arrive at their determinations through different discursive traditions. In the *Aḥkām al-Waqf*, Hilāl states that the limit is 200 *dirham*s for which he seeks support in exempla from an *ikhtilāf* between Abū Khālid Yūsuf b. Khālid (d. 189–196/805–812)[131] and Abū Ḥanīfa (d. 150/767):

> I said: What is your opinion if the second yields [of the *waqf*] arrive and a man from among the poor has already acquired—by means of the yields or by other means—200 or more *dirham*s or twenty *dīnār*s?
> He said: Then he has no right to these new yields.
> I said: But why?
> He said: Because he is rich. Abū Khālid said, "The rich are those with fifty *dirham*s." As for Abū Ḥanīfa, may God's mercy be upon him, he used to say, "200 *dirham*s."[132]

By contrast, when al-Khaṣṣāf is pressed to stipulate the amount of *dirham*s that distinguishes a rich person from a poor one, a past authority (in this case, the Prophet) is used to derive the rule of law

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[131] Abū Khālid Yūsuf b. Khālid reportedly died in the year 189/805 or 196/812 at the age of sixty-seven. No explanation is given for the disparity in his reported death dates. As will be discussed in chapter four, this dissimilarity in death-dates may be a result of what G. H. A. Juynboll has coined an "age trick." Aḥmad b. ʿAlī Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb* (Hyderabad: Dā'irat al-Maʿārif al-ʿUthmāniyya, 1325/1906), 11: 411–13; Juynboll, *Muslim Tradition* (Cambridge: Cambridge University Press, 1983), 46–48; idem, "Nāfiʿ, the *mawlā* of Ibn ʿUmar, and his position in Muslim *ḥadīth* literature," *Der Islam* 70 (1993), 219–23; idem, "The Role of the *Muʿammarūn* in the Early Development of the *Isnād*," *Wiener Zeitschrift für die Kunde des Morgenlandes* 81 (1991), *passim*.

[132] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 66. It is possible that Abū Khālid was deriving his fifty *dirham* limit from the Prophetic *ḥadīth* cited by al-Khaṣṣāf. Nonetheless, even if Abū Khālid had the Prophetic *ḥadīth* in mind when he spoke, it is significant that neither he nor Hilāl felt obligated to mention that the Prophet had set this limit. In consideration of Schacht's "back-projection" thesis, it is also possible that the fifty *dirham* limit was "raised" to the level of a Prophetic *ḥadīth* during the course of the third century A.H.

exegetically rather than to provide support, as an exemplum, for al-Khaṣṣāf's own discursively-formed legal opinion:

> I said: And likewise, if he says "*ṣadaqa mawqūfa* for the poor of my household."
> He said: The *waqf* is permitted for them, and the yields are for all of those who are poor among them.
> I said: And who are the poor who are included in this *waqf*?
> He said: It was transmitted on the authority of the Messenger of God that he said: "He who possesses fifty *dirham*s or its equivalent in gold is considered a rich man."[133]

The presence of hermeneutical elements is even more pronounced in al-Khaṣṣāf's introduction where the sequential presentation of Prophetic and Companion *ḥadīth*s forms an implicit exegetical link between the principles conveyed in these *ḥadīth*s and the discursive legal reasoning which dominates the remainder of the treatise.

* * *

In spite of these differences in tone and legal reasoning, the numerous similarities between the two works indicates that they emerged from within the same legal culture. The treatises rely on similar literary conventions and argumentative strategies to explicate and define the law. They are also clearly "Ḥanafī"[134] texts. The specifically Ḥanafī milieu is reflected in the references to the opinions of early Ḥanafī jurisprudents as well as the absence of polemics against the "personal schools" that had coalesced around the figures of Mālik b. Anas, al-Shāfiʿī and their disciples.[135] The treatises also present two of the clearest expositions of rationalist discourse (*raʾy*) prior to the convergence of traditionalism and rationalism in the fourth Islamic century.[136] For 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. In fact, if

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[133] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 38. Al-Dāraquṭnī considered this tradition to be weak. Al-Dāraquṭnī, *Kitāb Takhrīj al-Aḥādīth al-Ḍiʿāf* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1990), 224–25.

[134] The problem of categorizing third-century jurists and their texts as "Ḥanafī" was addressed in the introduction to chapter one.

[135] The wording of this sentence closely parallels the ideas of Brockopp in his discussion of why the *Mukhtaṣar* of Ibn ʿAbd al-Ḥakam should be understood as a Mālikī text. Brockopp, "Early Islamic Jurisprudence in Egypt," 172.

[136] Hallaq, "Was al-Shāfiʿī the Master Architect?," 600–01.

one excludes the introduction to al-Khaṣṣāf's *waqf* treatise, there is only one full *ḥadīth* cited between the two works.[137] As the next two chapters illustrate, however, while discursive rationalism would give legal definition to the substantive law of *waqf*, it ultimately required an exegetical superstructure to legitimize this *ra'y*-generated legal framework.[138]

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[137] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 151.

[138] Later Ḥanafī jurists did ground their discussions of the *waqf* in a more hermeneutical milieu. For example, the fourth-century *Sharḥ al-Maʿānī al-Āthār* of al-Ṭaḥāwī (d. 321/933) illustrates the influence of the traditionalist movement on Ḥanafī *ra'y*. The section on *waqf*s in the *Sharḥ* is primarily an exercise in hermeneutical exegesis with an emphasis on reconciling Prophetic *ḥadīth*s with earlier Ḥanafī legal decisions. Al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār*, 4: 95–98. Calder has described al-Ṭaḥāwī's use of *ḥadīth*s in the *Sharḥ* as an attempt "to demonstrate that the principles of Ḥanafī law can be established by reference to Prophetic *ḥadīth* and, conversely, that, whatever the appearances to the contrary, there are no reliable Prophetic *ḥadīth* that contradict Ḥanafī law." Calder, *Studies*, 235. Likewise, the fifth-century jurist al-Sarakhsī (d. *ca.* 483/1090) begins his discussion of the *waqf* by pointing out that the Qur'ān uses the verb *waqqafa*, although he does not seem to be bothered by the fact that the Qur'ān's use of this verb has nothing to do with sequestering property. Al-Sarakhsī, *Al-Mabsūṭ*, 12: 27. Al-Sarakhsī also includes a number of full *ḥadīth*s, and makes several references to the practices of the early Muslim community. Al-Sarakhsī, *Al-Mabsūṭ*, 12: 28–31, 35. This description should not obscure the fact that al-Sarakhsī's work includes elements of rationalist discourse; in fact, many of the *qultu/qāla* sections in the *Mabsūṭ* mimic the literary style of the *waqf* treatises. But what differentiates his work from that of his third-century predecessors is that he is more cognizant of the need to include hermeneutical elements in his discussion of the *waqf*.

CHAPTER THREE

GIVING LEGAL DEFINITION TO THE *WAQF*

I. *The Near Eastern Milieu of Trust Law Before the* Waqf

The title of this work claims that Hilāl and al-Khaṣṣāf played a critical role in the creation of a new legal institution. And yet, it is also clear that Hilāl and al-Khaṣṣāf did not invent the trust. The legal systems of the Near East had historically sanctioned various forms of endowments with trust-like properties involving the transfer of property from A to B for the benefit of C, the separation of principal and usufruct, the creation of inalienable endowments for charitable purposes, etc. There is also evidence from the historical record of an existing nomenclature of trust practices within Islamic society even before the *waqf* treatises came into existence. What Hilāl and al-Khaṣṣāf accomplished was the transformation of this nomenclature into a new, distinctly *Islamic* form of the trust—the *waqf*.

The *waqf* treatises reveal that use of the term *waqf/awqāf* and its verbs *waqqafa/awqafa* was exceptional in first and second-century A.H. Islamic legal discourse. In general, neither early juristic discourse nor the *ḥadīth*s which form the basis for the legitimacy of the *waqf* used this term when discussing pious endowments.[1] Instead, there existed a number of terms—*ṣadaqa, ḥubs, ṣadaqa muḥarrama, ṣadaqa maḥbūsa, ṣadaqa ḥubs*^{an}, *ḥubs mawqūfa, ṣadaqa ḥabīs, ḥabīs ṣadaqa, ṣadaqa musabbala, ṣadaqa mafrūḍa, ṣadaqa mu'abbada, ṣadaqa mawqūfa*, or *maḥbisa*

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[1] One of the earliest usages of *waqf/waqqafa* is found in Yaḥyā b. Ādam (d. 203/818), *Kītāb al-Kharāj* (Cairo: al-Maṭba'a al-Salafiyya, 1964), 26, no. 47, in which the author employs the verb "*waqqafa*" to refer to 'Umar b. al-Khaṭṭāb's pious endowment: "*innamā waqqafa 'Umar b. al-Khaṭṭāb*." Al-Shāfi'ī also uses the term "*waqf*," but seems to prefer other terms such as "*ḥubs*," "*aḥbās*," "*ṣadaqa mawqūfa*," and "*ṣadaqa muḥarrama*." Al-Shāfi'ī, *Kītāb al-Umm*, 4: 51–61. The title to the no longer extant *Kītāb al-Wuqūf wa'l-Ṣadaqāt* of Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804) also suggests that the second-century jurist used the term "*waqf*." However, without the actual text of al-Shaybānī's treatise it is impossible to confirm that the title accurately reflects the contents of the treatise.

muʿtiqa—that had come to be construed as establishing pious, charitable endowments that continued "until God inherits the Earth and those on it."[2] The fact that so many expressions had come to signify—perhaps—the same legal concept is an indication of the diversity of trust-like practices and terms in the Near East, and provides evidence for the organic development of Islamic law during its first two centuries.[3]

In the aftermath of the Arab conquests and the conversion of conquered populations to Islam, Islamic society had incorporated the practices, and, presumably, the legal terminology of various Near Eastern cultures. Whether a legal system can function satisfactorily with an array of terms for a single legal concept is an interesting question. In the case of pious endowments, however, the confusion created by these multiple terms may have been quite acute for two reasons. First, terms such as "*ṣadaqa*" had developed multiple meanings by the third century A.H., a situation that would have created significant legal ambiguity when parties contested the establishment of a pious endowment. Second, with the absorption into Islamic society of previously "foreign" cultural practices through conversion to Islam, there must have existed a range of indigenous property conveyance customs that, to a greater or lesser extent, resembled pious endowments. Whether these practices conflicted with the Islamic laws of bequest and inheritance would have become an increasingly common question over the course of the second and third centuries A.H.

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[2] Qur'ān 19.40. This expression, used in *waqf* deeds to imply perpetuity, is found in the deeds of the Prophet's wife, Ṣafiyya bt. Ḥuyayy, his Companion, ʿUqba b. ʿĀmir, and the deed in the *Kītāb al-Umm* of al-Shāfiʿī. Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 14–15; al-Shāfiʿī, *Kītāb al-Umm*, 4: 59.

[3] In spite of this plethora of terms, scholars of the *waqf* have tended to conflate their meanings and refer to them all as "*waqf*." For example, in an article on first-century A.H. *waqf*s, Moshe Gil states that during the early period, "*ṣadaqa* was used as synonym for *waqf*." Gil, "The Earliest *Waqf* Foundations," *JNES* 57/2 (1998), 130. Likewise, Anwār Aḥmad Qadrī describes the *waqf* as "a kind of *ṣadaqah*," and he observes that the word *waqf* is similar in form and meaning to the word *ḥubs* (pl. *aḥbās/ḥabūs*) used in North Africa, which has the legal meaning of "detention" or "tying up." Qadrī, *Islamic Jurisprudence*, 455. This conflation of terms has not been limited to modern scholars. The fifth-century A.H. Ḥanafī jurist, al-Sarakhsī stated that the word "*waqf*" is synonymous with sequestration (*ḥubs*) and withholding (*manʿ*), and that the term signifies "the sequestration of that which is owned from the potential ownership of someone else." Al-Sarakhsī, *Al-Mabsūṭ*, 12: 27. In the writings of Hilāl and al-Khaṣṣāf, however, important legal distinctions are drawn between these terms, see *infra*, section two.

While the content of the *waqf* treatises indicates that the signifier "*waqf*" emerged as a means to bring order and clarity to this area of law, the nomenclature of trust practices that formed the backdrop to the creation of the *waqf* treatises remains rather vague, making it hard to measure the accomplishment of the treatise writers. There exists, however, a set of works that may shed light on the milieu of Near Eastern trust law confronting third-century jurists—the writings of historians who have attempted to divine the foreign origins of the *waqf*.

Examining these arguments concerning the alleged foreign origins of the *waqf* gives both a sense of the terrain of Near Eastern trust practices at the time of the *waqf* treatises and may explain how terminological confusion arose in this area of law. The fact that historians have been able to find several different foreign origins for the *waqf* illustrates quite nicely what must have been the problem facing third-century jurists: seemingly every Near Eastern culture had practices that permitted trust formation, creating a plethora of trust law, but no distinctly Islamic trust.

Reliance on these arguments, however, poses an interesting question—is the *waqf* really new at all? Perhaps Hilāl and al-Khaṣṣāf merely "borrowed" a foreign form of the trust and gave it a new name. I actually agree with the argument that the "*waqf*" is infused with elements of foreign practices. What I do not agree with, however, is the contention that these echoes of foreign practices make the *waqf* a "borrowed" institution. The creation of the signifier "*waqf*" was a unique Islamic solution to what may have been the predominant problem facing jurists in the third Islamic century—the creation of a coherent Islamic law within the context of an increasingly heterogeneous Muslim population whose cultural (and legal) practices had origins outside an Arab-Islamic context. If "foreign" practices seeped into the substantive law of *waqf*, they likely did so unconsciously, as an unintended byproduct of the treatise authors' attempts to bring order to this area of law.

Byzantine/Roman Origins

Some of the earliest speculations into the foreign origins of the *waqf* centered on two Byzantine and Roman institutions—the *res sacrae* and the *piae causae*. Beginning in the nineteenth century, historians observed that the Roman *res sacrae* and the Byzantine *piae causae*

resembled the *waqf khayrī* or public endowment. Like the *waqf khayrī*, the *res sacrae* consisted of property consecrated for a religious purpose—usually the construction of a temple—that became inalienable.[4] The *piae causae* also shares a number of features with the Islamic *waqf*. Both are inalienable properties managed by administrators, and supervised by religious functionaries—the bishop for the *piae causae* and the *qāḍī* for the *waqf*.[5] More significantly, the charitable purposes of the *piae causae* parallel those of the *waqf*—relief for the poor, the ransom of captives, and the construction of churches, hospitals, hospices for travelers, orphanages, and almshouses.[6] The similarities between the *piae causae* and the *waqf khayrī* led one historian to conclude that scholars should look to Byzantium for the origins of the *waqf*:

> By way of conclusion, it must be said that there is no direct literary evidence that a conscious grafting occurred between Byzantine and Islamic religious foundations. Nonetheless, the analogy between the legal conditions for creating *piae causae* and the principles set forth by [early Ḥanafī jurists] offers convincing argument that such a borrowing had in fact occurred.[7]

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[4] Domenico Gatteschi, *Êtude sur la propriété foncière, les hypothèques et les wakfs* (Alexandria: Edward A. van Dyck, 1869), 284.

[5] *EI*[1], *s.v.* "*Wakf*," W. Heffening, 4: 1098.

[6] P. W. Duff, "The Charitable Foundations of Byzantium," in *Cambridge Legal Essays Written in Honour of and Presented to Doctor Bond, Professor Buckland, and Professor Kenny* (Cambridge, England: W. Heffer & Sons, Ltd., 1926), 83; Demetrios J. Constantelos, *Byzantine Philanthropy and Social Welfare* (New Brunswick, NJ: Rutgers University Press, 1968), 149–278; idem, *Poverty, Society and Philanthropy in the Late Mediaeval Greek World* (New Rochelle, NY: Aristide D. Caratzas, Publisher, 1992), 117.

[7] Barnes, *Introduction to Religious Foundations*, 16. Barnes' conclusion is based on the questionable premise that correlation implies causation. Barnes is not the first scholar of Islamic history to rely upon this technique. In *The Rise of Colleges*, Makdisi uses this form of reasoning as the foundation for his belief that many facets of the medieval European educational system were consciously borrowed from the Muslim *madrasa* system: "When the technical terms used in the two parallel cultures frequently correspond in their meanings not only in form, so that a term may be said to be the direct translation of its corresponding term, but in function as well, then the correspondence cannot reasonably be dismissed as the result of chance, as in no way related by causation." Makdisi, *The Rise of Colleges*, 286–88. See also Makdisi, "On the Origin and Development of the College," in *Islam and the Medieval West*, ed. Khalil I. Semaan (Albany: State University of New York Press, 1980), 39–40. This same form of reasoning forms the basis for the assertions of Makdisi, Henry Cattan, and Monica Gaudiosi that the English trust has its origins in the Islamic *waqf*. See Makdisi, *The Rise of Colleges*, 285–87; idem, "On the Origin and Development

These different theories about the Byzantine and Roman origins of the *waqf* are not without their detractors. In his 1910 work on Algerian law, Marcel Morand dispensed with the *res sacrae* theory. According to Morand the *res sacrae* differed from a *waqf* in that the *res sacrae* encompassed only the religious buildings and the lands to which they were affixed. By contrast, a *waqf* included revenue-bearing properties to support the religious endowments. Another difference between the two institutions concerned the creation and administration of the endowments. While the *waqf* was formed from the initiative of a private person and its administration remained in the hands of private individuals, a *res sacrae* could not be created by an individual, but rather had to be authorized by the Roman senate and consecrated by the passage of a statute or a *senatus consultum*. Moreover, the administration of the *res sacrae* remained in the hands of the state.[8] The *res sacrae* theory appears never to have recovered from Morand's initial criticisms. Since the publication of Morand's book, I have found only one historian—Amitabh Mukherji—who has attempted to revive this argument.[9]

The *piae causae* theory has also received its share of criticism. A common objection to the *piae causae* link centers on the third-party, or trustee, to whom the endowment is entrusted. In Islamic law, trusteeship of the *waqf* passes to administrators stipulated by the founder in the *waqf* deed. Only in cases where no suitable administrators can be found will the *qāḍī* take over trusteeship of the *waqf*. By contrast, after Constantine's rise to power, all Christian charitable donations had to be given to Church authorities who then held the properties in trusteeship for their founders.[10] As repositories for these charitable endowments, the Church was often given the choice

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of the College," 39–40; idem, "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court," *Cleveland State Law Review* 34 (1985–86), 3–18; Cattan, "The Law of *Waqf*," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington D.C.: The Middle East Institute, 1955); Gaudiosi, "The Influence of the Islamic *Waqf* on the Development of the Trust in England," 1231–61. For a more recent examination of this issue, see Gilbert Paul Verbit, *The Origins of the Trust* (Xlibris Corporation, 2002).

[8] Marcel Morand, *Études de droit musulman algérien* (Algiers: Jourdan, 1910), 244–45.

[9] Amitabh Mukherji, "Islamic Institutions of *Waqf*s: Origin and Practice in Muslim India," *Islamic and Comparative Law Quarterly* 10–11 (1990–91), 114.

[10] Duff, "The Charitable Foundations of Byzantium," 85.

to spend the property's wealth as it saw fit, and it was through Church initiative that many pious foundations were constructed.[11] Due to the fact that the Church acted as a trustee, and could determine how the endowment was used, some historians have characterized Byzantine endowments as donations to churches for pious causes rather than independently-controlled public endowments.[12] Claude Cahen presented another objection to the *piae causae* theory in his article, "Réflexions sur le *waqf* ancien." Cahen contended that the *piae causae* could not have been the precursor to the *waqf*, because Byzantine influences were restricted to Egypt and did not outlast the Fāṭimid dynasty. According to Cahen, with the fall of the Fāṭimids to Ṣalāḥ al-Dīn in 567/1171, the Ayyūbids introduced into Egypt the "Oriental form" of the *waqf* and displaced the indigenous Byzantine-inspired endowments.[13] Cahen concluded, therefore, that claims of Byzantine influence on the Islamic *waqf* were "excessive" because the *piae causae* neither reached beyond Egypt nor survived into the sixth/thirteenth century.[14] Nor has it gone unremarked that neither the *res sacrae* nor the *piae cause* offers much insight into the origins of the *waqf ahlī*. As Schacht remarked nearly a half-century ago, one will have to look elsewhere for the origins of these familial endowments.[15]

Schacht, himself, suggested that the Roman *fidei commissum* might be the inspiration for the *waqf ahlī*.[16] Like the *waqf ahlī*, the *fidei commissum* developed in response to a prohibition against legacies—in the case of Roman law—to foreigners and exiles.[17] By means of the *fidei commissum*, decedents were able to circumvent these testamentary restrictions and exert control over the devolution of their estates by entrusting the legacy to a third party (the trustee)[18] who would then

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[11] Duff, "The Charitable Foundations of Byzantium," 85.

[12] Makdisi, *The Rise of Colleges*, 226; William R. Jones, "Pious Endowments in Medieval Christianity and Islam," *Diogenes* 109 (1980), 23–36.

[13] Claude Cahen, "Réflexions sur le *waqf* ancien," *Studia Islamica* 14 (1961), 51.

[14] Cahen, "Réflexions sur le *waqf* ancien," 51–52.

[15] Joseph Schacht, "Droit byzantin et droit musulman," in *Convegno di scienze morali storiche e filologiche* (Rome: Accademia Nazionale dei Lincei, 1957), 215.

[16] The earliest reference that I have found for this connection between the *waqf* and the *fidei commissum* is a 1914 article by "Jurist." The author of this article, however, found the resemblance to be superficial. "Jurist," "*Waqf*," 182.

[17] Verbit, *Origins of the Trust*, 78.

[18] Technically, the trustee was really a legatee, because he would have received the property by means of a bequest. Verbit, *The Origins of the Trust*, 78.

hand the property over to the intended beneficiary or beneficiaries.[19] Under both systems the founder designated property to relatives for a fixed period, or until their extinction, and nothing was given to the beneficiaries from the property other than beneficial use (*al-manfaʿa*).[20] Similarly, neither the principal of the *waqf* nor the *fidei commissum* was to be sold, given as a gift, or inherited.[21] Schacht noted, however, that a comparison between the two institutions tended to highlight their considerable differences rather than their similarities.[22] One obvious difference between the two institutions is that the *fidei commissum* involves a *post mortem* transaction of property similar to a testamentary bequest[23] while the creation of the *waqf* generally occurs *inter vivos*.[24] Nor does it appear that the classical *fidei commissum* implied any separation between the principal and usufruct. In the case of the *waqf*, the property's principal is rendered inalienable through sequestration and only the usufruct is distributed to the endowment's beneficiaries. The *fidei commissum*, by contrast, involves a complete transfer of the property, albeit via a third party. This last observation is not new. "Jurist," in his 1914 article on the *waqf*, observed that the *fidei commissum* failed to convey the idea of separating usufructory rights for specified beneficiaries from a property's principal.[25]

There are legal concepts in Roman (and Byzantine) law—unrelated to the *fidei commissum*—in which usufructory rights are separated from ownership of the principal. For example, prior to reforms

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[19] Brendan F. Brown, "The Ecclesiastical Origin of the Use," *Notre Dame Lawyer* 10 (1935), 361; Vincent R. Vesey, "*Fideicommissa* and Uses: The Clerical Connection Revisited," *The Jurist* 42 (1982), 203. Initially, there appears to have been no legal obligation on the "trustee." Under the Emperor Augustus (63 B.C.–14 C.E.), the beneficiary (*fideicommissarius*) was given a legal remedy against the trustee, and in the time of Justinian, the *fidei commissum* moved from being an extra-legal device to one formally regulated by the legal code, with the trustee's obligation becoming enforceable in court. Kenelm Edward Digby, *An Introduction to the History of the Law of Real Property* (Oxford: Clarendon Press, 1875), 241–42; Verbit, *Origins of the Trust*, 79.

[20] Aḥmad Faraj al-Sanhūrī, *Majmūʿat al-Qawānīn al-Miṣriyya* (Cairo: Maṭbaʿat Miṣr, 1949), 1/3: 7–8. Cited in Amīn, *Al-Awqāf*, 13.

[21] Al-Sanhūrī, *Majmūʿa al-Qawānīn al-Miṣriyya*, 1/3: 7–8. Cited in Amīn, *Al-Awqāf*, 13.

[22] Schacht, "Droit byzantin et droit musulman," 215.

[23] F. W. Maitland, "The Origin of Uses," *Harvard Law Review* 8 (1894), 136–37; David Johnston, *The Roman Law of Trusts* (Oxford: Clarendon Press, 1988), 283.

[24] The one exception is the *post mortem* "testamentary *waqf* " discussed in section three of this chapter.

[25] "Jurist," "*Waqf*," 182.

introduced by Justinian, it was possible for the legal owner of a property to pass beneficial use to another party.[26] However, the principal of this property could remain in the possession of the owner,[27] which differs from the requirement on *waqf* founders to relinquish ownership. There also existed in Roman law the idea of *ususfructus*, or the right of temporary enjoyment to a thing, as distinct from the ownership of it.[28] Although this concept again creates a distinction between beneficial use and legal title, the analogy with the *waqf* exhibits a number of shortcomings. As Kenelm Digby observed, the idea of *ususfructus* does not imply any binding trust relationship between the owner and the usufructuary by which the former is compelled to hold to the use of the latter.[29] Rather, Digby claims that "[t]he relation between the two rather resembles that of a tenant for life, or other limited owner, and the reversioner in fee."[30]

If one merges the *fidei commissum* with those aspects of Roman (and Byzantine) law which permitted the separation of usufructory rights from a property's principal, it is possible to construct parallels between the *waqf* and these two legal systems. However, this blending of different legal concepts to find the origins of the *waqf* in the *fidei commissum* seems somewhat strained. While Roman and Byzantine law may have contained elements—that, when aggregated—resembled the Islamic *waqf*, neither legal system appears to have possessed a single institution that mirrored the *waqf*.

Jewish Origins

The *waqf* also manifests similarities with the Jewish *heqdēsh*. Although *heqdēsh* originally referred to property specifically dedicated to the needs of the Temple, after the Temple's destruction, the term acquired a more general meaning of property set aside for charitable purposes.[31] Many of these purposes have parallels with the *waqf*: "the poor in general", "the poor relatives of the donor", "synagogal needs" (Scrolls of Law, cantor's salary, etc.), "the ransom of captives", "the

[26] Digby, *Introduction to the History of the Law of Real Property*, 240.
[27] Digby, *Introduction to the History of the Law of Real Property*, 240.
[28] Digby, *Introduction to the History of the Law of Real Property*, 241.
[29] Digby, *Introduction to the History of the Law of Real Property*, 241.
[30] Digby, *Introduction to the History of the Law of Real Property*, 241.
[31] *EJ*, s.v. "*Hekdesh*," 8: 279–84.

burial of the dead", "dowries for orphans about to be married", and the construction of homes for the aged, hospitals, and hospices for travelers.[32] Like the *waqf*, a *heqdēsh* is removed from ownership and not subject to the normal transactions of property.[33] The two pious endowments also possess similar administrative features. The procedures for appointing administrators/trustees to a *heqdēsh* resemble those delineated in the *waqf* deed in al-Shāfiʿī's *Kitāb al-Umm* (see Appendix C),[34] and, similar to the relationship between the founder of a *waqf* and the *qāḍī*, the founder of a *heqdēsh* could appoint an *apotropos*, or guardian/trustee, but the court (or rabbi) remained the guardian of the *heqdēsh* and retained supervisory rights over the *apotropos*.[35]

Studies of fifth/eleventh and sixth/twelfth century Jewish endowment deeds from the Cairo, Geniza, also lend support for claims of cross-cultural influence between the *heqdēsh* and the *waqf* during the "classical" Islamic period. These deeds, however, show evidence of cultural influence *from* Islamic law, not influence *on* Islamic law. For example, the Geniza documents reveal that it was not uncommon for Jewish deeds to use the Islamic terms "*waqf*" and "*ḥubs*"—written in Hebrew—to refer to pious endowments.[36] Likewise, the phrase "for the poor" (*liʾl-aniyīm*) became a synonym for the *heqdēsh*, and, just as in a *waqf* deed, the phrase was considered sufficient to designate a pious endowment.[37] Due to the Islamic influences on these *heqdēsh* deeds, it is difficult to use these documents as evidence for the influence of the *heqdēsh* on the *waqf*. Nevertheless, the fact that Islamic terminology and concepts related to the law of *waqf* were incorporated into Jewish endowment deeds demonstrates that cross-cultural transmissions could and did occur between different legal systems.

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[32] *EJ*, s.v. "*Hekdesh*," 8: 284.

[33] *EJ*, s.v. "*Hekdesh*," 8: 280. The *heqdēsh* was believed to be in the ownership of God. Some of the Islamic schools of law held that the *waqf* was similarly owned. *EI*[2], *s.v.* "*Waḳf*," R. Peters, 11: 62.

[34] Al-Shāfiʿī, *Kitāb al-Umm*, 4: 60–61.

[35] *EJ*, s.v. "*Hekdesh*," 8: 285.

[36] Moshe Gil, *Documents of the Jewish Pious Foundations from the Cairo Geniza* (Leiden: E. J. Brill, 1976), 248, document 45. Gil also uses the term "*qōdesh*" to refer to the *heqdēsh*. The terms are considered synonymous with one another.

[37] Gil, *Documents of the Jewish Pious Foundations*, 4, 299, document 66.

Persian Origins

Anahit Perikhanian has proposed that the origins of the *waqf* are to be found in Sassanid Persia and that the *pat ruwan*, or *ruwānagān*, provides the basis for the later Islamic *waqf*:

> There can be no doubt of the Iranian origin of the Muslim *waqf*. The resemblance in legal régime between Iranian endowments for a fixed purpose and *waqf* properties is striking. There is the same non-consumable "principal" . . . the same way of distributing the income . . . The conditions and forms of the foundation are the same, including the irrevocability of the act of institution. Similar too is the way of administering *waqf* properties through trustees (*nāzir*, *mutawallī*), nominated (at least in the case of the first trustee) by the founder (*wāqif*) himself.[38]

In support of this conclusion, Perikhanian remarks that both Islamic and Sassanian property law differentiate between a property's principal and its usufruct, and that both systems stipulate that the two can be distributed separately.[39] For example, in the following passage from the Sassanian law-book, *The Book of a Thousand Judgements* (*ca.* 620 C.E.),[40] a distinction is drawn between usufructory revenues and the principal of a property:

> If a thing conveyed (as an endowment) "for the soul" bears fruit (= brings revenue), the fruit is (also) dedicated; but if it does not bear fruit, then the "principal" (shall be dedicated as well as) that which remains after the payment of the taxes and dues (with which the thing is encumbered), and of the expenses for the maintenance of the "principal," and of the payments ("payments and rations") to the trustees.[41]

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[38] Anahit Perikhanian, "Iranian Society and Law," in *The Cambridge History of Iran*, ed. Ehsan Yarshater (New York: Cambridge University Press, 1983), 3/2: 664. R. L. Zettler has also noted parallels between a pre-Islamic Iranian temple and the *waqf ahlī*. Zettler suggests that the position of a particular family group, the Ur-Meme, may be explained by assuming that they administered the temple in a manner similar to that of a *waqf ahlī*. Nevertheless, Zettler stops short of claiming that this type of administrative structure was a precursor of the later Islamic *waqf*. See Zettler, *The Ur III Temple of Inanna at Nippur. The Operation and Organisation of Urban Religious Institutions in Mesopotamia in the Late Third Millennium B.C.* (Berlin: D. Reimer, 1992), 211ff.

[39] Perikhanian, "Iranian Society and Law," 3/2: 655.

[40] Anahit Perikhanian and Nina Garsoïan, eds. and trans., *The Book of a Thousand Judgements: A Sassanian Law-Book* (Costa Mesa, CA: Mazda Publishers, 1997), 12.

[41] *The Book of a Thousand Judgements*, 97, no. 34, 2–3.

The creation in perpetuity of a *ruvānagān* likewise bears a striking resemblance to the endowment of a *waqf* in that the founder's words "for the soul" remove the property from his or her possession and make the property inalienable:

> If he declares the following: "I have declared (the transfer) of a thing (as a foundation) 'for the soul', and let Mihrēn possess (= be trustee of) the thing which I declared transferred 'for the soul'", then it (= the thing) cannot be taken back from "the soul" (= from the endowment "for the soul") because piety (lies) in (the transfer) "for the soul" (lit. "in the soul"). And Mihrēn can say that it was transferred for a pious purpose.[42]

Additionally, Perikhanian has observed that Sassanian law distinguished between proprietary and usufructory rights, and permitted two types of charitable trusts—one for public monuments and one for private families—two concepts also present in the Islamic *waqf*.[43] *The Book of a Thousand Judgements* even contains a passage which is similar to legal arguments and conclusions found in the *waqf* treatises. In this section of the text, the author of the Sassanian law book remarks that if the founder of an endowment fails to say certain phrases, then the endowment "is not well (= irregular)," and the scope of the endowment is restricted.[44] As discussed in the next section, this analysis is reminiscent of the definitional efforts of Hilāl al-Ra'y in the *Aḥkām al-Waqf*.

Of all the claims for the foreign origins of the *waqf*, the claim of Sassanian influence seems the most compelling. One scholar, Said Amir Arjomand, has gone so far as to claim that this influence "has now been incontestably established."[45] In spite of Arjomand's enthusiasm for this theory, the moment one privileges any one of these theories, a problem develops—did the other foreign legal systems

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[42] *The Book of a Thousand Judgements*, 99, no. 34, 12–15; Perikhanian, "Iranian Society and Law," 3/2: 661.

[43] Perikhanian, "Iranian Society and Law," 3/2: 656, 664–65. See, *e.g.*, the passage in *The Book of a Thousand Judgements*, 75, no. 24, 12–13, in which a personal endowment "for the soul" is considered analogous to one constructed for a Fire-temple.

[44] *The Book of a Thousand Judgements*, 99, nos. 34, 15–35, 6.

[45] Said Amir Arjomand, "Philanthropy, the Law, and Public Policy in the Islamic World Before the Modern Era," in *Philanthropy in the World's Traditions*, eds. Warren F. Ilchman, Stanley N. Katz, and Edward L. Queen III (Bloomington, IN: Indiana University Press, 1998), 110.

have no influence on the *waqf*?[46] If they did, how does one measure and allocate the scope of influence and/or borrowing between the potential antecedents? At best, one might tentatively conclude that the evidence supports the claim that the Sassanian trust may have had a significant influence on the *waqf*.

Rejection of Foreign Influences

The supposition that the *waqf* has its origins in foreign legal systems has not met with universal acceptance. In *Roman, Provincial and Islamic Law*, Crone traces the "sudden loss of enthusiasm for the theory of Roman influence" amongst scholars of Islamic law.[47] She cites the inter-war works of G. Bergsträsser and C. A. Nallino as well as the post-war writings of G.-H. Bousquet, A. Hassam and J. Wigmore, who argued that it was Arab custom rather than Near Eastern law (Roman or other) which became incorporated into the *sharīʿa*."[48] In a 1951 article, S. G. Vesey-FitzGerald referred to Roman influences on the *sharīʿa* as "alleged" and categorized these theories as "fallacies" and "infection[s]."[49] In another article, FitzGerald contended that many of the apparent borrowings between Islamic law and pre-existing Near Eastern practices may have resulted from human beings' similar responses to societal needs:

> At times during the Middle Ages the Islamic system appears to have marched on parallel lines with the canon law of the Christian Church. . . .

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[46] Singer has reached a similar conclusion in her analysis of the *waqf*'s origins: "Muslim religion and society first evolved in a region obviously replete with charitable traditions and examples. It is not necessary to sort out the proportionate contribution of each religion or culture to what became the practice of endowment-making in Islam." Amy Singer, *Constructing Ottoman Beneficence* (Albany: State University of New York Press, 2002), 24.

[47] Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate* (London and New York: Cambridge University Press, 1987), 5–6.

[48] Crone, *Roman, Provincial and Islamic Law*, 5. The works to which Crone refers are G. Bergsträsser, "Anfänge und Charakter des juristischen Denkens im Islam," *Der Islam* 14 (1925), 76–81; C. A. Nallino, "Considerazioni sui rapporti fra diritto romano et diritto musulmano," in *Raccolta di scritti editi e inediti*, vol. IV (Rome, 1942); G.-H. Bousquet, "Le mystère de la formation et des origines du *fiqh*," *Revue algérienne, tunisienne et marocaine de législation et de la jurisprudence*, 1947; A. Hassam, "Le droit musulman et le droit roman," *Archives d'histoire du droit orientale*, 1949, with observations by J. Wigmore appended.

[49] S. G. Vesey-FitzGerald, "The Alleged Debt of Islamic to Roman Law," *Law Quarterly Review* 67 (1951), 81–102, esp. 83.

> Most of these parallels are due to what [David de] Santillana calls 'L'identité essentielle de l'âme humaine.' But whatever indebtedness there may be, the Islamic system remains unique and quite unlike any other.[50]

More recently, Calder, Peters and Hallaq have reiterated these objections to foreign influences. Both Calder and Peters have remarked that it is not unusual for different societies to reach similar legal solutions to similar problems.[51] Calder noted that purity laws exhibit similarities across cultures even in the absence of extensive contact,[52] and Peters has cautioned that "[b]efore raising the issue of influence, one should investigate whether the emergence of a certain doctrine or institution can be explained from within a legal system."[53] Hallaq meanwhile has criticized historians for assuming that Arabian society prior to the rise of Islam was a primitive, blank slate waiting to absorb the more cultured Near Eastern civilizations.[54] He has disputed the premise that foreign legal practices and doctrines form the backbone of the *sharīʿa* and professed skepticism towards the widely-held belief that foreign influences made a significant contribution to Islamic law:

> The fundamental structural differences between Islamic and ancient Near Eastern legal systems makes the identification of influences on the former by the latter virtually impossible; for though there persists a nagging suspicion of borrowing, this suspicion can never be confirmed, at least not with the present state of documentation. All that we, in fact, have are some vague similarities between indigenous laws and the *Sharīʿa* that can never conclusively establish borrowings.[55]

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[50] S. G. Vesey-FitzGerald, "Nature and Sources of the *Sharīʿa*," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington D.C.: The Middle East Institute, 1955), 1: 110.

[51] Calder, *Studies*, 210; Rudolph Peters, "Murder in Khaybar: Some Thoughts on the Origins of the *Qasāma* Procedure in Islamic Law," *ILS* 9 (2002), 164.

[52] Calder, *Studies*, 210. This same phenomenon also has been observed by Jacob J. Finkelstein. With the exception of Western legal systems, which were influenced by a peculiar interpretation of the Bible, almost all other societies have reached similar conclusions with regards to compensation for the injury or killing of a person by a domesticated animal. Finkelstein, "The Ox That Gored," *Transactions of the American Philosophical Society* 71/2 (1981), 62–64.

[53] Peters, "Murder in Khaybar," 163.

[54] Wael B. Hallaq, "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law," *JAOS* 110/1 (1990), 81, 83.

[55] Hallaq, "The Use and Abuse of Evidence," 90.

Hallaq has countered that the unique role of the Qur'ān in the formation of Islamic law would have prevented the reception of Roman, Byzantine, Persian and/or Jewish influences: "The law which Muslims encountered in the conquered territories had, as a rule, to be modified to accord with the laws laid down in the Qur'ān. It is no wonder then that attempts to prove some specific debt of Islamic law to other legal systems in conclusive and clear-cut terms have resulted in failure."[56]

Related to these arguments against foreign influence are those which claim that the origins of the *waqf* can be found amongst the practices of *Jāhilī* (pre-Islamic) Arabs. Two of the earliest published pieces promoting this theory—which actually precede the aforementioned arguments—were written by Ömer Hilmî and Syed A. Majid. In the nineteenth century, Hilmî speculated that the *waqf* could be ascribed to the Biblical Abraham/Ibrāhīm.[57] As evidence for this claim, Hilmî noted that Abraham used his wealth to support the poor and the destitute as well as to provision guests and strangers.[58] In a 1908 article Majid asserted that "the institution of *wakf* formed a part of the customary law of Arabia prior to the time of Mohammed."[59] Majid explicitly rejected the premise that Roman law provided the basis for the law of *waqf*: "[O]ne can but hesitatingly affirm that the Arabian law, in spite of its various similarities to the Roman law, was of independent growth and no more influenced by the Roman law than the English common law shorn of all equitable doctrines."[60] Over half a century later Cahen proposed that the *ḥaram*s and *ḥimā*s[61] of the *Jāhilī* Arabs may have provided a legal

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[56] Hallaq, "The Use and Abuse of Evidence," 90.

[57] The fifth-century Muslim jurist al-Sarakhsī noted this connection between Abraham/Ibrāhīm and the *waqf*: "And likewise, Ibrāhīm made a *waqf* of Hebron (al-Khalīl)." Al-Sarakhsī, *Al-Mabsūṭ*, 12: 28.

[58] Ömer Hilmî, *Ithaf ül-Ahlâf fi Ahkâm ül-Evkaf* (Istanbul, 1307/1889), 8–9. Cited in Barnes, *Introduction to Religious Foundations*, 5–6.

[59] Syed A. Majid, "*Wakf* as Family Settlement Among the Mohammedans," *Journal of the Society of Comparative Legislation* 9 (1908), 125.

[60] Majid, "*Wakf* as Family Settlement," 126.

[61] Pre-Islamic *ḥaram*s were sacred places that belonged to no one specific person. The *ḥaram* was protected by a deity, and it maintained special rules and privileges. In particular, fighting was not permitted in the *ḥaram*s, which may explain their centrality in the development of Arabian trading. A *ḥimā*, by contrast, was an expanse of ground created by powerful nomadic lords to protect their flocks from the ill-effects of drought. By creating the *ḥimā*, the lords reserved to themselves, and

and conceptual inspiration for the first Islamic pious endowments. According to Cahen, these two pre-Islamic institutions may have "prepared the minds [of Muslims] for the dissociation of property and usufruct, principal and revenue."[62] And lastly, Maurice Gaudefroy-Demombynes claimed that pre-Islamic pagan shrines provided a prototype for the Islamic *waqf* because the sanctuary property was given to deities, in perpetuity, to be administered by a hereditary caste of priests, an arrangement that later became the basis for Muslim mosques dedicated to God and supervised by the *imām*s.[63]

Unfortunately, any argument constructed on pre-Islamic Arabian practices suffers from unassailable source and interpretive problems. Due to a paucity of pre-Islamic literary materials, this period is almost pre-historical, and what little reliable evidence remains is generally insufficient for concrete conclusions. Moreover, any reliance upon the *Jāhiliyya* period for historical information is complicated by the manner in which Muslim jurists used the "memory" of this period to buttress the *sharīʿa*. As Crone has observed in her discussion of the *qasāma* oath, the historical recollections of the *Jāhiliyya*, rather than preserving a memory of the past, became a medium whereby various practices—foreign and indigenous—were transformed into the customs of the *Jāhilī* Arabs:

> It was because God had raised up a prophet among the Arab tribes that the pagan past of the Arabs was to play a cultural role of considerably greater importance than that of being a storehouse of miscellaneous malpractices and superstitions. . . . [T]he *Jāhiliyya* gave the Arabs an unshakable identity for the simple reason that it had been endorsed by God himself, and it was thanks to this identity that they could appropriate: whatever they took over became unmistakably theirs. Whether they saw the Pentateuch as an account of their own *Jāhiliyya*, projected foreign institutions into their own *Jāhilī* past, or sought inspiration in what little they remembered of *Jāhilī* law, it thus remains true to say that without the *Jāhiliyya*, there would have been no *Sharīʿa*.[64]

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their networks of relations and affiliates, the grazing and watering rights in certain rich pasture lands. *EI*², *s.v.* "*Ḥimā*," J. Chelhod, 3: 393.

[62] Cahen, "Réflexions sur le *waqf* ancien," 56. More recently, Christian Décobert has expanded upon Cahen's conclusions about the influence of the *ḥimā* and the *ḥaram* on the *waqf*. Décobert, *Le mendiant et le combattant*, 336–47.

[63] Maurice Gaudefroy-Demombynes, *Mahomet*, 2d ed. (Paris: A. Michel, 1969), 42–43.

[64] Patricia Crone, "*Jāhilī* and Jewish Law: The *Qasāma*," *JSAI* 4 (1984), 200–01. For a critique of Crone's conclusions concerning the *qasāma*, see Peters, "Murder in Khaybar," 132–67.

In consideration of these historiographical problems, conclusions based on pre-Islamic practices must be viewed—at best—as hunches drawn from a questionable, and sometimes contradictory, source base.[65] For example, John Robert Barnes has called into question the basis for Gaudefroy-Demombynes' conclusions, observing that it remains "an open question . . . whether the first *masdjids*, comprised as they were of a simple open courtyard and sun-dried brick, were in need of land endowments for their support."[66] Barnes also notes that the practice of assigning income to mosques from land revenues did not occur until the end of the first Islamic century.[67] Therefore, to maintain Gaudefroy-Demombynes' conclusion regarding the influence of pre-Islamic practices, one would have to argue that the early Muslims initially forgot, and then later remembered, the institutional structures of their pre-Islamic sanctuaries. As for Hilmî's contention that the *waqf* has its origins in the patriarch Abraham, Barnes observes that this claim is "only conjectural" because, in addition to the enormous source problems presented by such a distant historical figure, there is "little evidence in Genesis to suggest that he gave his wealth to strangers and guests beyond the custom expected of a nomadic tribal leader;—and thus no grounds for regarding almsgiving as a unique activity instituted by Abraham."[68]

Composite Origin Theory

In response to these competing theories, a few historians have suggested that the *waqf* may constitute a composite institution possessing both foreign and Arab-Islamic elements. One of the earliest proponents of this composite theory was—unexpectedly—Schacht,

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[65] For a more optimistic assessment of historians' ability to identify and draw conclusions from pre-Islamic practices, see Peters, "Murder in Khaybar," 132–67.

[66] Barnes, *Introduction to Religious Foundations*, 7.

[67] Barnes, *Introduction to Religious Foundations*, 7. Barnes claims that when the Umayyad caliphs finally began to assign incomes from land revenues, they were "basing themselves on Byzantine, and not pre-Islamic models." This assertion, however, appears to be based on Barnes' conviction that the *waqf* descended from the Byzantine *piae causae*.

[68] Barnes, *Introduction to Religious Foundations*, 6. Mohammad Zain Bin Haji Othman has also concluded that there is no evidence to support the claim that Abraham founded the first *waqf*. Mohammad Zain b. Haji Othman, "Origin of the Institution of *Waqf*," *Hamdard Islamicus* 6/2 (1983), 8.

normally a strong advocate of foreign influences on Islamic law.[69] Schacht argued that the *waqf* consisted of Byzantine elements and Islamic practices from the first and second Islamic centuries:

> The *waḳf* is a good example of the composite nature of the raw material of Islamic law and the qualitatively new character which its institutions acquired; the *waḳf* has one of its roots in the contributions to the holy war which Muhammad had incessantly demanded from his followers in Medina, another in the pious foundations (*piae causae*) of the Eastern Churches, a third in the charities and public benefactions of the early Muslims, and a fourth, which came into prominence later, in the need of the new Islamic society to counteract some of the effects of its law of inheritance.[70]

More recently, Mohammad Othman has tried to conflate these different theories for the origins of the *waqf* into a single, unified theory: "Probably, therefore, the *waqf* came into existence in a conflux of ideas emanating from the Byzantine institution of *piae causae*, charitable institutions and the Iranian one of *ravanakan*. . . ."[71] What both these theories lack, however, is any clear conception of how these foreign legal concepts entered and became fused into the Islamic law of *waqf*.

The Origins of the Waqf

As the previous discussion illustrates there exist a plethora of competing theories suggesting that the *waqf* is partially, or even wholly, descended from foreign and/or pre-Islamic practices and legal doctrines. The claim that the *waqf* is a "borrowed" institution appears to conflict with the claim made in this work—namely, that Hilāl and al-Khaṣṣāf helped give birth to a new species of trust from within a backdrop of existing trust law. In reality, these two positions are

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[69] See, *e.g.*, Schacht's assertion that the maxim "*al-walad li-l-firāsh*" (the child belongs the owner of the marriage bed) originated from the Roman maxim *pater est quem nuptiae demonstrant*. Schacht, *Introduction to Islamic Law*, 21. More recently, Uri Rubin has discussed this maxim in his article "'*Al-Walad li-l-firāsh*' on the Islamic Campaign Against «*Zinā*»," *Studia Islamica* 78 (1993), 5–26. For a critique of Schacht's approach to the question of foreign influences, see Crone, *Roman, Provincial and Islamic Law*, 7–12.

[70] Schacht, *Introduction to Islamic Law*, 19.

[71] Othman, "Origin of the Institution of *Waqf*," 6.

not in conflict if one reconceptualizes what it means to "borrow" a foreign legal institution.

At the risk of oversimplifying, it is not unfair to say that most historians who have studied the origins of the *waqf* have tended to delineate the attributes of the foreign (or pre-Islamic) legal institution, compare these attributes to the *waqf*, and conclude that the *waqf* is a "borrowed" institution. The question that none of these theories has satisfactorily addressed is, how did this borrowing occur? One possibility is that Muslim jurists transcribed the law of a foreign culture and made it "Islamic law." The image of Muslim jurists incorporating wholesale the law of another culture strikes me as unlikely, if not somewhat fantastic, particularly in the area of inheritance law where the Qur'ān exerts a powerful (and fundamentally inflexible) influence on the legal structure. Another possibility, and one that seems more plausible, is that foreign elements seeped into the nascent *sharīʿa* as the juristic class (or the state bureaucracy) consciously adopted the legal practices of foreign/conquered communities. Particularly when the Arab conquerors were a minority population attempting to rule over a larger majority, pragmatic considerations of expediency and efficiency may have led jurists (or bureaucrats) to turn to the existing practices of the conquered peoples to maintain social order.[72] Although this type of conscious borrowing may explain how foreign elements entered the law of *waqf*, there is another equally plausible explanation—*unconscious* borrowing.

"Unconscious borrowing" may appear to be an oxymoron: if a legal culture "borrows" a foreign legal principle or institution, but believes that it is indigenous to its own legal culture, has borrowing occurred? In a literal sense, no. But at the same time, it seems equally incorrect to ignore the strong echoes of foreign antecedents in the law of *waqf*. How then did these foreign antecedents enter Islamic law, if not consciously? The answer lies in the dialogue between law and society that ultimately found legal expression in the *waqf* treatises.[73]

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[72] Peters has made a similar observation in his discussion of the *qasāma* oath. He argues that the second *qasāma* doctrine was originally an administrative measure to secure law and order in the newly founded garrison towns. Peters, "Murder in Khaybar," 139, 158, 161.

[73] Several historians have argued that *istiḥsān* functioned as a means of bringing customary (or in this case, "foreign" cultural practices) in the *sharīʿa*. Schacht,

In the two centuries between the rise of Islam and the creation of the *waqf* treatises, the culture of the Near East had been transformed dramatically. The sharp line separating Arab conquerors and the conquered populations slowly dissolved through conversion to Islam and intermarriage. As the Muslim community became more heterogeneous, the distinction between "foreign" and Islamic practices must have become increasingly confused.[74] As a result, by the beginning of the third century A.H., there was likely no overarching Islamic law of trusts, but merely a collection of local practices—Roman, Byzantine, Persian, Jewish, and Arab—that all shared some similar features, and almost certainly used different terminologies.

The task confronting jurists such as Hilāl and al-Khaṣṣāf was how to bring some measure of uniformity to this diverse landscape of trust practices and terminologies. The legal institution these authors devised to bring order to this milieu of trust practices—the "*waqf*"—permitted Roman, Byzantine, Persian and/or Jewish practices to enter (perhaps unnoticed) into the *sharīʿa*. Whether Hilāl or al-Khaṣṣāf was aware of the "foreign" origins of some of these practices remains an open, and probably unanswerable, question. There is certainly no indication in the *waqf* treatises that either author was attempting to draw a line between "Islamic" and "foreign" practices. Moreover, by the third century A.H., it is not clear whether such a distinction could be made within an increasingly heterogeneous Muslim community. By the middle of the third century there existed within Islamic society a range of trust-like practices whose "foreign" roots had long since been severed and were now seen as a continuation of the practices of the Prophet and his Companions. Just as Islam conjoined people of diverse cultures under one religion, the signifier "*waqf*" fused elements of various institutions—the *res sacrae*, the *piae causae*, the *fidei commissum*, the *ruvānagān*, the *heqdēsh*, the *ḥaram*, the

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Introduction to Islamic Law, 204; Hallaq, "Considerations on the Function and Character of Sunnī Legal Theory," 682; Libson, "On the Development of Custom," 138, 150–152. Libson writes that "*istiḥsān* . . . became a common means for assimilating custom and usage." The Islamic tradition also recognizes the role of *istiḥsān* as a conduit for customary practices. See al-Sarakhsī, *Al-Mabsūṭ*, 15: 90 (defining *istiḥsān* as "analogy abandoned in favor of custom" (*al-qiyās yutrak biʾl-ʿurf*)).

[74] The difficulty of distinguishing between foreign and Islamic practices arises in other contexts. For example, how should one classify a Sassanian land tax adopted by the ʿAbbāsid bureaucracy? Is this tax still "foreign" or is it now "Islamic"?

ḥimā—under a new rubric that incorporated the diverse range of trust practices found among the populations of the Near East.[75] This fusion may explain why so many different theories have been advanced for the origins of the institution: echoes of all these foreign and indigenous practices can be heard in the *waqf*.

Whether the presence of these foreign antecedents makes the *waqf* a "borrowed" institution ultimately turns on how one defines the term "Islamic" in Islamic law. Clearly, the description of legal development presented here diverges sharply from the traditional view that Islamic law was more or less fully developed during the lifetime of the Prophet. But this description also diverges with how historians have traditionally approached the question of foreign influences, which labels the slightest hint of foreign law as "borrowing." If one reconceptualizes the practices of second- and third-century Muslims as "Islamic" regardless of the "foreign" origins of these practices, then there may be no (conscious) borrowing at all.

Examining the relationship between the practices of ordinary Muslims and the resultant law of *waqf* restores some balance to analyses of Islamic law's formative period. Perhaps due to the nature of the source base, there is a tendency among studies of early Islamic law (including this one) to focus on the juristic class and treat the law as an autonomous, insular discourse. In reality, the history of the *waqf* suggests that Islamic society, by creating facts on the ground, shaped the Islamic law of pious endowments as much as its jurists did, a phenomenon observed in other areas of Islamic law as well.[76]

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[75] The *ḥadīth*s performed a similar function by providing an Arab-Islamic past to practices and legal concepts from other cultures.

[76] Other historians have observed that social realities influenced the development of Islamic law, especially in those areas not explicitly mentioned in the Qur'ān. Brunschvig, for example, noted the influence of existing social practices in his analysis of the laws surrounding legal majority, paternity disputes, and the status of slaves and women. Robert Brunschvig, "Considérations sociologiques sur le droit musulman ancien," in *Études d'Islamologie* (Paris: G.-P. Maisonneuve and Larose, 1976), 2: 119–31. Udovitch, in his discussion of the Ḥanafī law of commercial practice, commented on the willingness of early Ḥanafī jurists to yield to "practical necessity" and to define the law of commercial partnerships very broadly. Udovitch argued that through the use of *istiḥsān*, or judicial preference, Ḥanafī jurists were able to bring the customary practices of second- and third-century A.H. Muslim merchants into the *sharīʿa*:

> Rather than insist on the rigid application of legal norms and risk thereby almost certain violation of an untenable and unenforceable prohibition, they

Although the lawyer class would ultimately define the precise parameters of this institution, the creation of the "*waqf*" as a distinctly Islamic legal institution was the culmination of a long, organic process that began with the practices of the Muslim community and stretched over several generations.[77]

II. *Imposing Terminological Order*

Given the organic development of Islamic law, by the late second- and early third-century A.H., there would have existed general terminological and definitional confusion in the area of trust law. The *waqf* treatises give voice to this confusion in the efforts of their authors to clarify the terminology and to define the legal parameters of the *waqf*. These efforts involved not only defining the *waqf* positively, but also determining the legal boundaries that distinguish a *waqf* from other categories of property and methods of property conveyance. The *waqf* treatises reveal that the struggle to impose order on a range of legal terms extended beyond the *waqf* to include discussions about the meanings of charity, gift, bequest, inheritance, and transfers made during one's final death-sickness.

> yielded, not unwillingly, it would appear, to the prevalent commercial custom and included this contract within the pale of legally sanctioned practice. . . . They did not . . . develop their legal norms in splendid isolation from, or total disregard of, their surroundings.

Abraham L. Udovitch, "The 'Law Merchant' of the Medieval Islamic World," in *Logic in Classical Islamic Culture*, ed. Gustave E. von Grunebaum (Wiesbaden: Otto Harrassowitz, 1970), 118–19.

[77] There remains the possibility that the *waqf* is an institution that evolved internally amongst Muslim jurists and incorporated few, if any, foreign or pre-Islamic influences. Although I cannot categorically rule out this possibility, I believe the evidence points to the contrary because there are several inter-related factors which argue in favor of cross-cultural influence. First, the scope of the Arab conquests guaranteed that Islamic law did not emerge in isolation, but rather in a culturally diverse environment. Second, it is known that many jurists were not ethnically Arab, raising the possibility that they brought with them knowledge of practices from other Near Eastern cultures. Third, the documents from the Cairo Geniza illustrate that cross-cultural influences did occur between different religious legal systems. And lastly, Islamic civilization has demonstrated itself to be a highly incorporative culture. Even a traditional modern historian such as Mohammad Othman has asserted that the *waqf* probably received its inspiration from non-Arabian practices. Othman, "Origin of the Institution of *Waqf*," 6–7.

Defining the Waqf

In using the signifier "*waqf*," Hilāl and al-Khaṣṣāf were not simply picking one word from a number of possible candidates. Rather, the employment of this signifier arose in conjunction with the effort to define more precisely the legal distinctions between different types of "non-*waqf*" charity such as *ṣadaqa* and *zakāt*. Hilāl's introduction is concerned specifically with resolving these terminological issues. In this introductory chapter, Hilāl explores the semantic and legal distinctions between terms such as *ṣadaqa*, *ḥubs*, and *mawqūfa* in order to differentiate which combinations of words fall under the rubric of "*waqf*." The result is a clearly demarcated line between pious endowments/trusts and other related forms of charity and property conveyance.

The first issue Hilāl addresses is whether the phrase, "This land of mine is a *ṣadaqa*" constitutes a pious endowment or a simple charity. Hilāl, citing Abū Ḥanīfa (d. 150/767), begins the discussion by differentiating between the two terms:

> Abū Ḥanīfa, God's mercy be upon him, said: If a man says, "This land of mine is a *ṣadaqa*," and specifies its location, demarcates its borders, and does not add anything to this [statement], then it is proper for him to give its principal away as alms to the poor and the destitute or to sell [the principal] and give away its value (lit. "price") as alms to the destitute (*innahu yanbaghī an yataṣaddaqa bi-aṣlihā ʿalā al-fuqarāʾi waʾl-masākīni aw yabīʿahā wa yataṣaddaqa bi-thamanihā ʿalā al-masākīn*). But this is not a *waqf*,[78] and this is our opinion.[79]

The problem for the reader of this passage is that the distinction Abū Ḥanīfa draws between a *ṣadaqa* and a *waqf* is not deducible from the given text. Unless one possesses *a priori* knowledge of the precise definition of a *waqf*, it is virtually impossible to discern that the issues of ownership and perpetuity underlay Abū Ḥanīfa's judg-

[78] The use of the term "*waqf*" in this quotation may not be an authentic reproduction of Abū Ḥanīfa's speech. This term appears to have been used rarely in early legal discourse, which suggests that Abū Ḥanīfa's utterance of the term "*waqf*" may be anachronistic. Since the purpose of Hilāl's introduction is to define the legal parameters of a *waqf vis-à-vis* other forms of charity such as the *ṣadaqa*, Hilāl may have found it useful to have Abū Ḥanīfa differentiate between the terms "*ṣadaqa*" and "*waqf*" in order to set the stage for the next several pages of discussion in the *Aḥkām al-Waqf*.

[79] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 2.

ment that the statement "This land of mine is a *ṣadaqa*" does not create a *waqf*.[80] Our confusion, however, is shared by the *qultu* figure, who steps forward and asks Abū Ḥanīfa why he draws this distinction:

> Why do you say this [*i.e.*, that it is not a *waqf*] if he says, "This land of mine is a *ṣadaqa*," and does not add anything to this, but nevertheless gives it away as alms for the poor and the destitute? (*taṣaddaqa bi-hā ʿalā al-fuqarāʾi waʾl-masākīn*).[81]

As Hilāl's treatise illustrates, answering this question required defining the legal meaning of *ṣadaqa*—a term which had come to have several contradictory significations by the third Islamic century.[82]

Ṣadaqa

Although explicating the difference in meaning between a *ṣadaqa* and a *waqf* is a central focus of Hilāl's introduction, the historical context behind the evolution of these two terms is largely absent from his work. While Islamic law would eventually define *ṣadaqa* as a voluntary form of alms-giving whose qualities and amounts are indeterminate, early usage of the term indicates that it was a mandatory, state-collected alms-tax rather than a voluntary charity. For example, ʿUmar b. ʿAbd al-ʿAzīz (d. 101/720) equated the plural form "*ṣadaqāt*" with a state-collected alms-tax:

> And as for the Muslims, the only obligation incumbent upon them is the alms of their properties (*fa-ammā al-muslimūn fa-innamā ʿalayhim ṣadaqātu amwālihim*). When they pay it to the Treasury (*bayt al-māl*), they receive a written indemnity (*barāʾa*), and nothing more is incumbent upon them in this matter with respect to their properties for that year.[83]

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[80] According to Abū Ḥanīfa, a perpetual endowment could not exist, because property remained in the possession of its founder and was subject to the rules of the Islamic inheritance system when the founder died. This opinion was not followed by his companions Muḥammad b. al-Ḥasan al-Shaybānī and Abū Yūsuf. *EI*[2], *s.v.* "*Waḳf*," R. Peters, 11: 62.

[81] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 2.

[82] The Arabic meaning of *ṣadaqa* as "charity" or "alms" appears to have been appropriated from the Hebrew *ṣedāqā*. Franz Rosenthal has examined the process by which the Hebrew *ṣedāqā* acquired a meaning of "charity" and then became a loan-word for the Islamic usage of *ṣadaqa*. See Rosenthal, "*Sedaka*, Charity," *Hebrew Union College Annual* 23/1 (1950–51), 411–30.

[83] ʿAbd Allāh b. ʿAbd al-Ḥakam, *Sīrat ʿUmar b. ʿAbd al-ʿAzīz* (Damascus, 1964),

Similarly, in the *Kitāb al-Kharāj* of Abū Yūsuf (d. 182/798) the term "*ṣadaqāt*" is used for a levy on camels, cattle, sheep, and horses.[84] In the Qur'ān, the term is further differentiated. In two places, the singular form *ṣadaqa* means voluntary charity,[85] while in the only passage in which the Qur'ān speaks directly of an official duty to distribute alms, the plural form is used.[86]

This terminological confusion concerning *ṣadaqa* is further magnified in early juristic writings and *ḥadīth* collections. Often, the term *ṣadaqa* is used synonymously with *zakāt*, the term we now associate with an alms-tax fixed by law. For example, *ḥadīth*s in the *Ṣaḥīḥ* of al-Bukhārī reveal that the word *ṣadaqa* is used just as often as *zakāt* in discussions of the alms-tax.[87] In the *Muwaṭṭa'* of Mālik b. Anas, the term *ṣadaqa* is employed frequently in a chapter entitled *Kitāb al-Zakāt*.[88] Interestingly, Mālik understood the two terms as distinct taxes on different types of property.[89] In the *Muwaṭṭa'* the term *ṣadaqa* is affixed to agricultural goods such as livestock[90] while the term *zakāt* is used for precious metals such as *dirham*s, gold and silver.[91] But it

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98. My translation closely follows a translation published by H. A. R. Gibb, "The Fiscal Rescript of 'Umar II," *Arabica* 2 (1955), 1–16.

[84] Ya'qūb b. Ibrāhīm Abū Yūsuf, *Kitāb al-Kharāj* (Cairo: al-Maṭba'a al-Salafiyya, 1962), 76–77. In his study of early Islamic 'Irāq, Ḥusām Qawām el-Sāmarrāie has observed that second- and third-century Muslims frequently used the terms "*ṣadaqa*" and "*ṣadaqāt*" to denote a tax levy. El-Sāmarrāie, *Agriculture in 'Irāq During the 3rd Century, A.H.* (Beirut: Heidelberg Press, 1972), 154–55, 195–96, 205. Likewise, the second-century Baṣran *qāḍī*, 'Ubayd Allāh b. al-Ḥasan al-'Anbarī (d. 168/785) wrote a letter to the 'Abbāsid caliph al-Mahdī (158–169/775–785) in which he encouraged the caliph to pay more attention to the levy and administration of "*ṣadaqāt* taxes." Muḥammad b. Khalaf Wakī', *Akhbār al-Quḍāh*, ed. 'Abd al-'Azīz Muṣṭafā al-Marāghī (Cairo: Maṭba'at al-Istiqāma, 1947–50), 2: 97–107. Cited in Zaman, "The Caliphs, the *'Ulamā*", and the Law, 7–8.

[85] Qur'ān 4.114, 2.196.

[86] Qur'ān 9.58, 9.60; Rosenthal, "*Sedaka*, Charity," 421.

[87] Al-Bukhārī, *Sharḥ Ṣaḥīḥ al-Bukhārī li'l-Zarrūq al-Fāsī* (Cairo: Maṭba'at Ḥasan, 1973), 3: 510–13.

[88] Mālik b. Anas, *Al-Muwaṭṭa'* (Beirut: Dār al-Nafā'is, 1977), 162–93, esp. 172–91.

[89] *EI*[2], *s.v.* "*Ṣadaḳa*," T. H. Weir and A. Zysow, 8: 711.

[90] Mālik b. Anas, *Al-Muwaṭṭa'*, 172–80. Mālik discusses *ṣadaqa* in terms of cattle, cows, horses, sheep, and camels.

[91] Mālik b. Anas, *Al-Muwaṭṭa'*, 163–66. While Mālik used the term *zakāt* in reference to gold, *dirham*s, precious metals and treasure, the earlier fiscal rescript of 'Umar b. 'Abd al-'Azīz used the term *ṣadaqa* to refer to both agricultural products and precious metals: "The Messenger of God announced that alms owed on properties should come from cultivation, cattle, gold and silver (*fa-bayyana rasūlu allāhī ṣadaqāti al-amwāli al-ḥarthu al-mawāshī al-dhahabu wa'l-wariqu*)." 'Abd Allāh b. 'Abd al-Ḥakam, *Sīrat 'Umar b. 'Abd al-'Azīz*, 96.

is difficult to see how this distinction led to the eventual designation of *ṣadaqa* as a voluntary charity and *zakāt* as a state-sponsored tithe.

This lack of terminological clarity created a definitional problem when the term *ṣadaqa* was used to designate a *waqf*. For example, the following *ḥadīth* from the introduction to al-Khaṣṣāf's *waqf* treatise relates a debate concerning the first "*waqf*" in Islam. Although the term "*ṣadaqa*" is used in lieu of "*waqf*", the two objects discussed in the narrative—the seven gardens of the Prophet, and ʿUmar's property in Thamgh—were later considered by all Islamic authorities to have been *waqf*s:

> Wakīʿ b. al-Jarrāḥ—Sufyān—Abū Isḥāq—ʿAmr b. al-Ḥārith al-Khuzāʿī (the brother of Juwayriyya bt. al-Ḥārith, wife of the Prophet): He said: The Messenger of God did not leave anything behind except his donkey, his sword and land which he left as a *ṣadaqa*. Abū Bakr (*i.e.*, al-Khaṣṣāf)[92] said: There was a difference of opinion among us concerning the first *ṣadaqa* in Islam. Some of them said the first *ṣadaqa* in Islam consisted of the *ṣadaqāt* of the Messenger of God which were seven gardens (*al-sabʿa al-ḥawā'iṭ*), and then after this, the *ṣadaqa* of ʿUmar b. al-Khaṭṭāb in Thamgh, at the time of the return of the Messenger of God in the year seven A.H.[93]

The habit of referring to early Islamic *waqf*s as "*ṣadaqa*s" appears to have been engrained in the minds of the second- and third-century Muslims. For example, in another set of *ḥadīth*s from al-Khaṣṣāf's introduction, the "*waqf*" of ʿAlī b. Abī Ṭālib is continually referred to as the "*ṣadaqa* of ʿAlī."[94] This same set of *ḥadīth*s informs us that the *ṣadaqa* of ʿAlī imitated the *ṣadaqa* of ʿUmar b. al-Khaṭṭāb.[95] Even Hilāl, who is generally careful not to use the term *ṣadaqa* when he means *waqf*, momentarily succumbs to the common parlance of his era and refers to the *waqf* of ʿUmar as a "*ṣadaqa*."[96]

To add further to this terminological confusion, the *waqf* treatises delineate two different types of *ṣadaqa*s—one that more closely resembles a *waqf* and another which shares attributes with a *hiba*, or simple

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[92] An editor's note informs us that this Abū Bakr is Abū Bakr b. ʿAmr al-Shaybānī, who is more commonly known as al-Khaṣṣāf, the author of the *Aḥkām al-Awqāf*. Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 4, n. 1.

[93] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 4.

[94] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 10, in four places.

[95] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 10.

[96] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 72, in two places.

gift. The former resembles a *waqf* in that the principal and yields are separated, and only the usufruct of the property is given away to charity. This type of *ṣadaqa* could continue for several years, but unlike a *waqf*, the principal of this *ṣadaqa* was not rendered inalienable in perpetuity through sequestration, but rather remained in the possession of the founder. When the founder of the *ṣadaqa* died, the charity ceased, and the property that had been made a *ṣadaqa* was distributed to the founder's heirs and/or legatees according to the laws of intestacy and testacy. When a *ṣadaqa* functioned as almsgiving, however, it correlated more closely with a charitable *hiba* in which the principal of the object was transferred completely to another person. When such a transaction occurred, any rights belonging to the heirs ceased at the moment of transaction.

Delving into this terminological quagmire restores some of the historical context for the *Aḥkām al-Waqf*. Based upon the surviving *ḥadīth* record, it seems clear that during Hilāl's lifetime properties existed which people referred to as *ṣadaqa*s, but which conveyed the meaning of a perpetual pious endowment. For example, Hilāl himself discusses the "*ṣadaqa* of 'Umar," but it is clear from the context of his discussion that this property is what would subsequently be designated a "*waqf*."[97] While the terminological meaning of such famous endowments might have been self-evident, it probably was clear to jurists that failure to clarify this terminology would lead (or had already led) to legal confusion. For instance, what if the neighbors of a deceased man came to the local *qāḍī* alleging that the decedent had made the yields of his date-palm trees a "*ṣadaqa*" on their behalf, while the children of the decedent asserted that their father had intended this *ṣadaqa* to be only a temporary charity, and hence, the yields and principal should pass to them as an inheritance? Should the *qāḍī* declare the *ṣadaqa* to be a perpetual pious endowment for the decedent's neighbors, or an inheritance for his heirs? Furthermore, if a *ṣadaqa* encompassed only agricultural products, as suggested in Mālik's *Muwaṭṭa*', did this restriction preclude the possibility of designating a residence or a mosque as a pious endowment? And lastly,

[97] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 72–73. In this section, Hilāl refers to 'Umar's *waqf* both as a *ṣadaqa* and a *waqf*. This property is clearly a perpetual pious endowment, because Hilāl discusses the provisions 'Umar made for the continued administration of this property after his death and the inter-generational transfer of the property to his daughter, Ḥafṣa.

to whom could alms be given? Was a *ṣadaqa* limited strictly to the poor? Could it include the rich? One's relatives? Travelers? The Holy War? The terminological ambiguity surrounding the word "*ṣadaqa*" would have created an almost impossible situation for the *qāḍī* presiding over such a case.[98]

By beginning his treatise with the statement that a *ṣadaqa* is not equivalent to a *waqf*, Hilāl creates, at the outset, a distinction between these two terms. As the dialogue between the *qultu* and *qāla* figures continues, it becomes clear that a *waqf* is a perpetual form of charity enforceable by the *qāḍī*, whereas a *ṣadaqa* is a charity that exists only during the lifetime of the founder and is not compulsory. At different points in the introduction, the *qāla* figure (Hilāl) reminds the questioner of this distinction by highlighting the non-compulsory quality of a *ṣadaqa*:

> I said: What is your opinion if he was alive and did not give alms (*lam yataṣaddaq bi*) from this [*ṣadaqa*]. Is it proper for the *qāḍī* to compel him to give alms from this or to come between him and his property or land which he made a *ṣadaqa*?
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> (He said: It is not proper for the *qāḍī* to come between him and his property or land which he made a *ṣadaqa*).[99] But he should be informed with regard to that which is between him and between God to give it away as [voluntary] alms. But he [the *qāḍī*] should not compel him in this matter.[100]

Likewise, at another point in the introduction Hilāl characterizes the statement, "This land of mine is a *ṣadaqa*," as a *nadhr*, or solemn pledge.[101] Again, the implication of defining *ṣadaqa* in this manner is that the pledge is between the founder of the *ṣadaqa* and God. Consequently, whether the founder actually fulfills this pledge is something for God to judge rather than the *qāḍī*. This process of terminological definition reaches its conclusion in another *qultu-qāla* dialogue mid-way through the introduction. In what turns out to be the final discussion of this matter, the *qultu* figure queries the *qāla* figure about

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[98] The difficulty of resolving such cases would have also hampered the *qāḍī*'s ancillary function of resolving communal tensions and re-establishing communal harmony. See Powers, *Law, Society, and Culture in the Maghrib*, 82 (on the *qāḍī*'s role in the settling of intra-community disputes).

[99] This sentence is not in the "Madīna" version of the *Aḥkām al-Waqf*. Hilāl al-Ra'y, *Aḥkām al-Waqf*, 3, n. 1.

[100] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 3.

[101] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 7.

a *ṣadaqa* whose charitable ends are clearly specified. This question provides an opportunity for the *qāla* figure (Hilāl) to once again reassert that a *ṣadaqa* constitutes a voluntary, non-perpetual, *inter vivos* charity whose enforcement is left to God:

> I said: What is your opinion if it were the case that he said, "This land of mine is a *ṣadaqa* for orphans," or he said, "A *ṣadaqa* for different types of charity, welfare, the pilgrimage, the lesser pilgrimage, and general charity"? (*ṣadaqa fī wujūhi al-birri wa'l-khayri wa'l-ḥajji wa'l-ʿumrati wa'l-sabīl*)
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> He said: All of this is invalid and it is not a *waqf*, but we instruct him, with regard to that which is between him and between God, the Exalted, to implement this. But we do not compel him to do this. And if he dies before implementing this, then it becomes an inheritance for his heirs.[102]

Waqf = *Ṣadaqa* + *Mawqūfa*

One would presume that if the statement, "This land of mine is a *ṣadaqa*," defines a voluntary, non-perpetual charity, then the statement, "This land of mine is a *waqf*," would refer to a perpetual, charitable endowment enforceable by a *qāḍī*. Curiously, it is not that simple. In the *Aḥkām al-Waqf*, the reader learns that the statement, "This land of mine is a *waqf*," does not create a valid *waqf*.[103]

Hilāl does not permit the statement "This land of mine is a *waqf*" to create a valid *waqf* because the term "*waqf*" contains potential elements of ambiguity. Although it is common to think of the term "*waqf*" as simply a noun, it also expresses a verbal action meaning "to prevent or to restrain."[104] As a consequence of this dual meaning, the declaration, "This land of mine is a *waqf*," is subject to two interpretations. On the one hand, it can refer to the designation of a perpetual, charitable pious endowment. On the other hand, it can be understood to mean that the person's land has been removed from the normal transactions of property conveyance without there being any charitable purpose to this action. Under the former interpretation the land is a "*waqf*," while in the latter usage it is not. To

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[102] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 11–12.
[103] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 4.
[104] *EI*[1], *s.v.* "*Waḳf*," W. Heffening, 4: 1096.

illustrate this point, Hilāl notes that the statement, "This land of mine is a *waqf*," is equivalent to saying, "This land of mine is *mawqūfa*," or "This land of mine is *maḥbūsa*." That is to say, the founder has stipulated only that the property is sequestered or immobilized from commercial transactions.[105] In neither case, according to both Hilāl and Abū Ḥanīfa, do these two expressions designate a *ṣadaqa* or a *waqf*, because no charitable disposition for the property has been specified.[106] Hilāl notes that only Abū Yūsuf believed that the declaration, "This land of mine is a *waqf*," created a valid pious endowment because he held that the terms *mawqūfa* and *waqf* signified "for the destitute" (*li'l-masākīn*) and, therefore, implicitly designated a specific charitable purpose.[107]

If the expressions, "This land of mine is a *ṣadaqa*," and, "This land of mine is a *waqf*," fail to designate a valid *waqf*, Hilāl concludes that the intermingling of these two expressions establishes a pious endowment:

> I said: And if he says, "This land of mine is a *ṣadaqa mawqūfa*"?
> He said: It is permitted. He sequesters its principal and gives its yields as alms for the destitute in perpetuity (*yūqifu aṣlahā wa yataṣaddaqu bi-ghallatihā 'alā al-masākīni abadan*). And there is no possibility for revocation, and it is made inalienable for God in perpetuity (*takūna mawqūfan li'llāhi abadan*) according to the conventions of a valid *waqf* (*al-waqf al-jā'iz*).[108]

The distinction that Hilāl draws between a *ṣadaqa*, a *waqf*, and a *ṣadaqa mawqūfa* is more than a semantic game. By defining *ṣadaqa* as charity and *mawqūfa* as that which has been made inalienable, or removed from commercial transactions in perpetuity,[109] Hilāl points

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[105] Although this statement conveys the literal meaning of "This land of mine is *mawqūfa/maḥbūsa*," it is not entirely clear what Hilāl envisions when he speaks of property that has become "*mawqūfa*" or "*maḥbūsa*." Other than creating a pious endowment, I am not certain under what conditions a person would be permitted to remove property from commercial transactions. As a result, Hilāl's use of these phrases may be more theoretical than grounded in reality.

[106] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 4.

[107] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 4.

[108] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 6.

[109] The term *mawqūfa*, unlike the term *ṣadaqa*, does not appear to have had a multiplicity of meanings. However, the concept of sequestering property would appear, on its face, to be broad enough to encompass restrictions on property transfers that fell short of making the property inalienable.

out that a *waqf* must contain both of these elements (in any order)[110] to be considered valid. The absence of one of these elements turns the property into either a charity (*ṣadaqa*) or a sequestered/immobilized property (*mawqūfa*). Hilāl's conclusions on this matter can be expressed through the following equation: a valid *waqf* = charity (*ṣadaqa*) + inalienability/perpetuity (*mawqūfa*).

Ḥubs/Ḥabīs/Maḥbūsa/Muḥarrama

The early Muslim community also employed the terms "*ḥubs/ḥabīs/maḥbūsa*" and "*muḥarrama*" when referring to endowments that Hilāl and al-Khaṣṣāf would later call *waqf*s.[111] For example, in the *Kitāb al-Umm*, al-Shāfiʿī devotes a long section to pious endowments in his chapter on preemption (*Kitāb al-Shufʿa*). Although al-Shāfiʿī does employ the term *waqf* during the course of his discussion,[112] he eschews this word for the sub-titles to this chapter. Instead, the *Kitāb al-Shufʿa* contains sections entitled "*al-aḥbās*," "*al-khilāf fi'l-ṣadaqāt al-muḥarramāt*," "*al-khilāf fi'l-ḥubs wa-hiya al-ṣadaqāt al-mawqūfāt*," and "*wathīqa fi'l-ḥubs*."[113] Similarly, the *ḥadīth*s in the introduction to al-Khaṣṣāf's treatise demonstrate the extent to which the term "*ḥubs*" was utilized to signify a *waqf*. In another *ḥadīth* concerning the first "*waqf*" in Islam, the terms *ṣadaqa* and *ḥubs* are used interchangeably to denote a pious endowment:

> Muḥammad b. ʿUmar al-Wāqidī—ʿUtba b. Jubayra—al-Ḥusayn b. ʿAbd al-Raḥmān b. ʿAmr b. Saʿd b. Muʿādh: He said: We asked about *al-ḥubs*, the first *ḥubs* in Islam, and someone said that the *ṣadaqa* of the Messenger of God was the first [thing to be] sequestered (*ḥubbisa*) in Islam. And this is the opinion of the Helpers.[114]

Semantically, the terms *ḥubs, ḥabīs, maḥbūsa*, and *muḥarrama* have their parallels in the terms *waqf* and *mawqūfa*. Just as a *waqf* expresses the idea of "restraining" property such that it becomes inalienable, to make an object a *ḥubs* is to "sequester" it. Likewise, property that is *mawqūfa* has become inalienable, sequestered (*ḥabīs, maḥbūsa*), or

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[110] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 12.

[111] Whether the terms *ḥubs, ḥabīs, maḥbūsa*, and *muḥarrama* originally had distinct meanings seems to have become a moot point by the third century A.H.

[112] Al-Shāfiʿī, *Kitāb al-Umm*, 4: 55.

[113] Al-Shāfiʿī, *Kitāb al-Umm*, 4: 51–61.

[114] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 4.

inviolable (*muḥarrama*). These semantic parallels were not lost on Hilāl. In defining the terms *ḥubs*, *ḥabīs*, *maḥbūsa*, and *muḥarrama*, Hilāl channels their meaning into the last term in the "*waqf* = *ṣadaqa* + *mawqūfa*" equation. At the end of a long expository passage which introduces the verb *ḥabbasa*, Hilāl defines the term *ḥubs* in the same way that he defined *waqf*, declaring that he will not validate a pious endowment until the founder "brings together the two words *al-ṣadaqa* and *al-ḥubs*."[115] Hilāl then eliminates any latent ambiguity created by this multiplicity of terms by conflating *ḥabīs*, *maḥbūsa* and *muḥarrama* with the already defined *mawqūfa*:

> I said: What is your opinion if he says, "*ḥabīs ṣadaqa*," or says, "*ṣadaqa ḥabīs*"?
>
> He said: This is permitted according to what I have described to you.
>
> I said: What is your opinion if he says, "This land of mine is a *maḥbūsa ṣadaqa*," or he says, "*ṣadaqa muḥarrama*"?
>
> He said: This is permitted according to what I have described to you, in our opinion . . . And Abū Khālid Yūsuf b. Khālid[116] said that "his speech '*muḥarrama*' and '*mawqūfa*' are equal. . . ."
>
> I said: What is your opinion if he says, "This land of mine is a *ḥabīs waqf*," and he does not add anything to this?
>
> He said: This is invalid and not permitted in our opinion, nor in the opinion of Abū Ḥanīfa, may God be pleased with him.
>
> I said: But why do you say this?
>
> He said: Because the meaning of his speech "*waqf*," and the meaning of his speech "*ḥabīs*" are equivalent. So, it was as if he had said, "This land of mine is a *waqf*," and this is invalid and not permitted in our opinion.
>
> I said: And likewise, what if it were the case that he said, "It is *muḥarrama ḥabīs*," or "*ḥabīs muḥarrama*"?
>
> He said: Yes, this is also not permitted because he mentioned sequestration of the principal (*ḥabs al-aṣl*), but did not specify [a beneficiary] for the yields. So for these reasons, I would make it invalid.

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[115] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 7.

[116] Abū Khālid Yūsuf b. Khālid was reportedly a follower of Abū Ḥanīfa and is credited with being among the first to bring the ideas of Abū Ḥanīfa to Baṣra. He reportedly wrote a book on contracts (*Kitāb al-Shurūṭ*) and was alleged to have been a Jahmite. Yūsuf b. Khālid's biographical entry (*tarjama*) has nothing positive to say about him as a transmitter of *ḥadīth* (*muḥaddith*). He is accused of being a liar (*kadhdhāb*), weak (*ḍa'īf*) and unreliable (*laysa bi-thiqa*), which led some *muḥaddithūn* to refuse to record his *ḥadīth* (*lā yaktubu ḥadīthahu*). Ibn Ḥajar al-'Asqalānī, *Tahdhīb al-Tahdhīb*, 11: 411–13. The disparaging tone of Yūsuf b. Khālid's *tarjama* and his alleged association with the Jahmiyya may be a reflection of his close association with Abū Ḥanīfa and the *aṣḥāb al-ra'y*.

> I said: And what if it were the case that he said, "This land of mine is *mawqūfa ḥabīs muḥarrama*, that is not to be sold, given away as a gift, or inherited," and he did not add anything to this?
>
> He said: This and the previous example are equivalent to one another. And it is not permitted until he includes a meaning of *ṣadaqa*, or the destitute, in addition to the sequestration of the principal. . . .[117]

Under Hilāl's terminological rubric, the term "*waqf*" is not a self-defining term, but consists of two concepts—*ṣadaqa* and *mawqūfa*, which, when juxtaposed with another, make the property a pious endowment in perpetuity. Reliance on these terms, however, posed certain problems. In the case of *ṣadaqa*, the term had acquired a multiplicity of meanings within Islamic culture. In the case of *mawqūfa*, there were additional terms—*ḥubs, ḥabīs, maḥbūsa*, and *muḥarrama*—that might or might not mean the same thing. A legal order in which so many terms have multiple or ambiguous meanings is a prescription for chaos. The *waqf* treatises eliminated this ambiguity by (i) creating a new signifier—the "*waqf*"—to distinguish these pious endowments from other related forms of charity and gifts; and (ii) bringing clarity and terminological order to the underlying legal concepts—*ṣadaqa* and *mawqūfa*—that formed the institution.

Charitable Elements

If the first part of Hilāl's introduction is concerned with conflating the meanings of various terms into the "*waqf* = *ṣadaqa* + *mawqūfa*" equation, the second half focuses on defining the inter-relationship between charity, inalienability and perpetuity. In order for a *waqf* to be valid, Hilāl argues that the charitable remainder of the endowment must be a special kind of charity that has no possibility of extinction. Consequently, a *waqf* designated exclusively for one's family members would not be considered valid, because the extinction of one's family line is possible. And if this extinction occurred, then the endowment's remainder interest would be without a charitable purpose:

> I said: What is your opinion if someone says, "This land of mine is *mawqūfa* for my children and my descendants"?

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[117] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 7–8.

He said: This is not permitted because he did not specify its ultimate disposition for the destitute (*li'l-masākīn*), nor did he make any explicit or implicit reference to *ṣadaqa* and the destitute. However, if he had said, "*ṣadaqa mawqūfa*," the destitute are implied in his speech "*ṣadaqa*," and it would be permitted.

[I said]: And likewise if it were the case that he said, "This land of mine is *mawqūfa* and it may not be sold, nor given away as a gift, nor inherited by my children and my descendants"?

He said: Yes, this and the previous example are equivalent to one another. And it is something which is not permitted unless he says "*ṣadaqa*" and makes its ultimate disposition for the destitute.[118]

Other categories of charity that Hilāl holds to be eternal are *waqf*s designated for travelers (*ibn al-sabīl*), the Holy War (*al-jihād*), the manumission of slaves (*'itq al-riqāb*), and orphans (*al-yatāmā*).[119] But in each of these cases, the categories of charity must be defined broadly enough so that extinction is not possible. As a result, while a *waqf* for orphans would be considered valid, a *waqf* for the orphans of a specific tribe would not:

I said: And likewise, what if it were the case that he said, "This land of mine is *mawqūfa* for the orphans of the Banū so-and-so," and they are part of his tribal group and they are allotted a share?

He said: The *waqf* is invalid. Do you not see that if they die out, the ultimate disposition of the *waqf* would not be known. And this has the same status as his speech, "*mawqūfa* for so-and-so" to which he did not add anything. And this is invalid and not permitted because he does not say "*ṣadaqa*," nor designate its ultimate disposition for the destitute, nor designate it for one of the several types of charity (*wujūh al-birr*) which are incapable of becoming extinguished.[120]

At the heart of the above discussions is the issue of temporality. While the "*waqf* = *ṣadaqa* + *mawqūfa*" equation remains the basis for Hilāl's conclusions, this section expands the meaning of this equation to encompass future points in time. It is not enough that a charitable purpose and a state of inalienability exist at the beginning of

[118] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 10.

[119] These categories of charity closely resemble those mentioned in Qur'ān 9.60: the poor (*al-fuqarā'*), the destitute (*al-masākīn*), slaves (*al-riqāb*), debtors (*al-gharā'im*), the Holy War (*fī sabīl Allāh*), and travelers (*ibn al-sabīl*). The Qur'ān also contains many injunctions to show kindness and charity to orphans. See Qur'ān 2.220.

[120] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 11.

the endowment's creation, these two elements also must have the potential to co-exist, in perpetuity, "until God inherits the heavens and earth which belong to Him as an inheritance."[121]

The Hermeneutical Turn

The means by which Hilāl created his terminological categories constitute an excellent example of Ḥanafī[122] rationalism, or *ra'y*. Although Hilāl cites the precedents of early Companions to support his contention that perpetual, charitable endowments are legal,[123] his discursive reasoning is not derived from *ḥadīth*s. In fact, the "*waqf* = *ṣadaqa* + *mawqūfa*" equation that forms the terminological starting-point for Hilāl's discussion of the *waqf* is constructed without any reference to Prophetic or Companion precedents.

Hilāl, however, inadvertently created an intellectual problem for Muslim jurists by not integrating or harmonizing the practices and terminologies of the early Muslim community—as expressed in the *ḥadīths*—with his legal formulations. While Hilāl's legal reasoning provides a clear and precise terminological foundation for the establishment of pious endowments, the rigor with which he defined his categories placed those "*waqf*s" established by the first generation of Muslims outside the limits of permissibility. For example, if the Prophet's gardens are considered a "*ḥubs*" and 'Umar's property a "*ṣadaqa*," then, according to Hilāl's terminological categories, each of these figures improperly designated a pious endowment. Hilāl, who appears to have been aware of this problem, attempted to bring these early endowments into accord with his *waqf* equation. In the following passage, he anachronistically refers to the endowments of the early Companions as "*waqf*s" even though the *ḥadīth*s recorded in the *Aḥkām al-Awqāf* of al-Khaṣṣāf demonstrate that these endowments were more often referred to as a "*ṣadaqa*" or a "*ḥubs*:"[124]

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[121] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 8. This phrase appears to be a paraphrase of Qur'ān 3.180 and 57.10. Qur'ān 3.180 states, "It is God who will inherit the heavens and the earth," while 57.10 states, "God alone will inherit the heavens and the earth."

[122] As discussed in the introduction to chapter one, it may be anachronistic to apply the term "Ḥanafī" to third-century jurists and their legal reasoning.

[123] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 6–7.

[124] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 4–12.

> [A]nd ʿUmar made [his property] a *waqf* according to the directives of the Messenger of God. And ʿAlī b. Abī Ṭālib, al-Zubayr b. al-ʿAwwām, and others from among the Companions of the Prophet made *waqf*s.[125]

Hilāl's attempt to mediate between these early Islamic usages and the *waqf* terminology developed in his treatise may have been perceived as less than satisfactory. In particular, the introduction to the *Aḥkām al-Awqāf* of al-Khaṣṣāf can be read as an attempt to resolve and transcend the terminological problem created by Hilāl's *waqf* equation.

That al-Khaṣṣāf accepts Hilāl's *waqf* definition ("*waqf* = *ṣadaqa* + *mawqūfa*") is not in question. For example, in the following passage al-Khaṣṣāf maintains Hilāl's requirement that a pious endowment must be both *ṣadaqa* and *mawqūfa*, in perpetuity, for a *waqf* to be considered valid:

> I said: What is your opinion if he says, 'This land of mine is *mawqūfa* after my death'?
>
> He said: The *waqf* is invalid [because] he did not say "*ṣadaqa*. . . ."[126] . . .
>
> I said: What is your opinion of a man who says, "I have made my land a *ṣadaqa mawqūfa* for my poor kin relations," without adding anything else to this statement.
>
> He said: The *waqf* is invalid and this land is an inheritance (*mīrāth*) among his heirs on account of the fact that if his poor kin relations become extinct or rich, it would not be known upon whom the yields should be bestowed. Nor did the founder designate [its yields] for the destitute (*al-masākīn*). For this reason, the *waqf* is invalid.
>
> I said: What is your opinion if he says: "I have made my land a *ṣadaqa mawqūfa* for my kin relations and after their [extinction], it is for the destitute (*al-masākīn*)"?
>
> He said: The *waqf* is permitted.[127]

In spite of this acceptance of Hilāl's *waqf* equation, the introduction to the *Aḥkām al-Awqāf* of al-Khaṣṣāf stands in marked contrast to the *waqf* treatise of Hilāl. Al-Khaṣṣāf's work does not begin with a long rumination on the terminological distinctions between valid and invalid *waqf*s, but rather with a collection of *ḥadīth*s that document

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[125] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 6.
[126] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 260.
[127] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 50.

the construction of pious endowments by the Prophet and other early Muslims (see Appendix B). Assuming that al-Khaṣṣāf was responsible for affixing this *ḥadīth* collection to his *waqf* treatise, why did he feel the need to incorporate this hermeneutical element into his otherwise almost purely discursive legal treatise?

The third Islamic century was the era during which independent reasoning, or *ra'y*, began to "experience a process of decline."[128] With the intellectual foundations of rationalist legal thinking increasingly undermined by traditionalist/anti-*ra'y* critiques, it may have become necessary for rationalists to buttress their arguments with *ḥadīth*s. Hallaq, in particular, has observed that rationalist legal writing increasingly incorporated elements of traditionalist exegesis over the course of the third century.[129] As a result, the presence of these hermeneutical elements in the *Aḥkām al-Awqāf* may illustrate the increasing authority of *ḥadīth*s—especially Prophetic *ḥadīth*s—during this period. Concomitant with this increasing pressure on third-century rationalists to demonstrate that their legal theories were derived from Prophetic precedents was a marked increase in the number of Prophetic *ḥadīth*s.[130] In fact, the *ḥadīth* analysis undertaken in chapter four will demonstrate that many of these *ḥadīth*s concerning the *waqf* cannot reliably be dated any earlier than the late second/early third century A.H. The case can be made that the pressure to present exegetical links to the Prophet and his Companions, combined with the increasing availability of *ḥadīth*s, led al-Khaṣṣāf to foreground his *waqf* treatise with these *ḥadīth*s. There may, however, have been an additional, related factor that compelled al-Khaṣṣāf to include this introductory collection of *ḥadīth*s.

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[128] Hallaq, "Was al-Shāfi'ī the Master Architect?" 598.

[129] Hallaq, "Was al-Shāfi'ī the Master Architect?" 597–98. Although Hallaq is correct to note that Schacht over-emphasized the role of al-Shāfi'ī in the ascendance of the traditionalist movement, Schacht's contention that independent legal reasoning preceded the use of *ḥadīth*s remains essentially correct. See Schacht, *Origins*, 1–137. A similar understanding of this evolution in Islamic legal discourse forms the basis for Calder's assertion that the *Mudawwana* of Saḥnūn is an earlier text than the *Muwaṭṭa'* of Mālik b. Anas. The chronological methodology constructed in Calder's work is centered on the premise that the earliest juristic writings were discursive (i.e., derived from independent reasoning, or *ra'y*) while the hermeneutical/exegetical methodology of the traditionalists did not begin to affect legal thinking until the third century A.H. See Calder, *Studies*, 1–38. For a critique of Calder's chronological conclusions, see Brockopp, *Early Mālikī Law*, chapter 2.

[130] Schacht, *Origins*, 140. Schacht described the first half of the third century A.H. as a "particularly vigorous" period in the creation of Prophetic *ḥadīth*s.

It has been observed that Hilāl's *waqf* equation has an unfortunate consequence—it intimates that the earliest Muslims constructed their "*waqf*s" in an improper manner because they referred to their endowed properties as a "*ṣadaqa*" or a "*ḥubs*." For a discursive tradition in which the past functioned principally as confirmation for independent reasoning,[131] these discontinuities in terminology were peripheral to the derivation of the law. From the perspective of rationalists such as Hilāl, the fact that the early Muslim community had constructed perpetual, charitable endowments was significant for confirming the general legitimacy of the institution, but the terms these first generations of Muslims had used to describe their endowments were ultimately fungible. By contrast, for a hermeneutical tradition which derived its law from the past through exegesis, the terms early Muslims employed to describe their *waqf*s could not be so easily dismissed. Rather, these early usages would have formed the starting point for any conclusions about the *waqf*'s terminology.

Confronted with this conflict between the terminology of the *waqf* equation and the terms used in the *ḥadīth*s, it seems plausible that al-Khaṣṣāf intended his introduction to bridge the chasm between law derived discursively and law derived hermeneutically. Support for this interpretation can be found at the end of his introduction. After foregrounding his introduction with Prophetic, Companion and Successor *ḥadīth*s, al-Khaṣṣāf provides a brief commentary in which he states that it is the *sunna* created by these early endowments that forms the basis for the law of *waqf*:

> Abū Bakr Aḥmad b. ʿAmr al-Khaṣṣāf: These traditions (*al-āthār*) in the matter of *waqf*s (*al-wuqūf*),[132] along with that which the Messenger of

[131] Melchert, "Traditionist-Jurisprudents," 389 ("It would be going too far to assert that the ninth-century [C.E.] *aṣḥāb al-raʾy*, by contrast, relied exclusively on rational speculation to determine the law. As far back as the sources will take us, on the contrary, it is plain that *aṣḥāb al-raʾy* did use *ḥadīth*, at least to corroborate the results of their speculation.").

[132] Al-Khaṣṣāf's use of the plural form "*wuqūf*" is a little difficult to explain, particularly when the title of his treatise employs the plural form "*awqāf*." Based upon a cursory examination of al-Khaṣṣāf's *waqf* treatise, I discovered that the use of "*wuqūf*" is actually more prevalent than "*awqāf*." I found seven uses of "*wuqūf*" in the *qultu/qāla* dialogues and only one usage of "*awqāf*." Why al-Khaṣṣāf should prefer one plural form over the other remains something of a mystery, although it does highlight a discontinuity between the title of the treatise and al-Khaṣṣāf's use of terminology. Based on the predominant usage of the plural "*wuqūf*" in the text of the treatise, one would expect the title to be the *Aḥkām al-Wuqūf*. This discrepancy

> God commanded in the matter of his land—to endow its principal and to distribute to charitable purposes its fruits/yields (*yuḥabbisu aṣlahā wa-yusabbilu thamaratahā*)—all of this has come to be an established *sunna* in this matter. Likewise, the actions of the Companions of the Prophet with respect to their landed properties and moveable properties which they endowed (*waqqafū*); these actions constitute a consensus (*ijmāʿ*) among them to the effect that endowments (*al-wuqūf*) are permissible and established.[133]

The effect of this small passage, coming at the end of a set of *ḥadīth*s conveying the practices of the early Muslim community, is two-fold. First, by implying that the law of *waqf* is exegetically derived from the practices of the earliest Muslims, al-Khaṣṣāf restores the primacy of these early endowments in the derivation of *waqf* law. In practice, this exegetical link is mostly a fiction, since almost all of al-Khaṣṣāf's treatise is derived through discursive reasoning, and the terminology of the *waqf* equation conflicts with the exegetical record. Nonetheless, the inclusion of these *ḥadīth*s at the beginning of the work creates the impression of a hermeneutical link. Second, the passage resolves the terminological tension created by Hilāl's *waqf* equation and the traditional designations given to the "*waqf*s" of the Prophet and his Companions. In contrast to Hilāl, who sanitizes these traditions by anachronistically substituting the term "*waqf*,"[134] al-Khaṣṣāf undertakes no editing of the sources, but then refers to all of these pious endowments as *waqf*s in his final commentary. By figuratively wrapping the term "*waqf*" around these earlier endowments, al-Khaṣṣāf suggests that these "unorthodox" usages should be deemed synonymous with the establishment of a valid *waqf*, even if only some of these usages would now be considered acceptable under Hilāl's terminological rubric.

While al-Khaṣṣāf's commentary might appear to muddle the terminological clarity of Hilāl's work, he is careful not to let these

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suggests that the current title may be a later emendation. For the use of the plural "*wuqūf*" see, al-Khaṣṣāf, *Aḥkām al-Awqāf*, 19 (in two places, also confirmed in the fourteenth-century C.E. British Library copy), 134 (in three places), 203, and 335 (used as a chapter heading). For the use of the plural "*awqāf*," see page 212 (misspelled as "*al-awqāt*").

[133] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 18.

[134] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 6 ("[A]nd ʿUmar made [his property] a *waqf* according to the directives of the Messenger of God. And ʿAlī b. Abī Ṭālib, al-Zubayr b. al-ʿAwāmm, and others from among the Companions of the Prophet made *waqf*s.").

usages undermine Hilāl's *waqf* equation. Al-Khaṣṣāf accomplishes this by treating the past and the present as two distinct realms. This distinction allows al-Khaṣṣāf to proclaim that these past terminological usages created valid *waqf*s, while simultaneously liberating him to use Hilāl's more precise terminology throughout the main body of his treatise. By bridging this chasm between the past and the present, al-Khaṣṣāf's juxtaposition of the hermeneutic and discursive traditions might be described as having a "corrective" effect on Hilāl's definition of the *waqf*. In contrast to Hilāl's discursive approach which cut the past off from the derivation of the law—a position anathema to the traditionalists—in al-Khaṣṣāf's treatise the past is funneled into a more precise definition of the *waqf*. The effect is exegetical, even though we know that the derivation of *waqf* terminology occurred outside of a hermeneutical tradition.

Up to this point it has been convenient to suggest that al-Khaṣṣāf was responsible for the collection of *ḥadīth*s that foreground his *waqf* treatise. There does appear to be some evidence in support of this conclusion. First, although al-Khaṣṣāf was clearly a member of the *aṣḥāb al-ra'y*, at various points in the *Aḥkām al-Awqāf* he does show a limited willingness to employ hermeneutical thinking in his legal writing. Second, while the employment of the *ḥadīth*s is unusual, the listing of *ḥadīth*s in Ḥanafī texts is not. For example, in the earlier *Kitāb al-Kharāj* of Abū Yūsuf (d. 182/798), the author's commentary is followed by a list of Prophetic and Companion *ḥadīth*s which serve to justify the wisdom of Abū Yūsuf's recommendations to the caliph.

Nonetheless, the differences between the introduction and the remainder of the *Aḥkām al-Awqāf* raise the possibility that this collection of *ḥadīth*s was grafted onto the *waqf* treatise at some later point in time. First, al-Khaṣṣāf seems an unusual figure to promote a traditionalist, hermeneutical approach to legal thinking. As the author of a book on legal fictions (*ḥiyal*), and a confirmed rationalist, al-Khaṣṣāf does not seem to have bent over backwards to appease the traditionalists. Second, there is no suggestion that al-Khaṣṣāf had any connection with the transmission and/or collection of *ḥadīth*s. If al-Khaṣṣāf was a *muḥaddith*, he appears to have escaped the notice of the biographical dictionaries.[135] And lastly, the foregrounding of

[135] The fact that al-Khaṣṣāf was a rationalist would not have excluded him from the biographical dictionaries. As the *tarjama* of Abū Khālid Yūsuf b. Khālid illus-

the *ḥadīth*s is unusual. The lack of integration between the *ḥadīth*s and the main body of the *Aḥkām al-Awqāf* suggests that while the introductory *ḥadīth* collection is employed hermeneutically to legitimate the *waqf* treatise, the *ḥadīth*s have not really been incorporated into the treatise. In fact, when al-Khaṣṣāf later refers to the precedents of the early Muslim community, he uses these *waqf*s as exempla to support his independent reasoning rather than as a means for exegetically deriving the law.[136] Moreover, al-Khaṣṣāf's use of exempla cannot be linked causally to the presence of the *ḥadīth*s in his introduction. As noted previously, Hilāl also cited these early precedents even though his *waqf* treatise did not contain a *ḥadīth* collection. In short, there appears to be little overt connection between the collection of *ḥadīth*s and the rest of the *Aḥkām al-Awqāf*.

In addition, the fourteenth-century C.E. British Library manuscript exhibits a textual inconsistency in the relationship between the introductory *ḥadīth* collection and the main body of the text. Although the *ḥadīth*s are present in the manuscript, they are not mentioned in the table of contents. If the *ḥadīth*s are not native to the original text, the question of when they were added is difficult to answer. There are collections of *ḥadīth*s on the subject of *waqf* in the works of the fourth-century Ḥanafī jurisprudents al-Ṭaḥāwī (d. 321/933)[137] and al-Dāraquṭnī (d. 385/995),[138] the fifth-century follower of al-Shāfiʿī, al-Bayhaqī (d. 458/1066),[139] and the seventh-century Ḥanbalī scholar Ibn Qudāma (d. 620/1223).[140] The presence of such collections suggests that it would not have been difficult for a later redactor to

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trates, it was not uncommon to find rationalists in the biographical dictionaries, even if their presence in these works provided little more than a forum for the *aṣḥāb al-ḥadīth* to excoriate their credibility as *ḥadīth* transmitters.

[136] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 19–20, 38, 40, 73, 114, 149, 151.

[137] Al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār*, 4: 95–99.

[138] ʿAlī b. ʿUmar al-Dāraquṭnī, "*Kitāb al-Aḥbās*," in *Sunan al-Dāraquṭnī* (Cairo: Dār al-Maḥāsin liʾl-Ṭibāʿā, 1966), 4: 185–202.

[139] Al-Bayhaqī, *Kitāb al-Sunan al-Kubrā*, 6: 158–68.

[140] Abū Muḥammad ʿAbd Allāh b. Muḥammad Ibn Qudāma, *Al-Mughnī* (Cairo: Maṭbaʿat al-Imām, 1964), 5: 489–90. Some earlier legal works and *ḥadīth* collections do contain *ḥadīth*s that refer to pious endowments, but these earlier works do not bring together *multiple ḥadīth*s on the subject of the *waqf*. See al-Shāfiʿī (d. 204/820), *Kitāb al-Umm*, 4: 52–53; ʿAbd Allāh b. al-Zubayr al-Ḥumaydī (d. 219/834), *al-Musnad*, ed. Ḥabīb al-Raḥmān al-Aʿẓamī (Karachi: Al-Majlis al-ʿIlmī, 1963), 2: 289, no. 7; ʿAbd Allāh b. Muḥammad Ibn Abī Shayba (d. 235/849), *Al-Kitāb al-Muṣannaf* (Bombay: al-Dār al-Salafiyya, 1403/1983), 14: 167, no. 17962.

compile the *ḥadīth*s we now have in the introduction to the *Aḥkām al-Awqāf*. Nonetheless, these collections only provide a benchmark for assessing when the *ḥadīth*s may have become affixed to al-Khaṣṣāf's treatise. While there is evidence to suggest that these *ḥadīth*s were not native to the original text, when they were affixed to the *waqf* treatise, and who wrote the short expository passage at the end of the *ḥadīth* collection, remains an enigma.

Regardless of the problems generated by the formulation of the "*waqf* = *ṣadaqa* + *mawqūfa*" equation, Hilāl did succeed in clearing up the terminological confusion surrounding the construction of pious endowments in the third Islamic century. In fact, a credible argument can be made that the subsequent widespread usage of the term "*waqf*" is directly connected to the *waqf* treatises of Hilāl and al-Khaṣṣāf.[141] Before these two treatises, the term *waqf* and its verbal forms, *waqqafa/awqafa*, were rarely used. Not only do the *ḥadīth*s in the *Aḥkām al-Awqāf* attest to this lack of usage, but so do early legal texts and papyri fragments. In the *Mudawwana*, Mālik b. Anas never employs *waqf/waqqafa* in his discussion of pious endowments,[142] and al-Shāfiʿī appears to have preferred other terms, notably *ḥubs* and *aḥbās*.[143] Nor are these words used in one of the earliest extant *waqf* deeds—dated to the middle of the third century.[144] Instead, all these early sources rely upon terms such as *ḥubs* and *ṣadaqa* to convey the meaning of pious endowments. While trust instruments and inscriptions from the fourth century A.H. continued to use *ḥubs* and *ṣadaqa*, they also began to include the term "*waqf*." One finds in fourth-century sources such phrases as "This *ṣadaqa* and this *waqf*" (*hādhā al-ṣadaqa wa-hādhā al-waqf*)[145] and "He sequestered it and distributed it to charitable purposes as a *waqf*" (*ḥabbasahu wa-sabbalahu*

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[141] Clearly, access to the *Kītāb al-Wuqūf wa'l-Ṣadaqāt* of Muḥammad b. al-Ḥasan al-Shaybānī would be helpful for assessing the accuracy of this conclusion.

[142] Saḥnūn, *Al-Mudawwana*, 15: 98–117.

[143] Al-Shāfiʿī, *Kītāb al-Umm*, 4: 51–61. Al-Shāfiʿī does use the term "*waqf*" but he more commonly refers to pious endowments as *ḥubs, ṣadaqa, ṣadaqa muḥarrama*, etc. Even more telling is al-Shāfiʿī's title to this section of the *Umm*—"*al-aḥbās*."

[144] Yūsuf Rāġib, "Acte de *waqf* d'une maison," in *Marchands d'étoffes du Fayyoum au III^e/IX^e siècle: Les Actes des Banū ʿAbd al-Muʾmin* (Cairo: Institut français d'archéologie orientale du Caire, 1982), 36–45. Interestingly, the term "*waqf*" is never used in the deed. Rather, the endowment is described as a "*ḥubs*" and a "*ḥubs ṣadaqa*."

[145] Moshe Sharon, "*Waqf* Inscription from Ramla *c.* 300/912–913," 106. See also idem, "A *Waqf* Inscription from Ramlah," *Arabica* 13 (1966), 77, for the use of the verb "*waqqafa*."

waqf[an]).[146] Admittedly, the sources which form the basis for these conclusions are few, but they suggest that use of the term "*waqf*" became more common in the late third and early fourth centuries A.H., or, roughly two or three generations after the production of the *waqf* treatises.

A careful reader may have noticed a certain incongruity in the previous discussion. On the one hand, much has been made about the importance of the *waqf* equation in bringing terminological order to the law of Islamic trusts. On the other hand, it also seems clear that Muslims used the term "*waqf*" to refer to pious endowments, even though the term, by itself, was considered legally insufficient to create a valid pious endowment.[147] Even Hilāl and al-Khaṣṣāf use the term "*waqf*"—repeatedly—to denote pious endowments in their treatises. Two theories might explain this incongruity in usage. First, use of the term may simply reflect the disjunction between colloquial and legal terminology. In many circumstances, the colloquial use of "*waqf*" would have been sufficient to convey the meaning of a pious endowment. However, in other contexts, such as the creation of a *waqf* deed, the precise legal terminology of the *waqf* equation would have been required in order to provide legal certainty that the founder intended to create a perpetual, pious endowment and not some other form of charity or gift.[148] Second, the term "*waqf*" was probably a type of legal shorthand. In the *waqf* treatises, the *qultu* and *qāla* figures often use the term "*waqf*" after the founder has satisfied the precise legal terminology of the *waqf* equation because the underlying legal meaning of the endowment—as expressed in the juxtaposition of *ṣadaqa* and *mawqūfa*—is now clear and unambiguous. The creation of a new signifier for perpetual, charitable endowments was only half the battle, however. Since the *waqf* necessarily impacted the inter-generational transmission of wealth, its ambiguous relationship with the Islamic law of inheritance (*ʿilm al-farā'iḍ*) and the law of bequest (*al-waṣiyya*) also required clarification.[149]

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[146] Max van Berchem, *Matériaux pour un corpus inscriptionum arabicarum* (Paris: E. Leroux, 1894–1956), 52/2, 92.

[147] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 4; see also "*Waqf* = *Ṣadaqa* + *Mawqūfa*" section, *supra*.

[148] There is evidence from later periods that *qāḍī*s may have played a significant role in the drafting of legal instruments, which would have provided an opportunity to translate the colloquial expressions for pious endowments into the language of the law. See Powers, *Law, Society, and Culture in the Maghrib*, 137, 159.

[149] Hilāl's and al-Khaṣṣāf's terminological efforts were not limited solely to defining

III. *Defining the* Waqf *in Relation to Bequests and Inheritances*

From the perspective of the historian, the *waqf* clearly seems to have functioned as an antidote to the restrictions and atomizing effects of the *ʿilm al-farāʾiḍ*. That Muslims wished to exert more control over the disposition of their property is a recurrent theme that begins in the early Islamic period.[150] Initially, Muslims appear to have used bequests—not *waqfs*—as a means for circumventing the *ʿilm al-farāʾiḍ*.[151] But with the restriction of bequests to non-heirs and to only one-third of an estate—a rule which may not have developed until the second century A.H.[152]—pious endowments emerged as one of the few recourses Muslims had for maintaining control over the disposition of their wealth. In fact, the growth and importance of the *waqf* within Islamic society is inextricably linked to the emergence of the uniquely Islamic *ʿilm al-farāʾiḍ*.[153] After all, most societies possess some

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the terms that became the *waqf* equation. Other areas of confusion addressed in the treatises involved the terms used to designate beneficiaries, the poor, and various ambiguous grammatical distinctions. Appendix D analyzes these efforts.

[150] David S. Powers, "On Bequests in Early Islam," *JNES* 48 (1989), 190–91. Although Powers limits his discussion to an analysis of how prominent Muslims, such as Sufyān al-Thawrī (d. 161/778), attempted to ignore the one-third restriction on bequests, the motivations underlying such actions are similar to those that led Muslims to establish *waqfs*—a general unhappiness with the compulsory nature of the *ʿilm al-farāʾiḍ*.

[151] Powers argues that originally there were no restrictions on bequests and that the *ʿilm al-farāʾiḍ* took effect only in the absence of a last will and testament. Powers, *Studies in Qur'ān and Ḥadīth: The Formation of the Islamic Law of Inheritance* (Berkeley: The University of California Press, 1986), 107, 210–12. For a critique of Powers' conclusions, see Richard Kimber, "The Qur'ānic Law of Inheritance," *ILS* 5 (1998), 291–325.

[152] This dating is based upon Powers' assertion that the "No bequest to an heir" maxim (*lā waṣiyya li-wārith*) did not exist until the end of the first century A.H. and did not acquire Prophetic status until the end of the second century A.H. Powers, *Studies*, 216.

[153] Islamic society is not the only one to have had its laws influenced by a sacred text. In "The Goring Ox," Jacob J. Finkelstein examined how the now-defunct law of deodands resulted from an unusual interpretation of Biblical law. A deodand—literally, a thing to be given to God—was an amercement made to the Crown when wrongful death occurred. For example, if my ox gored your father, I would pay the Crown a deodand for your father's wrongful death. Significantly, however, this forfeiture was not considered compensation for the life of the wrongfully deceased, but rather a religious expiation to God's earthly agent, the Crown. From the modern perspective, the law of deodands seems rather odd, because the amercement for wrongful death goes to the Crown rather than the kin of the deceased. In fact, the law of deodands is notably dissimilar from how almost every other culture has dealt with wrongful death. Finkelstein argues that a Biblical "revulsion" against com-

form of an endowment or trust. But it is only in the Islamic world that endowments became a major, if not the dominant, inheritance strategy.

An Inter Vivos *Transfer of Property*

The assertion that the *waqf* constituted a means for eluding the Qurʾānic forced-share system finds support from within the Islamic tradition itself. Opponents of the *waqf* circulated maxims that the *waqf* constituted an illicit evasion of the Qurʾān.[154] Shurayḥ b. al-Ḥārith (d. 78–99/697–717) expressed his opposition to the legality of the *waqf* by proclaiming that "[t]here is no *ḥubs* in circumvention of the shares of God, the Exalted" (*lā ḥubs ʿan farāʾiḍ Allāh taʿālā*),[155] and the Prophet reportedly said that the right to create a *waqf* (or a *ḥubs*) had been abrogated by the inheritance verses: "*lā ḥubs baʿda sūrat al-nisāʾ*."[156]

In contrast to those who equated the *waqf* with an evasion of the *ʿilm al-farāʾiḍ*, proponents of the *waqf* attempted to break any connection between the *waqf* and a *post mortem* transaction of property by arguing that these endowments constituted a legal, *inter vivos* transfer of one's property similar to a sale or a gift. This conception of the *waqf* as an *inter vivos* transaction finds expression in the *waqf* equation generated by Hilāl: a *waqf* is literally a type of charitable gift (*ṣadaqa*) which has been sequestered (*mawqūfa*) in perpetuity. As in a conventional *inter vivos* sale or gift, the formation of this charity will have repercussions on the founder's heirs in the sense that they will permanently lose their inheritance rights to this property (although they may become beneficiaries of the *waqf*). But as the following passage from the *Kitāb al-Umm* of al-Shāfiʿī illustrates, Islamic law

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puting the value of human life in pecuniary terms shaped the peculiar nature of the institution. Confronted with this (perceived) Biblical proscription, English jurists formulated the unusual—actually, unique—law of deodands to impose a penalty for wrongful death without suggesting that the decedent's life had been measured in monetary terms. Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty," *Temple Law Quarterly* 46 (1973), 169–290, esp. 169–83.

[154] The verses in question are Qurʾān 4.8, 4.11–12, and 4.176.

[155] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 5–6. A similar version of this *ḥadīth* is found in al-Ṭaḥāwī, *Sharḥ Maʿānī al-Āthār*, 4: 99.

[156] Al-Bayhaqī, *Kitāb al-Sunan al-Kubrā*, 6: 162.

traditionally has granted individuals wide latitude to conduct *inter vivos* transactions so long as they do so in a state of sound health:

> If someone objects: If a person while in a state of sound health establishes a *ḥubs* and [later] dies, then [why] is it not inherited from him? [We reply]: Because he removed it from his ownership (*akhrajahā*). He is the owner (*mālik*) of all of his property, and he may do with it whatever he chooses (*yaṣnaʿu fī-hi mā yashāʾu*). He is [even] permitted to remove from his ownership more than this—in our opinion and in yours. What is your opinion if he had given it as a gift to a stranger or sold it to him below market value? Is this permitted? If he responds, 'Yes,' then ask [him]: If he does this, and then dies, can it be inherited from him? If he says, 'No,' then say [to him]: But this is an evasion of the shares of God, the Exalted (*farāʾiḍ Allāh taʿālā*). If he says, 'No, because he gave it away while he was still the owner, and [he did this] prior to the application (*wuqūʿ*) of the shares of God, the Exalted,' then say [to him]: Then this is similar to the *ṣadaqa* which he gives away as charity—in a state of sound health—prior to the application of the shares of God, the Exalted.[157]

The conceptualization of the *waqf* as an *inter vivos* charity (*ṣadaqa*) was critical for liberating the Islamic trust from the Qurʾānic forced-share system and giving the institution a distinctive position within the Islamic inheritance system. By shifting the discourse of the *waqf* from inheritance to an *inter vivos* charitable gift, Muslim jurists rendered impotent the criticisms of Shurayḥ and other *waqf* opponents: where there was no inheritance, there could be no circumvention of the *ʿilm al-farāʾiḍ*.

The categorization of the *waqf* as an *inter vivos* transfer of property also permitted the founder of the *waqf* to finesse the restrictions imposed on *post mortem* testamentary bequests. These restrictions, which do not permit a bequest to heirs who receive fractional shares and limit bequests to one-third of the decedent's estate (unless the heirs consent to a larger bequest), would have significantly curtailed the scope and size of the familial *waqf*s described in the two *waqf* treatises. The need to differentiate the *waqf* from a bequest may explain why Hilāl and al-Khaṣṣāf draw attention to the qualities that distinguish these two institutions in a form of "reverse" or "negative" *qiyās*. For example, al-Khaṣṣāf contrasts the eternal (*muʾabbad*)

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[157] Al-Shāfiʿī, *Kitāb al-Umm*, 4: 58.

nature of the *waqf* with the non-eternal bequest,[158] and observes that while a bequest can be revoked, there is no right of withdrawal in a *waqf*.[159] Moreover, both treatise authors remark that while a *waqf* can include those who have not yet come into existence, a bequest is limited solely to those who exist on the day the testator dies.[160] And as for the case of a recipient who refuses his or her share from a bequest or a *waqf*, Hilāl notes that the refused share of a bequest returns to the testator's heirs while in a *waqf* this same share is distributed among the remaining beneficiaries of the *waqf*, or is designated for the endowment's ultimate charitable disposition, should no other beneficiaries exist.[161]

These differences also extend to the usufructs of the two legal concepts. As the following *qultu/qāla* dialogue illustrates, in the case of a bequest of a property's usufruct, the bequest is limited to those recipients who exist on the day the founder dies, and the principal of the property (*al-aṣl*) is eventually returned to the founder's heirs. By contrast, in the case of a *waqf*, the principal is never returned to the heirs, and the yields continue their charitable function in perpetuity and can be distributed to beneficiaries who have not yet come into existence:

> I said: What is your opinion of a man who says, "After my death, the yields of my land are given to the children of ʿAbd Allāh and his descendants so long as they beget offspring." He did not say "*ṣadaqa mawqūfa*," nor designate it as a *ṣadaqa mawqūfa*, nor make its final disposition for the destitute.
>
> He said: It is permitted as a bequest (*waṣiyya*) from the third. And the yields are for the children of ʿAbd Allāh who have come into existence (*fa-takūn al-ghallatu li-waladi ʿAbd Allāh al-makhlūqīn*)—to the exclusion of those who have not come into existence from the children and the descendants—so long as they remain [living]. And when they die out, the land is returned to the decedent's heirs (*warathat al-mayyit*), and it is divided amongst them according to their shares (*ʿalā farā'iḍihim*). Its principal is distributed amongst them, and it is not a *waqf*.
>
> I said: And you do not assign a usufructory right to those who have not yet been created among the children and descendants?

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[158] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 259.
[159] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 248.
[160] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 138; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 260.
[161] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 166–67, 276.

> He said: No, because this is a bequest (*waṣiyya*) and not a *waqf*. And since it is a bequest, a bequest is not permitted for those who have not been created. It is only for those who have come into existence on the day the testator (*al-muṣī*) dies, to the exclusion of those who will [subsequently] come into existence. But if it had been *waqf* land [with] its final disposition for the poor, and he had said, "*ṣadaqa mawqūfa*," then it would have been permitted for the children who exist and for the descendants of those who have not yet been created, because this may not revert as an inheritance and it may not be owned, in perpetuity. [By contrast], the bequest (*al-waṣiyya*) is returned to the heirs (*al-waratha*) after the dying out of those for whom the yields were left as a bequest.[162]

The Testamentary Waqf

In spite of the desire of *waqf* proponents to differentiate the *waqf* from a *post mortem* bequest, the discussions in the *waqf* treatises reveal that under certain circumstances a *waqf* could not elude the strictures imposed on testamentary bequests. In the case of a *waqf* made during a person's death-sickness, the bequest restrictions were applied.[163] According to the *sharīʿa* doctrine of death-sickness,[164] the rights of a dying person's heirs begin at the moment the soon-to-be decedent enters his or her final sickness. As a result, should the dying person make a gratuitous disposition—such as a *waqf*—during this period, the transfer of property is considered to have occurred *post mortem*. In other words, dispositions made during a person's death-sickness are subject to the same restrictions as those imposed upon testamentary bequests—they cannot exceed one-third of the estate[165] and

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[162] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 138.

[163] Hilāl and al-Khaṣṣāf also consider the case of a founder who had bequeathed (*awṣā*) a *waqf* following his or her death. The founder's use of the term "to bequeath" automatically turns the transaction into a *post mortem* transfer of property so the restrictions imposed on bequests are applied to the *waqf*. Hilāl al-Raʾy, *Aḥkām al-Waqf*, 131; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 248.

[164] In his article on death-sickness, Hiroyuki Yanagihashi has traced the evolution of this doctrine over the course of the second Islamic century. He argues that the "classical" doctrine did not reach its final form until the beginning of the third century. Yanagihashi, "Doctrinal Development of *Maraḍ al-Mawt* in the Formative Period of Islamic Law," *ILS* 5 (1998), 326–58.

[165] The origins of the one-third restriction (*al-waṣiyya fi'l-thulth*) has spawned a great deal of discussion amongst scholars of Islamic law. See Schacht, *Origins*, 201–02; N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press,

they are not permitted for heirs.[166] The rationale for this doctrine is two-fold. First, the one-third restriction safeguards the interests of heirs and creditors during the phase in which the dying person may be cognizant that his or her life is ending.[167] Second, both restrictions work together to fulfill the "spirit" of the Islamic inheritance system: the majority of the estate is divided according to the Qur'ānic *'ilm al-farā'iḍ*, and the sanctity and balance of these shares are preserved by the prohibition against bequests to heirs.

Defining the *waqf* in relation to the doctrine of death-sickness was a concern of both Hilāl and al-Khaṣṣāf. Upon initial consideration, it would appear that there were only two possible legal outcomes for a *waqf* established during a person's death-sickness: declare the *waqf* null and void and divide the property according to the *'ilm al-farā'iḍ*, or transform it into a testamentary bequest (*waṣiyya*).[168] Instead, both treatises delineate what might be described as a hybrid *waqf*-bequest. This hybrid abides by the constraints imposed on bequests, and adheres to the *'ilm al-farā'iḍ*, but also retains the attributes associated with a pious endowment. Somewhat confusingly, Hilāl and al-Khaṣṣāf refer to this hybrid *waqf*-bequest as a "*waṣiyya*."[169] This hybrid, however, exhibits significant differences from a typical testamentary bequest. In calling this hybrid a "*waṣiyya*," Hilāl and al-Khaṣṣāf may have been acknowledging the fact that this type of *waqf*

1964), 65–69; Schacht's review of Coulson's argument, "Modernism and Traditionalism in *A History of Islamic Law*," *Middle Eastern Studies* 1 (1965), 388–400; Coulson's response to Schacht's review, Coulson, "Correspondence," *Middle Eastern Studies* 3 (1967), 195–203; R. Marston Speight, "The Will of Sa'd b. Abī Waqqāṣ: The Growth of a Tradition," *Der Islam* 50 (1973), 249–67; Patricia Crone and Michael Cook, *Hagarism: The Making of the Islamic World* (Cambridge: Cambridge University Press, 1977), 149 ff.; Crone, *Roman, Provincial and Islamic Law*, 92–97; Powers, "The Will of Sa'd b. Abī Waqqāṣ: A Reassessment," *Studia Islamica* 58 (1983), 33–53; idem, "On Bequests in Early Islam," 185–200.

[166] For a discussion of the origins of the maxim proscribing bequests to heirs (*lā waṣiyya li-wārith*), see Powers, *Studies*, 143–88.

[167] Yanagihashi, "Doctrinal Development of *Maraḍ al-Mawt*, 327.

[168] More than two decades ago, Moshe Gil (incorrectly) asserted that Islamic law does not allow for a *waqf* made during death-sickness: "I was not able to find any proof of 'a gift in contemplation of death' in Arabic sources, nor in the literature on Muslim law. Such a possibility seems to have been excluded. The founder (*wāqif*) must have full right of disposal over his property, and therefore he must be in the full possession of both his physical and mental faculties." Gil, *Documents of the Jewish Pious Foundations*, 13. I do not know if Gil's views on this matter have changed.

[169] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 133; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 245.

adheres to the restrictions placed upon bequests. For the sake of clarity, I will subsequently refer to this hybrid *waqf*-bequest as a "testamentary *waqf*" in order to contrast it with a testamentary bequest, or *waṣiyya*.

As the following passages from Hilāl's treatise illustrate, a testamentary *waqf* made during a person's death-sickness is defined in relation to the law of bequests. In contrast to an *inter vivos waqf*, on which there are no restrictions, a testamentary *waqf* is limited to a maximum of one-third of the estate unless the heirs permit it to be greater:

> I said: What is your opinion if a man, during his death-sickness (*fī maraḍihi*), says, "This land of mine is a *ṣadaqa mawqūfa* for my children, my grandchildren and my descendants so long as they beget offspring," and he bequeathed (*awṣā*) this after his death.
>
> He said: Then the two (*i.e.*, the *waqf* and the bequest) are equivalent. And the land is from the one-third if the heirs did not permit this [to become an unrestricted *waqf*]. But if they do permit this, then the land is a *waqf* and the yields are between the children, the grandchildren and descendants according to the number of heads (*i.e., per capita*). And if they do not permit this, it is from the one-third . . . (continued below)[170]

After placing the one-third restriction on the *waqf*, Hilāl turns to the more complex issue of how to distribute the shares of a testamentary *waqf* that had been established for heirs and non-heirs. According to the Prophetic maxim, "No bequest to an heir" (*lā waṣiyya li-wārith*), heirs who receive shares according to the *ʿilm al-farāʾiḍ* are not entitled to share in a bequest made on their behalf. Instead of nullifying this portion of the *waqf*, however, Hilāl splits the *waqf* into two parts—one for heirs and one for non-heirs—based on the number of aggregate beneficiaries in each group. The portion set aside for non-heirs is distributed equally amongst the beneficiaries, as in a conventional *waqf*. That which is designated for heirs, however, is handled differently in order to abide by the Prophetic prohibition against bequests to heirs. To comply with this proscription, Hilāl returns the amount stipulated for the heirs to the decedent's estate. In doing so, the amount becomes inheritable property for all the heirs, regardless of whether they were mentioned in the *waqf* deed

[170] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 133.

or not. This inherited amount is not divided equally, but rather it is distributed among the heirs according to the *ʿilm al-farāʾiḍ* (al-Khaṣṣāf, in a similar section, goes so far as to describe the complicated division by shares):[171]

> [He said]: And if it was taken from the permitted one-third, or if some of it was taken from the third, then the yields are [divided] among the [decedent's] children (*walad al-ṣulb*), grandchildren and descendants according to the number of heads. And whatever the [decedent's] children acquire is [divided] among them and the remainder of the decedent's heirs according to the Book of God (*i.e.*, the *ʿilm al-farāʾiḍ*), and that which the grandchildren and descendants acquire is [divided] among them equally.
>
> I said: Why did you make this just as you describe it?
>
> He said: Because it is a bequest (*waṣiyya*) for heir[s]—and they consist of the [decedent's] children; and for those who are not heir[s]—and they consist of the grandchildren and the descendants. And this is [a *waqf*] for the [non-heirs] because they are the ones for whom the bequest is permitted. And that which the [decedent's] children acquire, this is divided among them and the remainder of the heirs commensurate with their inheritance shares (*ʿalā qadri mawārīthihim*) because the bequest is not permitted for them.[172]

The impact of this partitioning of the *waqf* between heirs and non-heirs is made more explicit in a testamentary *waqf* for poor beneficiaries. Restricting the beneficiaries to the poor adds a level of complexity to the distribution of the shares. First, the financial status of the different beneficiary groups has to be taken into account. Second, following this initial determination, the relationship of the qualifying beneficiaries to the founder must be assessed. If the poor are non-heirs, then the distribution is straightforward—they receive their share of the *waqf* just as if it were an *inter vivos waqf*:

> I said: What is your opinion if a man says during his death-sickness, "This land of mine is a *ṣadaqa mawqūfa* for those who are needy (*ʿalā man iḥtāja*) from among my children and my descendants so long as they beget offspring," or he bequeathed (*awṣā*) that his land was made a *waqf* after his death in this manner?
>
> He said: The two are equivalent to one another and it is permitted from the third.

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[171] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 245.

[172] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 133. Similar passages can be found in al-Khaṣṣāf, *Aḥkām al-Awqāf*, 245–48.

I said: What is your opinion if all of them were rich?
He said: Then the yields are for the poor and destitute (*i.e.*, the remainder interest).
I said: What is your opinion if the grandchildren are poor and the [decedent's] children (*walad al-ṣulb*) are rich?
He said: All of the yields are for the poor grandchildren.
I said: And if some of the grandchildren are poor and the remainder are rich?
He said: Then the yields are for all of those who are poor from among the grandchildren . . . . (continued below)[173]

If the poor are among the founder's heirs, however, then the distribution of the *waqf* yields must conform to both the *lā waṣiyya li-wārith* maxim and the compulsory shares imposed by the *ʿilm al-farā'iḍ*. The result is somewhat unexpected. Although the *waqf* was stipulated for the poor, the yields intended for the founder's poor heir(s) must be distributed amongst *all* the founder's heirs regardless of their wealth or poverty. Again, as in the previous testamentary *waqf* discussion, any *waqf* yields designated for an heir are considered to be an inheritance for all heirs without exception:

I said: What is your opinion if the grandchildren and descendants are rich, but the [decedent's] children are poor?
He said: Then all of the yields are for the children—and they are [divided] among them and among the rest of the heirs according to the Book of God (*i.e.*, the *ʿilm al-farā'iḍ*).
I said: What is your opinion if some of the decedent's children are poor and the others are rich?
He said: Then all of the yields are for those who are poor from the [decedent's] children and for the rest of the heirs—regardless of whether they are rich or poor. And it is divided among all of them according to their inheritance shares from the founder.
I said: What is your opinion if there is no poor person among them except one biological child?
He said: Then he—and the rest of the heirs—are entitled to all of the yields regardless of whether they are rich or poor—commensurate with their inheritance shares.
I said: What is your opinion if there are poor children and poor grandchildren and descendants?
He said: Indeed, divide the yields of this *ṣadaqa* for the poor from among the [decedent's] children, the grandchildren and the descendants according to the number of heads (*i.e.*, *per capita*). That

[173] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 134–35.

> which the poor biological children acquire is divided among them and the remainder of the heirs—regardless of whether they are rich or poor—commensurate with their inheritance shares.[174]

Two questions not addressed fully in this passage concern the issue of future beneficiaries and whether a testamentary *waqf* exists in perpetuity. One of the qualities that distinguishes a *waqf* from a bequest is that the beneficiaries of a *waqf* may include those who have not yet come into existence, while a bequest is limited solely to those legatees who have come into existence on the day the testator dies. This distinction is important, because if a testamentary *waqf* is subject to this same restriction, then there really is no significant difference between a bequest and a testamentary *waqf*. At several points in the *waqf* treatises, however, both Hilāl and al-Khaṣṣāf imply that a testamentary *waqf* will continue to be executed, in perpetuity, according to the dictates of the founder. For example, in the case of a *waqf* established during death-sickness for the founder's "children, grandchildren and descendants in perpetuity so long as they beget offspring, and after them for the destitute," al-Khaṣṣāf concludes that when the founder's children die out, the yields of the *waqf* are designated for the grandchildren and descendants according to what the founder established.[175] In regard to the question of perpetuity, a testamentary *waqf* also differs from a bequest in that it does not revert to the heirs. Both Hilāl and al-Khaṣṣāf state that the charitable purpose of the testamentary *waqf* will be fulfilled should the other conditions no longer apply. For instance, in the previously cited selection from the *Aḥkām al-Waqf*, Hilāl stipulates that if all the beneficiaries are rich, then the *waqf* would continue as an endowment for its remainder interest, in this case, the poor and destitute.[176] Likewise, al-Khaṣṣāf states that should the beneficiaries of a testamentary *waqf* die out, then "the yields are executed according to the charitable purpose the founder stipulated" (*unfidhat al-ghallatu ʿalā mā sabbalahā al-wāqif*).[177]

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[174] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 135.
[175] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 248–49, 256.
[176] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 134.
[177] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 246.

Background Principles

Hilāl and al-Khaṣṣāf could not have created the *post mortem* testamentary *waqf* if the relationships between bequest law, the *ʿilm al-farā'iḍ*, and the doctrine of death-sickness had not achieved their "classical" form. The work of Powers and Yanagihashi has focused on the development of these different aspects of the Islamic inheritance system[178] during the formative period of Islamic history. In *Studies in Qur'ān and Ḥadīth*, Powers attempted to trace the evolution of bequest and inheritance law over the course of the first two Islamic centuries. Powers argued that originally there were no restrictions on bequests and that the laws surrounding intestate succession[179] only took effect in the absence of a last will and testament.[180] By the middle of the first century, however, this relationship between testacy and intestacy had become inverted with the Qur'ānic forced-share intestacy system now providing the compulsory default rules for the Islamic inheritance system.[181] Thus, instead of constituting the norm, bequests were now treated as exceptions to the sacrosanct "shares of God." This is the hierarchical relationship delineated in the *waqf* treatises: bequests are limited to one-third of the decedent's estate, bequests to heirs are proscribed, and the *ʿilm al-farā'iḍ* is mandatory in all *post mortem* transfers of property.[182]

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[178] The "Islamic inheritance system" encompasses more than the *ʿilm al-farā'iḍ*. As Powers has explained, "the term 'inheritance system' refers to the combination of laws, customs, land tenure rights and settlement restrictions that regulate the division of land at a succession." Powers, "The Islamic Inheritance System," 19–20. For the purposes of this discussion, *waqf*s, bequests, and testamentary *waqf*s would all be considered components of the Islamic inheritance system.

[179] The early law of intestacy was not the fully developed *ʿilm al-farā'iḍ*. For a discussion of the differences between the "proto-Islamic law of intestacy" and the *ʿilm al-farā'iḍ*, see Powers, *Studies*, 88–102.

[180] Powers, *Studies*, 107, 210–12.

[181] Powers posits two unrelated explanations for this switch to a compulsory intestacy default rule: (1) that the testamentary powers of Qur'ān 4.12b were read out of the Qur'ān in order to resolve political struggles over caliphal succession, and/or (2) that there was a high mortality rate amongst the early Muslim community from battles and plagues, making a forced-share system more attractive as a default rule. Powers, *Studies*, part II. It seems equally plausible that the early Muslim community switched to a forced-share intestacy system to lessen the traditional problems associated with testate succession: competing wills, oral wills, holographic wills, and capacity contests.

[182] Powers, *Studies*, 212–16.

Unlike Powers, who focused on the relationship between bequests and inheritances, Yanagihashi has observed how the doctrine of death-sickness developed parallel to this newly evolving hierarchical relationship. Once Muslim jurists had determined that the *ʿilm al-farā'iḍ*, and not bequests, would form the compulsory default rules for the Islamic inheritance system, the doctrine of death-sickness emerged as a means to safeguard the interests of heirs and creditors by limiting the legal effect of acts undertaken during this final stage of a person's life.[183] The doctrine protected the interests of heirs and creditors by subjecting gratuitous dispositions made during a person's final sickness to the one-third restiction on bequests.[184]

These second-century developments in bequest law, the *ʿilm al-farā'iḍ*, and the doctrine of death-sickness form the background for the definitional framework in the two *waqf* treatises. The law of *waqf*, as expressed by Hilāl and al-Khaṣṣāf, is contingent upon the full development of these different components of the Islamic inheritance system. For example, consider the importance that Hilāl and al-Khaṣṣāf place on defining the *waqf* as an *inter vivos* charity. Under the "proto-Islamic law of inheritance," in which a person possessed full testamentary powers, defining the *waqf* as a *post mortem* transfer of property would have presented no legal obstacles. However, once testamentary bequests were subordinated to the *ʿilm al-farā'iḍ*, all *post mortem* transfers of property beyond the one-third restriction were subject to the forced-share intestacy rules. Due to the precedence granted to the *ʿilm al-farā'iḍ*, Muslim jurists, including Hilāl and al-Khaṣṣāf, were compelled to construct the *waqf* as an *inter vivos* charity even though, in practice, the institution functioned much more like a *post mortem* bequest.

The conclusion that developments in bequest and inheritance law preceded the law of *waqf* is given further credence by the way in which various principles from these doctrines are incorporated into the *waqf* treatises. Both Hilāl and al-Khaṣṣāf emphasize the "share" to which a beneficiary is entitled. As Powers has argued in his discussion of the Islamic law of inheritance, this stress on shares—as opposed to heirs or beneficiaries—originates from the manner in

[183] Yanagihashi, "Doctrinal Development of *Maraḍ al-Mawt*," 326.
[184] Yanagihashi, "Doctrinal Development of *Maraḍ al-Mawt*," 353–54, 358.

which the Qur'ān allots a fractional share to specified heirs.[185] In the case of a *waqf* in which the total amount to be distributed is greater than the entirety of the *waqf*, Hilāl and al-Khaṣṣāf allot shares according to *'awl*, or "proportional reduction," a form of apportionment developed in connection with the *'ilm al-farā'iḍ*:

> I said: What is your opinion if he says, "Zayd is entitled to one-half, and 'Amr is entitled to two-thirds." How do you divide the yields?
> He said: According to seven [shares]: Zayd receives three[-sevenths] and 'Amr receives four[-sevenths]. The two divide the yields in this manner.[186]

This technique of reducing the shares on a *pro rata* basis developed as a consequence of an unusual feature of the *'ilm al-farā'iḍ*. Under certain circumstances, the inheritance shares awarded to a decedent's heirs might exceed 100 percent of the estate. Since it is not possible to give away more than the estate, Muslim jurists developed the principle of *'awl* in which the share of each heir would be reduced proportionally. In other cases, the reliance upon the *'ilm al-farā'iḍ* is even more explicit. For example, in the case of a man who establishes a *waqf* "for the heirs of so-and-so commensurate with their inheritances from him," the males receive twice as much of the yields as do the females:

> [Al-Khaṣṣāf] said: Do you not see that if so-and-so dies and leaves behind as heirs two boys and two girls, then the yields are divided among them according to six shares [four for the two boys and two for the two girls]. Each boy is entitled to two shares and the two [shares] are [each] one-third of the yields. Each girl is entitled to one share and [each share] is one-sixth of the yields.[187]

The basis for this two-to-one ratio is derived from an inheritance verse in the Qur'ān: "A male receives the share of two females."[188]

The intersection of the law of *waqf* with the laws of inheritance, bequest, and death-sickness reveals that the law of *waqf* did not emerge in a vacuum. To the contrary, *waqf* law emerged in the shadow of these established legal doctrines and was shaped and

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[185] Powers, *Studies*, 213.
[186] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 275.
[187] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 145.
[188] Qur'ān 4.11.

affected by them in various ways. On the one hand, the treatise writers had to distinguish the *waqf* from inheritances and bequests in order to secure a place for the institution within the Islamic inheritance system. On the other hand, this legal space could never be completely autonomous since the law of *waqf* remained subordinate to these established doctrines and depended upon them for its own substantive law. In the formation of the *waqf* as a legal institution, the creation and definition of this legal space was just as significant as the *waqf* equation. For without the former, the latter would have had no meaning.

* * *

The terminological and definitional efforts in the *waqf* treatises indicate that the 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. This effort required creating a new signifier, both to distinguish the institution from other forms of charity and gift, and to integrate the institution into the fully developed law of intestacy and testacy. The result was the creation of a new legal institution—the "*waqf*." For *qāḍī*s confronted with questions concerning the legality or propriety of a pious endowment, the substantive "black letter" law of the *waqf* treatises would have provided the legal framework through which they analyzed and resolved the legal questions before them.

But if the *waqf* treatises delineated the substantive law of *waqf*, they ultimately could not confer legitimacy on the institution. Obviously, neither Hilāl nor al-Khaṣṣāf constructed the law of *waqf* believing that they were conferring legal status on an illegitimate institution. From the perspective of the *aṣḥāb al-ra'y*, the internal consistency of the legal arguments in the *waqf* treatises, combined with the seamless integration of the *waqf* into the Islamic inheritance system, would have been sufficient to legitimize the institution. Certainly the converse would have been true: had the substantive law conflicted with the law of intestacy and testacy, such conflicts and inconsistencies would have called into question the legality of the institution. Moreover,

the fact that the *waqf* (presumably) reflected the actual practices of the Muslim community would have bolstered the conviction that the institution was in harmony with the *sharīʿa*. The problem, of course, was that legal legitimacy and legal authority were becoming an increasingly hermeneutical phenomena over the course of the third and fourth centuries. Not only was the discursive legal reasoning of the *waqf* treatises inherently non-exegetical, but in some cases this reasoning conflicted with the reports of pious endowments among the early Muslim community. Thus, in spite of the importance of the *waqf* treatises to the development of the institution's substantive law, one cannot speak of the *waqf*'s birth as a legitimate institution within Islamic law without examining its parallel, exegetical superstructure.

CHAPTER FOUR

HERMENEUTICAL LEGITIMATION

As *sharīʿa* legitimacy became an increasingly hermeneutical phenomenon over the course of the third century A.H., the (perceived) practices of the early Islamic community, rather than the *raʾy* of Hilāl and al-Khaṣṣāf, became the medium through which the *waqf* attained legal *and* cultural legitimacy. The introductory collection of *ḥadīth*s in the *Aḥkām al-Awqāf* of al-Khaṣṣāf is symbolic of this bifurcation between substantive law and legal legitimacy: while the substantive law of *waqf* developed through rationalist discourse, the institution's cultural (and 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. In the *Kitāb al-Umm*, al-Shāfiʿī (d. 204/820) alludes to the customs of the early Islamic community when he writes that

> knowledge of *ṣadaqāt* has been preserved by a considerable number of the Emigrants and Helpers. Indeed, a great number of [the early Muslims'] descendants and relatives continued to administer their *ṣadaqāt* until they died. The majority of them transmitted this on the authority of the majority, so there is no dispute in this matter.[1]

In the *Mudawwana*, Mālik b. Anas (d. 179/795) cites to "the *aḥbās* from the time period of 'Umar and others" to establish a precedent for whether the founder may retain possession of a *waqf*.[2] Historical writings also noted the *waqf*-making practices of the first Muslims. Al-Wāqidī (d. 207/823) reported that the Companions had transformed their *dirham*s and date trees into *ṣadaqa*s,[3] while al-Ṭabarī (d. 310/923) related the conversion of conquered lands (*ṣawāfī*) into "*ḥabīs* during the first century."[4] This latter practice was also remarked

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[1] Al-Shāfiʿī, *Kitāb al-Umm*, 4: 53.

[2] Saḥnūn, *Al-Mudawwana*, 15: 115.

[3] Muḥammad b. 'Umar al-Wāqidī, *Kitāb al-Maghāzī*, ed. Marsden Jones (London: Oxford University Press, 1966), 3: 991.

[4] Al-Ṭabarī, *Taʾrīkh*, 4: 31–32.

upon in the *Kitāb al-Kharāj* of Yaḥyā b. Ādam (d. 203/818), where the author reported that ʿUmar had made a *waqf* (*innamā waqqafa ʿUmar b. al-Khaṭṭāb*)[5] of Sawād al-Kūfa following its conquest in the year 16/637.[6]

Even Hilāl and al-Khaṣṣāf referenced the "*waqf*s" of the early Islamic community to bolster their legal reasoning. Hilāl cited to the customary practices of ʿUmar's *ṣadaqa* as well as the *waqf*s of ʿUthmān b. ʿAffān, ʿAlī b. Abī Ṭālib, al-Zubayr b. al-ʿAwwām, and Ḥafṣa,[7] and claimed that "these traditions (*akhbār*) are widely disseminated (*mutawātir*) and it is not permitted to contradict them."[8] Al-Khaṣṣāf's introduction, in addition to listing *ḥadīth*s describing the *waqf*-making practices of the early Muslim community, also included a tradition from Abū Yūsuf (d. 182/798) alleging that the practices of the Prophet and his Companions had legitimated the establishment of pious endowments:

> It was transmitted on the authority of Abū Yūsuf that he said: The *ṣadaqa*s of the Messenger of God and the leaders from among his Companions are famous and there is no need to say anything [more] about it.[9] They [the *ṣadaqa*s] are well-known and famous and it is not proper for anyone to question them. Indeed, on the contrary, you must seek to follow them in adopting their custom.[10]

This is the same Abū Yūsuf who initially opposed the *waqf*, but became convinced of the institution's legality when confronted with the customary practices of the earliest Muslims. According to this well-known anecdote, Abū Yūsuf, while on the pilgrimage with the ʿAbbāsid caliph al-Rashīd (r. 170–93/786–809), reversed his opposition when he saw that the Prophet's Companions had constructed numerous *waqf*s in and around the environs of Madīna.[11]

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[5] Note the use of the verb "*waqqafa*." This appears to be one of the earliest uses of this term in connection with the creation of pious endowments.

[6] Yaḥyā b. Ādam, *Kitāb al-Kharāj* (Cairo: al-Maṭbaʿa al-Salafiyya, 1964), 26, no. 47. The complicated status of the Sawād lands and its peasants has been discussed in an article by Paul G. Forand, "The Status of the Land and Inhabitants of the Sawād During the First Two Centuries of Islām," *JESHO* 14/1 (1971), 25–37.

[7] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 6–10, 72–73.

[8] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 6, 9–10, 72–73.

[9] This last phrase might also be read as "and there is no need in this matter for a *ḥadīth*."

[10] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 3–4.

[11] Al-Sarakhsī, *Al-Mabsūṭ*, 12: 28. Schacht considered this anecdote to be apoc-

Explicating the hermeneutical legitimation of the *waqf* requires consideration of sources outside the two treatises. To avoid confusion, it is important to note that many of these sources were put into circulation prior to the creation of the *waqf* treatises discussed here. The rationale for analyzing these sources in reverse chronological order is connected to the triumph of traditionalism over the course of the third century A.H. Although the sources analyzed in this chapter may have come into existence prior to the production of the *waqf* treatises, their hermeneutical significance became greater in later decades.

Another source of potential confusion concerns the terminology used in these sources. As with the *ḥadīth*s present in the introduction to al-Khaṣṣāf's treatise, almost all the traditions cited in this chapter use terms such as *ṣadaqa/taṣaddaqa, ḥubs/ḥabbasa, sabīl/sabbala* to convey to the idea of a pious endowment. Few of them use the term "*waqf*" and many do not satisfy the terminological requirements of Hilāl's *waqf* equation. This disjunction requires the reader to adopt the bifurcated perspective mentioned in the prior discussion of al-Khaṣṣāf's treatise: to see these traditions as providing exegetical support for the legitimacy of the *waqf* even though the legal vocabulary of *waqf* law (as it developed within Ḥanafī discourse) would seem to cast doubt on the legitimacy of these early endowments.

An examination of these sources reveals that the legality of the *waqf* rested upon three reference points—(i) Prophetic maxims; (ii) the *ṣadaqa* deed of ʿUmar b. al-Khaṭṭāb; and (iii) the *ṣadaqa*s of the Prophet. In early juristic discourse Prophetic maxims were the dominant legitimating force. In the writings of Hilāl and al-Shāfiʿī, for example, the *ṣadaqa*s of the Prophet are never mentioned and references to ʿUmar's *ṣadaqa* deed lack specificity. Instead, both jurists cite to Prophetic statements/maxims. Only in the introduction to

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ryphal: "There is no reason to credit the anecdote, reported by so late an author as Sarakhsī." Schacht, "Early Doctrines on *Waqf*," 451–52. A recent article by Michael Lecker, however, raises the possibility that late sources do not axiomatically constitute later emendations to the Islamic corpus. In his analysis of *ḥadīth*s relating the death of the Prophet's father, ʿAbd Allāh, Lecker argues that the terms "early" and "late" cannot be applied easily to Islamic traditions. Lecker makes a convincing case for dating a "late" *ḥadīth* from an eleventh/seventeenth-century collection to the "beginnings of Islamic historiography." Lecker, "The Death of the Prophet Muḥammad's Father: Did Wāqidī Invent Some of the Evidence?" *ZDMG* 145 (1995): 9–27, esp. 17.

the *Aḥkām al-Awqāf* of al-Khaṣṣāf can one speak of a fully formed superstructure/matrix encompassing all three strands of the triad.

While the contents of this *waqf* legitimating matrix are rather standard, the composition and interaction of these components is quite complicated. At various junctures, it is possible to perceive internal inconsistencies within each of these three reference points as well as conflicts between them. This examination reveals that while none of these traditions can be considered a historically reliable document, an understanding of the matrix's construction illuminates the process of hermeneutical legitimation within early Islamic legal discourse, and perhaps most importantly, why the Muslim community came to accept these historical accounts as an accurate representation of its past.

I. *The Maxims of the Prophet*

When discussing the Prophetic *waqf* maxims, it is helpful to group them into two broad categories: the *taṣaddaqa* maxim and the *sabbala* maxim. A third Prophetic maxim does exist, but this *amsakta* maxim appears to have emerged at a time posterior to the *waqf* treatises of Hilāl and al-Khaṣṣāf. Since *ḥadīth*s containing the *amsakta* maxim are found only in the later collections of al-Dāraquṭnī (d. 385/995) and al-Bayhaqī (d. 458/1066), they are considered outside the scope of this project.[12] Definitionally, the verbs *taṣaddaqa* and *sabbala* are virtually synonymous—both refer to alms-giving or dedicating objects to charitable purposes. Moreover, both Prophetic maxims were issued to the same person, ʿUmar b. al-Khaṭṭāb, concerning property that ʿUmar had recently acquired in Khaybar/Thamgh. The standard form of the *taṣaddaqa* maxim quotes the Prophet as suggesting, "If you want, sequester its principal and give (the yields) away as alms" (*in shi'ta ḥabbasta aṣlahā wa-taṣaddaqta bi-hā*).[13] The stan-

[12] The *amsakta* maxim appears to be a variant of the *taṣaddaqa* maxim, with the verb "to withdraw" (*amsaka*) taking the place of "to sequester" (*ḥabbasa*). As a result of this substitution, the new maxim reads, "If you want, give alms by means of it, and if you want, withdraw its principal" (*in shi'ta taṣaddaqta bi-hā wa-in shi'ta amsakta aṣlahā*). Al-Bayhaqī, *Kītāb al-Sunan al-Kubrā*, 6: 159; al-Dāraquṭnī, *Sunan*, 4: 186, no. 7, 190, no. 9 (omitting the second "*in shi'ta*").

[13] There are some traditions which reverse the order of the maxim, so that it reads "*in shi'ta taṣaddaqta bi-hā wa-ḥabbasta aṣlahā*." Al-Dāraquṭnī, *Sunan*, 4: 187, no. 5; al-Bayhaqī, *Sunan*, 6: 158–59, 161.

dard form of the *sabbala* maxim has the Prophet commanding ʿUmar to "Sequester its principal and dedicate its fruits/yields to charitable purposes" (*iḥbas aṣlahā wa-sabbil thamaratahā*). Although variants sometimes blur these distinctions, every maxim examined in this chapter orients itself around one of these two keywords. In terms of their content, both maxims refer to the sequestration of the property's principal. As for distribution of the yields, only the *sabbala* maxim explicitly mentions their distribution from the property's usufruct. In the *taṣaddaqa* maxim, the distribution of the property's yields is only implied in the suggestion to give alms. *Isnād* analysis of the *ḥadīth*s containing these two maxims indicates that their narrative structures—the background information that situates the Prophetic utterance—did not come into existence until the second century A.H., a time contemporaneous with debates over the legality of pious endowments.

Opposition to the *waqf* also took the form of maxims. For example, there is Shurayḥ's statement that pious endowments conflicted with the Qurʾān's forced shared system ("*lā ḥubs ʿan farāʾiḍ Allāh*"), a maxim that ultimately acquired Prophetic status in the third century,[14] and bore the controversial *isnād* chain of ʿIkrima (d. 104–07/722–25)[15]—Ibn ʿAbbās—the Prophet.[16] There is a similar anti-*waqf* *ḥadīth*—also on the authority of ʿIkrima and Ibn ʿAbbās—in which

[14] The dating of the Prophetic version of the "*lā ḥubs ʿan farāʾiḍ Allāh*" maxim is based upon its absence from the *Kitāb al-Umm* of al-Shāfiʿī and the *Aḥkām al-Waqf* of Hilāl al-Raʾy. Arguments from silence are not normally persuasive, but this case is exceptional. Al-Shāfiʿī bases part of his objection to the *lā ḥubs ʿan farāʾiḍ Allāh* maxim on the fact that it is Shurayḥ's opinion (see *infra*). It is unlikely that al-Shāfiʿī would have taken this position if a Prophetic version of the maxim had existed. Moreover, the *ḥadīth* in the *Aḥkām al-Waqf* provides a historical context for the maxim that is non-Prophetic. In the *ḥadīth*, Shurayḥ assumes his familiar role as *qāḍī* (he was reported to have been a *qāḍī* in Kūfa for sixty years and a *qāḍī* in Baṣra for one year) and relies upon the maxim as a justification for rejecting a *fatwā*. Nowhere in the *ḥadīth* does Shurayḥ allude to the Prophetic origins of the *lā ḥubs ʿan farāʾiḍ Allāh* maxim. Whether the maxim actually was issued by Shurayḥ is another matter altogether, but again, second-century A.H. legal discourse does not appear to have attributed the maxim to the Prophet. For biographical information on Shurayḥ, see Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 4: 326.

[15] Although ʿIkrima was the *mawlā* of Ibn ʿAbbās, his *tarjama* alleges that he attributed his own opinions to Ibn ʿAbbās and spread lies about his master. Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 7: 267, 269.

[16] Al-Bayhaqī, *Kitāb al-Sunan al-Kubrā*, 6: 162; al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār*, 4: 99.

the Prophet declared that there would be "no *ḥubs* after *sūrat al-nisāʾ*,"[17] the chapter in the Qurʾān in which the inheritance verses[18] were revealed. Another set of anti-*waqf* traditions indicated that the legal right to make a property inalienable—that is, to turn it into a *ḥubs* (*i.e., mawqūfa*)—had been proscribed. One of these *ḥadīth*s, also on the authority of Shurayḥ, alleged that "Muḥammad brought the release of *ḥubs*" (*jāʾa Muḥammad bi-iṭlāq al-ḥubs*),[19] while another stated unambiguously that "*ḥubs* is forbidden" (*nahā ʿan al-ḥubs*).[20]

Proponents of the *waqf* responded to these anti-*waqf* maxims and *ḥadīth*s with a variety of different argumentative strategies, including (i) questioning the authority of the *ḥadīth*s; (ii) challenging the legal meaning of the maxim; (iii) providing a different historical context for the maxim; and/or (iv) promoting counter-maxims and counter-*ḥadīth*s.[21] The fourth argumentative strategy is the one most relevant to this chapter. In his *waqf* treatise, Hilāl responded to Shurayḥ's "*lā ḥubs ʿan farāʾiḍ Allāh*" maxim by implicitly referring to the *taṣad-*

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[17] Al-Bayhaqī, *Kitāb al-Sunan al-Kubrā*, 6: 162.

[18] Qurʾān 4.8, 4.11–12, 4.176.

[19] Al-Shāfiʿī, *Kitāb al-Umm*, 4: 52.

[20] Al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār*, 4: 97.

[21] Al-Shāfiʿī's response to Shurayḥ's "*lā ḥubs ʿan farāʾiḍ Allāh*" maxim is illustrative of the first two argumentative strategies. First, al-Shāfiʿī claims that the maxim is little more than Shurayḥ's personal opinion. Second, al-Shāfiʿī asserts that the maxim does not prohibit the establishment of a *waqf*, because *inter vivos* transfers of property do not implicate the *ʿilm al-farāʾiḍ*—a position that would have also negated the "no *ḥubs* after *sūrat al-nisā*'" maxim.

The third argumentative strategy is illustrated in al-Shāfiʿī's responses to the Prophetic maxim concerning the "releasing of *ḥubs*." Al-Shāfiʿī first argues that this Prophetic utterance referred to a special group of pre-Islamic camels from whom ownership had been removed (*i.e.* made a *ḥubs*), and that the restriction, or sequestration, of these animals ended with the revelation of Qurʾān 5:103:

> May His praise be exalted. Oh people, God permitted to you the grazing livestock, so eat them if you have slaughtered them according to the law. And you are no longer prohibited from *baḥīra*, nor *sāʾiba*, nor *waṣīla*, nor *ḥāmin*, nor what you dedicate from them to your gods.

Al-Shāfiʿī next draws a distinction between the *ḥubs* of the *Jāhiliyya* and the *ḥubs* of Islam, observing that only in Islamic times have houses and land been made *ḥubs*: "We know of no *Jāhilī* person who designated a house as a *ḥubs* for his children, for the Holy War, or for the destitute. Their *ḥubs* were comprised of the things I have described, namely, the *baḥīra*, the *waṣīla*, the *ḥāmin*, and the *sāʾiba*." Al-Shāfiʿī, *Kitāb al-Umm*, 4: 52–53, 58.

In his *Sharḥ al-Maʿānī al-Āthār*, al-Ṭaḥāwī (d. 321/933) also relies on this third argumentative strategy to negate the impact of the "*ḥubs* are forbidden" maxim by noting parallels between this maxim and the practices of the *Jāhilī* Arabs. Al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār*, 4: 98.

daqa/sabbala maxims when he cited to the conversation between the Prophet and ʿUmar and the *waqf*s of prominent companions:

> [As for] the permissibility of the *waqf* . . . we have been informed on the authority of the Messenger of God: Verily, he commanded ʿUmar b. al-Khaṭṭāb to endow (*yūqifu*) land belonging to him, and ʿUmar made it a *waqf* according to the instructions of the Messenger of God. ʿAlī b. Abī Ṭālib, al-Zubayr b. al-ʿAwwām and others from among the Companions of the Messenger of God made *waqf*s. And (there is) the *ḥadīth* concerning ʿUthmān b. ʿAffān in the matter of Bi'r Rūma and the *waqf*s of the Companions of the Messenger of God; to this day these are the practices of the people.[22]

In the *Kitāb al-Umm*, al-Shāfiʿī's use of counter-*ḥadīth*s and counter-maxims is more explicit. He twice cites the Prophetic conversation between the Prophet and ʿUmar in response to Shurayḥ's maxim concerning the release of *ḥubs*.[23]

Clearly, the pressures to generate maxims and *ḥadīth*s in support of the *waqf* would have been great during the first half of the second century A.H. This was a time both when Abū Ḥanīfa was voicing opposition to the *waqf* and when anti-*waqf* maxims such as Shurayḥ's "*lā ḥubs ʿan farāʾiḍ Allāh*" came into existence. Pertinent to this study of the *waqf* maxims is Schacht's thesis that maxims reflect a stage of legal doctrine prior to the utilization of full *ḥadīth*s.[24] Schacht's conception of the maxim's evolution from an independent entity to encasement within a *ḥadīth* narrative structure reflects his own understanding of the development of Islamic law. Schacht believed that second-century A.H. jurists increasingly strove to bolster their opinions—or in this case, legal maxims[25]—by projecting

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[22] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 6.

[23] Al-Shāfiʿī, *Kitāb al-Umm*, 4: 52–53, 58.

[24] Schacht, *Origins*, 189.

[25] Schacht argued that legal maxims often had two sources in Islamic jurisprudence: second-century A.H. Muslim jurists who generated rhyming and alliterative maxims/slogans as teaching tools, and educated non-Arab converts who introduced foreign (particularly Roman) concepts and maxims into nascent Islamic legal discourse. Joseph Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington D.C.: The Middle East Institute, 1955), 36, 50. Crone has challenged Schacht's understanding of foreign/Roman influences on Islamic law, arguing that Roman influences were indirect rather than direct, because Roman law, "as an organized body of law taught, studied and consciously preserved," had receded from the Near East by the time of the Arab Conquests. Crone, *Roman, Provincial and Islamic Law*, 7–12, 91–94. As I have argued

them backwards into history.[26] According to Schacht, this process reached its inevitable conclusion with al-Shāfiʿī's privileging of Prophetic *ḥadīth*.[27] Although the *waqf* maxims do not exist independently of their narratives (*matn*s) in the Islamic sources, Schacht's thesis provides a framework for evaluating these traditions. Assuming *arguendo* that legal maxims existed as independent entities at some point in early Islamic jurisprudence, then the *matn*s and the chain of transmitters (*isnād*s) must be later accretions designed to situate and notarize these maxims.[28] In theory, then, it should be possible to peel away these accumulations to reveal how this evolution occurred.

The Taṣaddaqa *Maxim*

Although both maxims are similar in content, they should not be viewed as a linked pair. The justification for considering each maxim

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previously, at some point the distinction between "foreign" and "indigenous" legal cultures becomes illusory, but it may still be possible, in certain circumstances to isolate the non-Arab origins of particular maxims (even if the Muslims who used them were unaware of their "foreign" origins).

[26] The tendency of the "ancient schools" to back project their opinions to Successors and Companions instead of the Prophet is borne out by evidence from second-century A.H. legal texts. For example, the *Muwaṭṭa*' of Mālik b. Anas (d. 179/795) in the recension of Yaḥyā b. Yaḥyā al-Maṣmūdī (d. 234/849) contains 822 traditions from the Prophet as against 613 from Companions and 285 from Successors, while the earlier recension of Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805) contains 429 traditions from Muḥammad in comparison to 628 from Companions, 112 from Successors, and 10 from later authorities. The *Kītāb al-Āthār* of Abū Yūsuf (d. 182/798) contains 189 traditions from the Prophet, 372 from Companions and 549 from Successors. Schacht, "A Revaluation of Islamic Traditions," *Journal of the Royal Asiatic Society* (1949), 146. In addition to this numerical evidence, the Islamic tradition itself informs us that ascribing traditions back to the Prophet was not the norm in the second Islamic century. In the *Kītāb Ikhtilāf al-Ḥadīth*, al-Shāfiʿī (d. 204/820)—the man responsible for elevating the *ḥadīth*s ascribed to the Prophet above all others—inveighed against the "ancient schools of law" for neglecting traditions from the Prophet in favor of those from the Successors and Companions. Schacht, *Origins*, 21.

[27] The density of Schacht's theories and analyses make them difficult to summarize. The details of his argument can be found in the first and second parts of *Origins*, 1–179, and in a preliminary paper he presented in Paris to the Twenty-First International Congress of Orientalists in July, 1948, entitled "A Revaluation of Islamic Traditions," 143–54.

[28] For an example of how a maxim can move from juristic opinion to Prophetic *ḥadīth*, see Powers' study of the "No bequest to an heir" maxim (*lā waṣiyya li-wārith*). According to Powers, the maxim appears to have entered into circulation as an utterance of Mālik b. Anas at the beginning of the second Islamic century. By the third century, however, the maxim had become situated in the Prophet's Farewell Pilgrimage and acquired Prophetic authority. Powers, *Studies*, 158–72.

separately comes from the Islamic tradition itself. The absence of the *sabbala* maxim from the *waqf* treatise of Hilāl (d. 245/859) and the *Muṣannaf* of Ibn Abī Shayba (d. 235/849), combined with the omission of the *taṣaddaqa* maxim from the *Kitāb al-Umm* of al-Shāfiʿī (d. 204/820), suggests that the two maxims did not always circulate together. In analyzing these maxims it is also helpful to observe that they are encased in a *ḥadīth* structure consisting of two parts—the narrative (*matn*) and the chain of transmitters (*isnād*). Although it is natural to assume that these two *ḥadīth* components are linked to one another, contemporary *ḥadīth* studies indicate that *isnād* formation occurred independently of the *matn*. Due to this autonomy of both the *isnād* and the *matn*, each of these components will be examined separately.

Before undertaking this analysis, however, the theoretical and terminological groundwork for this discussion must be presented. For the purposes of this study, the terms "*ḥadīth*" and "tradition" will be used interchangeably. Likewise, the *matn* component of the *ḥadīth* will frequently be referred to as the "narrative," while the *isnād* will be described as a "chain of transmitters/authorities." As for the term "maxim," this designation will refer specifically to the Prophetic speech uttered in the *matn* of the *ḥadīth*.

In the *ḥadīth* collections the *matn* surrounding the *taṣaddaqa* maxim provides a historical context for the Prophet's speech, and demarcates the legal status and function of a *waqf*:

> Ismāʿīl—Ibn ʿAwn—Nāfiʿ—Ibn ʿUmar: ʿUmar acquired land in Khaybar, and he came to the Prophet and sought his advice in this matter. ʿUmar said: "I have acquired land in Khaybar, and I have never acquired property more precious to me than it. What do you command me to do with it?" He [the Prophet] said: "If you want, sequester its principal and give away (the yields) as alms." [Ibn ʿUmar] said: ʿUmar gave away (the yields) as alms on the condition that it [the principal] not be sold, given away as a gift, or inherited. [Ibn ʿUmar] said: ʿUmar gave (the yields) away as alms for the poor, kin relations, slaves, the Holy War, travelers and guests. It will not be held against the one who administers it if he eats from it in an appropriate manner or gives something to a friend so long as he does not appropriate any of the property (*ghayr mutamawwilin fī-hi*).[29]

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[29] Aḥmad b. Ḥanbal, *Al-Musnad* (Egypt: Dār al-Maʿārif, 1951–90), 6: 277, no. 4608.

In the opening sequence of this *ḥadīth*, the reader learns of an encounter between the Prophet and ʿUmar in which the latter expresses his fondness for a certain piece of real property in Khaybar and asks the Prophet what he should do with it. The Prophet suggests to ʿUmar that he might consider turning this property into a charitable endowment: "If you want, sequester its principal and give (the yields) away as alms" (*in shi'ta ḥabbasta aṣlahā wa-taṣaddaqta bihā*). The remainder of the *ḥadīth*, as conveyed by ʿUmar's son, ʿAbd Allāh b. ʿUmar (d. 73–74/693–94), delineates the parameters of this new charitable endowment: its principal is inalienable, its charitable ends are "for the poor, kin relations, slaves, the Holy War, travelers and guests," and its administrator (*wālī*) has limited rights of personal consumption from the endowment.[30]

In spite of the unitary appearance of this tradition, it is instructive to view the *taṣaddaqa ḥadīth* as a composite narrative comprised of two distinct components:

1. The conversation between ʿUmar and the Prophet which frames the maxim
2. Three conditions concerning the endowment's establishment:
   a. An explicit statement of inalienability
   b. The specification of charitable ends
   c. The guidelines for the administrator regarding personal consumption of the endowment

The rationale for treating the three conditions as a group arises from their joint presence in another document—the *ṣadaqa* deed of ʿUmar. Although these three conditions sometimes appear independently of one another,[31] they are always referenced to ʿUmar's *ṣadaqa* deed. Since ʿUmar's deed will be discussed in section two, a more detailed consideration of these three conditions will be postponed momen-

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[30] Ibn Ḥanbal, *Al-Musnad*, 6: 277, no. 4608. Some *ḥadīth*s contain a variant of the last phrase "so long as he does not appropriate any of the property" (*ghayr mutamawwilin fī-hi*). This variant reads "so long as he does not enrich himself by means of it" (*ghayr muta'aththilin mālan*).

[31] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 7–10, 72–73; Muḥammad b. Ismāʿīl al-Bukhārī, "*Kitāb al-Wakāla*," in *Ṣaḥīḥ al-Bukhārī* (Cairo: al-Jumhūriyya al-ʿArabiyya al-Muttaḥida, 1386–93/1966–73), 4: 148. In the *Aḥkām al-Waqf*, references to the specification of charitable ends can be found in the introduction, while the rules for the administrators of ʿUmar's *waqf* are discussed at a later point in the text. In the *Ṣaḥīḥ* of al-Bukhārī, there is a *ḥadīth* which contains only the condition concerning the guidelines for administrators.

tarily. Nevertheless, the presence of these three conditions in ʿUmar's *ṣadaqa* deed raises the possibility that they were grafted onto the *taṣaddaqa ḥadīth* to draw a connection between ʿUmar's deed and the conversation between ʿUmar and the Prophet.

While the *ḥadīth* does not elaborate on the circumstances that led to the conversation and the giving of the Prophetic maxim, the story of Khaybar is well-known in the Islamic tradition. After the expulsion of the Banū al-Naḍīr from Madīna in the year 4/626, the Jewish tribe sought refuge in Khaybar, an oasis well-known for its date-palm trees, located approximately 95 miles/150 km from Madīna.[32] In the year 7/629 the Prophet marched forth from Madīna and laid siege to the forts (*ḥisn*s)[33] that protected the inhabitants of Khaybar. After about a month and a half of hostilities, the Jews of Khaybar asked the Prophet for a treaty of capitulation, which was subsequently accepted.[34] The terms of this capitulation are in dispute. In some accounts the Prophet divided Khaybar into either 1800[35] or 3600[36] shares and distributed these shares amongst the Muslims, while in others, the division of Khaybar is entirely omitted and it is suggested that the Jews remained owners of the land even after their capitulation.[37]

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[32] *EI*[2], *s.v.* "Khaybar," L. Veccia Vaglieri, 4: 1137–38; ʿAbd al-Malik Ibn Hishām, *Sīrat al-Nabī*, ed. Muḥammad Khalīl Harrās (Cairo: Maktabat al-Jumhūriyya, 1971), 3: 464; al-Wāqidī, *Kitāb al-Maghāzī*, 1: 375, 2: 690; Aḥmad b. Yaḥyā al-Balādhurī, *Futūḥ al-Buldān* (Beirut: Dār al-Nashr, 1957), 34, 39.

[33] Some historians have chosen to characterize these *ḥisn*s as "farm-strongholds" rather than forts, possibly because the term "fort" tends to conjure up images of small, medieval European castles. *EI*[2], *s.v.* "Khaybar," L. Veccia Vaglieri, 4: 1139.

[34] *EI*[2], *s.v.* "Khaybar," L. Veccia Vaglieri, 4: 1140.

[35] Ibn Hishām, *Sīrat al-Nabī*, 3: 467–72; al-Wāqidī, *Kitāb al-Maghāzī*, 2: 718. Ibn Hishām's *Sīra* relates that the 1,800 shares of Khaybar were divided between 1,400 men and 200 horses. Each horse received two shares and every man received one.

[36] Al-Balādhurī, *Futūḥ al-Buldān*, 37–38; Yaḥyā b. Ādam, *Kitāb al-Kharāj*, 21, no. 18, 35–37, nos. 89–97; Yāqūt b. ʿAbd Allāh al-Ḥamawī (= Yāqūt), *Muʿjam al-Buldān* (Beirut: Dār Ṣādir, 1374–76/1955–57), 2: 410. Yāqūt (d. 575/1179) bridges the gap between these two accounts when he explains that the Prophet divided the properties of Khaybar into 36 shares which were then further subdivided into 100 units. The Prophet took half for his agents (*nawāʾib*) and divided the remaining 1800 shares among the Muslims. The *ḥadīth* which forms the basis for Yāqūt's conclusion is found in the earlier administrative work of Yaḥyā b. Ādam (d. 203/818). See Yaḥyā b. Ādam, *Kitāb al-Kharāj*, 35–36, no. 91.

[37] Al-Balādhurī, *Futūḥ al-Buldān*, 40; Yaḥyā b. Ādam, *Kitāb al-Kharāj*, 38, no. 98; Abū Yūsuf, *Kitāb al-Kharāj*, 49–51; al-Ṭabarī, *Taʾrīkh*, 3: 19–21; *EI*[2], *s.v.* "Khaybar," L. Veccia Vaglieri, 4: 1140–41.

Even if one discounts the confusion over whether Khaybar was or was not distributed to the Muslims after its conquest in 7/629, one searches in vain for mention of the conversation between ʿUmar and the Prophet in the historical narratives. Al-Wāqidī (d. 207/823),[38] Ibn Hishām (d. 218/834),[39] al-Balādhurī (d. 279/892),[40] al-Ṭabarī (d. 310/923),[41] Ibn al-Athīr (d. 606/1209),[42] and Ibn Kathīr (d. 774/1373)[43] devote extensive sections to the conquest of Khaybar and the division of its spoils, but none provides a narrative recording this encounter between ʿUmar and the Prophet. Nor is the conversation described in later encounters between the two men. The absence of the conversation is even more surprising in the *Kitāb al-Kharāj* treatises of Abū Yūsuf (d. 182/798) and Yaḥyā b. Ādam (203/818). In both of these tax treatises, the authors refer to the precedent of Khaybar's division to justify the position that ʿUmar's decree in the matter of the ʿIrāqī Sawād lands had transformed that region's revenues and peasants into a *waqf* after its conquest in the year 16/637.[44] Although both authors cite Prophetic *ḥadīth*s for the events at Khaybar, neither includes the conversation between ʿUmar and the Prophet, even though the contents of this encounter would have been relevant to the situation in the Sawād.[45] Clearly, these silences do not necessarily prove the non-occurrence of this event, but the omission of the conversation from these historical and administrative texts is unexpected. Not only were many other dialogues between the Prophet and ʿUmar recorded, but the authority for our *ḥadīth*—ʿAbd Allāh b. ʿUmar—was a major source for *ḥadīth*s for his father

[38] Al-Wāqidī, *Kitāb al-Maghāzī*. For criticisms of al-Wāqidī as a reliable transmitter of Islamic history, see Rizwi S. Faizer, "The Issue of Authenticity Regarding the Traditions of al-Wāqidī as Established in his *Kitāb al-Maghāzī*," *JNES* 58 (1999), 97 (surveying the literature).

[39] Ibn Hishām, *Sīrat al-Nabī*. Ibn Hishām's biography of the Prophet is a recension of the no longer extant *Sīra* of Ibn Isḥāq (d. 150/767).

[40] Al-Balādhurī, *Futūḥ al-Buldān*.

[41] Al-Ṭabarī, *Taʾrīkh al-Rusul waʾl-Mulūk*.

[42] Ibn al-Athīr, *Al-Kāmil fīʾl-Taʾrīkh*.

[43] Ibn Kathīr, *Al-Bidāya waʾl-Nihāya*.

[44] Abū Yūsuf, *Kitāb al-Kharāj*, 49–51; Yaḥyā b. Ādam, *Kitāb al-Kharāj*, 39–42, nos. 100, 102, 104, 106–07.

[45] The relevance of this Prophetic conversation to the situation in the Sawād has not been lost on modern historians. Forand alleges that ʿUmar based his Sawād decree upon his earlier experiences at Khaybar, and cites ʿUmar's conversation with the Prophet as the basis for the decree. Forand, "The Status of the Land and Inhabitants of the Sawād During the First Two Centuries of Islām," 30.

and the events at Khaybar.[46] It seems odd that Ibn ʿUmar would have recorded much about his father and yet forget to relate this conversation.

ʿUmar's interactions with the oasis of Khaybar were not limited to the conquest in the year 7/629. The Islamic tradition reports that during the early part of his caliphate (r. 13–23/634–44),[47] ʿUmar expelled the Jews from Khaybar, sent them to Syria, and divided their properties amongst the Muslims. The Islamic tradition remains divided over the reasons for ʿUmar's expulsion order. One set of traditions claims that ʿUmar expelled the Jews after learning that the Prophet had said, during the his final illness, "Two religions cannot coexist in the Arabian peninsula" (*lā yajtamiʿu bi-jazīrat al-ʿarab dīnān*).[48] These traditions, however, fail to explain why ʿUmar only learned of this Prophetic statement several years after the Prophet's death. Another set of traditions claims that the denizens of Khaybar began to mistreat and deceive the Muslims living there. In particular, certain traditions cite the abuse suffered by ʿUmar's son at the hands of the people of Khaybar:

> Then ʿAbd Allāh b. ʿUmar visited them for an unspecified purpose and they attacked him in the night.[49] [They] broke Ibn ʿUmar's hands by throwing him from the roof of a house. Subsequently, ʿUmar divided the land among those of the people of Ḥudaybiyya who had taken part in the battle of Khaybar.[50]

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[46] For events at Khaybar, Ibn ʿUmar is the final link in *isnād* chains for al-Balādhurī, al-Wāqidī, Ibn Hishām, Abū Yūsuf, and Yaḥyā b. Ādam. See al-Balādhurī, *Futūḥ al-Buldān*, 34, 40; al-Wāqidī, *Kitāb al-Maghāzī*, 2: 179; Ibn Hishām, *Sīrat al-Nabī*, 3: 479–80; Abū Yūsuf, *Kitāb al-Kharāj*, 50–51; Yaḥyā b. Ādam, *Kitāb al-Kharāj*, 37, no. 97.

[47] No specific date is given for the expulsion, but al-Balādhurī claims that it was during the "early part of the caliphate of ʿUmar." Al-Balādhurī, *Futūḥ al-Buldān*, 40.

[48] Al-Ṭabarī, *Taʾrīkh*, 3: 21; Ibn al-Athīr, *Al-Kāmil fiʾl-Taʾrīkh* (Beirut: Dār Ṣādir, 1965–67), 2: 224; al-Balādhurī, *Futūḥ al-Buldān*, 39; Abū al-Ḥasan ʿAlī b. al-Ḥusayn al-Masʿūdī, *Al-Tanbīh waʾl-Ishrāf* (Baghdād: Maktabat al-Muthannā, 1357/1938), 222.

[49] Al-Balādhurī, *Futūḥ al-Buldān*, 40.

[50] Al-Balādhurī, *Futūḥ al-Buldān*, 36. The *Kitāb al-Kharāj* of Yaḥyā b. Ādam (d. 203/818) contains a similar account of Ibn ʿUmar's mistreatment—"he was attacked during the course of the night and was wounded"—but this *ḥadīth* does not state that Ibn ʿUmar was thrown from a roof. Yaḥyā b. Ādam, *Kitāb al-Kharāj*, 38, no. 98.

In addition to these two rationales, other traditions cite a spreading pestilence as a reason for the expulsion,[51] while another tradition implies that the Muslims simply outgrew the capitulation arrangement that the Prophet had negotiated with the Jews of Khaybar: "When ʿUmar became caliph, the money became more abundant in the lands of the Muslims, and the Muslims became numerous enough to cultivate the land, so ʿUmar expelled the Jews to Syria and divided the property among the Muslims."[52]

The confusion surrounding the events at Khaybar is relevant to the analysis of the *taṣaddaqa ḥadīth* because the narrative structure is predicated on the division of Khaybar's lands shortly after the conquest of the oasis in the year 7/629—a premise at variance with historical accounts suggesting that the Banū al-Naḍīr remained on the lands after their capitulation. The only division of land at Khaybar upon which all the sources agree occurred during ʿUmar's caliphate, when a conversation between the Prophet and ʿUmar would have been impossible. This tension in the historical accounts raises the possibility that the narrative structure of the *taṣaddaqa ḥadīth* constitutes a conflation of events from two different time periods. Stated otherwise, it was well-known that Khaybar had been conquered during the Prophet's life and it was equally well-known that the lands in Khaybar had been divided amongst the Muslims (albeit perhaps not until ʿUmar's caliphate). To make the conversation between ʿUmar and the Prophet possible, the two events were conflated and the spoils of Khaybar became definitively divided amongst the Muslims during the lifetime of the Prophet. Moreover, the choice of ʿUmar as the person to whom the Prophet issued the maxim was uniquely appropriate. From the time of Khaybar's conquest to the final expulsion of the Jews, no person was more connected to the affairs of this oasis than ʿUmar. Consequently, because the narrative concerning ʿUmar and the Prophet references itself so effectively to the characters and events associated with Khaybar, it is not difficult to imagine that the conversation might have occurred.

Further support for the supposition that the conversation between the Prophet and ʿUmar lacks historicity is provided from the *isnād*s of these *ḥadīth*s. The *isnād* criticism presented here relies heavily upon

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[51] Al-Balādhurī, *Futūḥ al-Buldān*, 34.
[52] Al-Balādhurī, *Futūḥ al-Buldān*, 37.

the work of G. H. A. Juynboll. Central to Juynboll's interpretive framework is his belief that the "common link"[53] in *isnād* chains can be used to date and geographically locate a *ḥadīth*. Not all historians, however, are in agreement that the common link can be used to derive these types of conclusions. Crone[54] and Calder[55] have argued against this type of *isnād* analysis, and Cook has presented examples where reliance on the common link would have led to an error in dating.[56] Although Cook acknowledges that the common link must mean something, he doubts that historians will ever be able to unlock its meaning.[57] A skeptic of Juynboll's approach to *isnād*s will therefore find much of the following analysis unconvincing (although the skeptic should not overlook section four which is not based upon Juynboll's methodological framework). For those who believe that the common link can assist in determining the date and provenance of a *ḥadīth*, the following sections will illustrate how application of Juynboll's *isnād* methodology can decipher the intricate webs of *waqf*-related *isnād* bundles.

As illustrated in Diagram One, the *isnād* bundle for the *taṣaddaqa ḥadīth* possesses a curious feature—all the *isnād*s for the *ḥadīth*s in this diagram initially share a single row of transmitters. For all but one of these *isnād* chains,[58] the source of transmission begins with the

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[53] The term "common link" was coined by Schacht in *Origins*, 171–75. Juynboll's work constitutes a substantial elaboration upon Schacht's initial theories.

[54] Crone, *Roman, Provincial and Islamic Law*, 27–31.

[55] Calder, *Studies*, 236–41.

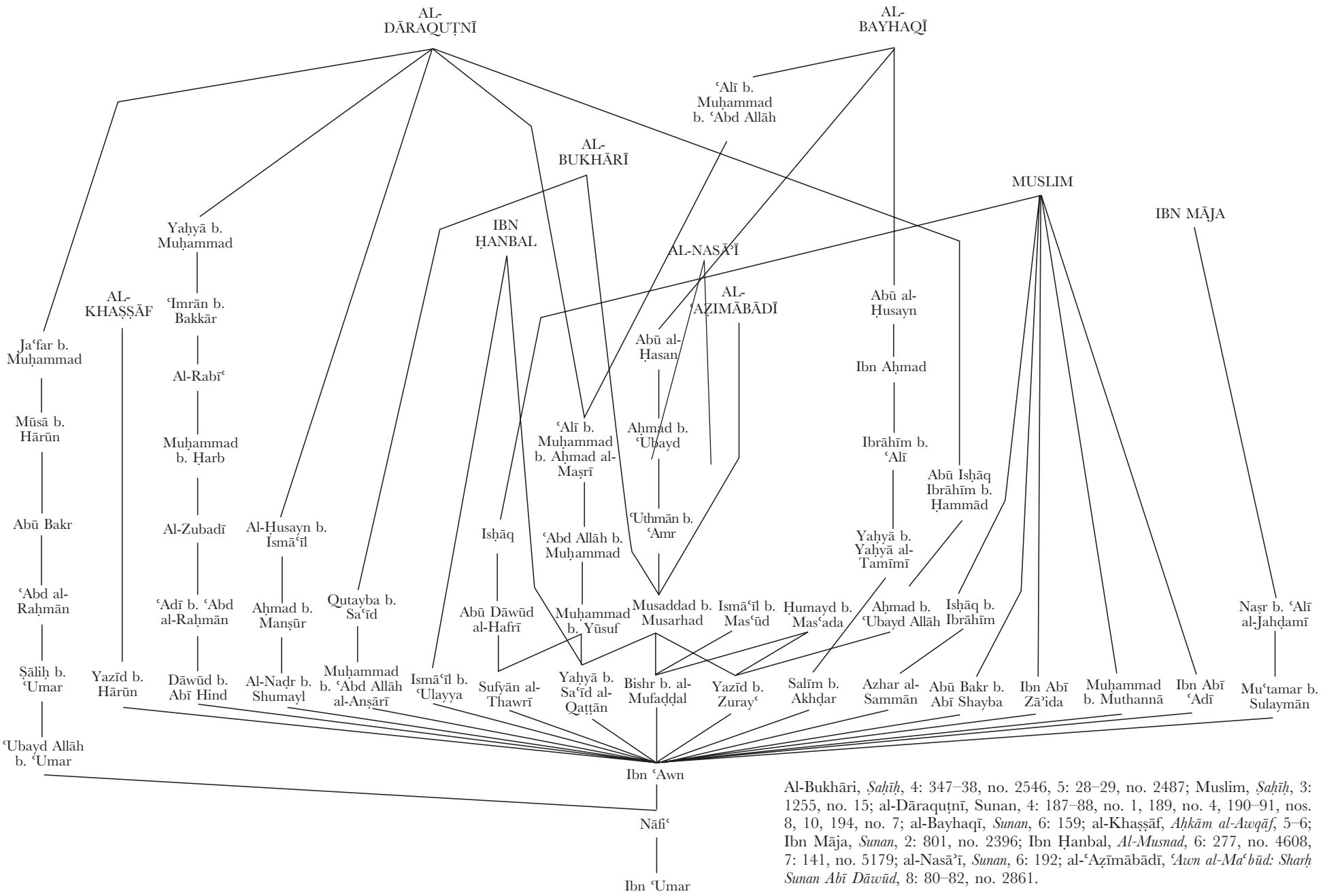
[56] Cook, *Early Muslim Dogma*, 107–16; idem, "Eschatology and the Dating of Traditions," *Princeton Papers in Near Eastern Studies* 1 (1992), 23–48.

[57] Cook, "Eschatology and the Dating of Traditions," 46, n. 74.

[58] The one exception is a *ḥadīth* found in the *Sunan* of al-Dāraquṭnī where ʿUbayd Allāh b. ʿUmar takes the place of Ibn ʿAwn. At first glance, the *isnād* of this tradition seems to represent a classic case of what Juynboll has described as "diving under the common link's level." However, this *isnād* is probably just a scribal mistake. First, ʿUbayd Allāh b. ʿUmar does figure prominently in the *isnād* for another collection of *waqf*-related *ḥadīth*s—those containing the *sabbala* maxim. Second, this tradition is located in an unusual place in al-Dāraquṭnī's *Sunan*. All of the other seven *taṣaddaqa ḥadīth*s are located in a section entitled "How to deed a *ḥubs*." By contrast, this "diver" appears in a chapter on "well-known *ḥubs*" consisting almost exclusively of *ḥadīth*s containing the *sabbala* maxim, which concomitantly have ʿUbayd Allāh b. ʿUmar in the *isnād* chain. Given the location of this "diver" in the *Sunan*, I suspect that either the wrong maxim or the wrong *isnād* found its way into this *ḥadīth*. Al-Dāraquṭnī, *Sunan*, 4: 194, no. 8. For Juynboll's analysis of "divers," see "Some *Isnād*-Analytical Methods Illustrated on the Basis of Several Woman-Demeaning Sayings from *Ḥadīth* Literature," *Al-Qantara* 10/2 (1989), 366–74.

DIAGRAM ONE

The *taṣaddaqa ḥadīth*s



Al-Bukhāri, *Ṣaḥīḥ*, 4: 347–38, no. 2546, 5: 28–29, no. 2487; Muslim, *Ṣaḥīḥ*, 3: 1255, no. 15; al-Dāraquṭnī, Sunan, 4: 187–88, no. 1, 189, no. 4, 190–91, nos. 8, 10, 194, no. 7; al-Bayhaqī, *Sunan*, 6: 159; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 5–6; Ibn Māja, *Sunan*, 2: 801, no. 2396; Ibn Ḥanbal, *Al-Musnad*, 6: 277, no. 4608, 7: 141, no. 5179; al-Nasāʾī, *Sunan*, 6: 192; al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd: Sharḥ Sunan Abī Dāwūd*, 8: 80–82, no. 2861.

Companion Ibn ʿUmar (d. 73–74/693–94), then passes to the Successor Nāfiʿ (d. 117–20/735–38), and then is transmitted to ʿAbd Allāh b. ʿAwn (d. 151/768).[59] On Ibn ʿAwn's authority, however, the transmission of the tradition suddenly branches out to sixteen different authorities, and it is for this reason that historians refer to such figures as "common links."

The presence of the common link (in the following: cl) in the third or fourth level of the *isnād* is consistent with a curious pattern in the Islamic tradition: many *ḥadīth*s pass only from a single Companion to an early Successor and then a later Successor before becoming widely disseminated within Islamic society.[60] This type of *isnād* bundle is so common that the Islamic tradition has a name for it: the *āḥād* or *khabar al-wāḥid*, *i.e.*, solitary traditions.[61] This singularity of transmission is odd because it runs counter to the widely held assumption that the early Muslim community contained many *ḥadīth* transmitters who strove to preserve the recollection of every Prophetic word and action:[62]

> When the overall characteristic of *ḥadīth* transmission depicted in all the medieval Islamic *ḥadīth* handbooks, namely, that the early Islamic world was literally teeming with *ḥadīth*s transmitted by multitudes of

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[59] One of the *ḥadīth*s in al-Nasāʾī's collection lists this transmitter's name as Ayyūb b. ʿAwn. This is probably a textual corruption or a mistake. There is no biographical entry for Ayyūb b. ʿAwn in either Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, Jamāl al-Dīn Abū al-Ḥajjāj Yūsuf b. al-Zakī ʿAbd al-Raḥmān al-Mizzī, *Tahdhīb al-Kamāl fī Asmāʾ al-Rijāl* (Beirut: Muʾassasat al-Risāla, 1980–1992); Ibn Saʿd, *Kitāb al-Ṭabaqāt al-Kabīr*, ed. Eduard Sachau (Leiden: E. J. Brill, 1904), or Muḥammad b. ʿAmr b. Mūsā al-ʿUqaylī, *Kitāb al-Ḍuʿafāʾ* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1984).

[60] G. H. A. Juynboll, "Some Notes on Islam's First *Fuqahāʾ* Distilled From Early *Ḥadīth* Literature," *Arabica* 39 (1992), 292.

[61] In comparison with *mutawātir* (widely disseminated) traditions, the transmission of these *āḥād*, or single-strand, *ḥadīth*s appears questionable. In spite of this deficiency, the Islamic tradition has maintained that single-strand *ḥadīth*s can establish a rule of law provided that they are conveyed by reliable transmitters and the *matn*s are not "contrary to reason." Jalāl al-Dīn al-Suyūtī, *Tadrīb al-Rāwī*, a commentary on the *Taqrīb waʾl-Taysīr* of al-Nawawī (Cairo: Maṭbaʿat al-Khayriyya, 1307/1889), 99–100. See also Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 1991), 71–74, for a general overview of Islamic attitudes towards *āḥād ḥadīth*s.

[62] The Islamic tradition contains numerous reports of early Muslims assiduously pursuing the preservation of every Prophetic utterance and action. Consider, for example, Abū Hurayra and ʿAbd Allāh b. ʿAmr b. al-ʿĀṣ. The former reportedly sacrificed all worldly pursuits to record the Prophet's words and actions for three years while the latter allegedly wrote down all that he heard from the Prophet. Ibn Saʿd, *Kitāb al-Ṭabaqāt al-Kabīr*, 4/2: 56, 2/2: 125.

> transmitters to even bigger multitudes of younger transmitters—when this characteristic is taken at face value, then the questions remain unanswered why the [P]rophet—as in this case or indeed in the vast majority of cases—should choose to convey his saying . . . to just one Companion, why this Companion should choose to convey it to just one Successor, and why this Successor should choose to convey it to just one other Successor, who is the cl. . . .[63]

Based on this incongruity between the purported widespread dissemination of *ḥadīth*s and the historical record left in the *isnād*s, Juynboll has concluded that single strands—such as the one between the cl (Ibn ʿAwn) and the Prophetic saying transmitted on the authority of Ibn ʿUmar—lack historicity.[64] Instead, Juynboll contends that the evidence supports the conclusion that the cl invented this portion of the *isnād* chain in order to lend a certain saying more prestige or credibility.[65] As Juynboll observes, this "raising" (*rafaʿa*) of the *isnād* was "the first and foremost authentication device" of the second century A.H.[66] Although some Muslim scholars seem to have been aware of the common link phenomenon, even describing the knots as "turning points" (*madār*),[67] no Muslim *ḥadīth* critic ever used these observations to form the conclusions that Juynboll advances in his works.

If Ibn ʿAwn did raise the *isnād*, the two figures he selected—Ibn ʿUmar and Nāfiʿ—are not only logical for a *ḥadīth* about the Prophet and ʿUmar b. al-Khaṭṭāb, but also among the most celebrated in the history of *ḥadīth* transmission. According to the Islamic tradition, ʿAbd Allāh b. ʿUmar (d. 73–74/693–94) was a major source of traditions for both the Prophet, and his father, ʿUmar b. al-Khaṭṭāb.[68] His credibility as a transmitter of *ḥadīth*s was also outstanding. He was considered among the "most devoted in the matter of traditions concerning the Prophet and his family" (*min al-tamassuki bi-āthāri al-nabī wa-ālihī*), and the Prophet confirmed his good character when he said that Ibn ʿUmar was a "virtuous man" (*rajul ṣāliḥ*).[69] Nāfiʿ,

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[63] Juynboll, "Some *Isnād*-Analytical Methods," 353.
[64] Juynboll, "Some *Isnād*-Analytical Methods," 353.
[65] Juynboll, "Some *Isnād*-Analytical Methods," 353.
[66] Juynboll, "Some *Isnād*-Analytical Methods," 353.
[67] G. H. A. Juynboll, "(Re)Appraisal of Some Technical Terms in *Ḥadīth* Science," *ILS* 8 (2001), 304–15; idem, "Nāfiʿ, the *Mawlā* of Ibn ʿUmar, and his position in Muslim *Ḥadīth* Literature," *Der Islam* 70 (1993), 214.
[68] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 328.
[69] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 330.

the second link in the *isnād*, was the client (*mawlā*) of Ibn ʿUmar, and died sometime between 117–20/735–38.[70] Ibn Ḥajar al-ʿAsqalānī's *Tahdhīb* describes Nāfiʿ as trustworthy (*thiqa*),[71] and asserts that the most sound *ḥadīth*s of Mālik b. Anas (d. 179/795) were those transmitted between Ibn ʿUmar and his *mawlā*.[72]

If the historicity of the transmission between Ibn ʿAwn, Nāfiʿ, and Ibn ʿUmar is suspect, then the manner in which the *isnād* strands (*ṭuruq*) dramatically branch out after Ibn ʿAwn suggests the opposite. Based on this expansion of transmitters after the cl, Juynboll believes that historians are justified in inferring that the historicity of transmissions within a given *isnād* bundle becomes more conceivable at the cl level.[73] In other words, the cl constitutes both the first authentic moment of *ḥadīth* transmission and the likely source for the *ḥadīth* narrative: "[T]he saying which he [the cl] claims was uttered by the [P]rophet is in reality his own, or (if somebody else's) he was the first to put it into so many words."[74]

In addition to the "knots" created by the common link, Juynboll has also discussed subsequent knotting in *isnād* bundles. For example, in the *isnād* bundle for the *taṣaddaqa ḥadīth*, only four of the sixteen transmitters immediately after Ibn ʿAwn—Bishr b. al-Mufaḍḍal, Yaḥyā b. Saʿīd al-Qaṭṭān, Yazīd b. Zurayʿ, and Sufyān al-Thawrī—transmitted the tradition to two or more individuals.[75] Juynboll has called these secondary knots in the *isnād* bundle (the cl being the primary knot) "partial common links" and defined them as follows:

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[70] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 10: 412, 414.

[71] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 10: 414. Juynboll has informed me that "*thiqa*" can also mean *ṣāliḥ*—a less edifying adjective meaning, "I hope his traditions were harmless in the sense that they did not create too much confusion." The use of this term, therefore, must be evaluated on a case by case basis. In the case of Nāfiʿ it is probably correct to assume that it means "trustworthy." *EI*², *s.v.* "*Ṣāliḥ*," G. H. A. Juynboll, 8: 982–84; idem, "(Re)Appraisal," 304; idem, *Muslim Tradition* (New York: Cambridge University Press, 1983), 64.

[72] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 4: 410, 10: 413. The Islamic tradition considered the *isnād* "Mālik—Nāfiʿ—Ibn ʿUmar" to be so free from error that it was described as a "golden chain." Juynboll, *Muslim Tradition*, 143.

[73] Juynboll, "Some *Isnād*-Analytical Methods," 353–54.

[74] Juynboll, "Some *Isnād*-Analytical Methods," 353.

[75] Yazīd b. Hārūn might have been another pcl if the traditions that reverse the *taṣaddaqa* maxim had been included in the *isnād* bundle. See al-Dāraquṭnī, *Sunan*, 4: 187, no. 5; al-Bayhaqī, *Sunan*, 6: 158–59, 161 (giving the maxim as "*in shi'ta taṣaddaqta bi-hā wa-ḥabbasta aṣlahā*"). The inclusion of these traditions would not have altered the conclusions reached here, however.

"Transmitters who receive something from a cl (or any other sort of transmitter from a generation after the cl) and pass it on to two or more of their pupils are called . . . 'partial common links' (hence abbreviated as pcl)."[76] In addition to pcls, there also exist "inverted pcls" within *isnād* bundles. Unlike the pcl who receives the tradition via one transmitter and then passes it on to two or more people, the ipcl is represented in the bundle as having received a report from two or more authorities and passed it on to one or more pupils.[77] In this *isnād* bundle, Musaddad b. Musarhad and Ḥumayd b. Masʿada are considered ipcls.[78]

Juynboll's insights into the manner in which *isnād* bundles form into knots through the existence of cls, pcls, and ipcls has led him to develop an adage which serves as a guide for all *isnād*s:

> The more transmission lines there are, coming together in a certain transmitter, either reaching him or branching out from him, the more that moment of transmission, represented in what may be described as a "knot", has a claim to historicity.[79]

The obverse of the *ṭuruq* which form knots are *isnād* chains which pass from one person to only one other person. These so-called "*fulāns*,"[80] or single-strand *ṭuruq*, sometimes constitute the majority of transmissions in an *isnād* bundle.[81] In the *isnād* bundle for the *taṣaddaqa ḥadīth* twelve of the sixteen transmitters who convey the *ḥadīth* on the authority of Ibn ʿAwn are considered *fulān*s because they passed their information to only one other person. According to Juynboll, these *fulān* transmissions must be considered historically suspect, because the notion of singular transmission seems improbable:

> If someone gave his tradition files, his *ṣaḥīfa*s, to just one pupil for copying, it is unlikely that the latter passed them on for copying similarly to just one pupil, and it is even more unlikely that the last-mentioned passed them on for copying again in the same fashion to

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[76] Juynboll, "Some *Isnād*-Analytical Methods," 352.
[77] Juynboll, "Some *Isnād*-Analytical Methods," 360–61.
[78] Juynboll observes that, according to this definition, all the *ḥadīth* collectors—al-Bukhārī, Muslim, al-Ḥumaydī, Ibn Ḥanbal, al-Tirmidhī, Ibn Māja and al-Nasāʾī—could be considered ipcls. Juynboll, "Some *Isnād*-Analytical Methods," 361.
[79] Juynboll, "Some *Isnād*-Analytical Methods," 352.
[80] Juynboll, "Nāfiʿ," 211.
[81] In some cases, entire *isnād* bundles are comprised exclusively of single strand transmissions.

> another single pupil. In early Islam *ṣaḥīfa*s are described as going from hand to hand, even if there was no formal master/pupil relationship between original compiler and later transmitters.[82]

Juynboll attributes these single strand transmissions to the various collectors in whose collections they reside, or to the alleged *shaykh* of that collector sitting just under him in the *isnād* chain.[83] Juynboll believes that the collector or *shaykh* may have been dissatisfied with the existing pcl strands and "established" a new link with the cl by launching his own *ṭuruq* through a *fulān*.[84] In light of these historical problems, Juynboll contends that these single strands do not represent authentic lines of transmission, and as a result, cannot be said to buttress the historicity of the cl's transmission.[85]

Juynboll's conclusions about these *fulān* traditions can also be applied to *isnād*s at the pcl level. For example, even though Sufyān al-Thawrī (d. 161/778) is a pcl, the subsequent transmitters in his *isnād* chain are *fulān*s. Likewise, the transmission from the pcl Yaḥyā b. Yaḥyā al-Tamīmī (d. 224–26/839–41) is also considered deficient since the preceding transmitter, Salīm b. Akhḍar, is a *fulān*.[86] As a consequence of these *fulān* transmissions, the *ḥadīth*s of Sufyān al-Thawrī and Yaḥyā b. Yaḥyā al-Tamīmī fall short of Juynboll's reliability standards: "[O]nly strands comprising pcls, whose pupils (whom we will also call pcls) themselves have several pupils, can be relied upon historically."[87]

Application of Juynboll's conclusions to the *taṣaddaqa ḥadīth*s reveals that only a small number of transmissions can be said to reflect genuine transmission [see Diagram Two]. Although the number of remaining strands is quite small, the Muslim historical tradition does support their claim to authentic transmission. For example, the bio-

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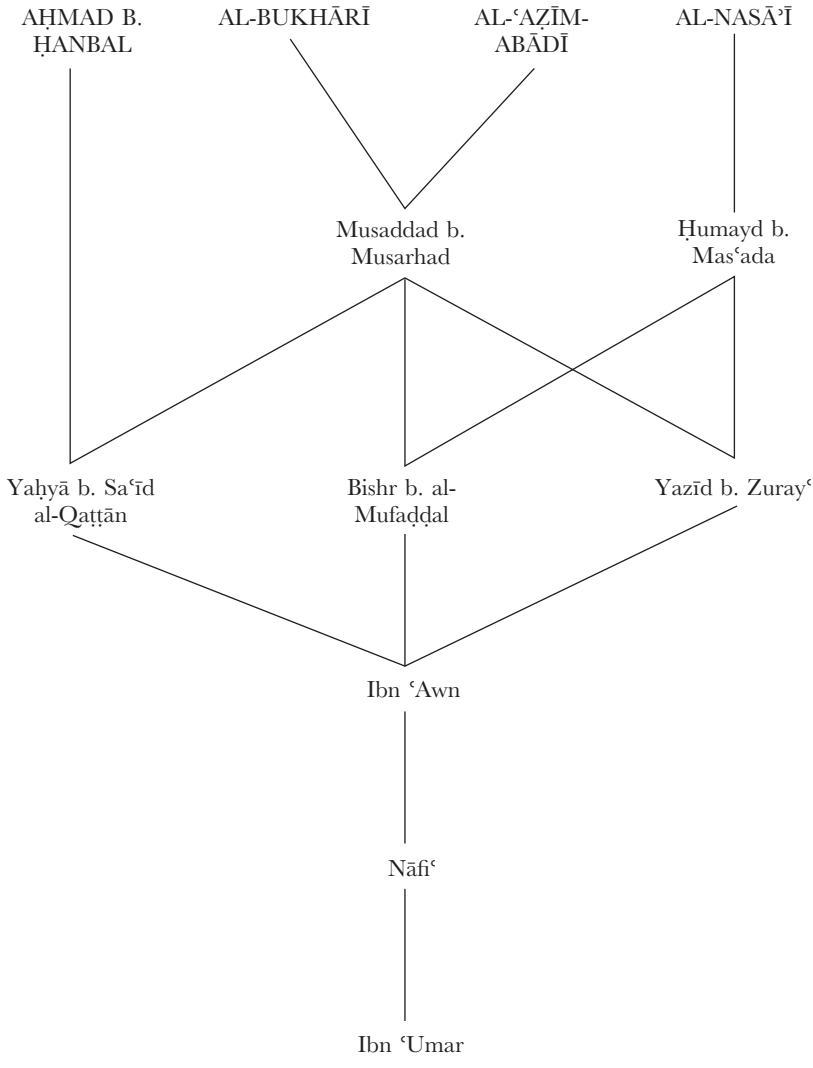
[82] Juynboll, "Some *Isnād*-Analytical Methods," 212.
[83] Juynboll, "Some *Isnād*-Analytical Methods," 212.
[84] Juynboll, "Some *Isnād*-Analytical Methods," 213.
[85] Juynboll, "Some *Isnād*-Analytical Methods," 211.
[86] This conclusion regarding Yaḥyā b. Yaḥyā al-Tamīmī may need to be revised at a later time should other traditions on the authority of Salīm b. Akhḍar (d. 180/796) emerge. The biographical dictionaries provide strong support for this chain of transmission. The Baṣran Salīm b. Akhḍar was a major transmitter of *ḥadīth*s on the authority of Ibn ʿAwn, and the biographical dictionaries report that Yaḥyā b. Yaḥyā al-Tamīmī transmitted *ḥadīth*s on the authority of Salīm b. Akhḍar. Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 11: 297–98, al-Mizzī, *Tahdhīb*, 11: 338–39, no. 2483, 32: 32, no. 6943.
[87] Juynboll, "Some *Isnād*-Analytical Methods," 211.

DIAGRAM TWO

The *taṣaddaqa ḥadīth*s, with a focus on cl, pcl, and ipcl lines of transmission



graphical dictionaries report that Musaddad b. Musarhad (d. 228/843) and Ḥumayd b. Masʿada (d. 244/858) transmitted traditions on the authority of both Bishr b. al-Mufaḍḍal (d. 187/803) and Yazīd b. Zurayʿ (d. 182/798),[88] and the dictionaries confirm the link between Musaddad and Yaḥyā b. Saʿīd al-Qaṭṭān (d. 198/813).[89] Similarly, the biographical dictionaries report that Bishr b. al-Mufaḍḍal, Yazīd b. Zurayʿ, and Yaḥyā b. Saʿīd all related *ḥadīth*s on the authority of ʿAbd Allāh b. ʿAwn (d. 151/768), the common link.[90] The dictionaries generally attest to the reliability and piety of these men. Ibn ʿAwn was known for fasting during the day and being reliably trustworthy (*thiqa thabat*).[91] Yaḥyā b. Saʿīd was described as "one of the most esteemed people of his time in regard to Qurʾān recitation, piety, knowledge, virtue and religion."[92] There appears to be some disagreement, however, concerning Musaddad's reliability as a transmitter. Ibn Ḥanbal considered him *ṣadūq*—honest, but not completely free from error in what he wrote down.[93] But when Jaʿfar b. Abī ʿUthmān asked the *ḥadīth* critic Yaḥyā b. Maʿīn from whom he should write down traditions in Baṣra, the latter said, "Musaddad, for he is the most trustworthy of the trustworthy" (*innahu thiqa thiqa*).[94] This same Ibn Maʿīn also considered Yazīd b. Zurayʿ one of the most reliable (*athbat*) *shaykh*s in Baṣra.[95] Ḥumayd b. Masʿada was deemed not only trustworthy (*thiqa*) in the matter of *ḥadīth* transmission, but particularly reliable in the area of history.[96] And lastly,

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[88] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 3: 49, 10: 107.
[89] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 10: 107, 11: 216.
[90] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 347–48.
[91] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 348.
[92] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 11: 219–20.
[93] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 10: 108.
[94] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 10: 108.
[95] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 11: 326.
[96] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 3: 49. The distinction between those who transmitted *ḥadīth*s (*al-muḥaddithūn*) and those who transmitted historical reports (*al-akhbāriyyūn*) has been examined by Ella Landau-Tasseron in her article on Sayf b. ʿUmar. In the biographical dictionaries, the *muḥaddithūn* generally malign the reputations of those connected with the writing of historical works, such as Sayf b. ʿUmar, al-Wāqidī, and Ibn Isḥāq. According to Landau-Tasseron most of these disparagements are unwarranted, because they result from the *muḥaddithūn* judging the *akhbāriyyūn* according to the standards of *ḥadīth* criticism, rather than historical writing. Landau-Tasseron further observes that non-*muḥaddithūn* critics considered these *akhbāriyyūn* trustworthy with respect to history. As for Ḥumayd b. Masʿada, he appears to constitute the case of an individual who successfully navigated this division between the *muḥaddithūn* and the *akhbāriyyūn*. Landau-Tasseron, "Sayf b. ʿUmar in Medieval and Modern Scholarship," *Der Islam* 67 (1990), 1–26, esp. 6–7.

members of the Muslim community took special notice of Bishr b. al-Mufaḍḍal's extreme piety—ʿAlī b. al-Madīnī claimed that Bishr fasted during daylight hours in addition to praying 400 *rakʿa*s each day.[97]

Even if the lines of transmission between the cl and the pcls are authentic, that does not mean that the events described are historically reliable. As discussed previously, Juynboll's analytical approach to the *isnād*s strongly suggests that the common link—Ibn ʿAwn (d. 151/768)—is the source of the *taṣaddaqa ḥadīth*'s narrative structure,[98] and that he raised the *isnād* by extending the chain of transmission through Nāfiʿ (d. 117–20/735–38) and Ibn ʿUmar (d. 73–74/693–94). Even though many transmitters of *ḥadīth*s seem to have lived extraordinarily long lives,[99] the Muslim tradition has never

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[97] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 1: 459.

[98] Even variant traditions of the *taṣaddaqa ḥadīth* have Ibn ʿAwn as the common link. In examining the sources, I have uncovered four variations on the *taṣaddaqa* maxim:

1. Reversal of the maxim: "If you want, give (the yields) away as alms, and sequester its principal" (*in shiʾta, taṣaddaqta bi-hā wa-ḥabbasta aṣlahā*). Al-Dāraquṭnī, *Sunan*, 4: 189, no. 5; al-Bayhaqī, *Kītāb al-Sunan al-Kubrā*, 6: 158–59.
2. Interpolation of the phrase "entrust it to God" into the maxim: "If you want, entrust it to God, sequester its principal and give (the yields) away as alms" (*in shiʾta, jaʿaltahā liʾllāhi, ḥabbasta aṣlahā wa-taṣaddaqta bi-hā*). Al-Dāraquṭnī, *Sunan*, 4: 188, no. 2.
3. Omission of the statement suggesting that ʿUmar give the yields away as alms and interpolation of an explicit inalienability clause into the maxim: "If you want, sequester its principal, it is not to be sold, or given as a gift, or inherited" (*in shiʾta, ḥabbasta aṣlahā, lā tubāʿu wa-lā tūhabu . . . wa-lā tūrathu*). Al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār*, 4: 95.
4. Omission of the phrase sequestering the principal: "If you want, give (the yields) away as alms" (*in shiʾta, taṣaddaqta bi-hā*). Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, 5: 29, no. 2488.

[99] Juynboll has written several times on the "age trick" amongst early transmitters of *ḥadīth*s. The "age trick" involved stretching the lives of key figures, such as Mālik b. Anas (d. 179/795) in a manner that made it possible to claim that they had received *ḥadīth* materials from important first-century A.H. authorities. For example, due to his long life, Mālik is said to have been a pupil of Nāfiʿ (d. 117–20/735–38). The prevalence of so many long-lived *ḥadīth* transmitters has led Juynboll to conclude that this phenomenon cannot be accepted as historically accurate: "Now one person or a few persons who reached their mid-eighties before dying may not strike a student of early Islamic society as particularly implausible, but literally hordes of people living to these ripe old ages stretches the imagination to the breaking point. And literally dozens of centenarians, nonagenarians and octogenarians, all firmly entrenched in *ḥadīth* transmission, who coincidentally received their most important and voluminous material from alleged masters whose students they became in their early youth, seems too much of a coincidence to accept without

claimed that Ibn ʿAwn was present at the conversation between the Prophet and ʿUmar in the year 7/629. In consideration of Ibn ʿAwn's age, the *ḥadīth* probably came into circulation sometime between the years 125–51/742–68. Moreover, since the best lines of transmission (cl-pcl-pcl) all pass through Baṣran authorities, it is logical to conclude that the *ḥadīth* originated in Baṣra.[100]

While Ibn ʿAwn may be credited with generating the narrative structure for the maxim, it is not entirely clear that he should be credited with creating the maxim. Schacht's work suggests that legal maxims could have entered into Islamic legal discourse as independent entities—either as borrowed phrases from foreign legal systems, as teaching tools generated by early Muslim jurists, or, as in the case of Shurayḥ's anti-*waqf* maxim, as opinions of early jurists. Consequently, while *isnād* analysis indicates that Ibn ʿAwn is responsible for situating the *taṣaddaqa* maxim within its narrative framework, the maxim may have circulated independently for a period of time prior to the narrative's creation.

The Sabbala *Maxim*

The *sabbala* maxim, although absent in the *Aḥkām al-Waqf* of Hilāl (d. 245/859), should be considered on par with the *taṣaddaqa* maxim in terms of legitimating the *waqf*. The *sabbala* maxim is foregrounded in the introduction to al-Khaṣṣāf's *waqf* treatise,[101] and it is this maxim that al-Shāfiʿī (204/820) cites when he argues in favor of the legitimation of pious endowments (*aḥbās*) in the *Kitāb al-Umm*:

> Sufyān [b. ʿUyayna]—ʿAbd Allāh b. ʿUmar b. Ḥafṣ al-ʿUmarī—Nāfiʿ—ʿAbd Allāh b. ʿUmar: ʿUmar b. al-Khaṭṭāb owned 100 shares (*sahm*)

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a further look." Juynboll, "Nāfiʿ," 219–23; idem, *Muslim Tradition*, 46–48; idem, "The Role of *Muʿammarūn* in the Early Development of the *Isnād*," *Wiener Zeitschrift für die Kunde des morgenlandes* 81 (1991), *passim*.

[100] Cook uses a similar approach for determining the provenance of the Prophetic *ḥadīth*, "Write nothing from me except the Qurʾān; if anyone writes anything from me other than the Qurʾān, let him erase it." Similar to the *taṣaddaqa ḥadīth*, this tradition has a "trunk" of four single transmitters and then begins to branch outwards. Although the trunk is Madīnan, Cook states that the *ḥadīth* emerged in Baṣra because all but one of the branches consist of Baṣran transmitters. Cook, "The Opponents of the Writing of Tradition," 446–47. Cook does not agree, however, with Juynboll's conclusions regarding the common link as the source for the *ḥadīth*.

[101] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 7.

> in Khaybar that he had purchased. He came to the Messenger of God and said, "O Messenger of God, verily I have acquired property the likes of which I have never acquired. I want to give it away as an act of piety" (lit. "to draw closer to God"). [The Prophet] commanded: "Sequester its principal and dedicate its fruits/yields to charitable purposes" (*iḥbas aṣlahā wa-sabbil thamaratahā*).[102]

At first glance, the *sabbala ḥadīth* is reminiscent of the *taṣaddaqa* tradition. In both instances ʿUmar informs the Prophet that he has acquired a special piece of real property in Khaybar and the Prophet advises/commands him to sequester the property's principal and distribute its yields to charity. However, the *sabbala* version of events also exhibits some dissimilarities with its *taṣaddaqa* counterpart. First, the three conditions concerning the endowment's establishment—the explicit statement of inalienability, the specification of charitable ends, and the guidelines for the administrator—are absent. Second, the *sabbala* narrative specifies how many shares ʿUmar owned in Khaybar whereas the *taṣaddaqa* tradition is silent on the extent of ʿUmar's property. Third, in the *sabbala* tradition ʿUmar informs the Prophet that he wants "to give (the property) away as an act of piety," or "to draw closer to God" (*aradtu an ataqarraba bi-hi*). By contrast, in the *taṣaddaqa* narrative ʿUmar simply asks the Prophet what he should do with his property and it is the Prophet who suggests that he give the yields away as alms.

Within the collection of *sabbala* traditions there are some slight variations. For example, in a tradition in the *Sunan* of Ibn Māja (d. 273/886), it is ʿUmar who tells the Prophet that he has 100 shares in Khaybar, whereas in the *ḥadīth* from the *Kītāb al-Umm* the narrator supplies this information. Moreover, in the Ibn Māja tradition ʿUmar does not tell the Prophet that he wishes to give away his property as an act of piety, only that he wants to give some of it away as alms (*taṣaddaqa*):

> Muḥammad b. Abī ʿUmar al-ʿAdanī—Sufyān [b. ʿUyayna]—ʿUbayd Allāh b. ʿUmar [b. Ḥafṣ al-ʿUmarī]—Nāfiʿ—Ibn ʿUmar. He [Ibn ʿUmar] said: ʿUmar b. al-Khaṭṭāb said: "O Messenger of God, verily the 100 shares (*sahm*) which are in Khaybar, I have never before acquired property which I have loved more than it. I want to give it away as alms" (*wa-qad aradtu an ataṣaddaqa bi-hā*). The Prophet

[102] Al-Shāfiʿī, *Kītāb al-Umm*, 4: 52–53, 58.

> commanded: "Sequester its principal and dedicate its fruits/yields to charitable purposes" (*iḥbas aṣlahā wa-sabbil thamaratahā*).[103]

The *isnād* bundle for the *sabbala* maxim [see Diagram Three], suggests why the *sabbala* and *taṣaddaqa* narratives differ—the chains of transmitters for the two *ḥadīth*s are quite different. Although both *ḥadīth*s have Ibn ʿUmar and Nāfiʿ as the first two authorities in the *isnād*, in the *sabbala ḥadīth*s Nāfiʿ emerges as a potential cl. Additional differences manifest themselves at the third level. Although Ibn ʿAwn is cited in a *fulān* tradition from al-Shāfiʿī, the dominant figures at the third level are ʿUbayd Allāh b. ʿUmar b. Ḥafṣ al-ʿUmarī and his brother ʿAbd Allāh. From the two brothers emanate three *fulān* strands and one pcl transmission on the authority of Sufyān b. ʿUyayna.[104] After Sufyān b. ʿUyayna, the *ṭuruq* branch out into eight different directions. Based upon this description of the *isnād* bundle it would appear that either Nāfiʿ, ʿUbayd Allāh b. ʿUmar, or ʿAbd Allāh b. ʿUmar constitutes the common link for the *sabbala ḥadīth*. Nevertheless, in spite of these presuppositions about our three potential cls, none will be shown to be the real cl.

As the client (*mawlā*) of the Companion Ibn ʿUmar, Nāfiʿ was in a unique position to transmit *ḥadīth*s on the authority of his patron. In fact, there are few people in the Islamic tradition who appear as frequently in *isnād*s as Nāfiʿ.[105] Of 1,979 traditions in the six canonical collections transmitted on the authority of Ibn ʿUmar, 1,088 have Nāfiʿ in the position of Successor.[106] Due to the prominence of Nāfiʿ and the fact that so many *isnād* bundles begin to branch out after him, as recently as 1992 Juynboll still held out the possibility that historians would "find indelible proof for the cl status of Nāfiʿ in a certain bundle."[107] A year later, however, Juynboll's opinion

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[103] Muḥammad Yazīd b. Māja, *Sunan Ibn Māja*, ed. Muḥammad Fu'ād ʿAbd al-Bāqī (Cairo: ʿĪsā al-Bābī al-Ḥalabī, 1972), 2: 801, no. 2397.

[104] One tradition in al-Nasā'ī's *Sunan* reports that the *ḥadīth* was transmitted on the authority of Sufyān "on the authority of" (*ʿan*) Ibn ʿUyayna. Since other *ḥadīth*s assert that this transmitter was one person—Sufyān b. ʿUyayna—this discrepancy is probably a textual corruption. Aḥmad b. Shu'ayb al-Nasā'ī, *Sunan al-Nasā'ī* (Egypt: Muṣṭafā al-Bābī al-Ḥalabī, 1964–65), 6: 193.

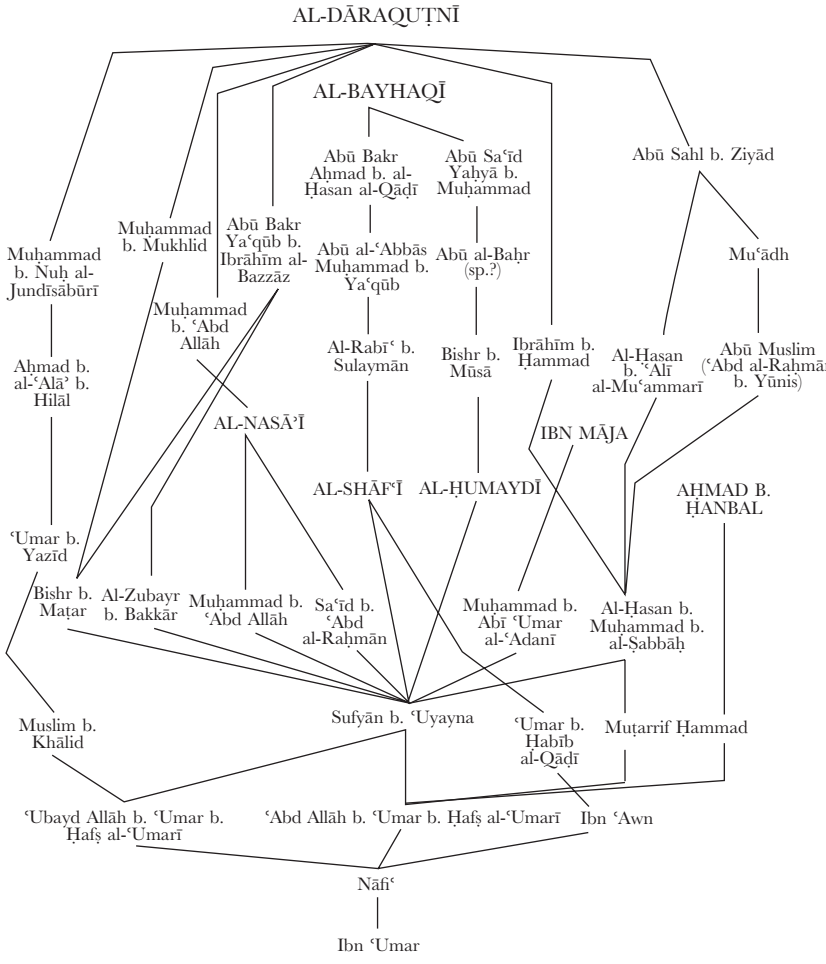
[105] Juynboll, "Nāfiʿ," 217. Juynboll also discusses the contradictory accounts surrounding the biography of Nāfiʿ on pages 217–20.

[106] Juynboll, "Nāfiʿ," 227.

[107] Juynboll, "Some Notes on Islam's First *Fuqahā'* Distilled from Early *Ḥadīth* Literature," *Arabica* 39 (1992), 309. In a 1993 article, Juynboll notes that he once

DIAGRAM THREE

The *sabbala ḥadīth*s



Al-Dāraquṭnī, *Sunan*, 4: 186, no. 6, 187, no. 13, 193, nos. 1–2, 4, 194, no. 8; al-Bayhaqī, *Sunan*, 6: 162; al-Nasāʾī, *Sunan*, 6: 193; al-Shāfiʿī, *Kitab al-Umm*, 4: 52–53, 58; al-Ḥumaydī, *Al-Musnad*, 2: 289–90, no. 652; Ibn Māja, *Sunan*, 2: 801, no. 2397; Ibn Ḥanbal, *Al-Musnad*, 9: 178, no. 6460.

concerning Nāfiʿ as a potential cl had changed. Based upon a meticulous (and voluminous) analysis into Nāfiʿ-supported *isnād*s, Juynboll now believes that none of the aforementioned 1088 *isnād*s supports the conclusion that Nāfiʿ is a historically believable cl.[108] As a result of these findings, Juynboll has concluded that Nāfiʿ is a "seeming-cl" and that the authentic cl is somewhere else in the *isnād* bundle.[109]

If Nāfiʿ is not the cl, then the next logical place to look for the cl of this *isnād* bundle is the third rung of the *isnād* chain—ʿUbayd Allāh b. ʿUmar b. Ḥafṣ al-ʿUmarī or his brother, ʿAbd Allāh (Ibn ʿAwn is excluded because he transmitted his tradition to only one other person). Within the *ḥadīth* collections there is some confusion over which of these two brothers transmitted the *ḥadīth*. For example, the *Sunan* of Ibn Māja contains a *ḥadīth* with the *isnād* Ibn Abī ʿUmar—Sufyān—ʿUbayd Allāh b. ʿUmar—Nāfiʿ—Ibn ʿUmar, but this same *ḥadīth* also includes a note in which Ibn Abī ʿUmar is alleged to have said: "And I found this *ḥadīth* at the end of my book [with the following *isnād*]: Sufyān—*ʿAbd Allāh*—Nāfiʿ—Ibn ʿUmar"[110] (emphasis added). Conversely, the editor of al-Ḥumaydī's *Musnad* states that ʿUbayd Allāh should replace ʿAbd Allāh in the *isnād*.[111]

Some of this confusion is justified since ʿUbayd Allāh (d. 144–47) and ʿAbd Allāh (d. 171–72) were brothers, and, theoretically, may have shared *ḥadīth*s. In spite of their shared lineage, the Islamic tradition has quite different assessments of them as *ḥadīth* transmitters. In Ibn Ḥajar al-ʿAsqalānī's *Tahdhīb*, ʿUbayd Allāh is commended for his trustworthiness, reliability and outstanding character. He was one of seven leading jurists (*fuqahāʾ*) in Madīna, and is described as reliable and trustworthy (*thiqa thabat*).[112] One *rijāl* critic even characterized him as "among the chiefs of Madīna and the nobles of the Quraysh in terms of excellence, knowledge, religiosity, nobility, mem-

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considered the position of Nāfiʿ as a cl in *isnād* bundles to be "unassailable." Juynboll, "Nāfiʿ," 227, n.30.

[108] Juynboll, "Nāfiʿ," 228.

[109] Juynboll, "Nāfiʿ," 228. For a critique of Juynboll's conclusions regarding Nāfiʿ, see Harald Motzki, "*Quo vadis, Ḥadīṯ*-Forschung? Eine kritische Untersuchung von G. H. A. Juynboll: Nāfiʿ the *mawlā* of Ibn ʿUmar, and his position in Muslim *Ḥadīṯ* Literature," *Der Islam* 73/1 (1996), 40–80.

[110] Ibn Māja, *Sunan Ibn Māja*, 2: 801, no. 2397.

[111] Al-Ḥumaydī, *Al-Musnad*, 2: 289, n. 7.

[112] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 7: 40.

ory and trustworthiness."[113] According to Aḥmad b. Ṣāliḥ, "No one is more reliable in the matter of the *ḥadīth*s of Nāfiʿ than [ʿUbayd Allāh].[114] Likewise, Ibn Mahdī is reported to have said that ʿUbayd Allāh was the most reliable (*athbat*) transmitter of *ḥadīth*s that bear the chain Nāfiʿ—ʿAbd Allāh [b. ʿUmar].[115] By contrast, the critics who evaluated ʿAbd Allāh b. ʿUmar b. Ḥafṣ al-ʿUmarī's credibility were caustic. While some were willing to grant him tepid praise ("There is nothing wrong with him" (*lā baʾs bi-hi*)),[116] most reviews were scathing. His *ḥadīth*s were deemed confusing/inconsistent (*fī ḥadīthihi iḍṭirāb*),[117] and al-Nasāʾī (d. 303/915) and al-ʿUqaylī (d. 322/934) labeled him "weak" (*daʿīf*).[118] Aḥmad b. Ḥanbal expressed reservations about ʿAbd Allāh's reliability when he stated that he would "transmit ʿAbd Allāh's traditions on the authority of his brother, but he would not transmit any of ʿUbayd Allāh's traditions if they were conveyed through ʿAbd Allāh."[119] Abū Ṭalḥa perhaps best articulated the difference between the two men when he said that ʿAbd Allāh was "not like his brother."[120]

Although ʿUbayd Allāh b. ʿUmar b. Ḥafṣ al-ʿUmarī survived the Muslim *ḥadīth* critics unscathed, his reputation has suffered at the hands of Juynboll. Based upon his work with thousands of *ḥadīth*s and hundreds of *isnād* bundles, Juynboll has concluded that ʿUbayd Allāh b. ʿUmar is never a real cl: "But close study of the ʿUbayd Allāh-supported traditions makes clear, no matter how incredible this may seem at first, that . . . he is never the real cl sitting above the seeming cl Nāfiʿ in a bundle, no, ʿUbayd Allāh is himself a seeming cl."[121] Juynboll goes on to state that ʿUbayd Allāh is "among the most spectacular seeming cls" in the transmission of *ḥadīth*s.[122] Juynboll bases this conclusion on the observation that many of the

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[113] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 7: 40.
[114] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 7: 40.
[115] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 7: 39.
[116] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 327.
[117] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 327. A *muḍṭarib* tradition is "a *Ḥadīth* in which the contents are inconsistent with a number of other reports, none of which can be preferred over the others." Kamali, *Principles of Islamic Jurisprudence*, 81.
[118] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 327; al-ʿUqaylī, *Kītāb al-Ḍuʿafāʾ*, 2: 280–81.
[119] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 327.
[120] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 327.
[121] Juynboll, "Nāfiʿ," 232.
[122] Juynboll, "Nāfiʿ," 232.

isnād strands which would justify labeling ʿUbayd Allāh a cl or pcl are simple "spiders"[123] or single strand *fulān*s for which only the collectors or possibly their teachers can be held responsible.[124] Consistent with Juynboll's conclusions, if we return to Diagram Three and remove the *fulān* tradition from al-Dāraquṭnī,[125] ʿUbayd Allāh is not a cl because he is only credited with transmitting *ḥadīth*s to one other individual—Sufyān b. ʿUyayna.

Even though the Muslim tradition considered him a poor transmitter of *ḥadīth*s, the possibility remains that ʿAbd Allāh b. ʿUmar is the cl for the *sabbala* tradition. After all, he is credited with transmitting the *sabbala ḥadīth* to three different authorities—Sufyān b. ʿUyayna, Ḥammād and Muṭarrif. However, two of these authorities—Ḥammād and Muṭarrif—are *fulān*s. The Ḥammād *ḥadīth* looks like a classic "dive" by a Baṣran/ʿIrāqī transmitter attempting to gain credit for a Madīnan/Ḥijāzī tradition by latching on to a Madīnan authority. According to Juynboll it is not uncommon to find Madīnan *isnād* bundles becoming cluttered with ʿIrāqī transmitters such as Ḥammād.[126] Eliminating the single strand traditions of Ḥammād and Muṭarrif also dislodges ʿAbd Allāh b. ʿUmar from the list of potential cls because he transmitted only to Sufyān b. ʿUyayna.

By removing the extraneous single strands which have attached themselves to Nāfiʿ, ʿUbayd Allāh and ʿAbd Allāh, the *isnād* bundle begins to resemble the one generated by the *taṣaddaqa ḥadīth*s [see Diagram Four]. Although there is a split in the chain of transmitters because of the ʿUbayd Allāh—ʿAbd Allāh phenomenon, the true common link is still readily perceivable—Sufyān b. ʿUyayna (b. 108/727, d. 197–98/813–14). Among *ḥadīth* critics, Sufyān b. ʿUyayna was considered both reliable and trustworthy, and al-Shāfiʿī went even further in his praise of Sufyān b. ʿUyayna when he purportedly said, "If it were not for Mālik and Sufyān, the learning of the Ḥijāz would

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[123] A spider bundle is created when a series of single-strand (*fulān*) traditions converge on a potential cl. Because the resulting *isnād* bundles resemble the so-called harvest spider (American English: daddy longlegs), Juynboll has given them the appellation "spiders." Juynboll, "Some *Isnād*-Analytical Methods," 214, n. 4.

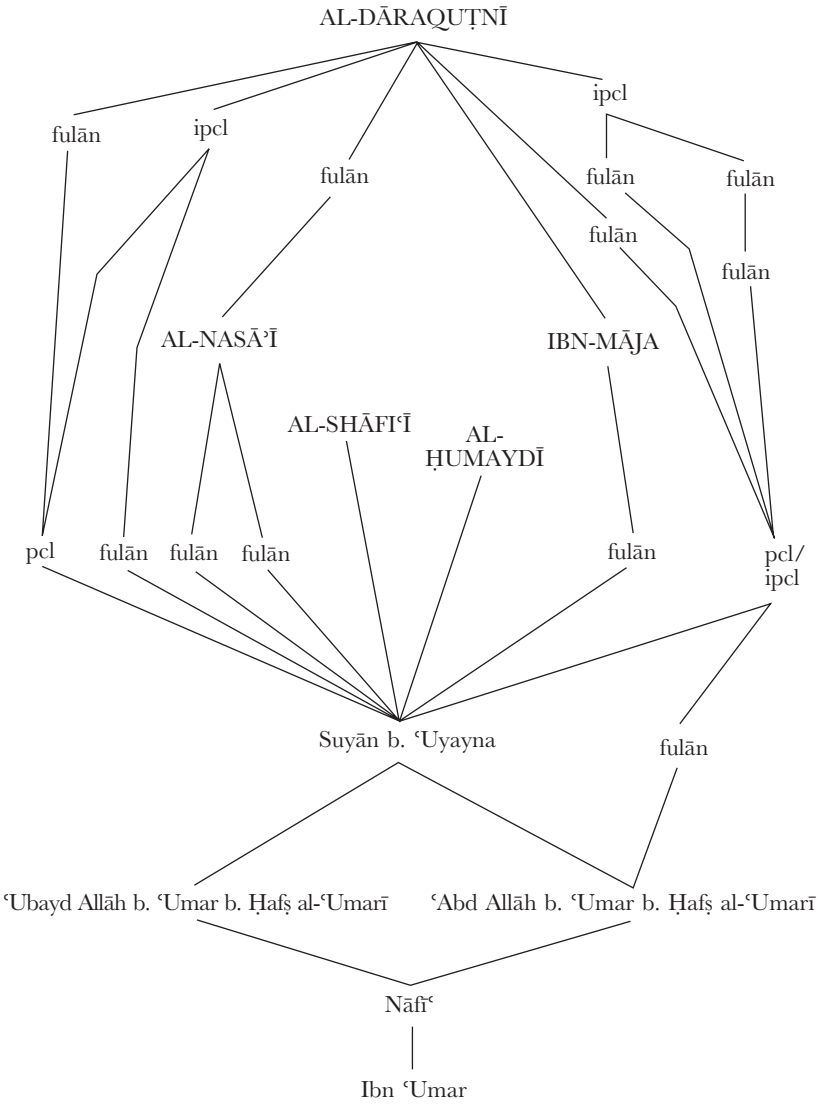
[124] Juynboll, "Nāfiʿ," 212, 232–33; idem, "Some *Isnād*-Analytical Methods," 352.

[125] This is the strand having the long *isnād*: Muḥammad b. Nūḥ al-Jundīsābūrī—Aḥmad b. al-ʿAlāʾ b. Hilāl—ʿUmar b. Yazīd—Muslim b. Khālid—ʿUbayd Allāh b. ʿUmar (b. Ḥafṣ al-ʿUmarī)—Nāfiʿ—Ibn ʿUmar. Al-Dāraquṭnī, *Sunan*, 4: 187, no. 13.

[126] Juynboll, "Nāfiʿ," 233–39.

DIAGRAM FOUR

The *sabbala ḥadīth*s, with a focus on Sufyān b. ʿUyayna as the common link



disappear." (*law-lā Mālik wa-Sufyān la-dhahaba ʿilmu al-Ḥijāz*)[127] As a cl, his reputation among modern scholars is also firmly established. In a 1989 article, Juynboll characterized Sufyān b. ʿUyayna as a "prolific cl" (*i.e.*, generator of *ḥadīth*s).[128]

With Sufyān b. ʿUyayna isolated as the cl, it is possible to discuss the chronological development of the *sabbala* tradition and its provenance. Although Sufyān b. ʿUyayna was born in Kūfa, he resided in Mecca for most of his life.[129] Consequently, the *sabbala* tradition appears to have emerged from within a Ḥijāzī milieu in contrast to the Baṣran *taṣaddaqa ḥadīth*s. As for the dissemination of the *sabbala ḥadīth* within the Ḥijāz, any conclusions on this matter are problematic. In comparison with the *isnād* bundle for the *taṣaddaqa* tradition, in which it is possible to isolate paths of authentic transmission from Ibn ʿAwn to other Baṣran transmitters (the cl-pcl-pcl lines of transmission), the *sabbala* bundle lacks any sustained pcl transmissions.

Upon initial consideration, the links of al-Ḥasan b. Muḥammad b. al-Ṣabāḥ (d. 259/873) and Bishr b. Maṭar might appear to be pcls [see Diagram Three]. However, these strands cannot be considered authentic lines of transmission for several reasons. The *ḥadīth* transmitted on the authority of Bishr b. Maṭar initially looks promising because there appears to be a transmission from a pcl (Bishr b. Maṭar) to an ipcl (Abū Bakr Yaʿqūb b. Ibrāhīm al-Bazzāz). However, the biographical dictionaries do not contain reports on either man, or the other alleged transmitter of *ḥadīth*s from Bishr, Muḥammad b. Mukhlid.[130] Nor does Sufyān b. ʿUyayna's *tarjama* list Bishr b. Maṭar among those who transmitted traditions on Sufyān's authority.[131] As for al-Ḥasan b. Muḥammad al-Ṣabāḥ, neither Ibrāhīm b. Ḥammād, nor al-Ḥasan b. ʿAlī al-Muʿammarī nor Abū Muslim (ʿAbd al-Raḥmān b. Yūnis) was reported to have transmitted *ḥadīth*s on his authority,[132] and the absence of *tarjama*s for either Ibrāhīm b. Ḥammād

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[127] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 4: 119.

[128] Juynboll, "Some *Isnād*-Analytical Methods," 356.

[129] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 4: 117.

[130] No biographical entry for either Bishr b. Maṭar, Abū Bakr Yaʿqūb b. Ibrāhīm al-Bazzāz, or Muḥammad b. Mukhlid, could be found in the *Tahdhīb* of al-Mizzī, the *Tahdhīb* of Ibn Ḥajar al-ʿAsqalānī, or the *Kītāb al-Ḍuʿafā'* of al-ʿUqaylī.

[131] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 4: 118–19.

[132] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 2: 318–19; 6: 302; al-Mizzī, *Tahdhīb*, 6: 310–13, no. 1270.

and al-Ḥasan b. ʿAlī raises further questions as to their identity.[133] And lastly, the source for these *ḥadīth*s, al-Dāraquṭnī, poses additional problems. Almost every *ḥadīth* on the subject of the *waqf* in the *Sunan* of al-Dāraquṭnī is a *fulān* tradition. The problematic nature of al-Dāraquṭnī's *ḥadīth* collection, combined with the aforementioned inconsistencies, argues against the authenticity of these transmissions.

By removing Bishr b. Maṭar and al-Ḥasan b. Muḥammad b. al-Ṣabāḥ as potential pcls, one is left with a cl (Sufyān b. ʿUyayna) and a succession of *fulān* traditions emanating from him. As discussed earlier, the origin of these *fulān* traditions is generally credited with the collector of the tradition (or the *shaykh* under him) rather than the cl. Obviously, something of a tension exists here. If Sufyān b. ʿUyayna is the cl, then he should be credited with "authorship" of both the *ḥadīth* narrative and the *isnād* chain below him.[134] And yet, the *isnād* bundle for the *sabbala ḥadīth*s suggests that the collectors of these traditions were responsible for their creation and that the focus on Sufyān b. ʿUyayna is merely the result of their dives through him.

To alleviate this seeming contradiction, two strands emanating from Sufyān b. ʿUyayna deserve further consideration. As Diagram Four illustrates, the *sabbala ḥadīth* appears to have passed directly from Sufyān b. ʿUyayna (d. 197–98/813–14) to both al-Shāfiʿī (d. 204/820) and al-Ḥumaydī (d. 219/834), a path of transmission strongly supported by the Islamic tradition.[135] Furthermore, the biographical dictionaries place both al-Shāfiʿī and al-Ḥumaydī in the Ḥijāz. Al-Shāfiʿī's mother reportedly took him to Mecca[136] and he later studied under Mālik in Madīna.[137] As for al-Ḥumaydī, his *Musnad* is a collection of Ḥijāzī traditions,[138] and it is reported that al-Ḥumaydī

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[133] No biographical entry for either Ibrāhīm b. Ḥammād or al-Ḥasan b. ʿAlī al-Muʿammarī could be found in the *Tahdhīb* of al-Mizzī, the *Tahdhīb* of Ibn Ḥajar al-ʿAsqalānī, the *Kītāb al-Ṭabaqāt al-Kabīr* of Ibn Saʿd, or the *Kītāb al-Ḍuʿafā'* of al-ʿUqaylī.

[134] Juynboll, "Some *Isnād*-Analytical Methods," 353–54.

[135] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 4: 118–19, 5: 215, 9: 25, 29. Al-Ḥumaydī's biographical entry asserts that he studied with Sufyān b. ʿUyayna for seventeen years, and that he was the "most reliable transmitter" of Sufyān b. ʿUyayna's *ḥadīth*s. Al-Shāfiʿī's biographical entry reports that he transmitted a great number of traditions on the authority of both Sufyān b. ʿUyayna and Mālik b. Anas.

[136] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 9: 25.

[137] Norman Calder, *Studies*, 68.

[138] Juynboll, *Muslim Tradition*, 25.

went to Egypt with al-Shāfiʿī,[139] further increasing the likelihood that similar traditions would appear in both collections. Considering the relatively close life-spans of these three individuals, it seems possible that Sufyān b. ʿUyayna created the *sabbala ḥadīth*, and the tradition quickly found its way into the collections of al-Shāfiʿī and al-Ḥumaydī. Based upon this analysis, the conclusion that the *sabbala ḥadīth* emerged in a Ḥijāzī setting in the latter half of the second Islamic century does not seem unreasonable.

The conclusion that the two traditions emerged in different locations—the *taṣaddaqa ḥadīth* in Baṣra and the *sabbala ḥadīth* in the Ḥijāz—is supported by the absence of one of the traditions in some collections. The *Aḥkām al-Waqf* of Hilāl (d. 241/859) and the *Muṣannaf* of Ibn Abī Shayba (d. Kūfa, 235/849) contain only the Baṣran *taṣaddaqa ḥadīth/akhbār* report,[140] while the *Kitāb al-Umm* of al-Shāfiʿī and the *Musnad* of al-Ḥumaydī contain only the Ḥijāzī *sabbala* tradition. Two explanations can be proffered to explain this geographical distribution. It is possible that *ḥadīth* transmitters in ʿIrāq and the Ḥijāz were unaware of each other's traditions for a certain period of time as a result of geographical separation.[141] Once regional *ḥadīth* collections had become established, it would have been difficult to eliminate the redundancy when the two communities became aware of each other's traditions.[142] This conclusion, as it pertains to the *waqf* traditions, does not seem likely. The close similarities between the maxims and the narratives of the two traditions suggest that they probably emerged as a result of rivalries between different geographically-situated jurists, combined with a refusal by regional centers to acknowledge each other's traditions.[143] While it is an over-

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[139] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 216.

[140] In the *Aḥkām al-Waqf* of Hilāl the *taṣaddaqa* maxim is present in an *akhbār* report, *i.e.*, there is no *isnād* for the tradition.

[141] See, *e.g.*, Peters, "Murder in Khaybar," (arguing that two distinct doctrines of *qasāma* originated in the Ḥijāz and ʿIrāq respectively).

[142] John Wansbrough, *Qur'ānic Studies: Sources and Methods of Scriptural Interpretation* (Oxford: Oxford University Press, 1977), 50. Wansbrough contends that the repetitiveness of the Qur'ān is partly the result of the status which these pre-canonical verses (*logia*) had acquired in their local communities prior to the revelation's codification.

[143] Schacht, *Introduction to Islamic Law*, 28–36; Wansbrough, *Qur'ānic Studies*, 33; *idem*, *The Sectarian Milieu* (Oxford: Oxford University Press, 1978), 41. Traveling *ḥadīth* transmitters and the annual pilgrimage to Mecca would have provided opportunities for transmitters in different centers to become aware of one another's traditions.

statement to describe the situation in the Ḥijāz and ʿIrāq as having coalesced into formal law schools with rigid doctrines, it is nonetheless clear that different areas of the Islamic world possessed regional *ḥadīth* collections, and that the development of early Islamic law was shaped by regionalism.[144] By the middle of the third century, much of this geographical separation or isolation seems to have ended. Not only does the introduction to the *Aḥkām al-Awqāf* of al-Khaṣṣāf (d. 261/874) contain both sets of traditions, but so do the *ḥadīth* collections of Ibn Ḥanbal (d. 241/859), Ibn Māja (d. 295/907), al-Nasāʾī (d. 303/915), al-Dāraquṭnī (d. 385/995), and al-Bayhaqī (d. 458/1066).[145]

As with the *taṣaddaqa* maxim, a distinction should be drawn between the narrative of the *sabbala ḥadīth* and the *sabbala* maxim. Although the *isnād* evidence suggests that Sufyān b. ʿUyayna was responsible for circulating the *sabbala ḥadīth*, he cannot necessarily be held accountable for generating the Prophetic maxim. In his study of Madīnan traditions, Juynboll has determined that a considerable amount of Madīnan thought conveyed through Nāfiʿ and ʿUbayd Allāh b. ʿUmar is actually from Mālik b. Anas (d. 179/795), the founder of the Mālikī

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[144] Consider for example, the *Muṣannaf*s of ʿAbd al-Razzāq (d. 211/827), and Ibn Abī Shayba (d. 235/849). The former is an early collection of Ḥijāzī traditions, while the latter is primarily a compilation of ʿIrāqī *ḥadīth*s. The issue of regionalism in the development of early Islamic law is a matter of current debate among scholars. Although Hallaq has questioned whether regional collections of jurists should be considered "schools," he nonetheless seems to agree with Melchert that jurists collected in regional centers: "Kufa, in particular, and Iraq, in general, were places in which a group of jurists flourished and spent the entirety of their professional lives." Hallaq, "From Regional to Personal Schools of Law?" 16. *Cf.*, Melchert, "Traditionist-Jurisprudents," 400. The work of Peters and Cook also suggests that groups of jurists were organized along regional/geographic lines. See Peters, "Murder in Khaybar," (arguing that the distinctiveness of two *qasāma* doctrines was the result of a lack of contact between jurists in the Ḥijāz and ʿIrāq); Cook, "The Opponents of the Writing of Tradition," 446–47 (asserting that the Prophetic *ḥadīth*, "Write nothing from me except the Qurʾān; if anyone writes anything from me other than the Qurʾān, let him erase it" emerged in Baṣra even though the trunk of the *isnād* is Madīnan). Hurvitz, however, has questioned whether developments in Islamic law should be linked to geography. Hurvitz, "Schools of Law in Historical Context," 63.

[145] The *taṣaddaqa* tradition can be found in the two most important collections of *ḥadīth*s—the *Ṣaḥīḥ*s of al-Bukhārī (d. 256/870) and Muslim (d. 261/875)—whereas the *sabbala* tradition is absent in both. Since the *sabbala* tradition existed by the third century A.H., this lacuna suggests either (i) that the *sabbala* tradition had not become widely disseminated amongst *ḥadīth* collectors, or (ii) that both al-Bukhārī and Muslim considered the *ḥadīth* to be less than *ṣaḥīḥ*.

school.[146] In fact, the maxim component of the *sabbala ḥadīth*—"Sequester its principal and dedicate its fruits/yields to charitable purposes" (*iḥbas aṣlahā wa-sabbil thamaratahā*)—is consistent with Mālik's "concise, finely-chiseled legal parlance."[147] Nevertheless, the historical evidence does not support a linkage between the maxim and Mālik. In the *Mudawwana* of Saḥnūn (d. 240/858) there are chapters on *ḥubs* and *ṣadaqa* in which Saḥnūn records Mālik's discussion of pious endowments.[148] Even though Mālik makes reference to the *ḥubs* of ʿUmar b. al-Khaṭṭāb[149] and relates the contents of a conversation between the Prophet and ʿUmar on the selling of endowments,[150] nowhere is reference made to the maxim. As for the *Muwaṭṭaʾ* of Mālik, it contains traditions transmitted on the authority of the Prophet and ʿUmar in the matter of *ṣadaqa*s, but none of these *ḥadīth*s mentions the maxim or ʿUmar's *waqf* in Khaybar. Instead, the discussions in the *Muwaṭṭaʾ* concern the type of livestock that can be made a *ṣadaqa* and which categories of people are eligible to receive support from an endowment.[151] Although the Islamic tradition's silence on this matter does not preclude the possibility that Mālik was the originator of the *sabbala* maxim, there is no evidence to support this claim. Since it is not possible to attribute the *sabbala* maxim to any one individual, it seems safer to assert that this maxim—like its *taṣaddaqa* counterpart—emerged either as a consequence of second century disputations over the legality of the *waqf*, or as a teaching tool of Muslim jurists, or as a phrase "borrowed" from a Near Eastern

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[146] Juynboll, "Nāfiʿ," *passim*.
[147] Juynboll, "Nāfiʿ," 237.
[148] Saḥnūn, *Al-Mudawwana*, 15: 98–117.
[149] Saḥnūn, *Al-Mudawwana*, 15: 115.
[150] Saḥnūn, *Al-Mudawwana*, 15: 114.
[151] Mālik b. Anas, *Al-Muwaṭṭaʾ*, 172–81. Neither maxim is present in an early collection of Ḥijāzī traditions, the *Muṣannaf* of ʿAbd al-Razzāq al-Ṣanʿānī (d. 210/826) or an early collection of ʿIrāqī *ḥadīth*s, the *Musnad* of Abū Dāwūd al-Tayālisī (d. 204/818–819). As a caveat, it should be noted that the *Muṣannaf* edition that we presently have at our disposal does not appear to be complete. It is known that ʿAbd al-Razzāq did not write down the material in the *Muṣannaf*. Rather, ninety percent of the traditions in the collection can be attributed to one man, Isḥāq b. Ibrāhīm al-Dabarī (d. 285/898), who probably received his information from his father. Juynboll has described the *Musnad* of al-Ṭayālisī as "but a shadow of what the original work compiled by Ṭayālisī must have looked like." Juynboll, "Islam's First *Fuqahāʾ*," 300, n. 27; idem, personal communication (April 1998); Harald Motzki, "The *Muṣannaf* of ʿAbd al-Razzāq al-Ṣanʿānī as a Source of Authentic *Aḥādīth* of the First Century A.H.," *JNES* 50/1 (1991), 2.

legal system.[152] At some later point in time, Sufyān b. ʿUyayna provided the narrative structure to elevate the maxim to a Prophetic level.

The Thamgh Variants

The Taṣaddaqa *Cluster*

To add another level of complexity to these *ḥadīth*s, there are variants which substitute the toponym Thamgh (or Thamagh)[153] for Khaybar. As will be discussed in more detail later, Thamgh was one of the properties listed in ʿUmar's *ṣadaqa* deed. In discussing these Thamgh variants it is helpful to conceive of them as coalescing into three different clusters. The first cluster is closely related to the *taṣaddaqa ḥadīth*s while the second is linked to the *sabbala* traditions. By contrast, the third cluster is a hybrid that contains elements of both the *taṣaddaqa* and *sabbala* traditions.

An examination of the *isnād*s for the three Thamgh variant clusters reveals a stark contrast with the *taṣaddaqa* and *sabbala* traditions: neither Ibn ʿAwn nor Sufyān b. ʿUyayna appears to have played any role in the transmission of the Thamgh variants. In addition to this discontinuity, reference to Thamgh is absent in some early discussions of the *waqf*. For example, while Thamgh is mentioned both in the introduction and the main text of al-Khaṣṣāf's *waqf* treatise,[154] there is no mention of Thamgh in Hilāl's *Aḥkām al-Waqf*, even though Hilāl's work contains traditions with the *taṣaddaqa* maxim. Likewise, the earlier *Kitāb al-Umm* of al-Shāfiʿī fails to mention Thamgh even though his text contains the *sabbala ḥadīth*. For these reasons alone, it appears that the introduction of Thamgh into the *ḥadīth* narratives

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[152] Juynboll has shared with me his opinion that the maxim should be attributed to Sufyān b. ʿUyayna, and that it likely emerged in response to an ʿIrāqī issue in the late second century A.H. Juynboll, personal communication (April 1998).

[153] Most sources suggest that Thamgh should be vocalized with a *fatḥa* over the *thā'* and a *sukūn* over the *mīm*. See al-Khaṣṣāf, *Aḥkām al-Awqāf*, 4, n. 2; al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār*, 4: 95, n. 4; Yāqūt, *Muʿjam al-Buldān*, 2: 84; Muḥammad Shams al-Ḥaqq al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd: Sharḥ Sunan Abī Dāwūd*, ed. ʿAbd al-Raḥmān Muḥammad ʿUthmān (Madīna: al-Maktaba al-Salafiyya, 1968–69), 8: 83; Muḥammad b. ʿAlī al-Shawkānī, *Nayl al-Awṭār* (Egypt: Muṣṭafā al-Bābī, 1952), 6: 25. Al-Shawkānī offers an alternative vocalization with *fatḥa*s over both the *thā'* and the *mīm* (*wa Thamagh bi-fatḥi al-muthallathati wa'l-mīm*). Al-Shawkānī, *Nayl al-Awṭār*, 6: 25.

[154] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 151.

constitutes a secondary development in the evolution of these traditions, although a further elaboration on this point will have to wait until the discussion of ʿUmar's *ṣadaqa* deed in the next section.

At first glance, the Thamgh variant does not seem particularly different from the Khaybar version:

> Aḥmad b. ʿAbd al-Raḥmān b. Wahb—my paternal uncle—Ibrāhīm b. Saʿd—ʿAbd al-ʿAzīz b. al-Muṭṭalib—Yaḥyā b. Saʿīd—Nāfiʿ, the *mawlā* of Ibn ʿUmar—Ibn ʿUmar: Verily, ʿUmar consulted the Prophet about giving away as alms (*yataṣaddaqa bi*) his property in Thamgh and the Prophet said, "Give it away as alms, divide its fruits/yields, sequester its principal, so that it may not be sold or given away as a gift" (*taṣaddaq bi-hi taqsim thamarahu taḥbis aṣlahu lā tubāʿ wa-lā tūhab*).[155]

Examined more closely, however, the Thamgh variant reveals a number of textual differences with its Khaybar counterpart. First, the Thamgh variant reverses the order of the maxim. Second the maxim interpolates the phrase "divide its fruits/yields" in-between the command to give alms and to sequester the principal, making explicit what was only implicit in the non-Thamgh/Khaybar version of the *taṣaddaqa ḥadīth*. Third, the explicit statement of inalienability ("it may not be sold or given away as a gift"), which had been attributed to ʿUmar in the Khaybar *ḥadīth*, is now Prophetic speech. A fourth difference between the two versions concerns the three conditions. While the Khaybar version contained an explicit statement of inalienability, a specification of charitable ends, and rules for the administrator, the Thamgh variant only conveys the first of these three. And lastly, the conversation between ʿUmar and the Prophet is one-sided in the Thamgh variant, since the reader is told only that ʿUmar "consulted" (*istashār*) with the Prophet.

As for the potential creator of this variant, the two most likely sources would be two Ḥijāzī authorities—ʿAbd al-ʿAzīz b. al-Muṭṭalib or Ibrāhīm b. Saʿd—since these are earliest potential cls [see Diagram Five].[156] ʿAbd al-ʿAzīz b. al-Muṭṭalib, served as a judge (*qāḍī*) in Madīna during the reign of the ʿAbbāsid caliph, al-Manṣūr (136–58/754–75) and then was transferred to the judgeship of Mecca during

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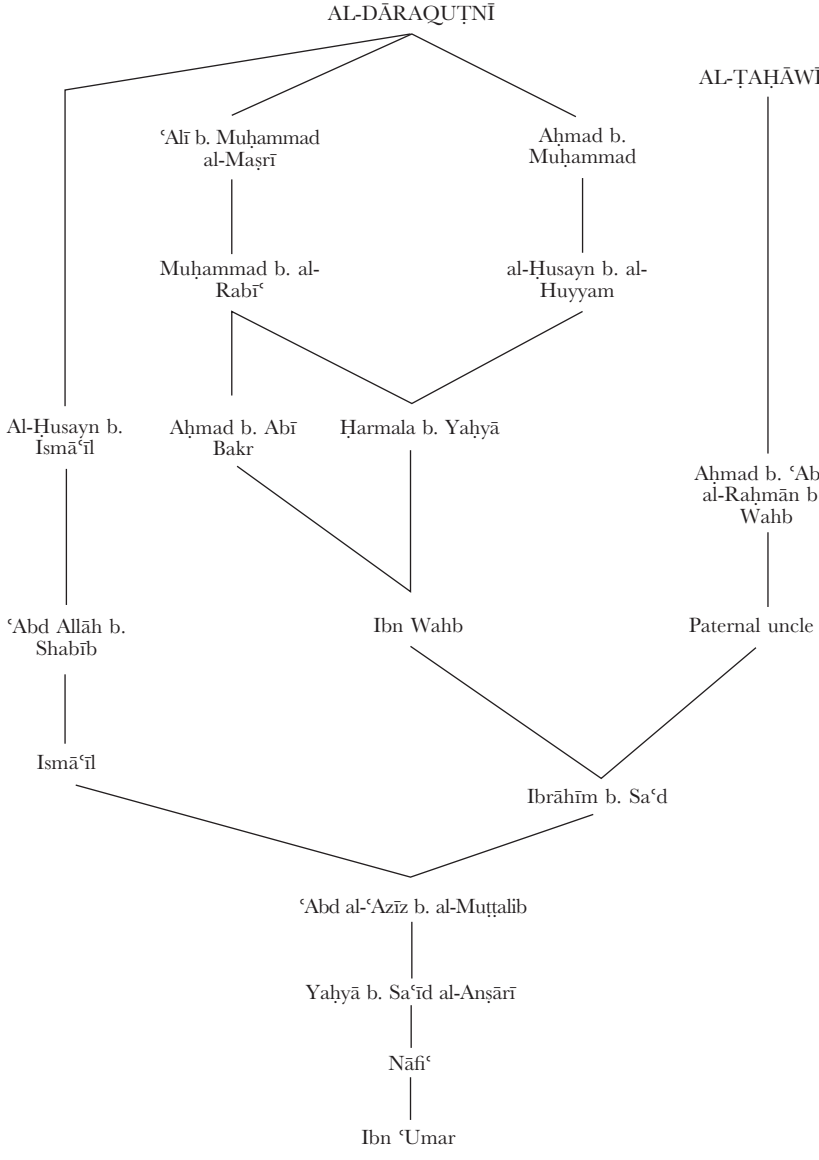
[155] Al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār*, 4: 95. See also al-Dāraquṭnī, *Sunan*, 4: 187, nos. 9–10.

[156] The small number of sources attesting to this Thamgh variant makes this conclusion more tentative, but in either case, these men would still be considered pcls if another common link were to emerge.

DIAGRAM FIVE

Thamgh Variant 1: The *Taṣaddaqa* Cluster



Al-Dāraquṭnī, *Sunan*, 4: 186–87, nos. 9–10; al-Ṭaḥāwī, *Sharḥ*, 4: 95.

the reign of al-Mahdī (158–69/775–85).[157] He reportedly died during the brief reign of al-Hādī (169–70/785–86).[158] Although some critics believed him to be trustworthy (*thiqa*), others considered him among the weak (*fī'l-ḍuʿafā'i*) and refused to transmit his *ḥadīth*s.[159] Al-ʿUqaylī (d. 322/934) also included ʿAbd al-ʿAzīz b. al-Muṭṭalib in his collection of weak *ḥadīth* transmitters.[160] In spite of these deficiencies ʿAbd al-ʿAzīz b. al-Muṭṭalib is reported to have transmitted *ḥadīth*s to the other potential cl, Ibrāhīm b. Saʿd (b. 108/727, d. 173–85/788–800),[161] who was described as "one of the greatest people in Madīna in terms of *ḥadīth* transmission during his lifetime" (*min akthar ahl al-Madīna ḥadīthan fī zamānihi*).[162]

In spite of the apparent pcl transmissions through Ibn Wahb (d. 197/812) and Ḥarmala b. Yaḥyā, *isnād* analysis reveals that the bundle lacks an identifiable cl.[163] Although transmission between Ibrāhīm b. Saʿd, Ibn Wahb and Ḥarmala b. Yaḥyā is supported by the Islamic tradition,[164] the remaining chains of transmission that would make them pcls (or even cls) appear to be "dives" to lower authorities. The transmission between Aḥmad b. Abī Bakr and Ibn Wahb is not supported in the biographical dictionaries,[165] Muḥammad b. al-Rabīʿ is not reported to have transmitted *ḥadīth*s to Aḥmad b. Abī Bakr or Ḥarmala b. Yaḥyā,[166] and al-Ḥusayn b. al-Huyyam is not

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[157] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 6: 358.

[158] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 6: 358.

[159] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 6: 358. See also Juynboll, *Muslim Tradition*, 85, where the author includes ʿAbd al-ʿAzīz b. al-Muṭṭalib in a list of three weak Meccan *qāḍī*s. Al-Mizzī, by contrast, conveyed only favorable reports about ʿAbd al-ʿAzīz b. al-Muṭṭalib. See al-Mizzī, *Tahdhīb*, 18: 206–08, no. 3475.

[160] Al-ʿUqaylī, *Kitāb al-Ḍuʿafā'*, 3: 11, no. 966.

[161] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 6: 358. For the confusion surrounding Ibrāhīm b. Saʿd's date of death, see *Tahdhīb al-Tahdhīb*, 1: 122. This confusion, combined with Ibrāhīm's long life-span, is evidence that there may have been an attempt to lengthen his life in order to facilitate the transmission of *ḥadīth*. Juynboll has described this phenomenon as an "age trick." Juynboll, "Nāfiʿ," 219–23; idem, *Muslim Tradition*, 46–48; idem, "The Role of the *Muʿammarūn*," *passim*.

[162] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 1: 122.

[163] Juynboll agrees that Ibrāhīm b. Saʿd is only a "seeming" cl in this *isnād* bundle. Juynboll, personal communication (April 1998).

[164] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 2: 229–30; al-Mizzī, *Tahdhīb*, 16: 280–82, no. 3645.

[165] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 1: 20–21; al-Mizzī, *Tahdhīb*, 16: 277, 280, 283, no. 3645.

[166] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 2: 229–30, 9: 162–63; Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 1: 20–21; al-Mizzī, *Tahdhīb*, 16: 277, 280, 283, no. 3645.

listed in the dictionaries.[167] Thus, the only transmission supported by the Islamic tradition is the single *fulān* strand between ʿAbd al-ʿAzīz b. al-Muṭṭalib, Ibrāhīm b. Saʿd, Ibn Wahb and Ḥarmala b. Yaḥyā. All the remaining transmissions, which create the appearance of pcl transmissions, are simply dives often involving unknown transmitters. Without an identifiable cl very little can be said about this *ḥadīth* except that it existed by the time that al-Ṭaḥāwī (d. 321/933) and al-Dāraquṭnī (d. 385/995) compiled their *ḥadīth* collections (although the connection between Thamgh and ʿUmar's *waqf* had already been made by the third century A.H.).[168]

The Sabbala *Cluster*

In comparison with the *taṣaddaqa* variant, the Thamgh version of the *sabbala ḥadīth* more closely follows its Khaybar counterpart. The only significant difference between the two versions is the omission of ʿUmar's speech, "the 100 shares (*sahm*) which are in Khaybar, I have never before acquired property dearer to me than it." Instead, the Thamgh version simply states that ʿUmar wanted to give alms from his property in Thamgh:

> ʿUbayd Allāh b. ʿUmar—Nāfiʿ—Ibn ʿUmar: He [Ibn ʿUmar] said that ʿUmar said: "I mentioned to the Messenger of God that I wanted to give away my property, Thamgh, as alms" (*dhakartu li-rasūl Allāhi annī urīdu an ataṣaddaqa bi-mālī Thamgh*). The Messenger of God commanded: "Sequester its principal and dedicate its fruits/yields to charitable purposes" (*iḥbas aṣlahā wa-sabbil thamarahu*).[169]

The *isnād* bundle for the Thamgh variant of the *sabbala* maxim also appears to share some similarities with its Khaybar counterpart [compare Diagrams Three and Six]. In both *isnād* bundles, Nāfiʿ, and the two brothers, ʿAbd Allāh and ʿUbayd Allāh b. ʿUmar b. Ḥafṣ al-ʿUmarī play a prominent role in the transmission of this *ḥadīth*.[170] The principal difference between the two *isnād* bundles is that the Thamgh variant lacks the cl, Sufyān b. ʿUyayna. As discussed

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[167] No biographical entry for al-Ḥusayn b. al-Huyyam could be found in either the *Tahdhīb* of al-Mizzī, the *Tahdhīb* of Ibn Ḥajar al-ʿAsqalānī, or the *Kītāb al-Ḍuʿafā'* of al-ʿUqaylī.

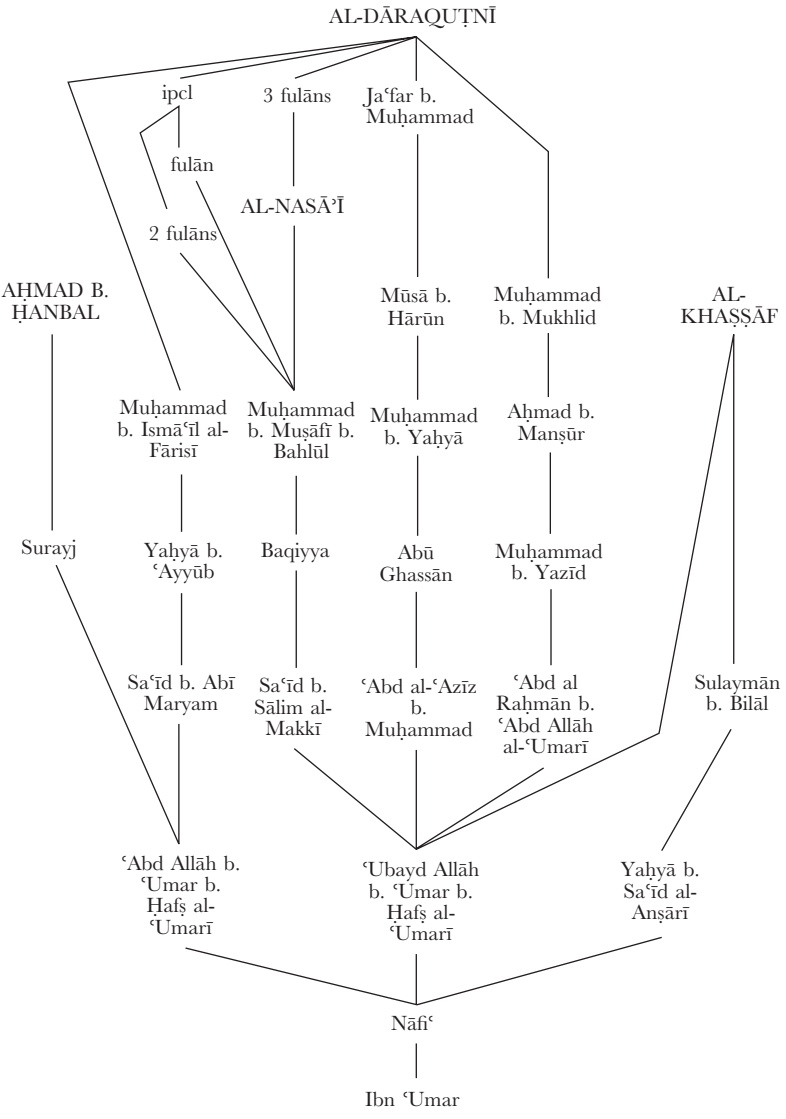
[168] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 151.

[169] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 6–7.

[170] This version of the *sabbala ḥadīth*—just like its Khaybar counterpart—is absent from the *Ṣaḥīḥs* of Muslim and al-Bukhārī.

DIAGRAM SIX

Thamgh Variant 2: The *Sabbala* Cluster



Ibn Ḥanbal, *Al-Musnad*, 8: 169, no. 5947; al-Dāraquṭnī, *Sunan*, 4: 187, nos. 11–12, 193–94, nos. 5–6; al-Nasāʾī, *Sunan*, 6: 194; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 6–7.

previously, Juynboll has concluded that neither Nāfiʿ nor ʿUbayd Allāh b. ʿUmar makes a suitable cl, while the Islamic tradition has a low opinion of ʿAbd Allāh b. ʿUmar. Due to the absence of any credible cl, combined with the fact that every *isnād* devolves into a *fulān* chain, this Thamgh variant appears to be a spider bundle.[171] A spider bundle is generated when a series of *fulān* traditions converge on a potential cl:

> A spider is a term for an *isnād* bundle which, at first sight, shows up a key figure which seems to be a cl from whom several strands fan out to reach eventually a number of collections. But upon inspection, all these strands, or almost all of them, turn out to be single strands, in other words: no transmitter has more than one alleged pupil.[172]

In his analysis of these spider bundles, Juynboll has concluded that it is virtually impossible to state anything concrete about the chronology of these *ḥadīth*s or the authorship of their *matn*s: "Apart from the overall vague corollary that they are late, probably contemporaneous with the oldest collector in whose collection one of the single strands making up the spider found a place, nothing more definite can be inferred from them."[173] In this case, the presence of the tradition in the *Musnad* of Ibn Ḥanbal (d. 241/859) and the introduction to the *Aḥkām al-Awqāf* of al-Khaṣṣāf (d. 261/874), provides evidence that this variant of the *sabbala ḥadīth* had come into existence by the middle of the third century.[174]

The Hybrid Cluster

The third cluster of Thamgh variants contains elements that are reminiscent of both the *taṣaddaqa* and *sabbala ḥadīth*s. In the tradition below we are informed that ʿUmar has acquired land that is precious to him. Next, in language from the *sabbala ḥadīth*, he asks the

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[171] Referring to this Thamgh variant, but not its Khaybar counterpart [see Diagram Three], as a spider bundle may appear inconsistent. In fact, it is true that both *isnād* bundles share a noted lack of pcl-supported *ṭuruq*. Nevertheless, I have refrained from designating the Khaybar *isnād* bundle a spider, because there are grounds for accepting an authentic transmission of the *ḥadīth* between al-Shāfiʿī, al-Ḥumaydī, and Sufyān b. ʿUyayna. By contrast, none of the *ṭuruq* in this bundle can be considered historically authentic lines of transmission.

[172] Juynboll, "Nāfiʿ," 214.

[173] Juynboll, "Nāfiʿ," 216.

[174] The Thamgh *sabbala* variant is found in two places in al-Khaṣṣāf's *Aḥkām al-Awqāf*, 6–7, and in one tradition in Ibn Ḥanbal's *Musnad*, 8: 169, no. 5947.

Prophet how he can give alms by means of it. The Prophet responds to ʿUmar's query with a maxim using the keyword *taṣaddaqa* and one of the three conditions from the Khaybar version of the *taṣaddaqa ḥadīth*:

> Mūsā b. [Sulaymān]—Ṣakhr b. Juwayriyya—Nāfiʿ—Ibn ʿUmar: Verily, ʿUmar had land belonging to him called Thamgh and it was a precious date grove (*kāna nakhlan nafīsan*). [ʿUmar] said: "O Messenger of God, verily I have acquired property, and it is precious to me. Shall I give it away as alms?" (*a-fa-ataṣaddaqu bi-hi?*). And the Messenger of God said, "Give away its principal as alms [but] it may not be sold, given away as gift, or inherited" (*taṣaddaq bi-aṣlihi wa-lā yubāʿu wa-lā yūhabu wa-lā yūrathu*).[175]

Traditions in the *Ṣaḥīḥ* of al-Bukhārī and the *Sunan* of al-Bayhaqī mirror this *ḥadīth*, but also include the remaining two conditions from the Khaybar version—the specification of charitable ends and the rules for the administrator.[176]

There are some important differences between this *ḥadīth* and the previously analyzed traditions. First, only the hybrid-Thamgh variant employs the verb "*istafāda*" to convey the meaning of "to acquire." In the other *ḥadīth*s, the verb "*aṣāba*" is used. Second, while the above maxim contains the keyword "*taṣaddaqa*" it also inverts the meaning of the previously analyzed traditions—now the principal, rather than the usufruct, is being distributed as alms, making the injunction "*wa-lā yubāʿu wa-lā yūhabu wa-lā yūrathu*" a non sequitur. Not only would the distribution of the property's principal undermine the financial soundness of the *waqf*, but the *ḥadīth* likewise provides no statement concerning the separation of usufructory rights from proprietary ownership. Apparently, even some of the Muslim *ḥadīth* collectors were a little confused (or concerned) by the repercussions of this maxim. In al-Bayhaqī's *Sunan* another *ḥadīth* is affixed to the end of this variant in order to re-direct the meaning of the maxim. This supplementary *ḥadīth* contains a more standard form of the *taṣaddaqa* maxim, imploring ʿUmar to sequester the principal and distribute the yields to charity.[177] Nevertheless, in spite of these

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[175] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 6.

[176] Al-Bukhārī, *Ṣaḥīḥ*, 5: 23–24, no. 2481; al-Bayhaqī, *Kītāb al-Sunan al-Kubrā*, 6: 159–60.

[177] Al-Bayhaqī, *Kītāb al-Sunan al-Kubrā*, 6: 159–60. The *ḥadīth* that al-Bayhaqī cites is: Yaḥyā b. Saʿīd al-Anṣārī—Nāfiʿ—Ibn ʿUmar: Verily, ʿUmar consulted the

differences, the narrative framework is generally consistent with both the *taṣaddaqa* and *sabbala* traditions.

Unfortunately, any attempt to date or determine the provenance of the hybrid *ḥadīth* is cut short by the fact that this *isnād* bundle—like the previous Thamgh variant traditions—is a simple spider [see Diagram Seven].[178] It would appear, therefore, that the only conclusion that can be derived with respect to all three clusters of Thamgh traditions is that they emerged subsequent to their Khaybar counterparts.[179]

Preliminary Conclusions

At the outset of this analysis, it was suggested that most of these *waqf*-related traditions could be placed into two broad categories—those that contain the keyword "*taṣaddaqa*" and those with the keyword "*sabbala*." While it is still true that these keywords orient most *ḥadīth*s, research into the narrative structures surrounding these maxims also suggests a second organizing principle—*ḥadīth*s which mention Khaybar versus those which make reference to Thamgh.

Broadly speaking, it appears that the Khaybar narratives preceded the Thamgh variants. This conclusion is based in part on the absence of any reference to Thamgh in the earliest discussions of *waqf*. It is more than a little odd that neither Mālik, nor Saḥnūn, nor al-Shāfiʿī, nor Hilāl seems to have heard of Thamgh. This lacuna is even more surprising in the writings of al-Shāfiʿī and Hilāl because both men make reference the location of ʿUmar's *ṣadaqa*.[180] For example, in the same sentence in which al-Shāfiʿī refers to ʿAlī b. Abī Ṭālib's *ṣadaqa* in Yanbuʿ, he fails to mention Thamgh as the location of ʿUmar's *ṣadaqa*.[181] Apparently al-Shāfiʿī believed ʿUmar's *ṣadaqa* was in Khaybar, since this toponym is the only one cited in the *Kītāb al-Umm*.[182] Even when Thamgh is mentioned and a connection is

Messenger of God in the matter of giving away as alms (*taṣaddaqa bi*) his property which was in Thamgh, and the Prophet said to him, "Give its fruits/yields as alms and sequester its principal; and it is not to be sold or inherited" (*taṣaddaq bi-thamarihi wa-ʾḥbas aṣlahu lā yubāʿ wa-lā yūrath*).

[178] Juynboll, personal communication (April 1998).

[179] Juynboll, "Nāfiʿ," 216.

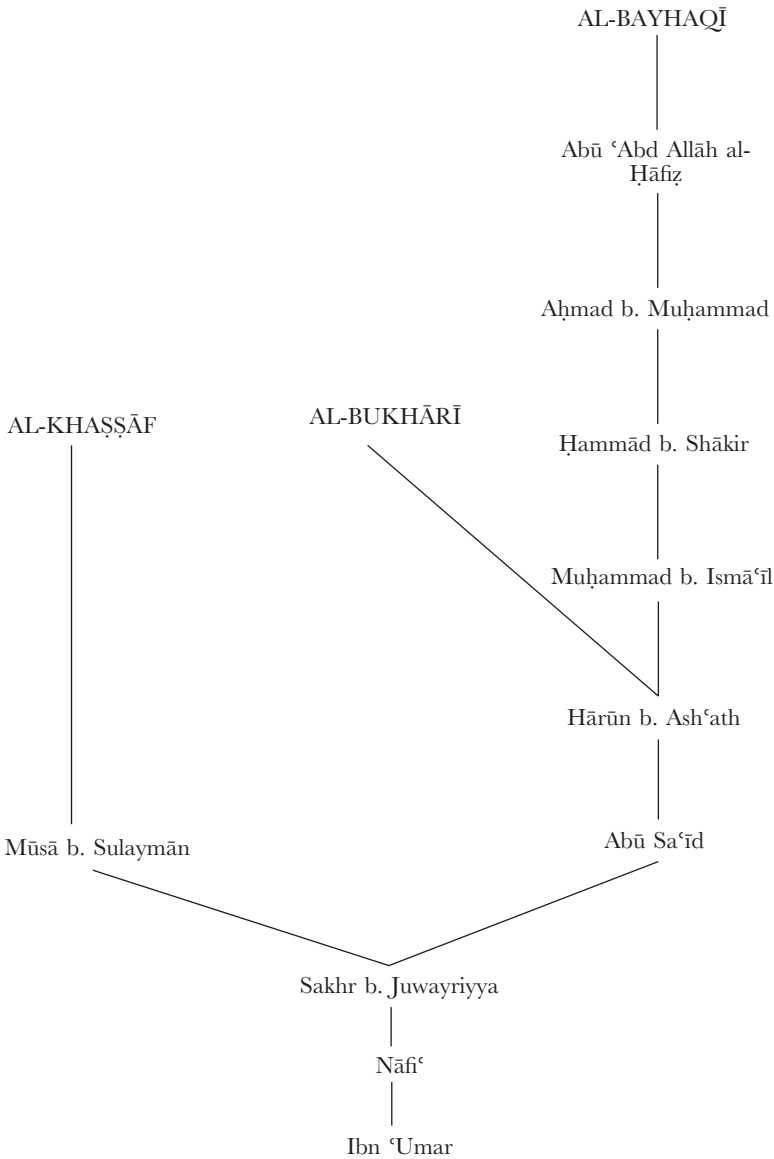
[180] Al-Shāfiʿī, *Kītāb al-Umm*, 4: 53; Hilāl al-Raʾy, *Aḥkām al-Waqf*, 72–78.

[181] Al-Shāfiʿī, *Kītāb al-Umm*, 4: 53.

[182] Al-Shāfiʿī, *Kītāb al-Umm*, 4: 53.

DIAGRAM SEVEN

Thamgh Variant 3: The Hybrid Cluster



Al-Kaṣṣāf, *Aḥkām al-Awqāf*, 6; al-Bukhārī, *Ṣaḥīḥ*, 5:23–24, no. 2481; al-Bayhaqī, *Sunan*, 6: 159–60.

made to ʿUmar's *ṣadaqa*, as in al-Khaṣṣāf's treatise,[183] this reference supports the chronology put forth here. Al-Khaṣṣāf refers to Thamgh in a long expository passage that is clearly his own writing,[184] indicating that while al-Khaṣṣāf may have been aware of the affiliation between ʿUmar's *ṣadaqa* and Thamgh, apparently none of the second-century jurists cited in his treatise (as well as Hilāl) was aware of this connection.

Additional evidence in support of this chronology comes from the *isnād* analysis. Although some of these conclusions must be qualified due to the small size of the Thamgh variant bundles, it would appear that none of the Thamgh *ḥadīth*s emerged earlier than their Khaybar counterparts since all of the *isnād* bundles for these Thamgh *ḥadīth*s are simple spiders. This conclusion, however, does not mean that the Khaybar *ḥadīth*s should be considered authentic. The confusion surrounding the historical events at Khaybar, combined with the absence of the conversation between the Prophet and ʿUmar in historical and administrative texts, argues against their authenticity. Applying Juynboll's critical methodology to the *isnād*s of these *ḥadīth*s also confirms these suspicions. The evidence from the *isnād* bundles indicates that the narrative encasing the *taṣaddaqa* maxim originated with ʿAbd Allāh b. ʿAwn (d. 151/768) during the second quarter of the second century A.H. The *sabbala ḥadīth*, by contrast, appears to have come into existence about a generation or two after Ibn ʿAwn, in connection with Sufyān b. ʿUyayna (d. 197–98/813–14). Isolating the common links for these traditions also indicates their geographical provenance: the Khaybar-*taṣaddaqa ḥadīth* appears to have originated within Baṣran circles, while the Khaybar-*sabbala ḥadīth* appears to be a product of Ḥijāzī jurists.

These conclusions about the Khaybar *ḥadīth*s might appear unreasonably speculative were it not for the fact that they are consistent with the general picture of debates over the *waqf*'s legality in the second century. From the *waqf* treatises of Hilāl and al-Khaṣṣāf (as well as the *Kitāb al-Umm* of al-Shāfiʿī), it is clear that the legality of the *waqf* was a contentious issue within Ḥanafī legal thought during the lifetime of Abū Ḥanīfa (d. 150/767). And yet, if either of these *ḥadīth*s had existed during the first century it is difficult to imagine

[183] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 151.
[184] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 149–51.

that Abū Ḥanīfa could have been so staunch in his opposition to the *waqf*. Instead, the probability is great that the Khaybar version of the *taṣaddaqa ḥadīth*—and perhaps the maxim itself[185]—emerged in response to these disputes among ʿIrāqī jurists. The *isnād* analysis also supports this conclusion because it indicates that the *taṣaddaqa ḥadīth* originated at a time contemporaneous to these debates. Ibn ʿAwn, the cl (and originator) of the *ḥadīth* was a contemporary of Abū Ḥanīfa, although nothing is known about Ibn ʿAwn's views on the legality of the *waqf*.

As for the Khaybar version of the *sabbala ḥadīth*, its subsequent emanation from the Ḥijāz is also consistent with the history of *waqf* law, in particular, and Islamic law, in general. In his study of early Islamic law, Schacht claimed that legal developments in ʿIrāq tended to precede those in the Ḥijāz: "Influences of the doctrine of one school on that of another almost invariably proceeded from ʿIrāq to Ḥijāz and not vice versa. . . ."[186] Even if one does not accept that the one- or two-generational lag between the two Khaybar narratives can be explained by Schacht's broad generalization, evidence from within the Mālikī tradition provides some support for this chronology. In comparison with the rancor created by the *waqf* in the Ḥanafī tradition, Mālikī law seems to have had less trouble establishing the legitimacy of pious endowments. If the *taṣaddaqa ḥadīth* emerged in response to intra-Ḥanafī disputes over the *waqf*'s legality, then the absence of these contentious forces in Madīna may explain why the Ḥijāzī *ḥadīth*s emerged at a later time. With the legitimation of pious endowments secure amongst the Ḥijāzī jurists, the need for Prophetic support was less pronounced. Nevertheless, once the *taṣaddaqa* tradition had emerged, it was only a matter of time before Ḥijāzī jurists surfaced with their own variant of the *ḥadīth*. If this hypothesis is correct, then the distinctions between the *taṣaddaqa* and *sabbala* traditions may be a result of juristic rivalry as Ḥijāzī jurists appropriated the ʿIrāqī maxim, but, for reasons of regional pride, put their own imprint on both the maxim and its narrative.

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[185] Since none of the *taṣaddaqa* maxims exists outside of its narrative framework, it is virtually impossible to state with certainty when this maxim might have come into existence, and/or whether it was a holdover from a Near Eastern (*i.e.*, Roman, Byzantine, Persian and/or Jewish) legal system.

[186] Schacht, *Introduction to Islamic Law*, 29.

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Providing a conclusion at this point is a bit premature since there exists one more Thamgh variant cluster. This fourth cluster is something of an oddball because the *matn*s of the two *ḥadīth*s are entirely different from one another. In spite of their differences, each *ḥadīth* evokes a similar response by more explicitly drawing our attention to the connection between Thamgh and Khaybar.

The *fulān* tradition in al-Dāraquṭnī's *Sunan* (on the authority of ʿUmar himself!) is the first Thamgh variant to link directly Khaybar and Thamgh:

> Muḥammad b. Aḥmad b. Asad al-Harawī—Muḥammad b. al-Ḥusayn Abū Jaʿfar al-Ḥurrānī—Yūnus b. Muḥammad—Ḥammād b. Zayd—ʿAyyūb—Nāfiʿ—Ibn ʿUmar—ʿUmar: Verily, he [ʿUmar] acquired land in Khaybar that was known as Thamgh. He asked the Prophet and he said to him: "Sequester its principal and give its fruits as alms" (*ḥabbis aṣlahā wa-taṣaddaq bi-thamaratihā*).[187]

Although unusual, this connection between Khaybar and Thamgh is not altogether surprising. In the previously discussed Khaybar and Thamgh *ḥadīth*s, the narratives concerning ʿUmar are quite similar even if none of the Thamgh variants explicitly states that Thamgh was in Khaybar. Moreover, the hybrid Thamgh variant (see the third cluster) mentions that Thamgh was a "precious date grove" (*kāna nakhlan nafīsan*). Most descriptions of Khaybar also call attention to its date groves,[188] further suggesting that Thamgh constituted a portion of these lands. One could even argue that no explicit connection between the two toponyms was needed, for why would ʿUmar ask the Prophet virtually the same question about two different properties? Assuming that al-Dāraquṭnī (or the *shaykh* below him) might be responsible for the creation of this *ḥadīth*, he simply seems to have made explicit the implicit link between these two locations.

Such a linkage might not pose any problems were it not for the *matn* of the following *ḥadīth* from the *Musnad* of Ibn Ḥanbal:

> Yūnus[189]—Ḥammād b. Zayd—ʿAyyūb—Nāfiʿ—Ibn ʿUmar: Verily, ʿUmar b. al-Khaṭṭāb acquired land from the Jews of the Banū Ḥāritha

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[187] Al-Dāraquṭnī, *Sunan*, 4: 186, no. 8.

[188] Ibn Hishām, *Sīrat al-Nabī*, 3: 464; al-Wāqidī, *Kitāb al-Maghāzī*, 1: 375, 2: 690; al-Balādhurī, *Futūḥ al-Buldān*, 34, 39.

[189] The cl for these two *ḥadīth*s, Yūnus b. Muḥammad (d. 207–08/822–23) was

> that is called Thamgh. [ʿUmar] said: "O Prophet, verily I have obtained precious property, [and] I want to give to give it away as alms" (*ataṣaddaqu bi-hi*). [Ibn ʿUmar] said: So, he designated it as a *ṣadaqa* that may not be sold, given away as a gift, or inherited. And administration of it passes to the upright members of ʿUmar's family. What is left over from its profits/yields (*thamaratihi*) is designated for the Holy War, travelers, slaves, the poor, kin relations and the weak. It will not be held against the one who administers it if he eats from it in an appropriate manner or feeds a friend, so long as he does not appropriate any of the property. Ḥammād said: ʿAmr b. Dīnār alleged that ʿAbd Allāh b. ʿUmar used to give to ʿAbd Allāh b. Ṣafwān from it. [Ḥammād] said: Ḥafṣa used to give alms (*taṣaddaqat*) from land belonging to her in this manner. And Ibn ʿUmar used to give alms (*taṣaddaqa*) from land belonging to him in this manner. And Ḥafṣa was its administrator.[190]

Aside from a few irregularities—the absence of any Prophetic maxim, the additional commentary about ʿUmar's relations—the substance of this *ḥadīth* appears consistent with the other Thamgh variants. In fact, this *ḥadīth* constitutes an improvement over the others by specifying that Thamgh was among the lands of the Jewish tribe, Banū Ḥāritha. Based upon the assumptions drawn from the al-Dāraquṭnī *ḥadīth*, one would surmise that the Banū Ḥāritha were a Jewish tribe in Khaybar. In fact, later Islamic commentators such as Aḥmad b. Muḥammad al-Qasṭallānī (d. 923/1517) and Muḥammad b. ʿAlī al-Shawkānī (d. 1255/1839), referred to this *ḥadīth* when they glossed the phrase: "And ʿUmar said, 'I have acquired land in Khaybar,' "[191]

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considered trustworthy (*fi'l-thiqāti*). Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 11: 447. If Yūnus is the cl, he appears to have used a common route through Ḥammād b. Zayd (d. 179/795). Juynboll writes in his analysis of Nāfiʿ-supported traditions that Ḥammād b. Zayd was notorious for employing the Baṣran Ayyūb b. Abī Tamīma al-Sakhtiyānī (d. 131/749) in his dives to Nāfiʿ: "This [dive] is not just a surmise: Ḥammād can be found resorting to this procedure on a number of other occasions." Juynboll, "Nāfiʿ," 230–31. Due to the fact that the *matn*s of these two *ḥadīth*s are different, al-Dāraquṭnī may have simply employed the well-traveled Yūnus—Ḥammād—Ayyūb—Nāfiʿ route when he created the *isnād* chain for this *ḥadīth*. Al-Dāraquṭnī, *Sunan*, 4: 186, no. 8. Juynboll has informed me that he considers this *isnād* bundle to be a simple spider and that no conclusions regarding Ḥammād b. Zayd, or anyone else, can be drawn from this bundle. Juynboll, personal communication (April 1998).

[190] Ibn Ḥanbal, *Al-Musnad*, 8: 224–25, no. 6078.

[191] Aḥmad b. Muḥammad al-Qasṭallānī, *Irshād al-Sārī li-Sharḥ Ṣaḥīḥ al-Bukhārī* (1886–88; reprint of the sixth edition, Baghdād: Maktabat al-Muthannā, 1971), 5: 25; al-Shawkānī, *Nayl al-Awṭār*, 6: 25. Al-Shawkānī cites the recensions of al-Bukhārī and Ibn Ḥanbal as evidence for this claim. Ibn Ḥanbal comments that Thamgh refers to a place in Khaybar, but al-Bukhārī does not provide a similar gloss in his

and Muḥyī al-Dīn Yaḥyā b. Sharaf al-Nawawī (d. 676/1277) reported that Thamgh was "the name given to the property which ʿUmar made a *waqf*" in Khaybar.[192]

There is a problem, however, the Banū Ḥāritha did not reside in Khaybar. Indeed, unlike those Jewish tribes exiled from Madīna to Khaybar, the Banū Ḥāritha converted to Islam and continued to live on lands northeast of Madīna.[193] As evidence for their geographical proximity to Madīna it was reported that Muḥammad passed through the *ḥarra* of the Banū Ḥāritha during the Battle of Uḥud,[194] a confrontation fought on the northern slopes of the Prophet's city. The contradiction created by this account was not lost on later commentators, who were struck by the incongruities between the Thamgh and the Khaybar *ḥadīth*s. In order to more fully elucidate the confusion surrounding Thamgh's location, however, it is necessary to discuss another document—the *ṣadaqa* deed of ʿUmar b. al-Khaṭṭāb.

II. *The* Ṣadaqa *Deed of ʿUmar*

The *ṣadaqa* deed of ʿUmar constitutes the second leg of the triangular matrix from which the *waqf* derives its legitimacy. In the Islamic tradition the deed is presented as a unitary document in which ʿUmar specifies the charitable purposes of his *waqf* and then stipulates a mechanism for the transfer of the property to subsequent generations. In spite of its unitary appearance, an examination of the *ṣadaqa* deed suggests a juxtaposition of two related documents. Moreover, there exists a variant set of *ṣadaqa* deeds which intermingle aspects of both deeds to create a third, composite *ṣadaqa* deed.

Ṣaḥīḥ. Thus, it is unclear from what source al-Shawkānī received his information. Ibn Ḥanbal, *Al-Musnad*, 8: 169, no. 5947.

[192] Muḥyī al-Dīn Yaḥyā b. Sharaf al-Nawawī, "Commentary," in al-Qasṭallānī, *Irshād*, 7: 92.

[193] Ibn Saʿd, *Kītāb al-Ṭabaqāt al-Kubrā* (Beirut, 1377/1957), 4: 384; Michael Fishbein, trans., *The History of al-Ṭabarī: The Victory of Islam* (Albany, NY: State University of New York Press, 1997), 8: 10, n. 54. See also Michael Lecker's discussion of the Banū Ḥāritha's conversion to Islam in *Muslims, Jews and Pagans* (New York and Leiden: E. J. Brill, 1995), 24, 156–64.

[194] Ibn Hishām, *Sīrat al-Nabī*, 3: 9; al-Ṭabarī, *Taʾrīkh*, 2: 506.

First Ṣadaqa *Deed*

In the "first" document, ʿUmar primarily discusses how the usufruct of the property may be used. The context for this document is the *taṣaddaqa ḥadīth* which frequently precedes this deed in the *ḥadīth* collections. To restore this context I have included the *taṣaddaqa ḥadīth*:

> Ismāʿīl—Ibn ʿAwn—Nāfiʿ—Ibn ʿUmar: ʿUmar acquired land in Khaybar, and he came to the Prophet and sought his advice in this matter. ʿUmar said: "I have acquired land in Khaybar, and I have never acquired property more precious to me than it. What do you command me to do with it?" He [the Prophet] said: "If you want, sequester its principal and give away (the yields) as alms." [Ibn ʿUmar] said: ʿUmar gave away (the yields) as alms on the condition that it not be sold, given away as a gift, or inherited. [Ibn ʿUmar] said: ʿUmar gave (the yields) away as alms for the poor, kin relations, slaves, the Holy War, travelers and guests. It is not objectionable if the one who administers it eats from it in an appropriate manner or gives something to a friend, so long as he does not appropriate any of the property (*ghayr mutamawwilin fī-hi*).[195] [*Beginning of ṣadaqa deed*]: Yaḥyā b. Saʿīd al-Anṣārī said: ʿAbd al-Ḥamīd b. ʿAbd Allāh b. ʿAbd Allāh b. ʿUmar b. al-Khaṭṭāb copied for me [a document about the *ṣadaqa* of ʿUmar]: "In the name of God, the Merciful, the Compassionate. This is what God's servant ʿUmar has written concerning Thamgh." He narrated a *ḥadīth* similar to the one that Nāfiʿ transmitted [i.e., the *taṣaddaqa ḥadīth*], except that he said, "so long as he does not enrich himself by means of it (*ghayr muta'aththilin mālan*). That which is left over from the fruits/yields is for the beggar and the deprived." The narration continued with him saying: "And if he wants, the administrator of Thamgh may purchase slaves from the fruits/yields in order to work the property."[196]

As an extension of the *taṣaddaqa ḥadīth*, this version of ʿUmar's *ṣadaqa* deed functions both as a gloss and an elaboration on two of the three conditions found in that *ḥadīth*—the specification of charitable ends and the rules for the administrator. After the *basmala* and a general description of the *taṣaddaqa ḥadīth*, the deed commences with a variant reading of the phrase "*ghayr mutamawwilin fī-hi*," and then

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[195] Ibn Ḥanbal, *Al-Musnad*, 6: 277, no. 4608.

[196] Al-Qasṭallānī, *Irshād*, 5: 25–26; al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 82–83; ʿAbd al-Raḥmān b. ʿAlī b. al-Dayba' al-Shaybānī, *Taysīr al-Wuṣūl ilā Jāmiʿ al-Uṣūl min Ḥadīth al-Rasūl* (Egypt: Muṣṭafā al-Bābī al-Ḥalabī, 1968–1969), 3: 259; Abū Dāwūd, *Sunan Abū Dāwūd*, trans. Aḥmad Ḥasan (Lahore: Sh. Muḥammad Ashraf, 1984), 2: 811, no. 2873.

adds "beggars" and "the deprived" to the list of charitable purposes. The deed also expands the rights of the administrator. In addition to feeding himself and a friend, the administrator may now purchase slaves with the usufruct of the *waqf* in order to increase the property's revenues/yields. Although the *ṣadaqa* deed seems to reference itself to the *taṣaddaqa ḥadīth*, the linkage between the two exhibits one area of discontinuity. While the *taṣaddaqa ḥadīth* concerns ʿUmar's property in Khaybar, the deed refers to Thamgh.

As for the provenance of this *ṣadaqa* deed, several factors suggest that it emerged at a time subsequent to the *ḥadīth* it glosses. By referencing itself to the *taṣaddaqa ḥadīth*, the *ṣadaqa* deed anticipates or presumes the existence of its referent. Since *isnād* analysis informs us that the *taṣaddaqa ḥadīth* did not come into existence until the second quarter of the second century A.H., a *ṣadaqa* deed which glosses this *ḥadīth* cannot have come into existence prior to this time.[197]

Second Ṣadaqa *Deed*

The "second" deed, which, in most collections, immediately follows the first,[198] reads more like an actual will left by ʿUmar b. al-Khaṭṭāb. In this document, ʿUmar specifies which properties are to be left as a *ṣadaqa*, designates the beneficiaries of the *ṣadaqa*, and delineates the rules of succession for the future administrators:

> Muʿayqīb wrote (*kataba*) [it] and ʿAbd Allāh b. al-Arqam witnessed (*shahida*) [it]: In the name of God, the Merciful, the Compassionate. This is what the servant of God, ʿUmar, the Commander of the Faithful

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[197] The *isnād* of the first *ṣadaqa* deed also raises questions about the deed's authenticity. The transmitter of the deed is Yaḥyā b. Saʿīd b. Qays al-Anṣārī (d. 143–146/760–763), a man considered generally reliable in the transmission of *ḥadīth*. The person from whom Yaḥyā b. Saʿīd b. Qays purportedly acquired his information, ʿAbd al-Ḥamīd, is an obscure figure in the Islamic tradition. Although ʿAbd al-Ḥamīd was the grandson of ʿUmar b. al-Khaṭṭāb, and conceivably could have been present to hear the many *ḥadīth*s transmitted by his grandfather, his *tarjama* in the *Tahdhīb* of Ibn Ḥajar al-ʿAsqalānī does not report that any *ḥadīth*s were conveyed on his authority. Rather, the only reference made to him is in connection with his transmission of ʿUmar's *ṣadaqa* deed to Yaḥyā b. Saʿīd b. Qays al-Anṣārī. Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 6: 118, 11: 221–24.

[198] Manṣūr ʿAlī Nāṣif's commentary includes only this second deed. Nāṣif, *Al-Tāj al-Jāmiʿ li'l-Uṣūl fī Aḥādīth al-Rasūl* (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, 1968), 2: 245. The absence of the first deed seems to confirm the conclusion that the two deeds are not one document, but two separate traditions that later became juxtaposed in the Islamic tradition.

> has bequeathed (*awṣā*)[199] in the event that something should happen to him: Thamgh, Ṣirma b. al-Akwaʿ and the servant who is in it, the 100 shares which are in Khaybar and the slaves which are in it, and the 100 [shares] which Muḥammad gave to him in al-Wādī—[all of these] are to be administered by Ḥafṣa so long as she lives. Then [these properties] are to be administered by a person of sound judgment from her family, on the condition that they are not to be sold or purchased. The [fruits/yields] are to be spent, as the administrator sees fit, for beggars, the deprived and kin relations. It is not objectionable if the administrator eats, feeds or purchases slaves by means of them.[200]

Unlike the first deed, this document specifies the various properties that ʿUmar made a *waqf*: Thamgh, Ṣirma b. al-Akwaʿ, 100 shares in Khaybar, and 100 shares in al-Wādī. This second deed also contains the names of the man who wrote the deed and the man who witnessed it.

The scribe and witness for this *ṣadaqa* deed are odd in two respects. First, there is only one witness, ʿAbd Allāh b. al-Arqam, whereas two witnesses are required to make a document legally valid. However, since none of the commentators seem to have been bothered by the absence of this second witness, the scribe Muʿayqīb must have been considered sufficient. Second, the mention of the scribe and witness at the beginning of this *ṣadaqa* deed is also rather unorthodox. Traditionally, these figures are mentioned near the end of a document,[201] so it could be argued that they should be affixed to the end of the first *ṣadaqa* deed rather than to the beginning of the second. A couple of factors suggest, however, that Muʿayqīb and ʿAbd Allāh b. al-Arqam should remain connected to the second *ṣadaqa* deed. In Islamic texts that utilize modern punctuation, Muʿayqīb and ʿAbd Allāh b. al-Arqam are offset by a colon preceding the *basmala*,[202] indicating that later editors/commentators thought that they should

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[199] The use of term "*awṣā*" is confusing because it suggests that this was a bequest and not a pious endowment. However, the conditions imposed on the property established a *waqf* and the Islamic tradition has always viewed it as such.

[200] Al-Qasṭallānī, *Irshād*, 5: 26; al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 83–85; Nāṣif, *Al-Tāj*, 2: 245; Ibn al-Dayba' al-Shaybānī, *Taysīr*, 3: 259; Abū Dāwūd, *Sunan*, 2: 811, no. 2873.

[201] Albrecht Noth, *The Early Arabic Historical Tradition: A Source-Critical Study*, trans. Michael Bonner (Princeton, NJ: The Darwin Press, Inc., 1994), 65.

[202] Ibn al-Dayba' al-Shaybānī, *Taysīr*, 3: 259; Abū Dāwūd, *Sunan*, 2: 811, no. 2873.

be linked to the second *ṣadaqa* deed. This anachronistic imposition of punctuation is not particularly strong proof, but it does provide an indication of how Muslim commentators have generally understood the construction of this document. Furthermore, in the later commentary of Manṣūr ʿAlī Nāṣif only the second *ṣadaqa* deed is present, and this deed is prefaced by the phrase "*kataba Muʿayqīb wa-shahida ʿAbd Allāh b. al-Arqam.*"[203]

If we accept that Muʿayqīb and ʿAbd Allāh b. al-Arqam are linked to the second *ṣadaqa* deed, then the biographies of these two men lend support to the claim that this document is authentic. According to the Islamic tradition, Muʿayqīb was one of the *muhājirun* to Madīna.[204] His *tarjama* also reports that he fought in the battle of Badr and then served in the Treasury (*bayt al-māl*) during the caliphates of both Abū Bakr (r. 11–13/632–34) and ʿUmar (r. 13–23/634–44).[205] Unfortunately for Muʿayqīb, he contracted leprosy and died in the year 40/660.[206] As for ʿAbd Allāh b. al-Arqam, it is reported that he served as a scribe to the Prophet, Abū Bakr and ʿUmar.[207] And like Muʿayqīb, he labored in the Treasury during the caliphate of ʿUmar.[208] His date of death remains something of a mystery. One report states that he died during the caliphate of ʿUthmān (r. 23–35/644–56), while another claims that he passed away in the year 64/683 during the reign of the Umayyad caliph Yazīd b. Muʿāwiyya (r. 60–64/680–83).[209] Additionally, unlike the first *ṣadaqa* deed, which was dependent upon the existence of the second-century *taṣaddaqa ḥadīth*, the second deed is not referenced to any outside source, bolstering the possibility that it may constitute an early first-century document.

But before concluding that the second *ṣadaqa* deed is a first-century source, an issue that was raised earlier must be addressed. In the conclusion to section one of this chapter, it was observed that neither Mālik, nor Saḥnūn, nor al-Shāfiʿī, nor Hilāl made any allusions to Thamgh. Since both the first and second *ṣadaqa* deeds make

[203] Nāṣif, *Al-Tāj*, 2: 245.
[204] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 10: 254.
[205] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 10: 254.
[206] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 10: 254.
[207] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 146.
[208] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 146.
[209] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5: 146–47.

explicit reference to Khaybar and Thamgh, it does not seem possible that these jurists could have been aware of ʿUmar's deed and not made a connection between ʿUmar's *ṣadaqa/waqf* and Thamgh.[210] An explanation for Thamgh's absence in early *waqf* discussions may come from the *waqf* treatises of Hilāl and al-Khaṣṣāf, and the *Ṣaḥīḥ* of al-Bukhārī, where the different components of ʿUmar's *ṣadaqa* deed are presented in a piecemeal manner, suggesting that ʿUmar's deed did not become a unitary text until sometime in the third century A.H. For example, Hilāl discusses the charitable ends to which ʿUmar dedicated his *waqf* at the beginning of the treatise, while the rules for the administrator and the transfer of the property to Ḥafṣa are discussed at a later point in the text.[211] Hilāl also refers to the widely-known practices of ʿUmar—without citing the deed—when he discusses whether ʿUmar administered his own *waqf*:

> [Hilāl] said: We were informed on the authority of ʿUmar b. al-Khaṭṭāb, may God be pleased with him, that he gave the authority over the *waqf* to Ḥafṣa, and in this action is an indicator for what we have said—that the meaning is for "other than [ʿUmar]." Do you not see that her administration of it occurred during the life of ʿUmar, and that this was [something which] he extended from himself to others who managed the *ṣadaqa* so that the matter would not be burdensome.[212]

Similarly, the *Aḥkām al-Awqāf* of al-Khaṣṣāf contains a series of *ḥadīth*s that refer to parts of the *ṣadaqa* deed, but these *ḥadīth*s do not appear to be a part of any larger document. In the *ḥadīth* below, the designation of Ḥafṣa and the rules for the administrator are depicted in a context outside of a written document. Instead of speaking to a scribe, ʿUmar is portrayed as uttering these prescriptive statements in conjunction with the transfer of his *ṣadaqa* to Ḥafṣa:

> Bishr b. al-Walīd—Abū Yūsuf—Hishām b. ʿUrwa: Verily, ʿUmar b. al-Khaṭṭāb entrusted his *ṣadaqa* to Ḥafṣa, then he said: "Whoever administers it after Ḥafṣa from my upright sons, he has the right to eat from it and feed a friend in an appropriate manner, so long as he does not enrich himself by means of it."[213]

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[210] Admittedly, this argument from silence cannot establish that the these jurists *never* made this linkage, but if they did, they did not express it in the writings that have come down to us.

[211] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 7–10, 72–73.

[212] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 73.

[213] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 8–9. See also pages six and eight for two addi-

The *Ṣaḥīḥ* of al-Bukhārī also contains a *ḥadīth* which reflects the fragmentation of ʿUmar's *ṣadaqa* deed. Although the *ḥadīth* refers to the deed, it only mentions the condition concerning the guidelines for administrators.[214]

This recontextualization and segmentation of the *ṣadaqa* deed in the *waqf* treatises of Hilāl and al-Khaṣṣāf and the *Ṣaḥīḥ* of al-Bukhārī raises the possibility that elements of the deed circulated as independent *ḥadīth*s or *akhbār* reports before becoming juxtaposed in the *ṣadaqa* deed of ʿUmar. A proto-*ṣadaqa* deed may have existed, but it did not exist as a unitary document, and it may have only been when this unitary document emerged that the links became Khaybar and Thamgh became established.

The literary form of the second *ṣadaqa* deed also suggests that this document is not a first-century source. Albrecht Noth has observed that many early texts conform to a series of literary conventions. So repetitive are the structures of these documents that Noth has concluded that these texts should not be considered verbatim survivals from the earliest period.[215] Although the *ṣadaqa* deed cannot be directly compared with the capitulation treaties analyzed by Noth, the documents do share a number of component parts. In both sets of documents, the *basmala* functions as an *invocatio* to introduce the written text. Likewise, both documents make reference to the actual writing down of the text. In particular, Noth remarks that the use of the verb "to write" (*kataba*) and the naming of the scribe are common literary conventions.[216] The two types of documents also share an attestation by witnesses, and a main body (*dispositio*) that provides a precise description of the subject at hand. The presence of these literary forms supports the claim that the deed was the product of a process by which independent traditions—including perhaps the references to Thamgh in the variant *ḥadīth*s—were molded into standard literary forms to create an "authentic" first-century document.

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tional *ḥadīth*s which present the rules for the administrator independently of the *ṣadaqa* deed. The *ḥadīth* on page eight also mentions the transfer of ʿUmar's *ṣadaqa* to Ḥafṣa.

[214] Al-Bukhārī, "*Kitāb al-Wakāla*," in *Ṣaḥīḥ al-Bukhārī*, 4: 148.

[215] Noth, *The Early Arabic Historical Tradition*, 63.

[216] The second *ṣadaqa* deed names the scribe and uses the verb *kataba*. Noth observed in his own work that the verb *kataba* was employed in about half the cases to indicate the writing down of the treaty, while the citing of the scribe's name occurred less often. Noth, *The Early Arabic Historical Tradition*, 65–66.

Third Ṣadaqa *Deed*

The "third" *ṣadaqa* deed of ʿUmar contains elements from both the first and second. Located in the *Aḥkām al-Awqāf* of al-Khaṣṣāf and the *Sunan* of al-Bayhaqī,[217] this hybrid deed interpolates the latter half of the second deed into the first one. In addition to this intermingling, the hybrid also expands upon aspects of both deeds. For example, the list of charitable purposes is extended in the hybrid version to include guests, travelers, and the Holy War. Each of these categories of charity can be found in *ḥadīth*s discussed in the first section of this chapter, but they are clearly not derived from either of the first two *ṣadaqa* deeds. As for the provenance of this deed, its interpolative quality would seem to suggest that it came into existence after the first two deeds, and therefore, constitutes a final attempt to bring together all the elements of the various *waqf ḥadīth*s into a single, composite deed.

Temporal and Geographical Inconsistencies

Despite the importance of ʿUmar's *ṣadaqa* deed to both the legitimacy of the *waqf* and the development of a *waqf* deed format,[218] later commentators on the *waqf* often had trouble harmonizing ʿUmar's

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[217] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 7; al-Bayhaqī, *Kitāb al-Sunan al-Kubrā*, 6: 160. These two hybrids are not identical, but they have virtually the same content. The greatest difference between the two is that al-Bayhaqī's version includes all of the second *ṣadaqa* deed. The redundancy of this inclusion suggests that the second deed was simply attached to the hybrid version.

[218] In al-Shāfiʿī's *Kitāb al-Umm* one finds a stylized *waqf* deed [see Appendix C]. Even though ʿUmar's deed was probably not a model for al-Shāfiʿī—given the textual differences and the chronological arguments adduced above—the concept of a written *waqf* deed had clearly entered legal discourse by the late second century A.H. Al-Shāfiʿī's deed, although far more detailed than ʿUmar's terse deed, recapitulates the basic literary elements found in ʿUmar's document: the founder stipulates the precise location of the lands to be made a *waqf*, delineates the charitable ends to which the *waqf*'s usufruct will be dedicated, creates a mechanism for the designation of future beneficiaries, discusses the role of the administrator, and then asks for the names of witnesses. In addition to al-Shāfiʿī's model for a *waqf* deed, evidence from fourth-century A.H. papyri and *waqf* inscriptions indicates that the elements of a *waqf* deed had become standardized, even if they did not always appear in the same order. Al-Shāfiʿī, *Kitāb al-Umm*, 4: 59–61; Adolf Grohmann, *Arabic Papyri in the Egyptian Library* (Cairo: Egyptian Library Press, 1936), 2: 157–61; D. S. Margoliouth, *Catalogue of the Arabic Papyri in the John Rylands Library at Manchester* (Manchester, UK: Manchester University Press, 1933), 52/2: 92; Rāġib, "Acte de *waqf* d'une maison," 36–45.

deed with the Prophetic *ḥadīth*s discussed in section one. At first glance, the disharmony is surprising because the two legs of the triangular matrix appear to converge quite nicely. In the *ḥadīth*s we have the Prophet instructing ʿUmar to make a *waqf* of certain lands, and the result of this conversation presumably became expressed in ʿUmar's *ṣadaqa* deed. Confusion arises, however, over the dating of ʿUmar's *ṣadaqa* deed. The Islamic sources seem to be in agreement that because Muʿayqīb was ʿUmar's scribe during his caliphate (r. 13–23/634–44), the *ṣadaqa* deed could not have been written until sometime after the Prophet's death.[219] This dating of ʿUmar's *ṣadaqa* deed, however, creates a temporal disjunction between the Prophetic conversation and the writing of the document. The Prophetic *ḥadīth*s suggest that ʿUmar complied with the Prophet's command and created a "*waqf*" during the Prophet's life, and yet the deed was apparently not written down until several years later. To resolve this temporal disparity between the two sets of traditions, later commentators suggested that ʿUmar's *ṣadaqa* deed was preserved orally for a period of several years before being set down in writing[220] (Nāṣif claims that it was written on red leather).[221] Not only does this conclusion harmonize the temporal discrepancy between the two events, but most importantly, it extends the Prophetic link to ʿUmar's *ṣadaqa* deed and implies Prophetic approval of its contents. The importance of "Prophetic approval" finds expression in a *ḥadīth* from al-Khaṣṣāf's introduction, where provenance of the *ṣadaqa* deed is transferred from ʿUmar to the Prophet:

> My father related to me—Ziyād b. Saʿd—al-Zuhrī: ʿUmar said: If it were not for the fact that I had mentioned my *ṣadaqa* to the Messenger of God (or words to that effect) I would have revoked it.[222]

The merger of the Prophetic *ḥadīth*s and ʿUmar's *ṣadaqa* deed also created a geographical discontinuity. As noted earlier, the Islamic tradition presents a confused record of Thamgh's location. On the

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[219] Al-Qasṭallānī, *Irshād*, 5: 26; al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 85; Nāṣif, *Al-Tāj*, 2: 245.

[220] Al-Qasṭallānī, *Irshād*, 5: 26; al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 83–85; Nāṣif, *Al-Tāj*, 2: 245.

[221] Nāṣif, *Al-Tāj*, 2: 245.

[222] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 8. This same *ḥadīth* appears in al-Ṭaḥāwī, *Sharḥ al-Maʿānī al-Āthār*, 4: 99, with the *isnād*: Yūnus—Ibn Wahb—Mālik—Ziyād b. Saʿd—Ibn Shihāb.

one hand, the Thamgh variants and the first *ṣadaqa* deed either implicitly suggest or explicitly indicate that Thamgh was property located in Khaybar, an oasis nearly 100 miles from Madīna. On the other hand, as noted in the conclusion to section one, there exists a *ḥadīth* which states that Thamgh belonged to the Banū Ḥāritha, a Jewish tribe which resided near Madīna. Although commentators such as al-Nawawī, al-Qasṭallānī and al-Shawkānī were certain that Thamgh was located in Khaybar,[223] other commentators found that the evidence supported a Madīnan location. In the *Nihāya*, Ibn al-Athīr (d. 606/1209) reported that Thamgh and Ṣirma b. al-Akwaʿ[224] were "two well known properties in Madīna (*humā mālāni maʿrūfāni bi'l-Madīna*) which belonged to ʿUmar b. al-Khaṭṭāb, may God be pleased with him; he made them both a *waqf*."[225] Al-Khaṣṣāf, Abū Dāwūd, and Ibn al-Daybaʿ al-Shaybānī all glossed Thamgh as property belonging to ʿUmar in Madīna,[226] and Abū ʿUbayd al-Bakrī[227] similarly claimed that Thamgh was "land opposite (*tilqā'a*) Madīna which belonged to ʿUmar, may God be pleased with him."[228]

The Madīnan location of Thamgh is further affirmed in Nāṣif's commentary on the following passage from ʿUmar's *ṣadaqa* deed: "Thamgh, Ṣirma b. al-Akwaʿ and the servant who is in it, the 100 shares which are in Khaybar and the slaves who are in it, and the 100 [shares] which Muḥammad gave to him in al-Wādī." In his analysis of this passage, Nāṣif claimed that Thamgh, along with Ṣirma b. al-Akwaʿ were "two estates belonging to ʿUmar in Madīna" (*ḍayʿatān kānatā li-ʿUmar bi'l-Madīna*),[229] adding that slaves labored on the estate of Thamgh.[230] Nāṣif stated that the "100 shares"—a clause also men-

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[223] Al-Nawawī, "Commentary," in al-Qasṭallānī, *Irshād*, 7: 92; al-Qasṭallānī, *Irshād*, 5: 25; al-Shawkānī, *Nayl al-Awṭār*, 6: 25.

[224] Ṣirma b. al-Akwaʿ was described as "an insignificant, sparse plot of land containing date-palms and camels" (*al-qiṭʿa al-khafīfa min al-nakhl wa'l-ibil*). See Nāṣif, *Al-Tāj*, 2: 245; al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 84. Al-ʿAẓīmābādī cites the *Fatḥ al-Wadūd* (possibly of al-Mukhtār b. Aḥmad al-Kuntī) and Ibn al-Athīr's *Al-Nihāya* as the sources for his information on Ṣirma b. al-Akwaʿ.

[225] Ibn al-Athīr, *Al-Nihāya fī Gharīb al-Ḥadīth wa'l-Athar* (Qum, Iran: Mu'assasat Ismāʿīliyān, 1364/1985), 1: 222. Also cited in al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 83.

[226] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 151, n. 1; Ibn al-Daybaʿ al-Shaybānī, *Taysīr*, 3: 259; Abū Dāwūd, *Sunan*, 2: 811, no. 2282.

[227] Al-ʿAẓīmābādī also claims that Ibn Ḥajar al-ʿAsqalānī mentioned this statement. Al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 83.

[228] Al-Qasṭallānī, *Irshād*, 5: 25; al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 83.

[229] Nāṣif, *Al-Tāj*, 2: 245.

[230] Nāṣif, *Al-Tāj*, 2: 245.

tioned in the *sabbala ḥadīth*s—referred to ʿUmar's land in Khaybar that was made a *waqf* during the lifetime of the Prophet,[231] and that "al-Wādī" referred to Wādī al-Qurā, a *wādī* in-between Madīna and Syria that was part of Madīna's administrative district.[232] Nāṣif's commentary concurs with the Islamic tradition in two respects. First, his commentary comports with a plain reading of the second *ṣadaqa* deed, which draws a distinction between Thamgh and ʿUmar's holdings in Khaybar. Second, the only tradition that actually identifies the tribe from whom ʿUmar acquired Thamgh states that it belonged to the Madīnan Banū Ḥāritha.

In spite of the apparent logic of Nāṣif's analysis, the conclusion that Khaybar and Thamgh were located in two geographically distinct areas created insurmountable problems for the reconciliation of the Khaybar and Thamgh traditions. Unless one contends that the Prophet and ʿUmar had virtually the same conversation over two different pieces of property, it is difficult to explain the existence of these parallel Khaybar and Thamgh *ḥadīth*s. One response to this tension was simply to downplay the confusion. For example, in the *Muʿjam al-Buldān*, Yāqūt b. ʿAbd Allāh al-Ḥamawī (d. 575/1179) gives a fairly detailed description of Khaybar, but then fails to specify the location of Thamgh. Instead, he simply describes it as "the site of property belonging to ʿUmar b. al-Khaṭṭāb, may God be pleased with him. He sequestered it (*ḥabbasahu*), that is to say, he made it a *waqf* (*waqqafahu*). This was recorded in a sound *ḥadīth*."[233] Another response was to try to harmonize the geography of the two traditions. In a widely cited commentary,[234] Ibn Ḥajar al-ʿAsqalānī contended that Thamgh constituted a portion of Khaybar's lands:

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[231] Nāṣif, *Al-Tāj*, 2: 245.

[232] Nāṣif, *Al-Tāj*, 2: 245. Al-ʿAẓīmābādī adds that the *wādī* was known to have contained many villages. Al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 85, citing ʿAbd al-Muʾmīn b. ʿAbd al-Ḥaqq al-Baghdādī's and Yāqūt b. ʿAbd Allāh al-Ḥamawī's *Al-Marāṣid al-Ittilāʿ ʿalā Asmāʾ al-Amkina waʾl-Biqāʿ* (Beirut: Dār al-Maʿrifa, 1954–55), 3: 1417. Ibn al-Athīr reports that the Prophet built a mosque there. Ibn al-Athīr, *Al-Nihāya*, 4: 36. There is a *sabbala ḥadīth* in al-Khaṣṣāf's *waqf* treatise indicating that the *wādī* might be Wādī al-Khashāshān, located in-between two hills near Madīna. According to this tradition, the Prophet gave ʿUmar Thamgh from this land, and ʿUmar then attached it to other lands that the Prophet had given him. This narrative provides the background for the *sabbala* maxim which concludes the tradition. Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 4–5.

[233] Yāqūt, *Muʿjam al-Buldān*, 2: 84–85.

[234] Ibn Ḥanbal, *Al-Musnad*, 8: 224–25, no. 6078; al-Qasṭallānī, *Irshād*, 5: 25; al-ʿAẓīmābādī, *ʿAwn al-Maʿbūd*, 8: 85.

> It is possible that Thamgh is part of the totality of the land of Khaybar, that its measure (*miqdār*) was the *miqdār* of the 100 shares from the shares which the Prophet divided among those who were present at Khaybar. These 100 shares are not the 100 shares that belonged to ʿUmar b. al-Khaṭṭāb in Khaybar which he acquired from his part of the booty and other things.[235]

While Ibn Ḥajar's exposition resolves the tension between the Khaybar and Thamgh accounts, his commentary conflicts with those traditions that report that Thamgh was a "well-known estate" in Madīna belonging to the Banū Ḥāritha.[236]

The limited success, if not outright failure, of these harmonizations is not altogether surprising. Although seemingly related, the analysis of these traditions indicates that the Prophetic *ḥadīth*s and ʿUmar's *ṣadaqa* deed emerged as independent entities that initially fixated on two different locations and two different time periods. While the *ḥadīth*s fixated on the conquest and division of Khaybar during the year 7/629, ʿUmar's *ṣadaqa* deed fixated on Madīna (*i.e.*, Thamgh) and Khaybar during his caliphate (r. 13–23/634–644). At some later point in time, the Thamgh variants and the first *ṣadaqa* deed emerged, and it was in these traditions that the Prophetic conversation, ʿUmar's deed, Khaybar, and Thamgh were presented as part of the same historical moment. It is true that some of these cross-fertilizations were innocuous. For example, the *taṣaddaqa ḥadīth*'s appropriation of the three conditions from the *ṣadaqa* deed generated no chronological or geographical inconsistencies. The temporal conflation of the two events proved more difficult to reconcile, but the Islamic tradition was able to resolve this discrepancy by creating the concept of an anterior oral *ṣadaqa* deed that bridged the chronological gap between the Prophetic conversation in the year 7/629 and ʿUmar's caliphate. The geographical juxtaposition of Khaybar and Thamgh proved to be more than the tradition could bear, however. With Thamgh firmly situated in Madīna, Muslim commentators struggled—with little success—to create a scenario in which Thamgh might actually refer to a location in Khaybar. Interestingly, these commentators never pursued the possibility that

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[235] Ibn Ḥajar al-ʿAsqalānī, *al-Fatḥ*, 5: 299.

[236] The basis for Ibn Ḥajar's resolution of the Thamgh issue remains unclear. Within the Islamic tradition there does not appear to be any support for his conclusion.

the Prophet and ʿUmar had virtually identical conversations concerning ʿUmar's property in Khaybar and Thamgh. One can only surmise from this omission that they considered this idea too preposterous to consider.

In spite of their differences, the *taṣaddaqa/sabbala ḥadīth*s and ʿUmar's *ṣadaqa* deed share a curious feature: the Prophet is not the person founding the *waqf*. While the Prophet instructs ʿUmar to separate usufructory rights from the property's principal, it is ʿUmar who actually creates the endowment. In the case of the *ṣadaqa* deed, the Prophet's role is reduced to that of a witness to ʿUmar's (alleged) oral deed. And if one does not accept the harmonization proffered by later commentators, then the Prophet may have had no input into the formation of ʿUmar's deed. While ʿUmar's actions alone probably would have been sufficient to legitimate the *waqf*, in the post-Shāfiʿī world of Islamic jurisprudence, a premium was placed on linking *sharīʿa* law to the Prophet. Clearly, the *taṣaddaqa/sabbala ḥadīth*s establish this linkage, but they do so only in speech. This oral authority was apparently insufficient for some jurists, because in the last leg of the *waqf*'s legitimating matrix we discover that it was the Prophet who designated the first *waqf* in Islam.

III. *The* Ṣadaqas *of the Prophet*

It is well-known that when the Prophet died he left only three things: a white mule, his weapons, and some land which he had designated as a *ṣadaqa*.[237] Although this tradition clearly states that the Prophet

[237] Al-Bukhārī, *Ṣaḥīḥ*, 5: 4, no. 2458. The issue of the Prophet's inheritance is a contentious one in Islamic history. As Ignaz Goldziher related in *Muslim Studies*, the question of whether the Prophet left an inheritance became enmeshed in the political struggle between ʿAlid Shīʿa supporters and their opponents. As a result of this conflict, numerous *ḥadīth*s emerged both for and against the Prophet leaving an inheritance. This *ḥadīth* does not specifically address the issue of the Prophet's inheritance, but it is located in a section that contains anti-ʿAlid *ḥadīth*s rejecting the idea that the Prophet had left an inheritance. This juxtaposition suggests that there might be some relation between the reports concerning the *ṣadaqa* of the Prophet and the anti-inheritance traditions. See Goldziher, *Muhammedanische Studien* (*Muslim Studies*), translated from German by C. R. Barber and S. M. Stern (New York: George Allen & Unwin, Ltd., 1971), 2: 112–15. See also Powers, *Studies*, 113–31, for a discussion of the relationship between the Prophet's inheritance and political succession; and al-Bukhārī, *Ṣaḥīḥ*, 5: 4–5, nos. 2459–60, for two anti-inheritance *ḥadīth*s.

left land as a *ṣadaqa*, it neither specifies the location of this property nor when it became a *ṣadaqa*. Furthermore, if Ibn Isḥāq/Ibn Hishām, Mālik, Saḥnūn, al-Shāfiʿī, Hilāl, and al-Ṭabarī were aware of the Prophet's *ṣadaqa*, they never mention it in their texts. This lacuna is particularly surprising in al-Shāfiʿī's case because reference to the Prophet's *ṣadaqa* would have been expected. Instead, early juristic writings derive the legitimacy of the *waqf* almost exclusively from the first two legs of the *waqf* matrix triad: the Prophetic *ḥadīth*s (concerning ʿUmar's *ṣadaqa*) and the *ṣadaqa* deed of ʿUmar.

Given this silence on the matter of the Prophet's *ṣadaqa*, it is somewhat surprising to encounter a series of *ḥadīth*s in al-Khaṣṣāf's treatise devoted to the location of the Prophet's *ṣadaqa* and whether one of these Prophetic *ṣadaqa*s was the first *waqf* in Islam. Elements of these traditions can also be found in the *Kitāb al-Maghāzī* of al-Wāqidī (d. 207/823),[238] the *Ṭabaqāt al-Kabīr* of Ibn Saʿd (d. 230/845),[239] and the *Futūḥ al-Buldān* of al-Balādhurī (d. 279/892).[240] Since none of these *ḥadīth*s were mentioned in earlier discussions of *waqf*, however, they almost certainly must be considered a secondary (or tertiary) development in the legitimation of the *waqf*.

The question of "who or what was first?" is a ubiquitous theme within the Islamic literary tradition. Categorized under the rubric of *awāʾil* ("firsts"), one finds within the Islamic corpus discussions concerning who was the first to convert to Islam, what was the first city in Persia to be conquered by the Muslims, who was the first to die in the Battle of Badr, etc. In al-Khaṣṣāf's treatise, this *awāʾil* debate is applied to the question of whether ʿUmar's *ṣadaqa* in Thamgh or the Prophet's seven gardens constituted the first Islamic "*waqf*":

> Abū Bakr said there was a difference of opinion among us about the first *ṣadaqa* in Islam, for some of them said the first *ṣadaqa* in Islam was the seven walled gardens belonging to the Messenger of God, and after that the *ṣadaqa* of ʿUmar b. al-Khaṭṭāb in Thamgh, at the time of the return of the Messenger of God in the year seven A.H.[241]

Some *ḥadīth*s even suggest that there may have been a political element to this discussion. In one tradition, it is reported that the

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[238] Al-Wāqidī, *Kitāb al-Maghāzī*, 1: 377.
[239] Ibn Saʿd, *Ṭabaqāt al-Kabīr*, 1/2: 183.
[240] Al-Balādhurī, *Futūḥ al-Buldān*, 30, 42.
[241] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 4; al-Shawkānī, *Nayl al-Awṭār*, 6: 27.

Emigrants claimed that Thamgh was the first Islamic *waqf*, while in another *ḥadīth* the Helpers were alleged to have supported the position that it was the Prophet who had established the "first *ḥubs* in Islam."[242]

Aside from the vague political controversy surrounding this debate, the ramifications of this discussion are not readily apparent. In fact, many *awā'il* debates seem to be little more than exercises in the accumulation of historical trivia.[243] Within juristic discourse, however, the trivial nature of this debate is deceptive. Not only is chronology important in terms of abrogation, but for a legal system whose legal legitimacy was derived almost exclusively from a few crucial decades in the past, *awā'il* questions determined which precedent-setting action or word would serve as the normative model.[244]

The issue of Prophetic precedent probably lies at the center of the debate over the first Islamic *waqf*. Although the *awā'il* genre may have spurred discussion on this matter, the attempt to situate the Prophet as the founder of the first Islamic *waqf* appears to have originated within a broader concern to establish Prophetic sanctioning for this legally contentious institution. Just as it was untenable that 'Umar could have created a *waqf* without Prophetic input, so was the premise that a Companion's action could have provided the legal precedent for these endowments (particularly in post-Shāfi'ī legal discourse). To manufacture this Prophetic precedent, it was necessary to impose a chronology onto the Islamic tradition that had the Prophet establishing the first *waqf*.[245] Although anachronistic, this newly created historical order established Prophetic authority over all aspects of the *waqf*'s legitimating framework.

Confirmation of the artificial manner in which Prophetic actions were projected onto the past is provided by the Islamic tradition itself. Among those who allege that the Prophet's *ḥubs*/*ṣadaqa* was the first *waqf* in Islam, there is general agreement that the endowed

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[242] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 4–5.

[243] Noth, *The Early Arabic Historical Tradition*, 108.

[244] Wansbrough, *The Sectarian Milieu*, 36.

[245] Wansbrough, *Qur'ānic Studies*, 177. In his discussion of the Qur'ān, Wansbrough describes a similar process whereby a chronology was imposed on the Qur'ān to assist the development of both halakhic (i.e. *sharī'a*) and masoretic (i.e. *tafsīr*) exegesis: "Solutions to the problems . . . were sought, and for the most part found, by imposing upon the document of revelation a chronological stencil. Historical order could thus be introduced into what was essentially literary chaos."

properties consisted of seven walled gardens (*ḥawā'iṭ*)[246] in Madīna: al-Aʿrāf,[247] al-Dalāl, al-Ṣāfiyya, al-Mīthab, Barqa, Ḥusnā[248] and Mashrabat Umm Ibrāhīm.[249] The Islamic tradition, however, exhibits some confusion regarding the person or tribe from whom the Prophet acquired these properties.

One set of traditions alleges that these gardens were acquired from Mukhayrīq following his death at the Battle of Uḥud in the year 3/625:

> Muḥammad b. Bishr b. Ḥamīd—his father. He said: I heard ʿUmar b. ʿAbd al-ʿAzīz [Umar II] saying during his caliphate, while in the town of Khunāṣira [in Syria]: I have heard in Madīna (and many of the people at that time were from the *shaykh*s of the Emigrants and Helpers) as follows: the seven walled gardens of the Messenger of God which he designated as *waqf* were from the property of Mukhayrīq. [Mukhayrīq] said: "If I am killed, then my properties belong to Muḥammad who may do with them whatever God shows him" (*yaḍaʿu-hā ḥaythu arā-hu Allāh*). He was killed on the day of Uḥud, whereupon the Messenger of God said: "Mukhayrīq was the best of the Jews."[250]

In another *ḥadīth* the Prophet is said to have taken possession of Mukhayrīq's properties and given them away as alms (*taṣaddaqa bi-hā*),[251] while a third tradition states that these properties were the

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[246] *Ḥawā'iṭ* (s. *ḥā'iṭ*) are date gardens surrounded by a wall. Ibn Manẓūr, *Lisān al-ʿArab*, 7: 279–80.

[247] There is a variant tradition which replaces the "*rā*'" in "*al-Aʿrāf*" with a "*wāw*" to make the garden's name "*al-Aʿwāf*." See al-Khaṣṣāf, *Aḥkām al-Awqāf*, 2, n. 3.

[248] Also translated as "al-Ḥasnā." Al-Balādhurī, *The Origins of the Islamic State*, trans. Philip Hitti and Francis Murgotten (New York: Columbia University Press, 1916–24), 1: 35, n. 2. The fourteenth-century C.E. manuscript copy of the *Aḥkām al-Awqāf* of al-Khaṣṣāf reports that the garden was called "al-Khuthnā'."

[249] Based on his studies of Madīna during the lifetime of Prophet, Lecker has attempted to reconstruct the story behind the name of this garden. Citing Ibn ʿAsākir's *Ta'rīkh Madīnat Dimashq*, Lecker writes that Umm Ibrāhīm was the Coptic slave-girl, Māriya, who bore the Prophet a son (Ibrāhīm) who died in infancy. According to these traditions, the Prophet took Māriya to an orchard that he owned in the ʿĀliya (upper Madīna, located at the southern end of the town). The Banū al-Naḍīr had owned the orchard prior to their expulsion. Māriya resided in the orchard during the summers and the date seasons, and the Prophet would visit her there. Due to her presence in the orchard, it subsequently acquired the appellation "Umm Ibrāhīm." Lecker, *Muslims, Jews and Pagans*, 8.

[250] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 1–2. Similar traditions can be found in al-Balādhurī, *Futūḥ al-Buldān*, 27–28; al-Wāqidī, *Kitāb al-Maghāzī*, 1: 262–63; Ibn Saʿd, *Kitāb al-Ṭabaqāt al-Kabīr*, 1/2: 182.

"general *ṣadaqāt* of the Messenger of God" (*fa-hiya ʿāmmat ṣadaqāt rasūl Allāh*).[252]

Curiously, the Islamic tradition does not always present this linkage between Mukhayrīq's story and the Prophet's gardens. In three nearly identical[253] *akhbār* reports[254] found in Ibn Hishām, al-Ṭabarī, and Ibn al-Athīr,[255] the reader is told that on the day of Uḥud, Mukhayrīq approached his fellow Jews in Madīna and reminded them that they had an obligation to fight alongside the Prophet. In turn, they reminded Mukhayrīq that it was the Sabbath. Angered by their recalcitrance, Mukhayrīq responded, "You have no Sabbath" (*lā sabt la-kum*), grabbed his sword and stormed off to Uḥud where he fought beside the Muslims until he was killed.[256] On account on his loyalty to the Prophet, Muḥammad reportedly said, "Mukhayrīq was the best of the Jews" (*Mukhayrīq khayru Yahūd*).[257] Similar to the previous traditions, Mukhayrīq informed his community that if he should die, his property was to pass to the Prophet to do with as he chose (*in uṣibtu fa-mālī li-Muḥammad yaṣnaʿu fī-hi mā shā'a*).[258] But in these traditions the property is left unspecified and we are not told what the Prophet did with it.

At the same time, there exist other traditions which suggest that the Prophet's gardens became a *waqf* as a result of the Banū al-Naḍīr's expulsion from Madīna in the year 4/626:

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[251] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 1.

[252] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 1.

[253] The only difference between the three reports concerns the tribal affiliation of Mukhayrīq. Ibn Hishām and al-Ṭabarī report that Mukhayrīq was from the Banū Thaʿlaba b. al-Fityūn while Ibn al-Athīr does not.

[254] *I.e.*, only one of the three traditions has an *isnād*, so I am describing them as "*akhbār* reports."

[255] Ibn Hishām, *Sīrat al-Nabī*, 3: 42; al-Ṭabarī, *Ta'rīkh*, 2: 531; Ibn al-Athīr, *Al-Kāmil*, 2: 162.

[256] Ibn Hishām, *Sīrat al-Nabī*, 3: 42; al-Ṭabarī, *Ta'rīkh*, 2: 531; Ibn al-Athīr, *Al-Kāmil*, 2: 162.

[257] Ibn Hishām, *Sīrat al-Nabī*, 3: 42; al-Ṭabarī, *Ta'rīkh*, 2: 531; Ibn al-Athīr, *Al-Kāmil*, 2: 162. There is some confusion in the sources over the state of Mukhayrīq's faith at the time of his death. Ibn Hishām notes that there is a variant tradition which reports that Mukhayrīq was among those who converted to Islam from Judaism. See *Sīrat al-Nabī*, 3: 42, n. 4. In the *Aḥkām al-Awqāf* of al-Khaṣṣāf, however, the author cites a *ḥadīth* which states that Mukhayrīq did not convert to Islam, but nonetheless received burial in a Muslim cemetery: "When he [Mukhayrīq] died he was buried in a corner of the Muslim cemetery, but no one prays over him." Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 2.

[258] Ibn Hishām, *Sīrat al-Nabī*, 3: 42; al-Ṭabarī, *Ta'rīkh*, 2: 531; Ibn Athīr, *Al-Kāmil*, 2: 162.

> Ibn Abī Sabra—al-Miswar (sp.?) b. Rafāʿa—Ibn Kaʿb al-Quraẓī: The *ḥubs* in the time of the Messenger of God consisted of seven walled gardens in Madīna: al-Aʿrāf, al-Ṣāfiyya, al-Dalāl, al-Mīthab, Barqa, Ḥusnā, and Mashrabat Umm Ibrāhīm. Ibn Kaʿb said: The Muslims subsequently sequestered (*ḥabbasa*) these lands for their children and their children's children. And other people transmitted that the *ṣadaqāt* of the Messenger of God, which were suspended (*mawqūfa*), were from the properties of the Banū al-Naḍīr.[259]

This narrative is not compatible with the story of Mukhayrīq, for both Ibn Hishām and al-Ṭabarī report that Mukhayrīq was from another Jewish tribe, the Banū Thaʿlaba.[260] Even more problematic for the linkage between Mukhayrīq and the Prophet's gardens is a tradition which reiterates that the seven gardens belonged to the Banū al-Naḍīr, and then specifies that "the property used to belong to Salām b. Mishkam al-Naḍīrī."[261] General support for this linkage between the Banū al-Naḍīr and the seven gardens is provided by another set of *ḥadīth*s in al-Balādhurī, al-Wāqidī and Ibn Saʿd. In these traditions the reader is told that the Prophet had three special shares which he appropriated for himself—the possessions of the Banū al-Naḍīr, Khaybar and Fadak—and that he made the properties of the Banū al-Naḍīr a *ḥubs* in case misfortune might befall him or his family.[262]

The confusion surrounding the traditions of the seven gardens also finds expression in early historical works. In the *Kitāb al-Maghāzī*, al-Wāqidī states that the Prophet established *ṣadaqa*s from both the

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[259] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 2.

[260] Ibn Hishām, *Sīrat al-Nabī*, 3: 42; al-Ṭabarī, *Taʾrīkh*, 2: 531.

[261] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 3.

[262] Al-Balādhurī, *Futūḥ al-Buldān*, 30, 42; al-Wāqidī, *Kitāb al-Maghāzī*, 1: 377; Ibn Saʿd, *Kitāb al-Ṭabaqāt al-Kabīr*, 1/2: 183. Marco Scholer reports a tradition in the *Tafsīr* of Abū l-Naḍr Muḥammad b. al-Sāʾib b. Bishr al-Kalbī (d. 146/763), which states that the Prophet made other properties a *waqf*: "Fadak and Khaybar were made a *waqf* by the Prophet for the benefit of the poor, so they remained in his hands during his life. After the Prophet's death, they were left in the hands of Abū Bakr, then likewise in the hands of ʿUmar, ʿUthmān and ʿAlī b. Abī Ṭālib, always remaining in the same condition, and they have remained this way until today." Scholer states that he considers the tradition to be an interpolation made by the late third or early fourth century A.H. compiler of the *Tafsīr al-Kalbī* because it reflects a "strong Sunnī claim," and the lands in Fadak had become a source of polemics between Sunnīs and Shīʿites. Marco Scholer, "Sīra and Tafsīr," in *The Biography of Muḥammad: The Issues of the Sources*, ed. Harald Motzki (Leiden: E. J. Brill, 2000), 40, 43. The use of the term "*waqf*" is also indicative of later creation since use of this term was exceptional in second century A.H. discourse.

properties of the Banū al-Naḍīr and the properties of Mukhayrīq. But when al-Wāqidī relates that these *ṣadaqa*s were the seven gardens, it is unclear whether he is referring to the properties of the Banū al-Naḍīr, Mukhayrīq, or both.[263] Similarly, Ibn Sa'd's *Kitāb al-Ṭabaqāt al-Kabīr* contains a *ḥadīth* which claims that the Prophet established a *ḥubs* from the seven gardens of Mukhayrīq, and then on the very next page states that these gardens belonged to the Banū al-Naḍīr.[264] This confusion reaches its apex in the eleventh/sixteenth century commentary, the *Wafā' al-Wafā'* of 'Alī b. Aḥmad al-Samhūdī (d. 1011/1602). In his analysis of the Prophet's *waqf*, al-Samhūdī cites a series of *ḥadīth*s in which the properties of Mukhayrīq and the seven gardens are attributed alternately to three different sets of Jewish tribes in Madīna: the Banū al-Naḍīr (expelled from Madīna in the year 4/626) the Banū Tha'laba (Mukhayrīq's tribe), and the Banū Qurayẓa (massacred in Madīna in the year 5/627).[265]

Modern historians such as Muḥammad Amīn have had difficulty sorting out this confusion. In his chronology of the first Islamic *waqf*s, Amīn maintains the position that the first *waqf* in Islam consisted of the seven gardens that the Prophet acquired from Mukhayrīq in the year 3/625.[266] He then adds that the second Prophetic *waqf* emerged from the properties of the Banū al-Naḍīr in Madīna. Although the Islamic tradition informs us that Amīn's two claims are in tension with another, Amīn is able to finesse these conflicting accounts by never specifying the properties of the Banū al-Naḍīr.[267]

The *awā'il* literary form may be the principal factor contributing to these conflicting accounts of the first Islamic *waqf*. It is quite possible that there did exist seven gardens in Madīna which second- and third-century Muslims accepted as the Prophet's *ṣadaqa/waqf*. Confusion arose, however, when Muslim jurists later attempted to demonstrate that this Prophetic endowment constituted the first *waqf* in Islam. The anachronistic superimposition of the *awā'il* question onto the Islamic corpus forced the Islamic tradition to manufacture

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[263] Al-Wāqidī, *Kitāb al-Maghāzī*, 1: 378.

[264] Ibn Sa'd, *Kitāb al-Ṭabaqāt al-Kabīr*, 1/2: 182–83.

[265] 'Alī b. Aḥmad al-Samhūdī, *Wafā' al-Wafā' bi-Akhbār Dār al-Muṣṭafā* (Cairo: Al-Ādab wa'l-Mu'ayyad, 1326/1908), 2: 154.

[266] Muḥammad M. Amīn, *Al-Awqāf wa'l-Ḥayāt al-Ijtimā'iyya fi Miṣr: 648/923–1250/1517/Pious Endowments and Social Life in Egypt* (Cairo: Cairo University, 1980), 16.

[267] Amīn, *Al-Awqāf*, 17.

a level of chronological specificity which the traditions themselves lacked. Because no single historical account clearly indicated from whom the Prophet acquired these gardens, this historical "fact" found multiple contexts for its realization. Some jurists fixated on the conversation between the Prophet and Mukhayrīq, while others cited the expulsion of the Banū al-Naḍīr or the massacre of the Banū Qurayẓa as the precursor to the Prophet's acquisition of these properties. In spite of their differences, all these narratives share a common feature—they situate the Prophet's *waqf* before the conquest of Khaybar in the year 7/629. The need to find a historical event anterior to the conversation between the Prophet and ʿUmar appears to have been the motivating force behind the emergence of these traditions.[268]

The evidence indicates that the identification of the Prophet's *waqf* was a secondary (or tertiary) development in the *waqf*'s legitimating matrix. Certainly, the bulk of the Islamic tradition indicates that it was ʿUmar's *ṣadaqa* and those of the other Companions which the Muslim community remembered best. Nevertheless, modern histori-

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[268] Skepticism towards these "first *waqf*" traditions has been an assumption underlying this analysis. The intellectual foundation for this skepticism can be found in the work of Schacht, who contended that the presence of conflicting *ḥadīth*s—such as the ones surrounding the first Islamic *waqf*—provided proof for the "continuing growth" of the Islamic corpus throughout the second and third Islamic centuries. There is, however, another way of viewing these contradictory *ḥadīth*s. Michael Lecker has argued that Schachtian skepticism is misplaced, because it fails to take into account how the Islamic tradition expanded during its formative phases. According to Lecker, divergent traditions emerged as a consequence of the decentralized, family-centered nature of first-century *ḥadīth* production and preservation:

> In this first phase, which preceded the appearance of systematic compilations, Islamic historiography came into existence in the form of an enormous body of historiographical records preserved (both in written form and as oral tradition) by people mainly interested in the history of their families and clans. Thanks to these early experts, whose scope and ambition were rather limited, Islamic historiography made a stormy appearance, gaining immense proportions within several decades of the 1st/7th century.

Lecker, "The Death of the Prophet Muḥammad's Father," 11. In spite of the apparent relevance of this passage to the conflicting accounts discussed here, there are several reasons to challenge its applicability in this case. First, it is difficult to see what familial/tribal advantages first-century Muslims would have garnered by linking the Prophet's *waqf* to Jewish tribes unless one proposes that the descendants of Mukhayrīq, the Banū al-Naḍīr or the Banū Qurayẓa propagated these traditions. Second, the question of whether or not the Prophet founded the first Islamic *waqf* carries legal ramifications that traditions surrounding the death-date of Muḥammad's father do not, which would have created incentives for the production of the *waqf* traditions in subsequent centuries.

ans have tended to invert this order and privilege the *waqf*s of the Prophet over the other two legs of the legitimating triad. For example, in Amīn's historical study of the early *waqf*, the author lists eight different properties alleged to have been the Prophet's *waqf*s before mentioning anything about ʿUmar b. al-Khaṭṭāb.[269] This internalization of the *awā'il* genre by modern historians is taken a step further in the writing of Muhammad Farooqi, who has used the *awā'il* question to isolate an even earlier Prophetic *waqf*. According to Farooqi, the first *waqf* in Islam was land dedicated to the construction of mosques in Quba and Madīna in the year 1/622.[270] In this tradition, as related in the *Ta'rīkh* of al-Ṭabarī, the Prophet desired a piece of land for his mosque in Madīna, but the land belonged to two orphans of the Banū al-Najjār, Sahl and Suhayl. The Prophet offered to let the two orphans set a price for the land, but they refused, and donated it to the Prophet in order to receive a reward from God.[271] The same story is told in Ibn Hishām's *Sīrat al-Nabī*, but the ending is different—the protector of the two orphans, Muʿādh b. ʿAfrā', informs the Prophet that he will compensate the two boys for the Prophet's taking of the land so that they should not suffer hardship for so noble a cause.[272] Presumably, what makes the mosque

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[269] Amīn, *Al-Awqāf*, 16–19. Amīn's eight Prophetic *waqf*s are: (1) the seven gardens of Mukhayrīq; (2) the unspecified properties of the Banū al-Naḍīr; (3–5) three forts in Khaybar—al-Katība, al-Waṭīḥ and al-Sulālim; (6) Fadak; (7) Wādī al-Qurā; and (8) the market in Madīna.

[270] Muhammad Yousuf Farooqi, "The Institution of *Waqf* in Historical Perspective," *Hamdard Islamicus* 13/1 (1990), 25.

[271] Al-Ṭabarī, *Ta'rīkh*, 2: 396–97.

[272] Ibn Hishām, *Sīrat al-Nabī*, 2: 122–23. Differences between Ibn Hishām and al-Ṭabarī are not unusual. Although the texts are very similar, they each draw upon a different recension (*riwāya*) of the no longer extant *Sīra* of Ibn Isḥāq (d. *ca.* 150/768) for their history of the Prophet's life. While it is common to refer to Ibn Hishām's *Sīra* as essentially the equivalent of Ibn Isḥāq's work, the text of Ibn Hishām's *Sīra* actually constitutes an abbreviated, annotated version of Ibn Isḥāq's work based upon the *riwāya* of Ziyād al-Bakkā'ī (d. 183/799). By contrast, al-Ṭabarī's biography draws upon the *riwāya* of Salamah b. Faḍl al-Abrash al-Anṣārī (d. 191/807) and its subsequent transmission to Ibn Ḥumayd (d. 248/862), one of al-Ṭabarī's teachers in the city of al-Rayy. The reliance of al-Ṭabarī and Ibn Hishām on different *riwāyas* may explain some of the small, but significant textual discontinuities in their respective accounts of the building of the first mosque in Madīna. See Ismail K. Poonawala, "Translator's Foreword," in *The History of al-Ṭabarī: The Last Years of the Prophet* (Albany: State University of New York Press, 1990), 9: xi; Franz Rosenthal, "General Introduction: The Life and Works of al-Ṭabarī," in *The History of al-Ṭabarī: From the Creation to the Flood* (Albany: State University of New York Press, 1989), 1: 17.

a *waqf* is that the Prophet took possession of the land and then donated it to a charitable purpose. Interestingly, neither al-Ṭabarī nor Ibn Hishām mentions anything about the property being a *ṣadaqa/ḥubs/waqf*.

The Islamic tradition has historically not cited the lands of Sahl and Suhayl in its discussions of the first Prophetic *waqf*, in spite of their apparent significance to the legitimation of this institution.[273] Instead, Farooqi's analysis should probably be considered a legacy of the *awā'il* genre itself. Just as the Islamic tradition was able to sift through its collective memory to isolate events where the Prophet might have designated the first *waqf*, modern historians continue to participate in this discourse by devising their own chronologies and mining the Islamic tradition for earlier evidence of Prophetic *waqf*s. Although the historicity of these endeavors is suspect, the work of Amīn and Farooqi is indicative of the way in which the Islamic tradition can be re-fashioned to provide an increasingly Prophetic milieu for the *waqf*. And even if the three legs of the triangular matrix exhibit incongruities when juxtaposed with one another, the collective effect of this matrix is to wrap the *waqf* within a shroud of Prophetic speech (the maxims), Prophetic approval ('Umar's *ṣadaqa* deed), and ultimately, Prophetic action (the Prophet's *waqf*s). And it is the construction of this Prophetic milieu which has been central to the cultural and hermeneutical legitimation of the *waqf*.

IV. *The Establishment of Legitimacy*

The "authenticity question" has dominated this examination into the sources for the legitimacy of the *waqf*. In fact, a great deal of energy has been expended demonstrating that very little, if any, of the *waqf*'s legitimating matrix can be considered historically authentic. In terms of developing a chronology for the *waqf* matrix, the analysis undertaken throughout this chapter suggests the following conclusions. It seems possible—even likely—that there existed in the Ḥijāz a col-

[273] See, *e.g.*, the nineteenth-century commentator al-Shawkānī (d. 1255/1839). In his *Nayl al-Awṭār*, al-Shawkānī cites a tradition that the first *ṣadaqa mawqūfa* in Islam consisted of the properties that Mukhayrīq gave to the Prophet in the year 3/625. Nowhere does al-Shawkānī allude to the mosques of Quba or Madīna. Al-Shawkānī, *Nayl al-Awṭār*, 5: 26.

lection of properties which the Muslim community considered the *ṣadaqa*s (and then later, the *waqf*s) of ʿUmar, the Prophet, the Prophet's Companions, the Prophet's wives, and so on. It is even possible that the Muslim community preserved some recollection of the original practices associated with these properties. It also seems clear that by the second Islamic century the legality of pious endowments had come into question. Probably in response to the opposition of jurists such as Shurayḥ, the first (counter)-*ḥadīth*s promoting Prophetic approval of the *waqf* came into existence. Based upon the *isnād* analysis conducted in this chapter, the ʿIrāqī/Baṣran *taṣaddaqa ḥadīth* appears to have emerged first (*c.* 125/742), while the Ḥijāzī *sabbala ḥadīth* seems to have manifested itself about a generation or two later. As for the Thamgh variants of these *ḥadīth*s, *isnād* analysis, in conjunction with a lack of reference to Thamgh in second-century *waqf* discussions, suggests that these variant traditions came into existence subsequent to their Khaybar counterparts. Concomitant with the emergence of the *taṣaddaqa* and *sabbala* traditions was the creation of ʿUmar's *ṣadaqa* deed—in particular, the second document attributed to the scribe Muʿayqīb. Although this document might constitute the Muslim community's authentic recollection of the practices associated with ʿUmar's *ṣadaqa*, the deed itself does not appear to have coalesced into its documentary form until the late second or early third century. And lastly, if opposition to the legality of pious endowments provided the impetus for the creation of the *taṣaddaqa* and *sabbala ḥadīth*s, the relatively late application of the *awā'il* question to the issue of the Prophet's *waqf* reflects a shift in the discourse of hermeneutical legitimacy. With legal authority becoming increasingly fixated upon the Prophet over the course of the third century it was necessary to find historical evidence showing that the Prophet had established the first *waqf* in Islam. The articulation of this *waqf* matrix chronology leads to a paradoxical conclusion: while pious endowments may have had authentic precursors from within the early Muslim community, none of the sources for the legitimation of the *waqf* constitute authentic first-century sources. The cumulative effect of these ahistorical accretions is the displacement of an authentic past with an imagined one.

If so much of the *waqf*'s legitimating matrix can be deemed historically inauthentic, it is worth considering why third-century Muslims jurists—including, to some extent, Hilāl and al-Khaṣṣāf—accepted it. Clearly, finding fault with the *ʿulamā'* for not arriving at

the conclusions presented here is not only unfair, but wholly anachronistic. The Muslim community has never subjected its *ḥadīth*s to the kind of modern *isnād* analysis conducted in this chapter. For the most part, the vast majority of the *ḥadīth*s discussed in this chapter were considered sound on the basis of Islamic *isnād* criticism, and it would have been more than surprising if the *ḥadīth* critics had challenged these conclusions.

In addition to the soundness of the *isnād*s, other reasons for the widespread acceptance of these traditions have already been discussed. ʿUmar's prominent role in Khaybar made his presence in the *ḥadīth*s not only reasonable, but expected. Likewise, the transmission of this knowledge on the authority of Ibn ʿUmar and his *mawlā*, Nāfiʿ, was consistent with the preservation of this historical moment. Not only was Ibn ʿUmar the son of ʿUmar b. al-Khaṭṭāb, but the Ibn ʿUmar—Nāfiʿ links in the *isnād* chain were among the most notable authorities for events at Khaybar. As for the *ṣadaqa* deed of ʿUmar, its incorporation of standard literary forms for Islamic documents also would have contributed to the enhancement of its "authenticity."

The means by which the *waqf* traditions conformed to the expectations of third-century Muslims is a matter that deserves further consideration. In pursuing the authenticity question, modern historians have generally neglected the manner in which "inauthentic" traditions established their legitimacy. While modern historians do not have to accept the contours of this Islamic authentication process, understanding how this process functions illuminates the means by which third-century Muslims established links to an increasingly distant past, and how these links legitimated legal doctrines and institutions, including the *waqf*.

It is important to remember that by the time Hilāl and al-Khaṣṣāf wrote their *waqf* treatises most Muslims were probably aware that the present in which they lived was only a dim reflection of the past from which the Muslim community had emerged. Most people, no doubt, were conscious of the fact that several of the cities in which they resided—Baghdād, Kūfa, and Baṣra—had not even existed during the Prophet's lifetime. And yet, while the topography of the past may have seemed vague and indeterminable, authenticating discourses within the Islamic tradition served to reassure the Muslim community that they had not lost their connection to it.

In order to frame this discussion of these discourses, the *ḥadīth* itself deserves further consideration. As a vehicle of historical transmission, the *ḥadīth* most resembles a photograph in that both mediums are effective at illuminating a historical moment while simultaneously denuding that moment of its context. Within the frame of the *ḥadīth*/photograph, the event recorded attains a hyper-clarity by focusing solely on the relevant aspects of the episode. Those elements not considered germane to the moment at hand are simply left outside the frame of the *ḥadīth*/picture. Like a photograph, once the *ḥadīth* is produced and begins to circulate, the tensions between its clarifying and obfuscating tendencies are exacerbated—chronology is frequently lost, and the larger context for the moment may disappear altogether. The absence of these situational and temporal references has the disorienting effect of denying the reader the opportunity to infer a sense of continuity or causality from the *ḥadīth*/picture.[274] Nevertheless, both mediums preserve the clarity of the moment they portray. For instance, the Prophetic conversation emerges "in the full light of history" as an illuminated vignette, even if the qualities that would complete the historical moment—location, context, chronology, etc.—have receded into total darkness. The result is a medium/literary genre that provides "authenticity" without necessarily conveying historicity.[275]

The mere existence of a *ḥadīth* or an early document, however, does not guarantee its authenticity. The Islamic tradition has long recognized that the *matn*s of *ḥadīth*s and the contents of documents could be subjected to anachronistic embellishments or outright forgery. Given this potential for pious falsification, and the importance of maintaining an authentic recollection of the past for the *sharīʿa*'s exegesis, the legitimacy of the *waqf* cannot be said to rest entirely upon the *ḥadīth*s and documents discussed in this chapter. Rather, for the *waqf* to be accepted into the *sharīʿa*, these sources first had to

[274] Wansbrough, *Sectarian Milieu*, 85.

[275] Wansbrough, *Sectarian Milieu*, 39. Wansbrough makes this distinction in a discussion of the Islamic tradition's use of dialogue: "Authenticity can be as much a result of (successful) narrative technique as of veracity. The extensive use of dialogue in the *sīra-maghāzī* literature, and the frequent occurrences there of situations familiar from (modern) observation of bedouin life, may certainly provide 'authenticity' but not necessarily 'historicity.'"

conform to authenticating discourses within the Islamic tradition. Obviously, *isnād* criticism played a significant role in authenticating these traditions, but it was not solely determinative. Equally important was the manner in which the events described in these traditions intersected with established literary discourses within the Islamic tradition. For example, while the conformity of ʿUmar's *ṣadaqa* deed to pre-existent literary forms for documents would appear to argue against its historicity, such conformity also served to authenticate this document within an Islamic context. As proof for this conclusion, consider the converse. Had ʿUmar's *ṣadaqa* deed deviated sharply from these literary conventions, second- and third-century Muslims likely would have considered the document fictitious.

In addition to literary forms, another "authenticating" discourse within the Islamic tradition consists of tropes.[276] Aspects of ʿUmar's behavior in the *waqf* traditions, such as the sincerity of ʿUmar's religious convictions, resemble literary tropes.[277] Similar to Peter in the Gospels, ʿUmar desires to demonstrate the depth of his religious commitment. If he is not performing an act of piety by giving away his property as alms,[278] then he is offering to cut off the head of Abū Sufyān during the conquest of Mecca.[279] And like Peter, ʿUmar's religious zeal frequently leads to errors in judgment which the Prophet corrects.[280] The Islamic tradition also records several traditions in which ʿUmar approaches the Prophet with the invocation, "Oh, Messenger of God" (*yā rasūl Allāh*), the same greeting which begins the Prophetic conversation.[281] This invocation was hardly unique to

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[276] The existence of these repetitive literary phrases has been well-documented in the work of Albrecht Noth. See Noth, *The Early Arabic Historical Tradition*, 109–218.

[277] The quasi-mythical construction of ʿUmar's image/persona has been the subject of several articles. See, *e.g.*, Heribert Busse, "'Omar's Image as the Conqueror of Jerusalem," *JSAI* 8 (1986), 149–68; Suliman Bashear, "The Title '*Fārūq*' and its Association with ʿUmar I," *Studia Islamica* 72 (1990), 47–70; Hava Lazarus-Yafeh, "'Umar b. al-Khaṭṭāb—Paul of Islam?" in *Some Religious Aspects of Islam* (Leiden: E. J. Brill, 1981).

[278] Al-Shāfiʿī, *Kitāb al-Umm*, 4: 52.

[279] Al-Ṭabarī, *Taʾrīkh*, 3: 53.

[280] Al-Ṭabarī, *Taʾrīkh*, 2: 609. This citation refers to a conversation between the Prophet and ʿUmar in which the Prophet points out that had he followed ʿUmar's advice and killed ʿAbd Allāh b. Ubayy b. Salūl, then this man would not have been around to kill his father at a later point in time. Seeing the error of his ways, ʿUmar responds: "By God, now I understand that what the Messenger of God ordered had more merit in it than what I would have ordered."

[281] Al-Wāqidī, *Kitāb al-Maghāzī*, 2: 616, 3: 1057; al-Ṭabarī, *Taʾrīkh*, 2: 465, 476,

ʿUmar, but nonetheless, its presence in the *ḥadīth*s would have contributed to a sense of authenticity. The cumulative effect of these literary tropes, combined with ʿUmar's prominent role in the events at Khaybar, lends a measure of credibility to the picture portrayed in the *ḥadīth* narratives because nothing ʿUmar does in these traditions is inconsistent with his previous patterns of behavior.

Another literary trope in the *waqf* traditions concerns the role of the Prophet as law-giver. In the history of the early Muslim community, the Prophet is frequently described as dispensing non-canonical law, such as on the occasion of the Farewell Pilgrimage, or in this *ḥadīth* regarding the affiliation of paternity:

> ʿAbd al-Razzāq—Ibn Jurayj—ʿAmr b. Shuʿayb. He said: There was an oath in the *Jāhiliyya* which was used with regard to homicide cases and with regard to a man on whose bed someone was born, but another man claims [*yuddaʿī*] the child. Consequently, fifty oaths were laid upon him, as in the oath which was used in homicide cases. And that was their custom. Then, when the Prophet was on the pilgrimage, al-ʿAbbās b. ʿAbd al-Muṭṭalib said to him: "Verily, so and so is my son, and we [my tribespeople] are willing to take oaths for him." But the Prophet said: "No, the child belongs to the owner of the bed, and the fornicator gets the stone" (*al-walad li'l-firāshi wa-li'l-ʿāhiri al-ḥajar*).[282]

As discussed previously, few of these maxims can be considered historically authentic Prophetic speech, and many of them appear to have acquired their Prophetic context only in the second century A.H. Nevertheless, the trope of the Prophet as law-giver is so pervasive within the Islamic tradition that the inauthenticity of the events described is often difficult to accept.

There are also exegetical and parabolic links which serve to "authenticate" the *waqf* sources. Although the term *waqf* is not found in the Qur'ān, some Muslim commentators have claimed that the creation of pious endowments is endorsed or sanctioned by the Qur'ān's injunctions to give alms (*ṣadaqa*).[283] In some cases this link between

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3: 73. ʿUmar is also reported to have uttered the invocation "Oh, Prophet of God" (*yā nabī Allāh*). Al-Ṭabarī, *Ta'rīkh*, 2: 473.

[282] ʿAbd al-Razzāq al-Ṣanʿānī, *Muṣannaf* (Beirut: Maktabat al-Islām), 3: 321, no. 5800. The complicated history surrounding the *al-walad li'l-firāsh* maxim is discussed by Uri Rubin in "'*Al-Walad li'-l-firāsh*' on the Islamic Campaign Against «*Zinā*»," 5–26.

[283] Othman, "Origin of the Institution of *Waqf*," 3.

the Qur'ān and pious endowments is made explicit/exegetical when the remainder interest of a *waqf* closely parallels those people and purposes for whom alms (*al-ṣadaqāt*) may be given: the poor, the destitute, the emancipation of slaves and debtors, the Holy War and travelers.[284] Several *ṣadaqa*/*waqf* deeds also present an exegetical link between the Qur'ānic verse "until God inherits the Earth and those on it."[285] Although this verse is not found in 'Umar's *ṣadaqa* deed, it can be found in the deeds of the Prophet's wife, Ṣafiyya bt. Ḥuyayy, the Prophet's Companion, 'Uqba b. 'Āmir,[286] and in the *waqf* deed in the *Kitāb al-Umm* of al-Shāfi'ī.[287] The same verse is mentioned by Hilāl in a general discussion of *waqf* deeds,[288] as well as in a *waqf* inscription from Ramla.[289] In another early *waqf* inscription, the phrase "God, to whom belongs the inheritance of the heavens and of the earth, and He is the best of heirs"[290] establishes a different exegetical connection to three different Qur'ānic verses.[291] Even when such links are not explicit, the continued presence of keywords such as "*taṣaddaqa*" or "*ṣadaqa*" in *waqf* deeds and *ḥadīth*s functions to maintain an implicit, or parabolic, allusion to the Qur'ān's numerous references to alms-giving.[292] The cumulative effect of these exegetical and parabolic links is the establishment of a Qur'ānic context for the *waqf*; a context that permitted the *waqf* to attain a quasi-canonical position even though the Qur'ān makes no explicit reference to the institution.

The *waqf* maxims also resemble a special subset of Qur'ānic pericopes that have been described as prophetical *logia*.[293] In spite of their absence from the revelation, these non-canonical Prophetic maxims attained semi-scriptural status by deriving their authority exegetically from within the Islamic tradition.[294] In the case of the *waqf*

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[284] Qur'ān 9.60.
[285] Qur'ān 19.40.
[286] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 14–15.
[287] Al-Shāfi'ī, *Kitāb al-Umm*, 4: 59.
[288] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 8.
[289] Sharon, "*Waqf* inscription from Ramla, *c.* 300/912–13," 100.
[290] Sharon, "A *Waqf* inscription from Ramlah," 77–78, 81.
[291] Qur'ān 3.180, 21.89, and 57.10. Qur'ān 3.180 states that "It is God who will inherit the heavens and the earth," while Qur'ān 57.10 states that "God alone will inherit the heavens and the earth." Qur'ān 21.89 states that God is the "best of heirs."
[292] Wansbrough, *Sectarian Milieu*, 2, 5, 139.
[293] Wansbrough, *Qur'ānic Studies*, 47.
[294] Wansbrough, *Sectarian Milieu*, 71.

*ḥadīth*s, parabolic links to the Qur'ān's repeated references to *ṣadaqa* sanctified the traditions' pericopes/maxims, *isnād*s gave the pericopes a recorded past, and tropes encased the maxims within a familiar Prophetic law-giving discourse. This exegetical process was hardly unique to maxims. Rather, these elements of exegesis demarcate the most common literary convention for contextualizing Qur'ānic pericopes—the *asbāb al-nuzūl*, or "occasions of the revelation."

The recapitulation of this Qur'ānic exegetical framework probably explains, more than anything else, how the *waqf* became legitimated. By creating a *sabab al-nuzūl* for the *waqf*'s past, the Islamic tradition drew upon familiar literary and exegetical conventions such as documentary forms, tropes, and parabolic linkages. The referential and cross-referential nature of these different literary forms not only connected the *waqf* to the Islamic past, but *intertwined* it with an evolving historical-legal edifice. This "intertwining" explains why third-century Muslims had to accept the image of the past that had been bequeathed to them. By the time Hilāl and al-Khaṣṣāf wrote their *waqf* treatises, the Muslim community had already begun the process of constructing its cultural, moral and legal foundations upon the unique historical period of the Prophet's life.[295] For any third-century Muslim—including Hilāl or al-Khaṣṣāf—to have rejected the legitimacy of the *waqf* would have entailed stepping entirely outside of the cultural, historical and legal discourses in which he participated. Such an action would have challenged not only the legitimacy of the *waqf*, but also the entire legitimating framework surrounding it: the Prophet as law-giver, 'Umar as rightly-guided Companion, and the Qur'ānic conception of alms-giving.

Ironically, these devices which serve to "authenticate" sources within the Islamic tradition are the very same ones that Western scholars have cited as reasons for doubting the historicity of these sources:

> Indeed, it can be, and has been, argued that there is here a kind of antithesis: that such conceptual and literary devices as myth, midrash, and *mise en scène* designed to create vitality and to ensure historicity are often, if not invariably, anachronistic.[296]

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[295] Calder, *Studies*, 193.
[296] Wansbrough, *Sectarian Milieu*, 143.

Because Western scholars operate outside the authenticating discourses of the Islamic tradition, the repetitive quality of these literary and hermeneutical structures becomes a source for skepticism rather than confirmation. Consistent behavior is interpreted as a trope, familiarity becomes a convention, and exegesis is considered anachronistic. The result of this dichotomy is the creation of two historical truths—one generated by those within the Islamic authenticating discourses and one by those outside of it. Although the historicity of these two historical visions cannot be considered equal, they are each successful at creating an "authentic" history.

The process by which the *waqf* became legitimated in Islamic legal discourse is testimony to the process of Islamicization itself. Although initially outside the *sharīʿa*, by the third century A.H. the *waqf* was recontextualized as a religiously sanctified institution. For the next thousand years, the legitimacy of the *waqf* was never seriously challenged. The urban tissue of most Middle Eastern cities testifies to the growth and expansion of this institution throughout the classical and early modern periods. Only in the nineteenth century, when Western discourses of progress, *laissez-faire* economics, and the Rule Against Perpetuities began to usurp the authority of the Islamic discourses, was the legitimacy of the *waqf* once again called into question.

CONCLUSION

The bifurcated legal construction of the *waqf* may provide a model for how other legal concepts attained definitional form and legal legitimacy within Islamic law. A cursory survey of the chapter headings to the two *waqf* treatises provides convincing evidence that it was rationalist discourse, not hermeneutical exegesis, that resolved most of the basic, substantive legal questions surrounding the institution. The *waqf* equation and the creation of a legal space for the *waqf* within existing categories of charitable giving, inheritance, bequest and death-sickness illustrate that the resolution of these relationships was done with virtually no reference to the past. In fact, in the case of Hilāl's *waqf* equation, the new terminology may have been seen as casting doubt on the legitimacy of pious endowments created by the Prophet and his Companions.

And yet, while rationalist legal reasoning created the substantive law of *waqf*, the institution's legal legitimacy depended on the exegetical framework analyzed in chapter four. While the bulk of that chapter was devoted to demonstrating that little of this exegetical superstructure/matrix can be considered historically authentic, the conclusion to this chapter observed that literary and cultural discourses within the Islamic tradition created a compelling form of "authenticity," and hence, exegetical legitimacy, for the institution. This hermeneutical legitimating matrix was especially critical for the *waqf* because the institution was viewed—at least by some early jurists—as an illegal circumvention of the *ʿilm al-farāʾiḍ*. The creation of an exegetical past for the *waqf* not only responded to these criticisms, but also provided an Arab-Islamic context for a range of trust practices that likely had antecedents in other Near Eastern cultures.

The "birth" of the *waqf* as a legal institution (within Ḥanafī discourse at least) rested on this symbiotic relationship between rationalist and traditionalist legal discourses; a symbiosis that perhaps neither side welcomed or wished to acknowledge, but one that was necessary in order to develop the law substantively and to confer legal legitimacy. Although trust practices existed in the Near East prior to and after the Arab conquests, the *waqf* did not. The substantive

law of the *waqf* treatises and the parallel hermeneutical tradition analyzed in chapter four represent several decades—if not generations—of legal thinking on the question of pious endowments: the relationship of the institution to the doctrines of charity and inheritance, and the exegetical derivation of the institution's legitimacy from an increasingly distant, albeit increasingly more authoritative, past. The fact that the *waqf* was dependent on, and subordinate to, the doctrines of intestacy, testacy and death-sickness also indicates that the *waqf* developed subsequent to these other doctrines; perhaps in response to the restrictions placed on testamentary dispositions.

As the lives of Hilāl and al-Khaṣṣāf illustrate, the *waqf* treatises emerged during a prodigious period in the development of substantive law—al-Khaṣṣāf alone is credited with writing fourteen legal treatises. This increased production in legal treatises in the third century indicates that while Islamic law had developed to the point where it was possible to articulate entire branches of law, there was still enough disorder and variation in the law to necessitate treatise-writing. Whether the numerous hypothetical questions in the treatises represent areas of actual legal confusion is probably unanswerable. There is some reason to believe that many of these hypotheticals may have been manufactured in order to explicate a specific legal principle. Nevertheless, it is also true that the treatises addressed areas of law where confusion must have been common, such as when certain types of *waqf*s, such as those made during death-sickness for heirs and non-heirs, intersected with the established doctrines of intestacy and testacy. The development of the *waqf* equation and use of the signifier "*waqf*" brought internal terminological order to this area of law as well as distinguished these types of trusts from other forms of charity and gifts.

The extent to which the substantive law of the *waqf* treatises affected or shaped actual trust formation during this era remains an open question. There is some limited evidence indicating that the term "*waqf*," or its verbal forms, became more common in the decades after the deaths of Hilāl and al-Khaṣṣāf, perhaps reflecting the terminology developed in the treatises. Additional studies may reveal whether Ḥanafī legal culture maintained, modified or abandoned the definitional efforts of Hilāl and al-Khaṣṣāf. The treatises almost certainly had an impact on how *qāḍī*s adjudicated disputes concerning *waqf*s. Judging ultimately requires that answers be given to litigants. Although some disputes can be resolved through compromise, other

legal questions, such as whether a *waqf* is legal or not, require a yes or no answer. Because the *qultu/qāla* dialogues anticipate many of the types of questions that *qāḍī*s eventually faced in the real world, the treatises likely became an easy reference for resolving legal questions and disputes. While the precise relationship between legal scholarship and the actual practice of law in the *qāḍī*s' courts remains unclear, if these treatises were used as reference tools, then their impact on the actual practice of trust formation may have been quite pronounced.

The treatises and their authors also provide a window onto developing debates concerning third-century Islamic legal culture. The authors' lives provide indications of a juristic culture that valued legal scholarship as well as administrative and judicial appointments in the 'Abbāsid regime. Al-Khaṣṣāf's life, in particular, suggests that political appointments may have been highly prized, which runs counter to the traditional conception of these early jurists as "scholars." The *waqf* treatises also lend tentative support to the recent reconceptualization of early Muslim jurists as independent scholars and/or Great Shaykhs rather than as members of established schools. While Hilāl and al-Khaṣṣāf both refer to early "school" authorities such as Abū Ḥanīfa, Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī, there is no clear indication that they saw themselves as merely following in these earlier jurisprudents' footsteps. The fact that the Ḥanafī school would later categorize Hilāl and al-Khaṣṣāf as followers of these earlier authorities may not be an accurate reflection of how these men viewed themselves or their legal formulations in the treatises.

Along similar lines, a comparison of the writings styles in the *waqf* treatises with those analyzed by Brockopp in *Early Mālikī Law* suggests that even if the schools of law had not developed by the third century, regional influences were affecting the development of law within the Islamic world. Despite the texts' similarities, Brockopp's typology of common stylistic elements in Mālikī texts does not capture some of the stylistic distinctions within the Ḥanafī *waqf* treatises. These differences suggest that there was no universal style of juristic discourse during this period, but rather variations on basic forms, such as the *qultu/qāla* dialogues and the reliance on past authorities. Whether these stylistic differences were simply due to regionalism or represent nascent school formation is a question that future studies of this era may be able to answer.

There is a danger, in narrowly focused studies such as this one, of fetishizing the texts upon which they are based. Obvious historiographical questions arise when one plucks out of history two sources—albeit two sources which share a lot of similarities—and attempts to explain areas of history (and law) that are broader than the texts themselves. That said, broad surveys relying on multiple sources also pose their own historiographical problems, namely, the inevitable downplaying of differences in order to impose some sort of thematic unity on the sources. With regard to the third Islamic century, I would submit that both types of projects are needed. Particularly in comparison to the first two centuries, very little historical work has been done on this period. The debates concerning the development of the schools of law and the nature of third-century legal culture are still in their infancy. For example, the fact that Brockopp's Mālikī texts exhibit differences with the Ḥanafī *waqf* treatises discussed here says something about the development of Islamic law, but we currently lack the base of historical knowledge to ascertain the significance of these differences. For the moment, studies such as this one raise as many questions as they answer. But as more dark corners of the past are illuminated, our understanding of this period—and the development of Islamic law—should become clearer.

APPENDIX A

TABLE OF CONTENTS TO THE *AḤKĀM AL-WAQF* OF HILĀL AL-RA'Y[1]

1 Introduction

17 Chapter pertaining to the man who makes his house (*dār*) a mosque, or a *khān*, (or a cemetery), or something else.

19 Chapter pertaining to the man who makes land a *waqf* for the poor, but does not stipulate repairs.

22 Chapter pertaining to the man who makes a house (*dār*) a *waqf*—on the condition that he may reside in it—in favor of a specified, named group, but does not stipulate who is responsible for its repairs and does not specify the [financial] source for the repairs.

28 Chapter pertaining to the man who makes land a *waqf* for a man, but does not specify what [revenues] will/should be used to maintain it [= the land].

30 Chapter pertaining to the man who makes land or an estate (*dār*)[2] a *waqf* for specified people; and the buildings of the estate and the date-palm trees fall down, [and] repairs relating to this.

34 Chapter pertaining to the man who makes land a *waqf* "for his children" and does not add anything to this.

(37 Chapter pertaining to the man who makes land a *waqf* "for his children" and does not add anything.)[3]

43 Chapter pertaining to the man who makes land a *waqf* "for his children" and other children are born before or after the emergence of the yields.

46 Chapter pertaining to the man who makes a *waqf* "for his children and his descendants." How are the yields divided among them?

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[1] Hilāl al-Ra'y, *Aḥkām al-Waqf* (Madīna: Maṭba'at Majlis Dā'irat al-Ma'ārif al-'Uthmāniyya, 1355/1937).

[2] In this context, the term "*dār*" seems to be referring to something larger than a single residence.

[3] This chapter may not be a part of the original treatise. It is not listed in the Rāmfūriyya version of the treatise and repeats the previous chapter heading.

52 Chapter pertaining to the man who makes land a *waqf* "for his children," but he has no children.
58 Chapter pertaining to the man who makes land a *waqf* "for his poor kin relations, his poor children, and his poor descendants." To whom are [the yields] given?
71 Chapter pertaining to the man who makes land a *waqf* for himself.
84 Chapter pertaining to a defective/voidable *waqf* (*al-waqf al-fāsid*).
91 Chapter pertaining to the man who makes land belonging to him a *waqf*, on the condition that he retains the right to sell it.
101 Chapter pertaining to the administration of a *waqf*.
112 Chapter pertaining to testimony in the matter of a *waqf*.
119 Chapter pertaining to a joint *waqf*.
125 Chapter pertaining to testimony in the matter of a *waqf* in which the witness refers (?) to himself or his administrator (*i.e.*, the witness has a conflict of interest).
131 Chapter pertaining to a *waqf* made during death-sickness.
147 Chapter pertaining to the man who, while sound in mind and body, makes land belonging to him a *waqf* "for the poor," and one of his children or kin relations is in need. Can he give to (them) from [the *waqf*] or not?
157 Chapter pertaining to the man who purchases land by means of a defective/voidable sale and makes it a *waqf* before taking possession of it.
166 Chapter pertaining to the man who makes land a *waqf* "for people (*qawm*)," but they do not accept this, or some of them accept it to the exclusion of the others.
171 Chapter pertaining to the man who makes his land a *ṣadaqa mawqūfa* for [his] closest kin relations.
179 Chapter pertaining to the man who makes land a *waqf* for his kin relations and preference is given to his closest relation, and then to the one next in closeness, and so on. The closest relative is given the yields and then the next closest.
186 Chapter pertaining to the man who makes land a *waqf* for the family (*āl*) of so-and-so or the "stock" (*jins*) from the "*āl*" of so-and-so and his "*jins*."
188 Chapter pertaining to the man who makes land belonging to him a *waqf* "for his clients (*mawālīhi*)."

198 Chapter pertaining to the man who makes land belonging to him a *waqf* "for his poor neighbors."
206 Chapter pertaining to the leasing of a *waqf*.
211 Chapter pertaining to *waqf* land which is brought into an agricultural or temporary sharecropping contract.
216 Chapter pertaining to the illegal seizure of a *waqf*.
221 Chapter pertaining to the man who makes a *waqf* "for kin relations according to priority of relationship [to the founder]."
224 Chapter pertaining to the man who makes land a *waqf* "for his poor kin relations according to priority of relationship [to the founder]."
229 Chapter pertaining to the man who makes land belonging to him a *waqf* "for his poor kin relations" and he does have relatives who are needy; [but] there are relatives of his who are wealthy.
236 Chapter pertaining to the man who makes an acknowledgment with respect to land: it is in his possession as a *ṣadaqa mawqūfa*.
254 Chapter pertaining to the man who makes land a *waqf* "for his kin relations." Then a man comes forward and says: "I am one of the kin relations." What shall be imposed?
265 Chapter pertaining to the man who makes land a *waqf* "for his poor kin relations." Then a man comes forward establishing [both] his kinship [to the founder] and his poverty.
273 Chapter pertaining to the man who makes land a *waqf* "for specified purposes." How does one divide the yields?
286 Chapter pertaining to the man who makes land a *waqf*, and the land contains fruits and date-palm trees.
291 Chapter pertaining to the man who makes land belonging to him a *waqf* on the condition that its yields are given to whomever he wants.
297 Chapter pertaining to the man who says, "My land is a *ṣadaqa mawqūfa*, on the condition that I distribute its yields in whatever manner I want."
300 Chapter pertaining to the man who says, "My land is a *ṣadaqa mawqūfa*, on the condition that so-and-so is entitled to give its yields to whomever he wants."
304 Chapter pertaining to the man who says, "My land is a *ṣadaqa mawqūfa* for the Banū so-and-so, on the condition that I retain the right to give its yields to whomever I want from among them."

309 Chapter pertaining to the man who says, "My land is a *ṣadaqa mawqūfa* (for the Banū so-and-so), on the condition that I retain the right to give preference to some over others."
341 Epilogue of the book.
342 Biography of the author.

APPENDIX B

TABLE OF CONTENTS TO THE *AḤKĀM AL-AWQĀF* OF AL-KHAṢṢĀF[1]

0 Introduction
1 What was transmitted regarding the *ṣadaqāt* of the Prophet, may God bless him and grant him salvation.
5 What was transmitted regarding the *ṣadaqa* of Abū Bakr, may God be pleased with him.
5 What was transmitted regarding the *ṣadaqa* of ʿUmar b. al-Khaṭṭāb, may God be pleased with him.
9 What was transmitted regarding the *ṣadaqa* of ʿUthmān b. ʿAffān, may God be pleased with him.
9 What was transmitted regarding the *ṣadaqa* of ʿAlī b. Abī Ṭālib, may God be pleased with him.
11 What was transmitted regarding the *ṣadaqa* of al-Zubayr, may God be pleased with him.
11 What was transmitted regarding the *ṣadaqa* of Muʿādh b. Jabal, may God be pleased with him.
12 What was transmitted regarding the *ṣadaqa* of Zayd b. Thābit, may God be pleased with him.
13 What was transmitted regarding the *ṣadaqa* of ʿĀ'isha, may God be pleased with her.
13 What was transmitted regarding the *ṣadaqa* of Asmā' bt. Abī Bakr, may God be pleased with both of them.
13 What was transmitted regarding the *ṣadaqa* of Umm Salama, wife of the Prophet, may God bless him and grant him salvation.
13 What was transmitted regarding the *ṣadaqa* of Umm Ḥabība, wife of the Prophet, may God bless him and grant him salvation.
14 What was transmitted regarding the *ṣadaqa* of Ṣafiyya bt. Ḥuyayy, wife of the Prophet, may God bless him and grant him salvation.

[1] Al-Khaṣṣāf, *Aḥkām al-Awqāf* (Cairo: Maktabat al-Thaqāfa Dīniyya, 1322/1904).

14 What was transmitted regarding the *ṣadaqa* of Saʿd b. Abī Waqqāṣ, may God be pleased with him.
14 What was transmitted regarding the *ṣadaqa* of Khālid b. al-Walīd, may God be pleased with him.
14 What was transmitted regarding the *ṣadaqa* of Abū Arwā al-Dawsā (sp.?), may God be pleased with him.
15 What was transmitted regarding the *ṣadaqa* of Jābir b. ʿAbd Allāh, may God be pleased with him.
15 What was transmitted regarding the *ṣadaqa* of Saʿd b. ʿUbāda, may God be pleased with him.
15 What was transmitted regarding the *ṣadaqa* of ʿUqba b. ʿĀmir, may God be pleased with him.
15 What was transmitted regarding the *ṣadaqāt* of the Companions of the Prophet, may God bless him and grant him salvation.
17 What was transmitted regarding the *ṣadaqa* of ʿAbd Allāh b. al-Zubayr, may God be pleased with both of them.
17 What was transmitted regarding the *ṣadaqa* of the Successors and those after them.
19 Chapter pertaining to the *waqf* for a man and the stipulations relating to it [= the *waqf*] in this matter.
34 Chapter pertaining to the man who makes land a *waqf* from *kharāj* land or from *ṣadaqa* land, and that which is included in this subject.
38 Chapter pertaining to the man who makes land a *waqf* "for his family (*ahl al-baytihi*)," or "for his servants," or "for his kin relations," or "for his maternal relatives," or "for his relations by marriage."
42 Chapter pertaining to designating kin relations.
52 Chapter pertaining to the man who makes land a *waqf* "for people (*al-nās*) closest [in relation] to him" or "for people closest [in relation] to another man."
57 Chapter pertaining to the man who makes land a *waqf* "for his kin relations," but they contest each other's rights to this.
61 Chapter pertaining to a *waqf* "for poor kin relations," and what is obligatory in this.
64 Chapter pertaining to the man who makes his house "*mawqūfa*" so that specified members of a group may reside in it, and, after them, its yields are for the poor.
71 Chapter pertaining to the man who makes his land a *ṣadaqa*

mawqūfa[2] "for himself, his children, his grandchildren, and his descendants."

90 Chapter pertaining to the man who makes his land a *waqf* "for a specific man, for his children, and his grandchildren, and then for the destitute after them;" or he makes it a *waqf* for specific people and makes its final disposition for the destitute, and what is included in this.[3]

93 Chapter pertaining to the man who makes his land a *ṣadaqa* for the descendants, kin, or progeny of a man.

97 Chapter pertaining to a *waqf* for progeny.
"Chapter 13": In the matter of negligence.[4]

104 Chapter pertaining to the man who makes land a *waqf* "for his children" or he says "I have made it a *waqf* for the children of Zayd."

109 Chapter pertaining to the man who makes land a *waqf* "for his sons" or "for the Banū Zayd."

113 Chapter pertaining to the man who builds a mosque and gives permission to the people to pray in it, or builds a *khān*, or makes his land a cemetery, or makes a water fountain for the Muslims and that which pertains to this chapter.

115 Chapter pertaining to the man who makes land a *waqf* "for his clients."
"Chapter 18" Chapter pertaining to the man who makes land a *waqf* "for a client and his children," or "for his slave (*mudabbarātihi*)."[5]

119 Chapter pertaining to the man who makes land a *waqf* "for the mothers of his children, his slaves (*mudabbarātihi*), his *umm walad*s, and the *umm walad*s of others."[6]

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[2] The fourteenth-century C.E. manuscript copy from the British Library does not include the word "*mawqūfa*" in its table of contents.

[3] The phrase "and what is included in this" is not included in the table of contents to the fourteenth-century C.E. manuscript copy from the British Library.

[4] This chapter is not listed in the table of contents to the "1904 Cairo" version of the *Aḥkām al-Awqāf* of al-Khaṣṣāf, but is present in the table of contents to the fourteenth-century C.E. manuscript copy from the British Library.

[5] This chapter is not listed in the table of contents to the "1904 Cairo" version of the *Aḥkām al-Awqāf* of al-Khaṣṣāf, but is present in the table of contents to the fourteenth-century C.E. manuscript copy from the British Library.

[6] This chapter is not included in the table of contents to the fourteenth-century C.E. manuscript copy from the British Library.

121 Chapter pertaining to the man who makes land a *waqf* for the *umm walad*s of a man, or the man's slaves (*mudabbarāt* and *mamālīk*), and that which pertains to this.
125 Chapter pertaining to the *waqf* which is not permitted.
131 Chapter pertaining to the man who makes land or a house belonging to him a *waqf* for the repairs of a specific mosque or a specific water fountain, and that which pertains to this.
134 Chapter pertaining to old *waqf*s.
136 Chapter pertaining to the man who makes land a *waqf* "for his children," but he has no children.
138 Chapter pertaining to the man who makes land a *waqf* for two men, and one of them is dead; or one of them accepts this and the other does not.
141 Chapter pertaining to the man who makes land a *waqf* for two men, and he designates to each one a part of its yields.
145 Chapter pertaining to a *waqf* "for the heirs of so-and-so."
148 Chapter pertaining to the man who makes land a *waqf* "for specific people, on the condition that some are preferred over others."
149 Chapter pertaining to the man who makes land a *waqf* "for himself and then, after [his death], it is for the destitute.
152 Chapter pertaining to the man who makes land a *waqf*, and [the land] contains slaves (*raqīq*) or cows which work on it; or he makes slaves a *waqf* without the land.
153 Chapter pertaining to the man who makes land a *waqf* for people, and some of them accept this and others do not; or none of them accept this.
154 Chapter pertaining to the man who makes land a *waqf* on the condition that he is entitled to sell it.
160 Chapter pertaining to the beneficiary of a *waqf* (*al-rajul al-mawqūf ʿalayhi*) who acknowledges that the *waqf* is for him and another man.
164 Chapter pertaining to the man who makes land a *waqf* "for kin relations according to priority of relationship [to the founder]."
168 Chapter pertaining to the man who makes land a *waqf* "for kin relations."
171 Chapter pertaining to the man who makes a house a *waqf* for people who live in it or receive the proceeds from it.
173 Chapter pertaining to the man who makes land a *waqf* "for his kin relations, on the condition that [the distribution of the yields]

should begin with those closest in relationship to the founder."
178 Chapter pertaining to the man who makes land and a house a *waqf* for [one group of] people and makes other land a *waqf* for other people, etc.
182 Chapter pertaining to the man who makes land a *waqf* "for his neighbors (*jīrānihi*)."
186 Chapter pertaining to the acknowledgment of a man that land in his possession is a *waqf*, and an acknowledgment during death-sickness.
201 Chapter pertaining to the administration of a *waqf*.
205 Chapter pertaining to the matter of leasing/renting a *waqf*.
207 Chapter pertaining to agricultural and temporary sharecropping contracts on *waqf* land.
209 Chapter pertaining to the man who makes land a *waqf*, then revokes [it] while it is in his possession or in the possession of someone else. He denies that it is the land that he made a *waqf*, and the testimony in this matter.
221 Chapter pertaining to land which is in the possession of a man, and [another] man alleges that it belongs to him. The person who possesses the land acknowledges that a free Muslim designated it as a *waqf* and handed it over to him.
232 Chapter pertaining to a jointly-held *waqf*. May it be divided, and what is included in this?
237 Chapter pertaining to the man who makes land a *waqf* for the "gates of charity," or the pilgrimage, or travelers, or something other than this, but his children or kin relations are needy and have need of [the yields from the *waqf*].
240 Chapter pertaining to land or a house which was made a *waqf* and then illegally seized.
245 Chapter pertaining to a *waqf* made during death-sickness.
265 Chapter pertaining to a man who makes land, a house, a garden, walled gardens, a water fountain, or crops a *waqf* and that which pertains to a *waqf* of this type.
268 Chapter pertaining to a man who makes land belonging to him a *ṣadaqa mawqūfa*, then cultivates it, but he and the beneficiaries of the *waqf* quarrel in the matter of the sowing [of the land] or with regards to what is spent.
270 Chapter pertaining to the man who makes land or a house a *waqf*, on the condition that the administrator may not rent/lease it, or on the condition that if one of the beneficiaries of the

waqf challenges [him] in this matter, then he is removed from the *waqf*.

274 Chapter pertaining to the man who makes land a *waqf* "for his children, grandchildren, and their descendants in perpetuity," or "for his family (*ahl al-baytihi*)," or "for his kin relations," and he stipulates that anyone who departs from such-and-such [a place] and goes to such-and-such [a place] is removed from his *waqf*.

278 Chapter pertaining to testimony in the matter of a *waqf* and that which pertains to this.

283 Chapter pertaining to the man who makes land or a house a *waqf*, but does not delineate [its borders], claiming that it is well-known, and that it is unnecessary to provide a clear delineation of its borders. The man makes land a *waqf*, but it is tied up in a leasing/rent contract or something other than this.

284 Chapter pertaining to the man who purchases a house or land and he makes it a *waqf*. Then he says, "Verily, I sold it to so-and-so."

287 Chapter pertaining to the man who makes land a *waqf* for a specific person for a number of years, and then he [the founder] says, "I have made this land a *waqf* for so-and-so after the conclusion of the [aforementioned] years."

289 Chapter pertaining to the man who leases a country estate (*ḍayʿa*) belonging to him and then makes it a *waqf*.

290 Chapter pertaining to the man who mortgages (*yurhinu*) a country estate (*ḍayʿa*) belonging to him and then makes it a *waqf*.

291 Chapter pertaining to the man who makes land a *waqf* from the property (*māl*) of a limited partnership.

292 Chapter pertaining to a slave with limited legal rights who purchases a house and then the client makes it a *waqf*.

292 Chapter pertaining to the man who illegally seizes a country estate (*ḍayʿa*) from [another man] and then makes it a *waqf*.[7]

293 Chapter pertaining to the man who sells land belonging to him on the condition that he [retains] the right of withdrawal. Then he makes it a *waqf*. Does this abrogate the right of withdrawal?[8]

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[7] This chapter is not included in the table of contents to the fourteenth-century C.E. manuscript copy from the British Library.

[8] This chapter is not included in the table of contents to the fourteenth-century C.E. manuscript copy from the British Library.

293 Chapter pertaining to the man who gives land to a man, and the recipient makes it a *waqf* prior to taking possession.[9]

293 Chapter pertaining to the minor/interdicted person who makes land belonging to him a *waqf*.

294 Chapter pertaining to the man who bequeaths land to a man, and the legatee makes the land a *waqf* before the death of the testator.

294 Chapter pertaining to *waqf* "for 'the gates of charity.'"

295 Chapter pertaining to the man who makes land a *waqf* "for the poor, the destitute, his poor kin relations, and others."

301 Chapter pertaining to the man who makes land a *waqf* "for so-and-so," or "for so-and-so," or he says '[the recipient must] go on the pilgrimage on my behalf" or "engage in raids/battles on my behalf."

309 Chapter pertaining to the man who makes land a *waqf* for people, on the condition that if his kin relations have need of this, then the yields of the *waqf* are returned to them. Some of them came to be in need, but not all of them.

315 Chapter pertaining to the man who purchases land whose sale was defective/voidable (*fāsid*^{an}), and then makes it a *waqf*.

319 Chapter pertaining to a *waqf* [made for] estates located on frontiers, or for some plots of land there [= on the frontier], or [for] estates in Mecca and a *khān* intended for passers-by to live in.

322 Chapter pertaining to the man who makes land a *waqf* for the righteous among his poor relations, or he says for the "people of righteousness (*ahl al-ʿafāf*)" from among his poor relations.

323 Chapter pertaining to a *waqf* for orphans, widowers, widows, unmarried women, and virgins.

"Chapter 75" Chapter pertaining to the man who illegally seizes a country estate (*ḍayʿa*) from a man and then makes it a *waqf*, and that which relates to this: gift, illegal usurpation, and other things.[10]

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[9] This chapter is not included in the table of contents to the fourteenth-century C.E. manuscript copy from the British Library.

[10] This chapter is not listed in the table of contents to the "1904 Cairo" version of the *Aḥkām al-Awqāf* of al-Khaṣṣāf, but is present in the table of contents to the fourteenth-century C.E. manuscript copy from the British Library.

332 Chapter pertaining to the non-Muslim who enters the House of Islam with an assurance of protection, then purchases land or a house and makes it a *waqf*, or bequeaths it by means of a will.

332 Chapter regarding testimony for a *waqf*, a mosque, a cemetery, and a way-station (*khān al-sabīl*), and the subsequent revocation of the testimony.

334 Chapter pertaining to testimony for a *ṣadaqa* and the disagreements in this matter.

335 Chapter pertaining to the *waqf*s of the People of the Book (*ahl al-dhimma*), may God destroy them.[11]

342 Chapter pertaining to the *dhimmī* who has land in his possession, and makes an acknowledgment that a Muslim man made it a *waqf*, but that [the Muslim man] conveyed it to him for purposes which he specified; or makes an acknowledgment that a man from among the *ahl al-dhimma* made it a *waqf*.

345 Chapter pertaining to the man who makes land a *waqf* for specific people, and after them for the destitute, but he stipulates that the supervisor of the *waqf* has a certain claim to the yields.

351 Chapter pertaining to the Muslim man who makes land a *waqf* for specific people or for the "gates of charity," or he makes its final disposition for the destitute. Then he apostatizes from Islam and the protection of God.

[11] This last phrase, "may God destroy them" is found only in the table of contents to the fourteenth-century C.E. manuscript copy from the British Library.

APPENDIX C

TRANSLATION OF AN EARLY *ṢADAQA/ḤUBS* DEED[1]

Deed in the matter of al-ḥubs

Rabīʿ b. Sulaymān informed us. He said: al-Shāfiʿī informed us, as a dictation. He said: This document was written by so-and-so the son of so-and-so, while sound in mind and body, and legally capable of conducting his affairs. This was done in such-and-such a month in such-and-such a year: Verily, I have made my estate (*dār*) which is in al-Fusṭāṭ in Egypt in such-and-such place a *ṣadaqa*. One of the borders of the entirety of this estate extends to such-and-such, the second . . ., the third . . ., and the fourth. . . . I have designated as a *ṣadaqa* all the land of this estate, its wooden structures, its buildings, its entrances, its other structures, its road, its water channels, all other material conveniences and appurtenances, everything small and large, everything which is contained within it or comes from it, and every legal right which belongs to this estate—those that are inside and outside.

I have sequestered [the estate] as an irrevocable pious gift (*ṣadaqa*), dedicated for the sake of God, for the seeking of His reward. There is no exception in it, and no possibility of cancellation. It is an inviolable *ḥubs* that may not be sold, inherited, or given away as a gift until God inherits the earth and those on it. He is the best of heirs. I remove it from my ownership, and hand it over to so-and-so, the son of so-and-so, to administer on behalf of himself and others from among those for whom I made it a *ṣadaqa* according to what I stipulated and specified in this, my deed. My conditions in it are as follows:

Verily, I make it a *ṣadaqa* for my offspring, both males and females, from among those living today and those who will come into existence after this day. I treat both genders equally, both minors and

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[1] Al-Shāfiʿī, *Kitāb al-Umm*, ed. Muḥammad Zuhrī al-Najjār (Cairo: Maktabat al-Kulliyyāt al-Azhariyya, 1961) 4: 59–61.

majors, with full rights to reside in the estate and to its yields. None of them takes precedence over any other so long as my daughters do not marry. But if any one of [my daughters] marries and spends the night with her husband, then her rights are severed so long as she remains with her husband. Her entitlement passes to the remaining beneficiaries of my *ṣadaqa*—they continue to have full rights so long as she is with her husband. If she returns because of the death of her husband or divorce, then her rights in the matter of the estate are just as they were prior to her marriage. Every time one of my daughters marries, she becomes subject to this provision—she is excluded from my *ṣadaqa* by marrying and her rights return through the divorce or the death of her spouse. None of my daughters is excluded [from the *ṣadaqa*] except by marriage.

The rights of those who die from among my offspring—both males and females—revert to the remainder of my offspring. If my offspring die out, and there does not remain a single one of them, then this *ṣadaqa* is sequestered (*ḥubs*^{an}) for the children of my male children; the children of my daughters receive nothing. Then this *ṣadaqa* is for the children of my sons—both male and female—in the same manner as it had been for my offspring. The males and females are entitled to an equal share, but a woman is excluded from my *ṣadaqa* by marriage, [although she] returns to [it] through the death of [her] husband or divorce. Everyone who comes into existence from among my offspring—both grandsons [lit. males] and granddaughters [lit. females]—is included in my *ṣadaqa* with my existing grandchildren. Each one who dies from among them, his entitlement reverts to the remainder of them, until there does not remain a single grandchild. If there does not remain a single grandchild from among my offspring, then this *ṣadaqa* follows the conditions for the children of my male grandchildren who are linked to me through their kinship. The women are excluded by their marriage and return to [the *ṣadaqa*] by the husband's death or divorce.

Included, in perpetuity, are those who come into existence from my grandchildren, but the generation of those who have a link to my grandchildren is not included at the expense of the most distant generation from me, so long as one person from this generation is alive.[2] And none of the children of my daughters are included, unless

[2] At this point, the founder no longer draws a distinction between generations—everyone who exists gets a share.

there is someone among the children of my daughters who is linked in kinship to my grandchildren [by first-cousin marriage?]. In this case, he [the son of the aforementioned daughter] is included with the generation of those for whom my *ṣadaqa* was created on account of his father's lineage rather than his mother's.[3] My *ṣadaqa* then is eternal for the remainder of those who are descendants of my children whose lineage is part of my [agnatic] line, no matter how distant [lit. low]. And if they are descendants, they follow successively until there are one hundred or more fathers between me and them so long as one of them has a direct link to me.

If all of them die out, and there no longer remains a single person with a direct link to me, then this estate becomes a sequestered *ṣadaqa* (*ḥubs*^{un} *ṣadaqat*^{un}) that may not be sold or given as a gift, for the sake of God the Exalted, for the needy cognatic relatives on my father's side and my mother's side. They are included in it with full entitlements—equally males and females—regardless of their kinship relationship to me (*i.e.*, near or far).

If they die out, and there no longer remains a single person among them, then this estate is sequestered for my clients whom my fathers and I emancipated and their children and their children's children so long as they beget offspring; both males and females, minors and majors. He who is distant from me and my father's lineage is treated equally since his lineage belongs to someone who was my client.

If they die out, and there no longer remains a single person among them, then this estate becomes a sequestered *ṣadaqa* (*ḥubs*^{un} *ṣadaqat*^{un}) for the sake of God the Exalted for those among the Muslim warriors, travelers and poor who pass by it, the destitute from among the neighbors of this estate, and others from among the people of al-Fusṭāṭ, [including] travelers and passers-by, whoever they may be, until God inherits the earth and those on it.

My son, so-and-so the son of so-and-so, shall administer this estate. I appoint him administrator during my life and after my death, so long as he remains capable of administrating it and is honest in that which God the Exalted makes incumbent upon him—namely, increasing the yields if there are any, and justice in dividing the yields and in the allocation of living quarters for those beneficiaries of my *ṣadaqa*

[3] *I.e.*, the principle of including only agnatic descendants in the endowment is maintained.

who want to reside in it, commensurate with their entitlements. If the condition of my son, so-and-so the son of so-and-so, changes [and there is] weakness in the administration [of the *ṣadaqa*] or a lack of trustworthiness, then I appoint the child of mine who is the most pious and trustworthy as its administrator, according to the conditions that I stipulated for my son, so-and-so. He [the new administrator] administers it so long as he remains capable and trustworthy. But if [his administration] weakens, or his trustworthiness changes [for the worse], then he has no right to administer it, and the administration is transferred from him to someone else from among my children who is capable and trustworthy.

For each generation, the administration of this *ṣadaqa* passes to the person who is most excellent in terms of capability and trustworthiness. If his situation changes and his administration weakens or his trustworthiness diminishes, administration is transferred from him to the most excellent beneficiary of my *ṣadaqa* in terms of capability and trustworthiness. This follows for each generation to whom my *ṣadaqa* passes; it is for them to administer it, and [they should pick] the most excellent among them in terms of piety and trustworthiness, according to what I stipulated for my children, so long as there remains among them one person.

Then, [the administration of] this estate passes to my kin relations or clients: the most excellent among [my kin relations] with respect to piety and trustworthiness administers it so long as there exists within the generation to whom this *ṣadaqa* passes those who are capable and trustworthy. However, if among the existing generation there is no one who is capable and trustworthy, then a *qāḍī* of the Muslims assigns the administration of my *ṣadaqa* to someone from among my closest cognatic relatives who will assume the burden of administering it, so long as there is someone capable and trustworthy. If there is no one [qualified] among them, [then the *qāḍī* chooses] from among my clients and my father's clients whom we emancipated. If there is no one [qualified] among them, then [its administration] passes to a man from among the Muslims whom the judge (*ḥākim*) chooses.

If there subsequently comes into existence someone from among my descendants or my clients who is capable and trustworthy, then the judge removes the *ṣadaqa* from the possession of the one he assigned before, and returns its administration to the one who is capable and trustworthy from among those I designated.

Each administrator is to administer it, to keep that which is in this estate in a prosperous state, to repair whatever he fears may be falling into disrepair in it, to keep it open to the poor, to augment that which is good in it, and to increase its yields and the number of renters who gather the yields of this estate. Then, he is to distribute to those who have an entitlement to these yields equally from what remains [of the yields after they are used for repairs, the poor, etc.] in accordance with my conditions for them.

No Muslim governor has the right to remove from possession those whom I appoint as administrator so long as they are capable and trustworthy. Nor may he take it from the possession of any one of the generation to whom [the *ṣadaqa*] passes, so long as there are among them those who claim the right to administer it on the basis of capability and trustworthiness. Nor may he appoint a third-party [to administer the *ṣadaqa*] if he finds among them those who have the right to its administration.

And so-and-so and so-and-so gave witness to the acknowledgment [of this].

APPENDIX D

ADDITIONAL TERMINOLOGICAL CLARIFICATIONS IN THE *WAQF* TREATISES

Beneficiaries

Significant portions of the *waqf* treatises are devoted to defining precisely categories of people and objects. An area of concern in both works is the multiplicity of terms used to designate familial beneficiaries. Al-Khaṣṣāf imposes order on these terms by conflating their meanings and making them synonymous with one another. He defines "*ahl al-bayt*" as all those who share the same ancestral lineage (*kullu man yunāsibuhu bi-ābā'ihi*[1]) to the furthermost Muslim ancestor,[2] and then states that the terms "*jins*" and "*āl*" have the same meaning as "*ahl al-bayt.*"[3] Hilāl defines these terms somewhat differently. According to Hilāl, the "*āl*" of a founder refers to all his male ancestors.[4] As for the "*jins*" of the founder, Hilāl states that this term refers to male ancestors of the founder to the third generation (*thalātha ābā'*).[5] By contrast, the term "*ahl al-bayt*" refers to the third grandfather from the founder (*al-jadd al-thālith*).[6] Nevertheless, Hilāl also states that the meanings of "*ahl al-bayt*" and "*āl*" can be considered equivalent to one another.[7]

Hilāl and al-Khaṣṣāf do not limit their definitional efforts to familial beneficiaries, but also examine what kinds of "clients" (*mawālī*) and "neighbors" (*jīrān*) can be beneficiaries of a *waqf*. According to al-Khaṣṣāf, the term "*mawālī*" functions as a collective term for both male and female clients,[8] while Hilāl points out that the children of

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[1] "*Ābā*'" literally means "fathers," but can also mean "ancestors." Lane, *Arabic-English Lexicon*, 1: 10.
[2] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 38.
[3] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 38.
[4] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 186.
[5] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 187.
[6] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 187.
[7] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 187.
[8] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 115.

clients are not classified as beneficiaries because they retain a right to form a clientage relationship with someone other than the founder.[9] Hilāl further specifies his definition of clients by drawing a distinction between clients who are emancipated slaves (*mawālī ʿatāqa*) and those who are under a contract of clientage (*mawālī al-muwālāh*). According to Hilāl, the former are always given preference over the latter in terms of receiving the yields of the *waqf*.[10] As for the definition of "*jīrān*," both al-Khaṣṣāf and Hilāl cite the opinion of Abū Ḥanīfa, who claimed that "a neighbor" includes all of those who border the estate of the founder (*yulāṣikūn dār al-wāqif*) regardless of whether they are slaves, free-born women, Muslims or *dhimmī*s.[11] Al-Khaṣṣāf and Hilāl further note that another definition of "a neighbor" consists of those who gather in the mosque together.[12] And lastly, Hilāl offers a definition of a neighbor based upon an *athar* concerning ʿAlī b. Abī Ṭālib in which the fourth caliph stated that a neighbor is anyone who resides within ear-shot of the town crier (*al-munādī*).[13]

In addition to defining categories of beneficiaries, the *waqf* treatises also address how to rank beneficiaries in order of priority. For example, Hilāl discusses the case of a founder who creates a *waqf* on the condition that he retain the right to show preference (*afḍala*) to some beneficiaries over others. Hilāl points out, however, that the act of showing preference (*afḍala*) towards some beneficiaries requires that all the beneficiaries receive something from the yields of the endowment.[14] If anyone is excluded, then "this is not preference, this is singling out [someone] (*laysa bi-tafḍīl innamā hādhā ikhtiṣāṣ*)."[15] Alternatively, in the case of a *waqf* diminished by the founder's debts or small yields, it might not be possible to provide for all the beneficiaries. In such a case, who is entitled to the yields? According to al-Khaṣṣāf, kin relations take precedence over clients who, in turn, take precedence over neighbors.[16]

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[9] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 188–89.
[10] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 189.
[11] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 198–99; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 182. Al-Khaṣṣāf also cites Zufar b. al-Hudhayl who reiterated Abū Ḥanīfa's assertion that a neighbor is someone who lives on the borders of the founder's estate.
[12] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 198–99; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 182. In the *Aḥkām al-Awqāf* of al-Khaṣṣāf, this definition is attributed to Abū Yūsuf.
[13] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 199.
[14] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 309–10.
[15] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 310.
[16] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 238.

"For the poor" (ʿalā al-fuqarāʾ)

In the *waqf* treatises, Hilāl and al-Khaṣṣāf also explore how certain phrasings and small semantic differences can alter significantly the manner in which the yields of a *waqf* are disbursed. Hilāl observes that the inclusion of the clause "for the poor" (*ʿalā al-fuqarāʾ*) imposes a 200 *dirham* limit on the amount of yields any one person can receive. As a result, a *waqf* established "for my nearest kin, in order of priority of relationship" and then for those next closest in relation" (*ʿalā qarābatī al-aqrab*[17] *faʾl-aqrab*) is treated quite differently from a *waqf* established "for my *poor* kin, in order of priority of relationship" (*ʿalā fuqarāʾ qarābatī al-aqrab faʾl-aqrab*):

> He said: [I]f the *waqf* is for the poor (*ʿalā al-fuqarāʾ*) I do not exceed the amount of 200 *dirham*s for the nearest [kin relation] until the remaining [poor kin relations] receive a share similar to this. And I would conclude [disbursement of the yields] according to the amount[s] that the founder had specified. But if he had specified the rich and the poor among them [*i.e.*, he did not say *ʿalā al-fuqarāʾ*], and did not intend that the *ṣadaqa* was for the poor [exclusively], I would begin with the [kin] nearest in relation to him. And I would give him all of the yields because the founder neither mentioned the poor nor the rich; he only wanted the person nearest in relation to him.[18]

Similarly, Hilāl notes how this same phrase, "*ʿalā al-fuqarāʾ*," makes a founder's minor children ineligible to take from the yields of a *waqf* because they are considered to be in a relationship of dependence with their father.[19] If the founder is rich enough to create a *waqf*, then his children cannot be considered "poor" since their financial status is inseparable from that of their father-founder. Hilāl applies the same principle to the wife of the founder and any of his

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[17] Al-Khaṣṣāf's treatise contains a section defining who is nearest (*aqrab*) in relation to the founder among various sets of kin relations. See al-Khaṣṣāf, *Aḥkām al-Awqāf*, 52–56.

[18] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 225. It is possible that this last sentence is an editing error and actually constitutes a *qultu/qāla* exchange, which I reconstruct as follows:

> I said: But if he had specified the rich and the poor among them, and did not intend that the *ṣadaqa* was for the poor [exclusively]?
>
> He said: I would begin with the [kin] nearest in relation to him. And I would give him all of the yields because the founder neither mentioned the poor nor the rich; he only wanted the person nearest in relation to him.

[19] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 229–30.

children—regardless of age—who might be chronically ill (*al-zamnā*).[20] By contrast, a *waqf* established for kin relations that omits the phrase "'*alā al-fuqarā*'" does not contain these restrictions because the financial status of the beneficiaries is no longer an issue.[21]

Grammatical Distinctions

Other semantic distinctions addressed in the *waqf* treatises concern the repercussions of singular and plural forms, and the impact of possessive pronouns on the disbursement of *waqf* yields. For example, Hilāl demonstrates how a seemingly inconsequential difference between the singular and plural forms of the word "poor" has a significant effect on how the yields of a *waqf* are disbursed:[22]

> I said: What is your opinion if it were the case that he said, "This land of mine is a *ṣadaqa mawqūfa* for those who are poor (*faqīr*, sing.) from among the descendants (*nasl*) of so-and-so," and there is only one poor person among the descendants of so-and-so?
>
> He said: The one [poor person] is entitled to all the yields. And if there are more than this, they are all entitled [to the yields] collectively.
>
> I said: What is your opinion if it were the case that he said, "This land of mine is a *ṣadaqa mawqūfa* for the poor (*fuqarā'*, pl.) of the children of so-and-so and his progeny," and there is only one poor person among them?
>
> He said: He is entitled to one-half of the yields.
>
> I said: And why do you say this?

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[20] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 229–31.

[21] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 254.

[22] Al-Khaṣṣāf's treatise also contains several sections which focus on this singular/plural distinction (see pages 48, 51, 116, 147). In the following *qultu/qāla* dialogue, the same distinction between singular and plural forms is drawn in regard to the word *walad*, and its plural, *awlād*:

> I said: And what is your opinion of a man who says, "This land of mine is a *ṣadaqa mawqūfa* for God the Exalted in perpetuity for any child (*walad*, sing.) of Zayd, and after him it is for the destitute"?
>
> He said: The *waqf* is permitted and the child (*walad*, sing.) of Zayd is entitled to the yields. . . . And as long as it is the case that there remains among [Zayd's children] one child, then he or she is entitled to all of its yields. And if he dies then its yields are for the destitute (*i.e.*, the remainder interest).

He said: Because he said "poor (*fuqarā'*, pl.) of the family (*āl*) of so-and-so," and there is only one poor person. So he is entitled to one-half of the yields.

I said: And why do you say this?

He said: Because he said "poor" (*fuqarā'*, pl.) and saying this implies not less than two people.[23] I would give the one [poor person] one-half because if there is one, he [does not meet the numerical requirements expressed by the term] "poor" (*fuqarā'*, pl.).[24] So, therefore, I give him one-half.

I said: And, in your opinion, this does not resemble the previous example?

He said: In my opinion, it does not resemble it because he said in the first example, "those who are among the poor (*faqīr*, sing.)" and this means it is for one or more of these people.[25]

Both *waqf* treatises also consider the relationship between pronominal suffixes (*hu, humā, hum*) and ordering in a *waqf* deed. In the following passage, al-Khaṣṣāf discusses a *waqf* that has been designated for the three stock figures, Zayd, ʿAmr and ʿAbd Allāh, and how the ordering of these three figures impacts the meaning of the pronominal suffix construction "his/their children" in its singular, dual, and plural forms:

I said: And if he said "for Zayd, ʿAmr and ʿAbd Allāh"?

He said: The yields are (divided) among them in thirds.

I said: And if he had said "the children (*awlād*, pl.) of Zayd" and some of them died?

He said: If there remains amongst them two [children] then they are entitled to the yields collectively and their share is abolished through death. But if there remains amongst them only one [child], then he is entitled to one-half the yields, and the other half is for the destitute because it is less than that which is signified by the word "*awlād*," namely, two or more children. . . .

Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 147.

[23] Both treatises confusingly conclude that the plural form of a word implies two or more people. The Arabic language possesses a dual form, however, which should mean that a plural form refers to three or more people, not two or more.

[24] *I.e.*, the plural form of the word "poor" (*fuqarā'*) refers to a minimum of two people.

[25] Hilāl al-Raʾy, *Aḥkām al-Waqf*, 65. In a later section in the *Aḥkām al-Waqf* (pages 283–84), Hilāl discusses a *waqf* that is dedicated to several charitable purposes: the poor (*al-fuqarā'*), the destitute (*al-masākīn*), debtors (*al-gharā'im*), the Holy War (*fī sabīl Allāh*), slaves (*al-riqāb*), and travelers (*ibn al-sabīl*). Hilāl proposes that the *waqf* should be divided into shares. However, dividing the *waqf* in this manner creates immediate problems. Hilāl notes that some jurists have held that each charitable purpose should receive a single share, while others have argued that the plural forms of "debtors," "slaves" and "the destitute" entitle these categories to two shares.

I said: And if he said "for Zayd, ʿAmr, ʿAbd Allāh and his [singular-form] children (*wuldihi*)"?

He said: Then Zayd, ʿAmr, ʿAbd Allāh and the children of ʿAbd Allāh are entitled to the yields exclusively.

I said: And if he said "for Zayd, ʿAmr, ʿAbd Allāh and their [dual-form] children (*wuldihumā*)"?

He said: Then Zayd, ʿAmr, ʿAbd Allāh, the children of ʿAbd Allāh and the children of ʿAmr are entitled to the yields. And the children of Zayd are entitled to nothing.

I said: And likewise, if he said "his [singular-form] descendants (*nasluhi*) or their [dual-form] descendants (*nasluhumā*)"?

He said: The understanding in this matter is the same (*wāḥid*). If he put the singular-form "the child" or "the descendant" in an *iḍāfa* construction, then this refers to the last child or descendant [in the list]. But if two are put into this construction, then this refers to the last child or descendant [in the list] and the child adjacent to him. And the first child is entitled to nothing. But if the children and descendants are referred to collectively, or [the founder] says "their [plural-form] children (*awlādihim*)" or "their [plural-form] descendants (*naslihim*)," then their children and descendants are included collectively in the yields of this *waqf*.[26]

[26] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 137. An almost identical dialogue can be found in Hilāl al-Raʾy, *Aḥkām al-Waqf*, 55–56.

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BIBLIOGRAPHY

Primary Sources

ʿAbd al-Razzāq al-Ṣanʿānī. *Al-Muṣannaf*. 11 vols. Beirut: Maktabat al-Islām, 1983.

Abū Dāwūd. *Sunan Abū Dāwūd*. 3 vols. Translated by Aḥmad Ḥasan. Lahore: Sh. Muḥammad Ashraf, 1984.

Abū Yūsuf, Yaʿqūb b. Ibrāhīm. *Kitāb al-Kharāj*. Cairo: al-Maṭbaʿa al-Salafiyya, 1962.

al-Āmidī, ʿAlī b. Abī ʿAlī. *Al-Iḥkām fī Uṣūl al-Aḥkām*. Cairo: Maṭbaʿat al-Maʿārif, 1914.

al-ʿAẓīmābādī, Muḥammad Shams al-Ḥaqq. *ʿAwn al-Maʿbūd: Sharḥ Sunan Abī Dāwūd*. 14 vols. Edited by ʿAbd al-Raḥmān Muḥammad ʿUthmān. Madīna: al-Maktaba al-Salafiyya, 1968–69.

al-Baghawī, ʿAbū al-Qāsim ʿAbd Allāh b. Muḥammad. *Al-Jaʿdiyyāt Ḥadīth ʿAlī b. al-Jaʿd al-Juharī*. 2 vols. Cairo: Maktaba wa-Maṭbaʿa al-Khānajī, 1994.

al-Baghdādī, Abū al-Faraj Qudāma b. Qudāma al-Kātib. *Kitāb al-Kharāj*. Edited by M. J. de Goeje. Leiden, 1889.

al-Balādhurī, Aḥmad b. Yaḥyā. *The Origins of the Islamic State*. Translated by Philip Hitti and Francis Murgotten. 2 vols. Columbia University Studies in History, Economics, and Public Law, volume 68, nos. 163, 163a. New York: Columbia University Press, 1916–24.

———. *Futūḥ al-Buldān*. Beirut: Dār al-Nashr, 1957.

al-Bayhaqī, Abū Bakr Aḥmad b. al-Ḥusayn b. ʿAlī. "*Kitāb al-Waqf*." In *Kitāb al-Sunan al-Kubrā*. 10 vols. Hyderabad: Dār Ṣādir, 1344–57 A.H.

al-Bayḍāwī, ʿAbd Allāh b. ʿUmar b. Muḥammad b. ʿAlī. *Anwār al-Tanzīl wa-Asrār al-Taʾwīl*. Edited by Winend Fell. 2 vols. 1878. Reprint. Osnabrück, Germany: Biblio-Verlag, 1968.

al-Bazdawī, Fakhr al-Islām In *Kashf al-Asrār* by ʿAbd al-Azīz b. Aḥmad al-Bukhārī. 4 vols. Beirut: Dār al-Kitāb al-ʿArabī, 1974.

al-Bukhārī, Muḥammad b. Ismāʿīl. *Al-Taʾrīkh al-Kabīr*. 4 vols. Hyderabad: Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1361–77/1940–58.

———. *Ṣaḥīḥ al-Bukhārī*. 6 vols. Cairo: al-Jumhūriyya al-ʿArabiyya al-Muttaḥida, 1386–93/1966–73.

———. *Sharḥ Ṣaḥīḥ al-Bukhārī liʾl-Zarrūq al-Fāsī*. 6 vols. Cairo: Maṭbaʿat Ḥasan, 1973.

al-Dhahabī, Muḥammad b. Aḥmad. *Mīzān al-Iʿtidāl fī Naqd al-Rijāl*. Edited by ʿAlī Muḥammad al-Bajāw. 4 vols. Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, 1382/1963.

al-Dāraquṭnī, ʿAlī b. ʿUmar. *Sunan al-Dāraquṭnī*. 4 vols. Cairo: Dār al-Maḥāsin liʾl-Ṭibāʿā, 1966.

———. *Kitāb Takhrīj al-Aḥādīth al-Ḍiʿāf*. Beirut: Dār al-Kutub al-ʿIlmiyya, 1990.

al-Dārimī, Abū Muḥammad ʿAbd Allāh b. ʿAbd al-Raḥmān. *Sunan al-Dārimī*. 2 vols. Beirut: Dār al-Qalam, 1991.

al-Ḥamawī, Yāqūt b. ʿAbd Allāh (= Yāqūt). *Muʿjam al-Buldān*. 5 vols. Beirut: Dār Beirut, 1374–76/1955–57.

al-Ḥamawī, Yāqūt b. ʿAbd Allāh, and ʿAbd al-Muʾmīn b. ʿAbd al-Ḥaqq al-Baghdādī (= Yāqūt). *Al-Marāṣid al-Ittilāʿ ʿalā Asmāʾ al-Amkina waʾl-Biqāʿ*. 3 vols. Beirut: Dār al-Maʿrifa, 1954–55.

Hilāl b. Yaḥyā b. Muslim al-Raʾy al-Baṣrī. *Aḥkām al-Waqf*. Madīna: Maṭbaʿat Majlis Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1355/1937.

al-Ḥumaydī, ʿAbd Allāh b. al-Zubayr. *Al-Musnad*. 2 vols. Edited by Ḥabīb al-Raḥmān al-ʿAẓimī. Karachi: al-Majlis al-ʿIlmī, 1963.

Ibn Abī al-Wafāʾ, Abū Muḥammad ʿAbd al-Qādir. *Al-Jawāhir al-Muḍiyya fī Ṭabaqāt al-Ḥanafiyya*. 2 vols. Hyderabad: Dāʾirat al-Maʿārif al-Niẓāmiyya, 1332/1914, and second printing, 1408/1988.

Ibn ʿĀbidīn, Muḥammad Amīn b. ʿUmar. *Rasāʾil*. 2 vols. Beirut: Muʾassasat Fuʾād, 1978.

Ibn Abī Shayba, ʿAbd Allāh b. Muḥammad. *Al-Muṣannaf*. 15 vols. Bombay: al-Dār al-Salafiyya, 1403/1983.

Ibn al-Athīr, ʿIzz al-Dīn. *Al-Kāmil fī al-Taʾrīkh*. 12 vols. Beirut: Dār Ṣādir, 1965–67.

Ibn al-Athīr, Majd al-Dīn al-Mubārak b. Muḥammad. *Al-Nihāya fī Gharīb al-Ḥadīth waʾl-Athar*. 5 vols. Qum, Iran: Muʾassasat Ismāʿīliyān, 1364/1985.

Ibn al-Daybaʿ (al-Shaybānī), ʿAbd al-Raḥmān b. ʿAlī. *Taysīr al-Wuṣūl ilā Jāmiʿ al-Uṣūl min Ḥadīth al-Rasūl*. 4 vols. Egypt: Muṣṭafā al-Bābī al-Ḥalabī, 1968–69.

Ibn Ḥajar al-ʿAsqalānī, Aḥmad b. ʿAlī. *Tahdhīb al-Tahdhīb*. 12 vols. Hyderabad: Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1325/1906.

——. *Subul al-Salām: Sharḥ Bulūgh al-Marām*. 4 vols. in 2. Egypt: Al-Maktaba al-Tijāriyya al-Kubrā, 196–?.

Ibn Ḥanbal, Aḥmad b. Muḥammad. *Al-Musnad*. 22 vols. Egypt: Dār al-Maʿārif, 1951–90.

Ibn Ḥibbān, Muḥammad. *Kitāb al-Thiqāt fī al-Ṣaḥāba waʾl-Tābiʿīn*. 9 vols. Hyderabad: Dāʾirat al-Maʿārif al-ʿUthmāniyya, 1392–1403/1972–83.

Ibn Hishām, ʿAbd al-Malik. *Sīrat al-Nabī*. Edited by Muḥammad Khalīl Harrās. 4 vols. Cairo: Maktabat al-Jumhūriyya, 1971.

Ibn Hishām, ʿAbd al-Malik. *The Life of Mohammad*. Translated by A. Guillaume. Lahore: Oxford University Press, 1955.

Ibn Kathīr, Abū al-Fidāʾ Ismāʿīl b. ʿUmar. *Al-Bidāya waʾl-Nihāya*. 8 vols. in 4. Beirut: Maktabat al-Maʿārif, and Riyāḍ: Maktabat al-Naṣr, 1966.

Ibn Khallikān, Shams al-Dīn. *Wafayāt al-Aʿyān wa-Anbāʾ al-Zamān*. 8 vols. Beirut: Dār Ṣādir, 1968?–72?.

Ibn Māja, Muḥammad b. Yazīd. *Sunan Ibn Māja*. 2 vols. Edited by Muḥammad Fuʾād ʿAbd al-Bāqī. Cairo: ʿĪsā al-Bābī al-Ḥalabī, 1972.

Ibn Manẓūr, Muḥammad b. Mukarram. *Lisān al-ʿArab*. 15 vols. Beirut: Dār Ṣādir, 1979.

Ibn al-Muqaffaʿ. "*Risāla fiʾl-Ṣaḥāba*." In Muḥammad Kurd ʿAlī. *Rasāʾil al-Bulaghāʾ*. 4th ed. Cairo: Lajnat Taʾlīf waʾl-Tarjama waʾl-Nashr, 1374/1954.

Ibn al-Nadīm, Muḥammad b. Isḥāq. *The Fihrist of al-Nadīm*. Translated and edited by Bayard Dodge. 2 vols. New York: Columbia University Press, 1970.

——. *Al-Fihrist li-Ibn al-Nadīm*. 2 vols. Cairo: Dār al-ʿArabī liʾl-Nashr waʾl-Tawzīʿ, 1991.

Ibn Qudāma, Abū Muḥammad ʿAbd Allāh b. Aḥmad b. Muḥammad. *Al-Mughnī*. 10 vols. Cairo: Maṭbaʿat al-Imām, 1964.

Ibn Qutayba, ʿAbd Allāh b. Muslim. *Al-Imāma al-Siyāsa*. 2 vols. Cairo: Muʾassasat al-Ḥalabī liʾl-Nashr waʾl-Tawzīʿ, 1967.

——. *Kitāb al-Maʿārif*. Cairo: Dār al-Maʿārif bi-Miṣr, 1969.

Ibn Saʿd, Muḥammad. *Kitāb al-Ṭabaqāt al-Kabīr*. Edited by Eduard Sachau. 9 vols. Leiden: E. J. Brill, 1904.

al-Jumaḥī, Muḥammad b. Sallām. *Ṭabaqāt al-Shuʿarāʾ*. Edited by Joseph Hell. Leiden: E. J. Brill, 1916.

al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad b. ʿAlī. *Taʾrīkh Baghdād aw Madīnat al-Salām*. 24 vols. Beirut: Dār al-Kutub al-ʿIlmiyya, 1997.

al-Khaṣṣāf, Abū Bakr Aḥmad b. ʿAmr al-Shaybānī al-Maʿrūf biʾl-Khaṣṣāf. *Kitāb Aḥkām al-Awqāf*. Cairo: Maktabat al-Thaqāfa al-Dīniyya, 1322/1904.

——. *Kitāb Adab al-Qāḍī*. Edited by Farḥāt Ziyāda. Cairo: The American University in Cairo Press, 1978.

——. *Kitāb al-Nafaqāt*. Edited by Abū al-Wafāʾ al-Afghānī. Beirut: Dār al-Kutub al-ʿArabī, 1404/1984.
Mālik b. Anas. *Al-Muwaṭṭaʾ*. Beirut: Dār al-Nafāʾis, 1977.
al-Masʿūdī, ʿAlī b. al-Ḥusayn. *Al-Tanbīh waʾl-Ishrāf*. Baghdād: Maktabat al-Muthannā, 1357/1938.
——. *Murūj al-Dhahab*. 4 vols. Beirut: Dār al-Andalus, 1385/1965.
——. *The Meadows of Gold: The ʿAbbāsids*. Translated and edited by Paul Lunde and Caroline Stone. London and New York: Kegan Paul International, 1989.
al-Mizzī, Jamāl al-Dīn Abū al-Ḥajjāj Yūsuf b. al-Zakī ʿAbd al-Raḥmān. *Tahdhīb al-Kamāl fī Asmāʾ al-Rijāl*. 35 vols. Beirut: Muʾassasat al-Risāla, 1980–1992.
Muslim b. Ḥajjāj al-Qushayrī. *Ṣaḥīḥ Imām Muslim*. 2 vols. Cairo: Dār al-Salām, 1409/1988.
Nāṣif, Manṣūr ʿAlī. *Al-Tāj al-Jāmiʿ liʾl-Uṣūl fī Aḥādīth al-Rasūl*. 5 vols. Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, 1968.
al-Nasāʾī, Aḥmad b. Shuʿayb. *Sunan al-Nasāʾī*. 8 vols. Egypt: Muṣṭafā al-Bābī al-Ḥalabī, 1964–65.
al-Nawawī, Muḥyī al-Dīn Yaḥyā b. Sharaf. "Commentary." In Aḥmad b. Muḥammad al-Qasṭallānī. *Irshād al-Sārī li-Sharḥ Ṣaḥīḥ al-Bukhārī*. 10 vols. 1886–88. Reprint of the sixth edition. Baghdād: Maktabat al-Muthannā, 1971.
al-Qasṭallānī, Aḥmad b. Muḥammad. *Irshād al-Sārī li-Sharḥ Ṣaḥīḥ al-Bukhārī*. 10 vols. 1886–88. Reprint of the sixth edition. Baghdād: Maktabat al-Muthannā, 1971.
Saḥnūn, ʿAbd al-Salam b. Saʿīd al-Tanūkhī. *Al-Mudawwana al-Kubrā*. 16 vols. Cairo: Maṭbaʿat al-Saʿāda, 1323–42 A.H.
al-Samhūdī, ʿAlī b. Aḥmad. *Wafāʾ al-Wafāʾ bi-Akhbār Dār al-Muṣṭafā*. 2 vols. Cairo: al-Adab waʾl-Muʾayyad, 1326/1908.
al-Sarakhsī, Abū Bakr Muḥammad b. Abī Sahl. *Kitāb al-Mabsūṭ*. 30 vols. Cairo: Maṭbaʿat al-Saʿāda, 1906–13.
——. *Sharḥ Kitāb al-Siyar al-Kabīr li-Muḥammad b. al-Ḥasan al-Shaybānī*. Edited by Ṣalāḥ al-Dīn al-Munajjid. 5 vols. Cairo: Maṭbaʿat Miṣr, 1971–72.
——. *Uṣūl al-Sarakhsī*. Edited by Abū al-Wafāʾ al-Afghānī. 2 vols. Beirut: Dār al-Maʿarifa, 1973.
al-Ṣaymarī. *Akhbār Abī Ḥanīfa wa-Aṣḥābihi*. Beirut, 1985.
al-Shāfiʿī, Muḥammad b. Idrīs. *Kitāb al-Umm*. Edited by Muḥammad Zuhrī al-Najjār. 8 vols. Cairo: Maktabat al-Kulliyyāt al-Azhariyya, 1961.
——. *Al-Risāla*. Edited by Aḥmad Muḥammad Shākir. Cairo: Maktabat Dār al-Turāth, 1979.
——. *Al-Risāla*. Translated and edited by Majid Khadduri. Cairo: Maktaba Dār al-Turāth, 1979.
al-Shawkānī, Muḥammad b. ʿAlī. *Nayl al-Awṭār*. 8 vols. Egypt: Muṣṭafā al-Bābī, 1952.
al-Shaybānī, Muḥammad b. al-Ḥasan. *Kitāb al-Aṣl*. 5 vols. Cairo: Maṭbaʿat Jāmiʿat al-Qāhira, 1954.
Sufyān al-Thawrī. *Kitāb al-Farāʾiḍ*. Edited by Hans-Peter Raddatz. *Die Welt des Islams* 13 (1971): 26–78.
al-Ṭabarī, Abū Jaʿfar Muḥammad b. Jarīr. *Taʾrīkh al-Rusul waʾl-Mulūk*. Edited by Muḥammad Abū al-Faḍl Ibrāhīm. 2d ed. 10 vols. Cairo: Dar al-Maʿārif, 1960–69.
——. *Jāmiʿ al-Bayān ʿan Taʾwīl al-Qurʾān*. 30 vols. Egypt: Dār al-Maʿārif, 1969–??.
al-Ṭaḥāwī, Aḥmad b. Muḥammad. *Sharḥ al-Ṭaḥāwiyya*. Cairo: Zakariyyāʾ ʿAlī Yūsuf, Maṭbaʿat al-ʿĀṣima, 196?.
——. *Sharḥ al-Maʿānī al-Āthār*. 4 vols. Cairo: Maṭbaʿat al-Anwār al-Muḥammadiyya, 1968–?.
——. *The Function of Documents in Islamic Law: The Chapter on Sales from Ṭaḥāwī's Kitāb al-Shurūṭ al-Kabīr*. Edited by Jeanette A. Wakin. Albany: State University of New York Press, 1972.

al-Tamīmī, Taqī al-Dīn b. ʿAbd al-Qādir. *Al-Ṭabaqāt al-Saniyya fī Tarājim al-Ḥanafiyya*. Edited by ʿAbd al-Fattāḥ Muḥammad Aḥmad al-Ḥilw. 3 vols. Riyad, 1983.
al-Ṭayālisī, Abū Dāwūd. *Al-Musnad*. Hyderabad: Maṭbaʿat Majlis Dāʾirat al-Maʿārif al-Niẓāmiyya, 1321/1903.
al-Tirmidhī, Muḥammad b. ʿĪsā. *Al-Jāmiʿ al-Ṣaḥīḥ*. 5 vols. Medina: al-Maktaba al-Salafiyya, 1965–67.
al-ʿUqaylī, Muḥammad b. ʿAmr b. Mūsā. *Kitāb al-Ḍuʿafāʾ*. 4 vols. Beirut: Dār al-Kutub al-ʿIlmiyya, 1984.
Wāqidī, Muḥammad b. ʿUmar. *Kitāb al-Maghāzī*. 3 vols. Edited by Marsden Jones. London: Oxford University Press, 1966.
Yaḥyā b. Ādam. *Kitāb al-Kharāj*. Cairo: al-Maṭbaʿa al-Salafiyya, 1964.
al-Ziriklī, Khayr al-Dīn. *Al-Aʿlām*. 2d ed. 10 vols. Cairo: Jamīʿ al-Ḥuqūq Maḥfūẓa liʾl-Muʾallif, 1954–59.

Secondary Sources

Abbot, Nadia. *Studies in Arabic Literary Papyri*. 3 vols. Chicago: The University of Chicago Press, 1957–72.
Ali, Saleh A. el-. "Muslim Estates in Hidjaz in the First Century A.H." *Journal of the Economic and Social History of the Orient* 2 (1959): 247–61.
Ali, Syed Ameer. *Mohammedan Law*. 2 vols. Lahore, Pakistan: The Punjab Educational Press, 1965.
Aly Pacha, S. E. Mohamed. "Le *wakf* est-il une institution religieuse? Les conséquences des *wakfs ahli* sur l'intérêt général, les motifs de ces *wakfs*." *L'Égypte contemporaine* 18 (1927): 385–402.
Amīn, Muḥammad M. *Al-Awqāf waʾl-Ḥayāt al-Ijtimāʿiyya fī Miṣr: 648/923–1250/1517 (Pious Endowments and Social Life in Egypt)*. Cairo: Cairo University Press, 1980.
———. *Fihrist Wathāʿiq al-Qāhira ḥattā nihāyat ʿAsr Salāṭīn al-Mamālīk/Catalogue des documents d'archives du Caire, de 239/853 à 922/1516, suivi de l'édition critique de neuf documents*. Cairo: Institut français d'archéologie orientale du Caire, 1981.
Anderson, J. N. D. "The Religious Element in *Waqf* Endowments." *Journal of the Royal Central Asian Society* 38/4 (1951): 292–99.
Ansari, Zafar Ishaq. "Islamic Juristic Terminology Before Šāfiʿī: A Semantic Analysis with Special Reference to Kūfa." *Arabica* 19/3 (1972): 255–300.
———. "An Early Discussion on Islamic Jurisprudence: Some Notes on *al-Radd ʿalā Siyar al-Awzāʿī*." In *Islamic Perspectives: Studies in Honour of Mawlānā Sayyid Abul Aʿlā Mawdūdī*, edited by Hurshid Ahmad and Zafar Ishaq Ansari, 147–67. London: The Islamic Foundation, 1980.
Arjomand, Said Amir. "Philanthropy, the Law, and Public Policy in the Islamic World before the Modern Era." In *Philanthropy in the World's Traditions*, edited by Warren F. Ilchman, Stanley N. Katz, Edward L. Queen II, 109–32. Bloomington: Indiana University Press, 1998.
Azami, M. M. *Studies in Early Ḥadīth Literature*. Beirut, 1968.
———. *Studies in Ḥadīth Methodology and Literature*, 1977.
———. *On Schacht's Origins of Muhammadan Jurisprudence*. Cambridge, England: Islamic Texts Society, 1993.
Bacon, Francis. *Reading upon the Statute of Uses* (read in 1600, first published 1642), in *The Works of Francis Bacon*. Edited by J. Spedding, R. L. Ellis, and D. D. Heath. London, 1917.
Baer, Gabriel. "The *Waqf* as a Prop for the Social System (Sixteenth–Twentieth Centuries." *Islamic Law and Society* 4/3 (1997): 264–97.
Baillie, Neil B. E. *A Digest of Moohummudan Law*. 2 vols. Lahore, Pakistan: Premier Book House, 1958.

Barnes, John Robert. *An Introduction to Religious Endowments in the Ottoman Empire*. Leiden: E. J. Brill, 1986.
Barton, J. L. "The Medieval Use." *The Law Quarterly Review* 81 (1965): 562–77.
Bashear, Suliman. "The Title '*Fārūq*' and its Association with 'Umar I." *Studia Islamica* 72 (1990): 47–70.
Beeston, A. F. L., T. M. Johnstone, R. B. Serjeant, and G. R. Smith, eds. *Arabic Literature to the End of the Umayyad Period*. Cambridge History of Arabic Literature. Cambridge: Cambridge University Press, 1985.
Behrens-Abouseif, Doris. "Change in Function and Form of Mamlūk Religious Institutions." *Annales Islamologiques* 21 (1985): 73–93.
——. *Egypt's Adjustment to Ottoman Rule: Institutions, Waqf & Architecture in Cairo (16th and 17th Centuries)*. Leiden: E. J. Brill, 1994.
Bekhit, Mohamed. "De l'institution du *wakf*." *L'Égypte contemporaine* 18 (1927): 403–31.
Berchem, Max van. *Matériaux pour un corpus inscriptionum arabicarum*. 10 vols. Paris: E. Leroux, 1894–1956.
Berkey, Jonathan P. *The Transmission of Knowledge in Medieval Cairo: A Social History of Islamic Education*. Princeton, NJ: Princeton University Press, 1992.
——. Review of *Religion, Law and Learning in Classical Islam*, by George Makdisi. In *Islamic Law and Society* 4/2 (1997): 242–44.
Birks, Peter, ed. *New Perspectives in the Roman Law of Property*. Oxford: Clarendon Press, 1989.
Black's Law Dictionary, 5th ed. St. Paul: West Publishing Co., 1979.
Blankinship, Khālid Yaḥyā. *The End of the Jihād State: The Reign of Hishām ibn 'Abd al-Malik and the Collapse of the Umayyads*. Albany: State University of New York Press, 1994.
Bremner, Robert H. *Giving: Charity and Philanthropy in History*. New Brunswick and London: Transaction Publishers, 1994.
Brockelmann, Carl. *Geschichte der arabischen Litteratur*. Original edition: 2 vols., Leiden: E. J. Brill, 1943–49, 3 supplement vols., Leiden: E. J. Brill, 1937–42.
Brockopp, Jonathan E. "Slavery in Islamic Law: An Examination of Early Mālikī Jurisprudence." Ph.D. diss., Yale University, 1995.
——. "Early Islamic Jurisprudence in Egypt: Two Scholars and their *Mukhtaṣar*s." *International Journal of Middle East Studies* 30 (1998): 167–82.
——. *Early Mālikī Law: Ibn 'Abd al-Ḥakam and His Major Compendium of Jurisprudence*. Leiden: E. J. Brill, 2000.
——. "Competing Theories of Authority in Early Mālikī Texts." In *Studies in Islamic Legal Theory*, edited by Bernard G. Weiss, 3–22. Leiden: E. J. Brill, 2002.
Brown, Brendan F. "The Ecclesiastical Origin of the Use." *Notre Dame Lawyer* 10 (1935): 353–66.
Brunschvig, Robert. "Logic and Law in Classical Islam." In *Logic in Classical Islamic Culture*, edited by Gustave E. von Grunebaum, 9–20. First Giorgio Levi Della Vida biennial conference. Wiesbaden: Otto Harrassowitz, 1970.
——. "Considérations sociologiques sur le droit musulman ancien." In *Études d'Islamologie*, 2: 119–32. Paris: G.-P. Maisonneuve and Larose, 1976.
——. "De la fiction légale dans l'Islam médiévale." In *Études d'Islamologie*, 2: 335–46. Paris: G.-P. Maisonneuve and Larose, 1976.
——. *Études d'Islamologie*. 2 vols. Paris: G.-P. Maisonneuve and Larose, 1976.
——. "Logique et droit dans l'Islam classique." In *Études d'Islamologie*, 2: 347–62. Paris: G.-P. Maisonneuve and Larose, 1976.
Buchanan, Allen. "Charity, Justice, and Ideas of Moral Progress." In *Giving: Western Ideas of Philanthropy*, edited by J. B. Schneewind, 98–116. Bloomington and Indianapolis: Indiana University Press, 1996.
Busse, Heribert. "'Omar's Image as the Conqueror of Jerusalem." *Jerusalem Studies in Arabic and Islam* 8 (1986): 149–68.

Cahen, Claude. Review of *Islamic Taxation in the Classic Period*, by Frede Lokkegaard. In *Arabica* 1 (1954): 346–53.
——. "Réflexions sur le *waqf* ancien." *Studia Islamica* 14 (1961): 37–56.
——. "Histoire economic-sociale et islamologie. Le problème prejudiciel de l'adaptation entre les autochtones et l'Islam." In *Actes du Colloque sur la sociologie musulmane, Correspondance d'Orient* 5, 197–215. Brussels, 1961.
——. "Le changeante portée sociale de quelques doctrines religieuses." In *L'élaboration de l'Islam*, 5–22. Paris: Presses universitaires de France, 1961.
——. "Economy, Society, Institutions." In *Cambridge History of Islam: Islamic Society and Civilization*, edited by P. M. Holt, Ann K. S. Lambton, and Bernard Lewis, 2: 511–38. Cambridge: Cambridge University Press, 1970.
——. *Les peuples musulmans dans l'histoire médiévale*. Damascus: Institut Français de Damas, 1977.
Calder, Norman. *Studies in Early Muslim Jurisprudence*. Oxford: Clarendon Press, 1993.
Carter, M. G. "Analogical and Syllogistic Reasoning in Grammar and Law." In *Islam: Essays on Scripture, Thought and Society*, edited by Peter G. Riddell and Tony Street, 105–12. Leiden: E. J. Brill, 1997.
Casson, L. "The Administration of Byzantine and Early Arab Palestine." *Aegyptus* 32 (1952): 54–60.
Cattan, Henry. "The Law of *Waqf*." In *Law in the Middle East: Origin and Development of Islamic Law*, edited by Majid Khadduri and Herbert J. Liebesny, 1: 203–22. Washington D.C.: The Middle East Institute, 1955.
Chamberlain, Michael. *Knowledge and Social Practice in Medieval Damascus, 1190–1350*. Cambridge: Cambridge University Press, 1994.
Chehata, Chafik. "Logique juridique et droit musulman." *Studia Islamica* 23 (1965): 5–25.
——. "L'équité en tant que source du droit hanafite." *Studia Islamica* 25 (1966): 123–38.
Chelhod, Joseph. *Introduction à la sociologie de l'Islam*. Paris: G.-P. Maisonneuve et Larose, 1958.
——. *Les structures du sacré chez les arabes*. Paris: G.-P. Maisonneuve et Larose, 1964.
——. "*Ḥimā*." *EI*², 3: 393.
Cilardo, Agostino. *Studies on the Islamic Law of Inheritance*. Napoli: Istituto Universitario Orientale, 1990.
Çizakça, Murat. "Cash *Waqf*s of Bursa, 1555–1823." *Journal of the Economic and Social History of the Orient* 38/3 (1995): 313–54.
——. *A History of Philanthropic Foundations: The Islamic World from the Seventeenth Century to the Present*. Istanbul: Boğaziçi University Press, 2000.
Constantelos, Demetrios J. *Byzantine Philanthropy and Social Welfare*. New Brunswick, NJ: Rutgers University Press, 1968.
——. *Poverty, Society and Philanthropy in the Late Mediaeval Greek World*. New Rochelle, NY: Aristide D. Caratzas, Publisher, 1992.
Cook, Michael. *Early Muslim Dogma*. Cambridge: Cambridge University Press, 1981.
——. "Eschatology and the Dating of Traditions." *Princeton Papers in Near Eastern Studies* 1 (1992): 23–48.
——. "The Opponents of the Writing of Tradition in Early Islam." *Arabica* 46/4 (1997): 437–530.
Cooper, Richard S. "Land Classification Terminology and the Assessment of the *Kharāj* Tax in Medieval Egypt." *Journal of the Economic and Social History of the Orient* 17 (1974): 91–102.
——. "The Assessment and Collection of *Kharāj* Tax in Medieval Egypt." *Journal of the American Oriental Society* 96 (1976): 365–82.
Coulson, Noel J. *A History of Islamic Law*. Edinburgh: Edinburgh University Press, 1964.

——. "Correspondence." *Middle Eastern Studies* 3 (1967): 195–203.
——. *Conflicts and Tensions in Islamic Jurisprudence*. Chicago: The University of Chicago Press, 1969.
——. *Succession in the Muslim Family*. London: Cambridge University Press, 1971.
——. "A Comparison of the Law of Succession in the Islamic and British Legal Systems." *The American Journal of Comparative Law* 26 (1978): 227–32.
Crecelius, Daniel. "The *Waqfiyyah* of Muḥammad Bey Abū al-Dhahab." *Journal of the American Research Center in Egypt* 15 (1978): 83–105.
——. "Archival Sources for Demographic Studies of the Middle East." In *The Islamic Middle East, 700–1900: Studies in Economic and Social History*, edited by Abraham L. Udovitch, 349–74. Princeton, NJ: The Darwin Press, Inc., 1981.
——. "Introduction." *Journal of the Economic and Social History of the Orient* 38/3 (1995): 247–61.
Crone, Patricia. *Slaves on Horses: The Evolution of the Islamic Polity*. Cambridge: Cambridge University Press, 1980.
——. "*Jāhilī* and Jewish Law: The *Qasāma*." *Jerusalem Studies in Arabic and Islam* 4 (1984): 153–201.
——. *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronate*. London and New York: Cambridge University Press, 1987.
Crone, Patricia, and Michael Cook. *Hagarism: The Making of the Islamic World*. Cambridge: Cambridge University Press, 1977.
Crone, Patricia, and Martin Hinds. *God's Caliph: Religious Authority in the First Centuries of Islam*. New York: Cambridge University Press, 1986.
Crook, J. A. *Law and Life of Rome, 90 B.C.–A.D. 212*. Aspects of Greek and Roman Life. Ithaca, NY: Cornell University Press, 1967.
Darraj, Aḥmad. *L'acte de waqf de Barsbāy (Ḥuǧǧat waqf Barsbāy)*. Cairo: Institut français d'archéologie orientale du Caire, 1963.
Daube, David. "Rabbinic Methods of Interpretation and Hellenistic Rhetoric." *Hebrew Union College Annual* 22 (1949): 239–64.
——. *The Collected Works of David Daube, Volume I: Talmudic Law*. Edited by Calum M. Carmichael. Berkeley: The Robbins Religious and Civil Law Collection, 1992.
Décobert, Christian. *Le mendiant et le combattant*. Paris: Éditions du Seuil, 1991.
——. "L'institution du *waqf*, la *baraka* et la transmission du savoir." In *Modes de transmission de la culture religieuse en Islam*, edited by Hassan Elboudrari, 25–40. Cairo: Institut français d'archéologie orientale du Caire, 1993.
Deguilhem, Randi, ed. *Le waqf dans l'espace islamique outil de pouvoir socio-politique*. Damascus: L'institut français d'études arabes de Damas, 1995.
Dennett, Daniel C. *Conversion and the Poll Tax in Early Islam*. Harvard Historical Monographs 22. Cambridge, MA: Harvard University Press, 1950.
Digby, Kenelm Edward. *An Introduction to the History of the Law of Real Property*. Oxford: Clarendon Press, 1875.
Donner, Fred. *The Early Islamic Conquests*. Princeton: Princeton University Press, 1981.
Duff, P. W. "The Charitable Foundations of Byzantium." In *Cambridge Legal Essays Written in Honour of and Presented to Doctor Bond, Professor Buckland, and Professor Kenny*, 83–99. Cambridge, England: W. Heffer & Sons, Ltd., 1926.
Dūrī, ʿAbd al-ʿAzīz. *Taʾrīkh al-ʿIrāq al-Iqtiṣādī fī al-Qarn al-Rābiʿ al-Hijrī (Economic History of Iraq in the Fourth Century A.H.)*. Baghdād: Maṭbaʿat al-Maʿārif, 1948.
——. "The Origins of *Iqṭāʿ* in Islam." *Al-Abḥāth* 22/1–2 (1969): 3–22.
——. "Notes on Taxation in Early Islam." *Journal of the Economic and Social History of the Orient* 17 (1974): 136–44.
——. *The Rise of Historical Writing Among the Arabs*. Edited and translated by Lawrence I. Conrad. Princeton, NJ: Princeton University Press, 1983.
Ess, Josef van. "The Logical Structure of Islamic Theology." In *Logic in Classical*

Islamic Culture, edited by Gustave E. von Grunebaum, 21–50. First Giorgio Levi Della Vida biennial conference. Wiesbaden: Otto Harrassowitz, 1970.
——. "*Ḳadariyya*." *EI*², 4: 368–72.
——. "*Mu'tazilah*." *The Encyclopedia of Religion*, 10: 220–29 (New York: Macmillan Publishing Company, 1987.
Fadel, Mohammad. "*Istiḥsān* is Nine-tenths of the Law": The Puzzling Relationship of *Uṣūl* to *Furūʿ* in the Mālikī *Madhhab*. In *Studies in Islamic Legal Theory*, edited by Bernard G. Weiss, 161–76. Leiden: E. J. Brill, 2002.
Faizer, Rizwi S. "The Issue of Authenticity Regarding the Traditions of al-Wāqidī as Established in his *Kītāb al-Maghāzī*." *Journal of Near Eastern Studies* 58 (1999): 97–106.
Farooqi, Muhammad Yousuf. "The Institution of *Waqf* in Historical Perspective." *Hamdard Islamicus* 13/1 (1990): 25–31.
Fernandes, Leonor. "Three Sufi Foundations in a Fifteenth Century *Waqfiyya*." *Annales Islamologiques* 17 (1981): 141–58.
——. "Notes on a New Source for the Study of Religious Architecture during the Mamlūk Period: the *Waqfiya*." *Al-Abḥāth* 33 (1985): 3–12.
——. "Mamluk Politics and Education: The Evidence from Two Fourteenth Century *Waqfiyya*s." *Annales Islamologiques* 23 (1987): 87–98.
——. "The Foundation of Baybars al-Jashankir: Its *Waqf*, History, and Architecture." *Muqarnas* 4 (1987): 21–42.
——. *The Evolution of a Sufi Institution in Mamluk Egypt: The Khanqah*. Berlin: Klaus Schwarz Verlag, 1988.
Finkelstein, Jacob J. "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty." *Temple Law Quarterly* 46/2 (1973): 169–290.
——. "The Ox That Gored." *Transactions of the American Philosophical Society* 71/2 (1981): 1–89.
Fleming, John G. "Changing Functions of Succession Laws." *The American Journal of Comparative Law* 26 (1978): 233–38.
Forand, Paul G. "The Status of the Land and its Inhabitants of the Sawād During the First Two Centuries of Islām." *Journal of the Economic and Social History of the Orient* 14/1 (1971): 25–37.
Frank, Robert. "Motivation, Cognition, and Charitable Giving." In *Giving: Western Ideas of Philanthropy*, edited by J. B. Schneewind, 130–152. Bloomington and Indianapolis: Indiana University Press, 1996.
Fratcher, William F. "Uses of Uses." *Missouri Law Review* 34 (1969): 39–66.
——. "The Islamic *Wakf*." *The Missouri Law Review* 36 (1971): 153–66.
Fuad Köprülü. "L'institution du Vakouf: Sa nature juridique et son évolution historique." *Vakiflar Dergisi* 2/3 (1942): French section.
Gabrieli, F. "The Transmission of Learning and Literary Influences to Western Europe." In *Cambridge History of Islam: Islamic Society and Civilization*, edited by P. M. Holt, Ann K. S. Lambton, and Bernard Lewis, 2: 851–89. Cambridge: Cambridge University Press, 1970.
Garcin, Jean Claude, and Mustapha Anouar Taher. "Enquête sur le financement d'un *waqf* égyptian du XV^e^ siècle: les comptes de Jawhār al-Lālā." *Journal of the Economic and Social History of the Orient* 38/3 (1995): 262–304.
Gatteschi, Domenico. *Étude sur la propriété foncière, les hypothèques et les wakfs*. Alexandria: Edward A. van Dyck, 1869.
Gaudefroy-Demombynes, Maurice. *Muslim Institutions*. Translated by John P. MacGregor. London: George Allen & Unwin, Ltd., 1950.
——. *Mahomet*. 2d ed. Paris: A. Michel, 1969.
Gaudiosi, Monica M. "The Influence of the Islamic *Waqf* on the Development of the Trust in England: The Case of Merton College." *University of Pennsylvania Law Review* 136 (1988): 1231–61.

Gerber, Haim. "Rigidity Versus Openness in Late Classical Islamic Law: The Case of the Seventeenth-Century Palestinian Muftī Khayr al-Dīn al-Ramlī." *Islamic Law and Society* 5/2 (1998): 165–95.

Gibb, H. A. R. "Government and Islam Under the Early ʿAbbāsids." In *L'élaboration de l'Islam*, 115–27. Paris: Presses universitaires de France, 1961.

Gil, Moshe. *Documents of the Jewish Pious Foundations from the Cairo Geniza*. Leiden: E. J. Brill, 1976.

——. "The Earliest *Waqf* Foundations." *Journal of Near Eastern Studies* 57/2 (1998): 125–40.

Gimaret, D. "*Muʿtazila*." *EI*², 7: 783–93.

Ginio, Eyal. "Violations of Founders' Stipulations in the *Sharīʿa* Court of Jaffa during the British Mandate." *Islamic Law and Society* 4/3 (1997): 389–415.

Goitein, S. D. *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza*. 6 vols. Berkeley: University of California Press, 1967–88.

Goldziher, Ignaz. *Muhammedanische Studien (Muslim Studies)*. Translated by C. R. Barber and S. M. Stern. 2 vols. New York: George Allen & Unwin, 1971.

——. *The Ẓāhirīs: Their Doctrine and their History*. Translated by Wolfgang Behn. Leiden: E. J. Brill, 1971.

——. *Introduction to Islamic Theology and Law*. Translated by Andras and Ruth Hamori. Princeton, NJ: Princeton University Press, 1981.

Goody, Jack. "Inheritance, Property, and Marriage in Africa and Eurasia." *Sociology* 3/1 (1969): 55–76.

——. *The Domestication of the Savage Mind*. Cambridge: Cambridge University Press, 1977.

Graham, William A. *Divine Word and Prophetic Word in Early Islam: A Reconsideration of the Sources with Special Reference to the Divine Saying or Ḥadīth Qudsī*. Religion and Society 7. The Hague: Mouton, 1977.

——. "Review of *Quranic Studies: Sources and Methods of Scriptural Interpretation*, by John Wansbrough." In *Journal of the American Oriental Society* 100 (1980): 137–41.

——. *Beyond the Written Word: Oral Aspects of Scripture in the History of Religion*. Cambridge: Cambridge University Press, 1987.

Gray, John Chipman. *Rule Against Perpetuities*. 3rd ed. Boston: Lewis, Brown, and Company, 1915.

Grohmann, Adolf. *Arabic Papyri in the Egyptian Library*. 6 vols. Cairo: Egyptian Library Press, 1936.

Grunebaum, Gustave E. von, ed. *Logic in Classical Islamic Culture*. First Giorgio Levi Della Vida biennial conference. Wiesbaden: Otto Harrassowitz, 1970.

Haarmann, Ulrich. "Islamic Duties in History." *The Muslim World* 68 (1978): 1–24.

——. "Mamlūk Endowment Deeds as a Source for the History of Education in Late Medieval Egypt." *Al-Abḥāth* 28 (1980): 31–47.

Ḥajjī Khalīfa (= Kâtib Çelebi). *Kashf al-Ẓunūn ʿan Asāmī al-Kutub wa'l-Funūn*. Edited and translated by Gustav Flügel as *Lexicon Bibliographicum et Encyclopaedicum*. 7 vols. New York and London: Johnson Reprint Corporation, 1964.

Halkin, A. S. "The Ḥashwiyya." *Journal of the American Oriental Society* 54 (1934): 1–28.

Hallaq, Wael B. "Considerations on the Function and Character of Sunnī Legal Theory." *Journal of the American Oriental Society* 104/4 (1984): 679–89.

——. "Was the Gate of *Ijtihād* Closed?" *International Journal of Middle East Studies* 16 (1984): 3–41.

——. "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law." *Cleveland State Law Review* 34 (1985–86): 79–96.

——. "The Development of Logical Structure in Sunnī Legal Theory." *Der Islam* 64 (1987): 42–67.

——. "Non-Analogical Arguments in Sunn Juridical *Qiyās*." *Arabica* 36 (1989): 286–306.
——. "Logic, Formal Arguments and Formalization of Arguments in Sunnī Jurisprudence." *Arabica* 37 (1990): 315–58.
——. "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law." *Journal of the American Oriental Society* 110/1 (1990): 79–91.
——. "On Inductive Corroboration, Probability and Certainty in Sunnī Legal Thought." In *Islamic Law and Jurisprudence*, edited by N. L. Heer, 3–31. Seattle: University of Washington Press, 1990.
——. "*Uṣūl al-Fiqh*: Beyond Tradition." *Journal of Islamic Studies* 3 (1992): 172–202.
——. "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies* 25 (1993): 587–606.
——. *Law and Legal Theory in Classical and Medieval Islam*. Variorum Reprint. Great Britain: Ashgate Publishing Limited, 1995.
——. *A History of Islamic Legal Theories*. Cambridge: Cambridge University Press, 1997.
——. "From Regional to Personal Schools of Law? A Reevaluation." *Islamic Law and Society* 8/1 (2001): 1–26.
——. *Authority, Continuity, and Change in Islamic Law*. Cambridge: Cambridge University Press, 2001.
Hands, A. R. *Charities and Social Aid in Greece and Rome*. Ithaca, NY: Cornell University Press, 1968.
Hanki, Aziz Bey. *Du wakf: Recueil de jurisprudence des tribunaux mixtes, indigènes et mehkémehs chariehs*. Translated from the Arabic by Yacoub Hanki. Cairo: Imprimerie menikides frères, 1914.
Ḥasan, Aḥmad. "Early Modes of *Ijtihād: Raʾy, Qiyās* and *Istiḥsān*." *Islamic Studies* 6 (1967): 47–79.
——. *The Early Development of Islamic Jurisprudence*. Islamabad, Pakistan: Islamic Research Institute, 1970.
——. "The Principle of *Istiḥsān* in Islamic Jurisprudence." *Islamic Studies* 16 (1977): 347–62.
——. *Analogical Reasoning in Islamic Jurisprudence*. Islamabad, Pakistan: Islamic Research Institute, 1986.
Hawting, G. R. "The Origins of the Muslim Sanctuary in Mecca." In *Studies on the First Century of Islamic Society*, edited by G. H. A. Juynboll, 23–47. Carbondale, IL, 1982.
——. "We Were Not Ordered with Entering It but only with Circumambulating It." *Bulletin of the School of Oriental and African Studies* 47 (1984): 228–42.
Hawting, G. R., and Abdul-Kader A. Shareef, eds. *Approaches to the Qurʾān*. London and New York: Routledge, 1993.
Heffening, W. "*Waḳf*." In *EI*[1], 4: 1096–1103.
Heffening, W., and J. Schacht. "*Ḥanafiyya*." In *EI*[2], 3: 162–64.
Hennequin, Gilles. "*Waqf* et monnaie dans l'Égypte Mamlūke." *Journal of the Economic and Social History of the Orient* 38/3 (1995): 305–12.
Henry, Jean-Robert, and François Balique. *La doctrine coloniale du droit musulman algérien*. Aix-en-Provence: Le centre de recherches et d'études sur les sociétés méditerranéennes, 1979.
Hinds, Martin. "*Miḥna*." *EI*[2], 7: 2–6.
Hoexter, Miriam. "*Ḥuqūq Allāh* and *Ḥuqūq al-ʿIbād* as Reflected in the *Waqf* Institution." *Jerusalem Studies in Arabic and Islam* 19 (1995): 133–56.
——. "Adaptation to Changing Circumstances: Perpetual Leases and Exchange Transactions in *Waqf* Property in Ottoman Algiers." *Islamic Law and Society* 4/3 (1997): 319–33.

——. *Endowments, Rulers, and Community: Waqf al-Haramayn in Ottoman Algiers*. Leiden: E. J. Brill, 1998.
Holmes, Oliver Wendell. "Early English Equity." *Law Quarterly Review* 1 (1885): 162–74.
——. "Law in Science and Science in Law." *Harvard Law Review* 12 (1898): 443–63.
Humphreys, R. Stephen. *Islamic History*. Princeton: Princeton University Press, 1991.
Hurvitz, Nimrod. "Aḥmad Ibn Ḥanbal and the Formation of Islamic Orthodoxy." Ph.D. diss., Princeton University, 1994.
——. "Schools of Law and Historical Context: Re-Examining the Formation of the Ḥanbalī *Madhhab*." *Islamic Law and Society* 7 (2000): 37–64.
Johansen, Baber. "Sacred and Religious Element in Hanafite Law—Function and Limits of the Absolute Character of Government Authority." In *Islam et politique au maghreb*, 282–303. Paris: Centre de recherches et d'études sur les sociétés méditerranéennes, 1981.
——. *The Islamic Law on Land Tax and Rent*. London and New York: Croom Helm Ltd., 1988.
Johnson, Alan Chester, and Louis C. West. *Byzantine Egypt: Economic Studies*. Princeton: Princeton University Press, 1949.
Johnston, David. *The Roman Law of Trusts*. Oxford: Clarendon Press, 1988.
Jones, William R. "Pious Endowments in Medieval Christianity and Islam." *Diogenes* 109 (1980): 23–36.
"Jurist." "*Waqf*." *Muslim World* 4 (1914): 173–87.
Juynboll, G. H. A., ed. *Studies on the First Century of Islamic Society*. Carbondale: Southern Illinois University Press, 1982.
——. *Muslim Tradition*. New York: Cambridge University Press, 1983.
——. "Dyeing the Hair and Beard in Early Islam: A *Ḥadīth*-Analytical Study." *Arabica* 33 (1986): 49–75.
——. "Some New Ideas on the Development of *Sunna* as a Technical Term in Early Islam." *Jerusalem Studies in Arabic and Islam* 10 (1987): 97–118.
——. "Some *Isnād*-Analytical Methods Illustrated on the Basis of Several Woman-Demeaning Sayings from *Ḥadīth* Literature." *Al-Qanṭara: Revista de estudos árabes* 10/2 (1989): 343–83.
——. "The Role of *Muʿammarūn* in the Early Development of the *Isnād*." *Wiener Zeitschrift für die Kunde des morgenlandes* 81 (1991): 155–75.
——. "Some Notes on Islam's First *Fuqahāʾ* Distilled from Early *Ḥadīth* Literature." *Arabica* 39 (1992): 287–314.
——. "Nāfiʿ, the *Mawlā* of Ibn ʿUmar, and his position in Muslim *Ḥadīth* Literature." *Der Islam* 70 (1993): 207–44.
——. "Early Islamic Society as Reflected in Its Use of *Isnād*s." *Le Muséon: Revue d'études orientales* 107/1–2 (1994): 151–94.
——. *Studies on the Origins and Uses of Islamic Ḥadīth*. Variorum Reprint. Great Britain: Ashgate Publishing Limited, 1996.
——. "(Re)Appraisal of Some Technical Terms in *Ḥadīth* Science." *Islamic Law and Society* 8 (2001): 303–49.
——. "*Muʿanʿan*." *EI*^{2}, 7: 260–61.
——. "*Ṣāliḥ*." *EI*^{2}, 8: 982–84.
Juynboll, Th. W. "*Istiḥsān*." *EI*^{1}, 2: 561.
Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. Cambridge: The Islamic Texts Society, 1991.
Kennedy, Hugh. "Central Government and Provincial Élites in the Early ʿAbbāsid Caliphate." *Bulletin of the School of Oriental and African Studies* 44 (1981): 26–38.
——. *The Early ʿAbbāsid Caliphate*. London: Croom Helm, 1981.
——. *The Prophet and the Age of the Caliphates*. New York: Longman Group Limited, 1986.

Khadduri, Majid, and Herbert J. Liebesny, ed. *Law in the Middle East: Origin and Development of Islamic Law, volume. 1*. Washington D.C.: The Middle East Institute, 1955.

Khare, R. S., ed. *Perspectives on Islamic Law, Justice, and Society*. New York: Rowman & Littlefield Publishers, Inc., 1999.

Kimber, Richard. "The Quranic Law of Inheritance." *Islamic Law and Society* 5 (1998): 291–325.

Kohlberg, E. "*Al-Rāfiḍa*." *EI*², 8: 386–89.

——. "*Shurayḥ*." *EI*², 9: 508–09.

Lambton, Ann K. S. "*Awqāf* in Persia: 6th–8th/12th–14th Centuries." *Islamic Law and Society* 4/3 (1997): 298–318.

Lammens, Henri. "L'âge de Mahomet et la chronologie de la *Sīra*." *Journal asiatique* (1911): 209–50.

——. *La Mecque à la veille de l'hégire* (reprinted from *Mélanges de l'Université Saint Joseph*, vol. 9). Beirut: Imprimerie Catholique, 1924.

Lane, Edward William. *Arabic-English Lexicon*. 8 vols. London and Edinburgh: Williams and Norgate, 1863; reprint, Lahore, Pakistan: Islamic Book Centre, 1978.

Layish, Aharon. "The Mālikī Family *Waqf* According to Wills and *Waqfiyyāt*." *Bulletin of the School of Oriental and African Studies* 46 (1983): 1–32.

——. "The Druze Testamentary *Waqf*." *Studia Islamica* 71 (1990): 127–54.

——. "The Family *Waqf* and the *Sharʿī* Law of Succession in Modern Times." *Islamic Law and Society* 4/3 (1997): 352–88.

Lazarus-Yafeh, Hava. "'Umar b. al-Khaṭṭāb—Paul of Islam?" In *Some Religious Aspects of Islam*, 1–16. Leiden: E. J. Brill, 1981.

Leach, W. Barton. "Perpetuities in a Nutshell." *Harvard Law Review* 51 (1938): 638–71.

Lecker, Michael. *The Banū Sulaym*. Jerusalem: The Hebrew University of Jerusalem, 1989.

——. *Muslims, Jews and Pagans: Studies on Early Islamic Medina*. New York: E. J. Brill, 1995.

——. "The Death of the Prophet Muḥammad's Father: Did Wāqidī Invent Some of the Evidence?" *Zeitschrift Der Deutschen Morgenländischen Gesellschaft* 145/1 (1995): 9–27.

——. "Biographical Notes on Ibn Shihāb al-Zuhrī." *Journal of Semitic Studies* 41 (1996): 21–63.

Libson, Gideon. "On the Development of Custom as a Source of Law in Islamic Law." *Islamic Law and Society* 4/2 (1997): 131–55.

Little, Donald P. *A Catalogue of the Islamic Documents from al-Haram aš-Šarif in Jerusalem*. Beirut and Wiesbaden: In Kommission bei F. Steiner, 1984.

——. "Nature of *Khānqāh*s, *Ribāṭ*s, and *Zāwiya*s under the Mamlūks." In *Islamic Studies Presented to Charles J. Adams*, edited by Wael B. Hallaq and Donald P. Little, 91–105. Leiden: E. J. Brill, 1991.

Lokkegaard, Frede. *Islamic Taxation in the Classic Period*. Copenhagen: Branner and Korch, 1950.

Mahdi, Muhsin. "Language and Logic in Classical Islam." In *Logic in Classical Islamic Culture*, edited by Gustave E. von Grunebaum, 51–84. First Giorgio Levi Della Vida biennial conference. Wiesbaden: Otto Harrassowitz, 1970.

Maitland, F. W. "The Origin of Uses." *Harvard Law Review* 8 (1894): 127–37.

Martin, Mike W. *Virtuous Giving: Philanthropy, Voluntary Service, and Caring*. Bloomington: Indiana University Press, 1994.

Majid, Syed A. "*Wakf* as Family Settlement Among the Mohammedans." *Journal of the Society of Comparative Legislation* 9 (1908): 122–41.

Makdisi, George. "On the Origin and Development of the College." In *Islam and the Medieval West: Aspects of Intercultural Relations*, edited by Khalil I. Semaan, 26–49. Albany: State University of New York Press, 1980.

——. *The Rise of Colleges: Institutions of Learning in Islam and the West*. Edinburgh: Edinburgh University Press, 1981.
——. "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court." *Cleveland State Law Review* 34 (1985–86): 3–18.
——. *The Rise of Humanism in Classical Islam and the Christian West*. Edinburgh: Edinburgh University Press, 1990.
Makdisi, John. "Legal Logic and Equity in Islamic Law." *The American Journal of Comparative Law* 33 (1985): 63–92.
Margoliouth, D. S. *Catalogue of the Arabic Papyri in the John Rylands Library at Manchester*. Manchester, UK: Manchester University Press, 1933.
Masud, Muhammad Khalid, Brinkley Messick, and David S. Powers. *Islamic Legal Interpretation: Muftis and their Fatwas*. Cambridge, MA: Harvard University Press, 1996.
Mauss, Marcel. *The Gift: Forms and Functions of Exchange in Archaic Societies*. Translated by Ian Cunnison. New York: W. W. Norton and Company, 1967.
McChesney, Robert D. *Charity and Philanthropy in Islam: Institutionalizing the Call to Do Good*. Indianapolis: Indiana University Center on Philanthropy, 1995.
Melchert, Christopher. "Religious Policies of the Caliphs from al-Mutawakkil to al-Muqtadir, A.H. 232–295/A.D. 847–908." *Islamic Law and Society* 3/3 (1996): 316–42.
——. *The Formation of the Sunni Schools of Law, 9th–10th Centuries C.E.* Leiden and New York: E. J. Brill, 1997.
——. "Notes et documents: George Makdisi and Wael B. Hallaq." *Arabica* 46/2 (1997): 308–16.
——. "The Adversaries of Aḥmad Ibn Ḥanbal." *Arabica* 44 (1997): 234–53.
——. "How Ḥanafism Came to Originate in Kufa and Traditionalism in Medina." *Islamic Law and Society* 6 (1999): 318–47.
——. "Traditionist-Jurisprudents and the Framing of Islamic Law." *Islamic Law and Society* 8 (2001): 383–406.
——. Review of *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and His Major Compendium of Jurisprudence*, by Jonathan E. Brockopp. In *Islamic Law and Society* 9 (2002): 271–74.
Mercier, Ernest. *Le code du habous ou ouakf selon la législation musulmane*. Constantine: Imprimerie D. Braham, 1899.
Meron, Yaʿakov. "The Development of Legal Thought in Ḥanafī Texts." *Studia Islamica* 30 (1969): 73–118.
——. *L'obligation alimentaire entre époux en droit musulman Hanéfite*. Bibliothèque de droit privé 114. Paris: Librairie générale de droit et de jurisprudence, 1971.
Messick, Brinkley. *The Calligraphic State: Textual Domination and History in Muslim Society*. Berkeley: University of California Press, 1993.
Minovi, M., and V. Minorsky. "Naṣīr al-Dīn Ṭūsī on Finance." *Bulletin of the School of Oriental [and African] Studies* 10 (1940): 755–89.
Morand, Marcel. *Études de droit musulman algérien*. Algiers: Jourdan, 1910.
Morimoto, Kosei. *The Fiscal Administration of Egypt in the Early Islamic Period*. Kyoto, Japan: Dohosha Publisher, Inc., 1981.
Motzki, Harald. "The *Muṣannaf* of ʿAbd al-Razzāq al-Ṣanʿānī as a Source of Authentic *Aḥādīth* of the First Century A.H." *Journal of Near Eastern Studies* 50/1 (1991): 1–21.
——. "*Quo vadis, Ḥadīṯ*-Forschung? Eine kritische Untersuchung von G. H. A. Juynboll: Nāfiʿ the *mawlā* of Ibn ʿUmar, and his position in Muslim *Ḥadīṯ* Literature." *Der Islam* 73/1 (1996): 40–80.
——, ed. *The Biography of Muḥammad: The Issue of the Sources*. Leiden: E. J. Brill, 2000.
Mukherjea, Bijan Kumar. *The Hindu Law of Religious and Charitable Trust*. Calcutta: Eastern Law House Private, Ltd., 1962.
Mukherji, Amitabh. "Islamic Institution of *Waqf*s: Origin and Practice in Muslim India." *Islam and Comparative Law Quarterly* 10–11 (1990–91): 109–18.

Mundy, Martha. "The Family, Inheritance and Islam: A Re-examination of the Sociology of *Farā'iḍ* Law." In *Islamic Law: Social and Historical Contexts*, edited by Aziz al-Azmeh, 1–123. New York: Routledge, 1988.

Naqvi, S. Ali Raza. "Prophetic *Sunna* in the Islamic Legal Framework." *Islamic Studies* 19 (1980): 120–33.

Nawas, John A. "A Reexamination of Three Current Explanations for al-Ma'mūn's Introduction of the *Miḥna*." *International Journal of Middle East Studies* 26 (1994): 615–29.

Nicholas, Barry. *An Introduction to Roman Law*. Oxford: Clarendon Press, 1962.

Noth, Albrecht. *The Early Arabic Historical Tradition: A Source-Critical Study*. Studies in Late Antiquity and Early Islam 3. Translated by Michael Bonner. Princeton, NJ: The Darwin Press, Inc., 1994.

O'Fahey, R. S. "Endowment, Privilege, and Estate in Central and Eastern Sudan." *Islamic Law and Society* 4/3 (1997): 334–51.

Othman, Mohammad Zain b. Haji. "Origin of the Institution of *Waqf*." *Hamdard Islamicus* 6/2 (1983): 3–23.

———. "Institution of *Waqf*." *Islamic Culture* 58 (1984): 55–62.

Paret, R. "*Istiḥsān and Istiṣlāḥ*." *EI*^{2}, 4: 255–59.

Perikhanian, Anahit. "Iranian Society and Law." In *The Cambridge History of Iran*, edited by Ehsan Yarshater, 3(2): 627–80. New York: Cambridge University Press, 1983.

Perikhanian, Anahit, and Nina Garsoïan, eds. and trans. *The Book of a Thousand Judgements (A Sassanian Law-Book)*. Costa Mesa, CA: Mazda Publishers, 1997.

Peters, Rudolph. "Murder in Khaybar: Some Thoughts on the Origins of the *Qasāma* Procedure in Islamic Law." *Islamic Law and Society* 9 (2002): 132–67.

———. "*Waḳf*." *EI*^{2}, 11: 59–63.

Poliak, A. N. "Classification of Lands in the Islamic Law and its Technical Terms." *American Journal of Semitic Languages and Literatures* 57 (1940): 50–62.

Pollack, Frederick, and F. W. Maitland. *History of English Law*. 2 vols. Cambridge: Cambridge University Press, 1952.

Poonawala, Ismail K. "Translator's Foreword." In al-Ṭabarī, *The History of al-Ṭabarī, volume 9: The Last Years of the Prophet*. Albany: State University of New York Press, 1990.

Powers, David S. "The Will of Sa'd b. Abī Waqqāṣ: A Reassessment." *Studia Islamica* 58 (1983): 33–53.

———. "Revenues of Public *Waqf*s in Sixteenth-Century Jerusalem." *Archivum Ottomanicum* 9 (1984): 163–202.

———. *Studies in Qur'ān and Ḥadīth: The Formation of the Islamic Law of Inheritance*. Berkeley: University of California Press, 1986.

———. "On Bequests in Early Islam." *Journal of Near Eastern Studies* 48/3 (1989): 185–200.

———. "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India." *Comparative Studies in Society and History* 31/3 (1989): 535–71.

———. "The Islamic Inheritance System: A Socio-Historical Approach." In *Islamic Family Law*, edited by Chibli Mallat and Jane Conners, 11–29. London and Boston: Graham and Trotman, 1990. Also in *Arab Law Quarterly* 8 (1993): 13–29.

———. "The Mālikī Family Endowment: Legal Norms and Social Practices." *International Journal of Middle East Studies* 25 (1993): 379–406.

———. *Law, Society and Culture in the Maghrib, 1300–1500*. Cambridge: Cambridge University Press, 2002.

Qadrī, Anwār Aḥmad. *Islamic Jurisprudence in the Modern World*. Lahore, Pakistan: Sh. Muhammad Ashraf, 1973.

Rabie, Hassanein. "Some Financial Aspects of the *Waqf* System in Medieval Egypt." Reprint from *al-Majalla al-Tarikhiyya al-Misriyya* 18 (1971): 3–24.
Rāġib, Yūsuf. *Marchands d'étoffes du Fayyoun au III^e/IX^e siècle: Les actes des Banū ʿAbd al-Muʾmin*. Cairo: Institut français d'archéologie orientale du Caire, 1982.
Rahim, Abdur. *The Principles of Muhammadan Jurisprudence*. Lahore, Pakistan: The Punjab Educational Press, 1963.
Reiter, Yitzhak. *Islamic Endowments in Jerusalem Under British Mandate*. London and Portland, OR, 1996.
Renan, Ernest. "Mahomet et les origines de l'islamisme." Chap. in *Oeuvres complètes*, edited by Henriette Psichari. 10 vols. Paris: Calmann-Lévy, 1947–61.
Roberts, Suzanne. "Contexts of Charity in the Middle Ages: Religious, Social, and Civic." In *Giving: Western Ideas of Philanthropy*, edited by J. B. Schneewind, 24–53. Bloomington and Indianapolis: Indiana University Press, 1996.
Rogers, J. Michael. "*Waqfiyya*s and *Waqf*-Registers." *Kunst des Orient* 11 (1976/77): 182–96.
Rorty, Richard, J. B. Schneewind, and Quentin Skinner, eds. *Philosophy in History: Essays on the Historiography of Philosophy*. Cambridge: Cambridge University Press, 1984.
Rosen, Lawrence. *The Anthropology of Justice: Law as Culture in Islamic Society*. Cambridge: Cambridge University Press, 1989.
———. *The Justice of Islam*. Oxford: Oxford University Press, 2000.
Rosenthal, Franz. "*Sedaka*, Charity." *Hebrew Union College Annual* 23/1 (1950–51): 411–30.
———. "General Introduction." In al-Ṭabarī, *The History of al-Ṭabarī, volume 1: From the Creation to the Flood*. Albany: State University of New York Press, 1989.
Roth, Martha T. *Law Collections from Mesopotamia and Asia Minor*. Atlanta, GA: Scholars Press, 1995.
Rubin, Uri. "The Kaʿbah: Aspects of Its Ritual Functions and Position in Pre-Islamic and Early Islamic Times." *Jerusalem Studies in Arabic and Islam* 8 (1986): 97–131.
———. "'*Al-Walad li-l-firāsh*' on the Islamic Campaign Against «*Zinā*»." *Studia Islamica* 78 (1993): 5–26.
———. *The Eye of the Beholder: The Life of Muhammad as Viewed by the Early Muslims*. Studies in Late Antiquity and Early Islam 5. Princeton, NJ: The Darwin Press, Inc., 1995.
Runciman, Steven. "Muslim Influences on the Development of European Civilization." *Şarkiyat Mecmuasi* 3 (1959): 13–24.
Sabra, Adam. *Poverty and Charity in Medieval Islam: Mamluk Egypt, 1250–1517*. Cambridge: Cambridge University Press, 2000.
Sāmarrāie, Ḥusām Qawām el-. *Agriculture in ʿIrāq During the 3rd Century, A.H.* Beirut: Heidelberg Press, 1972.
Sanhūrī, Aḥmad Faraj al-. *Majmūʿa al-Qawānīn al-Miṣriyya al-Mukhtāra min al-Fiqh al-Islāmī/Collection of Selected Egyptian Laws from Islamic Jurisprudence*. 2 vols. Cairo: Maṭbaʿat Miṣr, 1949.
Schacht, Joseph. "A Revaluation of Islamic Traditions." *Journal of the Royal Asiatic Society* (1949): 143–54.
———. *The Origins of Muhammadan Jurisprudence*. Oxford: Clarendon Press, 1950.
———. "Foreign Elements in Ancient Islamic Law." *The Journal of Comparative Legislation and International Law* 32/3–4 (Nov. 1950): 9–17.
———. "Early Doctrines on *Waqf*." In *Fuad Köprülü Armagani/Mélanges Fuad Köprülü*, 23–32. Istanbul: Osman Yalçin Matbaasi, 1953.
———. "Pre-Islamic Background and Early Development of Jurisprudence." In *Law in the Middle East: Origin and Development of Islamic Law*, edited by Majid Khadduri and Herbert J. Liebesny, 1: 28–56. Washington D.C.: The Middle East Institute, 1955.

——. "The Schools of Law and the Later Developments of Jurisprudence." In *Law in the Middle East: Origin and Development of Islamic Law*, edited by Majid Khadduri and Herbert J. Liebesny, 1: 57–84. Washington D.C.: The Middle East Institute, 1955.
——. "The Law." In *Unity and Variety in Muslim Civilization*, edited by Gustave E. von Grunebaum, 65–86. Chicago: The University of Chicago Press, 1955.
——. "Droit byzantin et droit musulman." In *Convegno di scienze morali storiche e filologiche*, 197–230. Rome: Accademia Nazionale dei Lincei, 1957.
——. *An Introduction to Islamic Law*. Oxford: Clarendon Press, 1964.
——. "Modernism and Traditionalism in a History of Islamic Law." *Middle Eastern Studies* 1 (1965): 388–400.
——. "Law and Justice." In *Cambridge History of Islam: Islamic Society and Civilization*, edited by P. M. Holt, Ann K. S. Lambton, and Bernard Lewis, 2: 539–68. Cambridge: Cambridge University Press, 1970.
Schneewind, J. B. "Philosophical Ideas of Charity: Some Historical Reflections." In *Giving: Western Ideas of Philanthropy*, edited by J. B. Schneewind, 54–75. Bloomington and Indianapolis: Indiana University Press, 1996.
Schneider, David M. "Kinship and Culture: Descent and Filiation as Cultural Constructs." *Southwestern Journal of Anthropology* 23 (1967): 65–73.
Schoeler, G. "Mündliche Thora und *Ḥadīṯ*: Überlieferung, Schreibverbot, Redaktion." *Der Islam* 66 (1989): 213–51.
Scholer, Marco. "Sīra and Tafsīr." In *The Biography of Muḥammad: The Issues of the Sources*, edited by Harald Motzki. Leiden: E. J. Brill, 2000.
Schulz, Fritz. *Roman Legal Science*. Oxford: Clarendon Press, 1946.
——. *Classical Roman Law*. Oxford: Clarendon Press, 1951.
Sezgin, Fuat. *Geschichte des arabischen Schrifttums*. 9 vols. Leiden: E. J. Brill, 1967–in progress.
El-Shakankiri, M. "Loi divine, loi humaine et droit dans l'histoire juridique de l'Islam." *Revue historique de droit français et étranger* 59 (1981): 161–82.
Sharon, Moshe. "A *Waqf* Inscription from Ramlah." *Arabica* 13 (1966): 77–84.
——. "*Waqf* Inscription from Ramla *c.* 300/912–913." *Bulletin of the School of Oriental and African Studies* 60/1 (1997): 100–08.
Shear, Eli M., and Chaim Miller. *The Rich Go to Heaven: Giving Charity in Jewish Thought*. Northvale, NJ: Jason Aronson Inc., 1998.
Shehaby, Nabil. "*'Illa* and *Qiyās* in Early Islamic Legal Theory." *Journal of the American Oriental Society* 102 (1982): 27–46.
Shemesh, A. Ben. *Taxation in Islam*. 2 vols. Leiden: E. J. Brill, 1958, 1969.
Ṣiddīqī, Muḥammad Zubayr. *Ḥadīth Literature*. Cambridge, England: Islamic Texts Society, 1993.
Simes, Lewis M. "The Policy Against Perpetuities." *University of Pennsylvania Law Review* 103 (1955): 707–38.
Singer, Amy. *Constructing Ottoman Beneficence: An Imperial Soup Kitchen in Jerusalem*. Albany: State University of New York Press, 2002.
Sourdel, D., and J. Sourdel-Thomine. "Biens fonciers constitués *waqf* en Syrie fatimide pour une famille de Šarīfs damascains." *Journal of the Economic and Social History of the Orient* 15 (1972): 269–96.
Speight, R. Marston. "The Will of Sa'd b. Abī Waqqāṣ: The Growth of a Tradition." *Der Islam* 50 (1973): 249–67.
Stillman, Norman A. "Charity and Social Service in Medieval Islam." *Societas* 5 (1975): 105–15.
——. "*Waqf* and the Ideology of Charity in Medieval Islam." In *Studies in Honour of Clifford Edmund Bosworth, volume I: Hunter of the East: Arabic and Semitic Studies*, edited by Ian Richard Netton, 357–72. Leiden: Brill, 2000.
Suhrawardy, 'Abd Allāh al-Ma'mūn. "The *Waqf* of Moveables." *Journal and Proceedings of the Asiatic Society of Bengal* 7 n.s. (1911): 323–430.

Tabātabā'i, Hossein Modarressi. *Kharāj in Islamic Law*. London: Anchor Press, Ltd., 1983.
Thomas, Ann Van Wynen. "Note on the Origin of Uses and Trusts—*Waqfs*." *Southwestern Law Journal* 3 (1949): 162–66.
Tsafrir, Nurit. "Semi-Ḥanafīs and Ḥanafī Biographical Sources." *Studia Islamica* 84 (1996): 67–85.
Tyan, Émile. "Méthodologie et sources du droit en Islam." *Studia Islamica* 10 (1959): 79–109.
Udovitch, Abraham L. "The 'Law Merchant' of the Medieval Islamic World." In *Logic in Classical Islamic Culture*, edited by Gustave E. von Grunebaum, 113–30. First Giorgio Levi Della Vida biennial conference. Wiesbaden: Otto Harrassowitz, 1970.
——, ed. *The Islamic Middle East, 700–1900: Studies in Economic and Social History*. Princeton, NJ: The Darwin Press, Inc., 1981.
Vaglieri, L. Veccia. "*Khaybar*." *EI*², 4: 1137–43.
Verbit, Gilbert Paul. *The Origins of the Trust*. Xlibris Corporation, 2002.
Vesely, Rudolf. "Trois certificats delivrés pour les fondations pieuses en Égypte au xvi^e^ siècle. Troisième contribution à la question des fondations pieuses Ottomanes d'Égypte et de la diplomatique judiciaire." *Oriens*, 21–22 (1968–69): 248–99.
——. "Procès de la production et rôle du *waqf* dans les relations ville-campagne." In *Le waqf dans l'espace islamique outil de pouvoir socio-politique*, edited by Randi Deguilhem, 229–41. Damascus: L'institut français d'études arabes de Damas, 1995.
Vesey, Vincent R. "*Fideicommissa* and Uses: The Clerical Connection Revisited." *The Jurist* 42 (1982): 201–14.
Vesey-FitzGerald, S. G. *Muhammadan Law*. London: Oxford University Press, 1931.
——. "The Alleged Debt of Islamic to Roman Law." *Law Quarterly Review* 67 (1951): 81–102.
——. "Nature and Sources of the *Sharī'a*." In *Law in the Middle East: Origin and Development of Islamic Law*, edited by Majid Khadduri and Herbert J. Liebesny, 1: 85–112. Washington D.C.: The Middle East Institute, 1955.
Waines, David. "The Third Century Internal Crisis of the 'Abbāsids." *Journal of the Economic and Social History of the Orient* 20/3 (1977): 282–306.
Waldman, Marilyn R. "Primitive Mind/Modern Mind: New Approaches to an Old Problem Applied to Islam." In *Approaches to Islam in Religious Studies*, edited by Richard C. Martin, 91–105. Tucson, AZ: University of Arizona Press, 1985.
Wansbrough, John. *Quranic Studies: Sources and Methods of Scriptural Interpretation*. Oxford: Oxford University Press, 1977.
——. *The Sectarian Milieu*. Oxford: Oxford University Press, 1978.
Watt, W. Montgomery. "The Materials Used by Ibn Isḥāq." In *Historians of the Middle East*, edited by Bernard Lewis and P. M. Holt, 23–34. London: Oxford University Press, 1962.
——. "The Influence of Islam on Medieval Europe." In *Islamic Surveys*, 9: 1–125. Edinburgh: Edinburgh University Press, 1972.
——. *The Formative Period of Islamic Thought*. Edinburgh: Edinburgh University Press, 1973.
——. *Early Islam: Collected Articles*. Edinburgh: Edinburgh University Press, 1990.
——. "*Djahmiyya*." *EI*², 2: 388.
Weir, T. H., and A. Zysow. "*Ṣadaḳa*." *EI*², 8: 708–16.
Weiss, Bernard. "Interpretation in Islamic Law: The Theory of *Ijtihād*." *The American Journal of Comparative Law* 26 (1978): 199–212.
——. "The Primacy of Revelation in Classical Islamic Legal Theory as Expounded by Sayf al-Dīn al-Āmidī." *Studia Islamica* 59 (1984): 79–109.
——. "Law in Islam and the West: Some Comparative Observations." In *Islamic Studies Presented to Charles J. Adams*, edited by Wael B. Hallaq and Donald P. Little, 239–53. Leiden: E. J. Brill, 1991.

——, ed. *Studies in Islamic Legal Theory*. Leiden: E. J. Brill, 2002.

Wensick, A. J. *Concordance et indices de la tradition musulmane*. 7 vols. Leiden: E. J. Brill, 1936–69.

Wheeler, Brannon M. *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Ḥanafī Scholarship*. Albany, NY: State University of New York Press, 1996.

Yanagihashi, Hiroyuki. "The Judicial Functions of the *Sulṭān* in Civil Cases According to the Mālikīs up to the Sixth/Twelfth Century." *Islamic Law and Society* 3/1 (1996): 41–74.

——. "Doctrinal Development of *Maraḍ al-Mawt* in the Formative Period of Islamic Law." *Islamic Law and Society* 5/3 (1998): 326–58.

Young, M. J. L., J. D. Latham, and R. B. Serjeant, eds. *Religion, Learning and Science in the ʿAbbāsid Period*. Cambridge History of Arabic Literature. Cambridge: Cambridge University Press, 1990.

Zaman, Muhammad Qasim. *Religion and Politics Under the Early ʿAbbāsids: The Emergence of the Proto-Sunnī Elite*. Leiden: E. J. Brill, 1997.

——. "The Caliphs, the *ʿUlamā'*, and the Law: Defining the Role and Function of the Caliph in the Early ʿAbbāsid Period." *Islamic Law and Society* 4/1 (1997): 1–36.

Zettler, R. L. *The Ur III Temple of Inanna at Nippur. The Operation and Organisation of Urban Religious Institutions in Mesopotamia in the Late Third Millennium B.C.* Berlin: D. Reimer, 1992.

Ziadeh, Farhat J. "*Al-Muwaṭṭa'* as a Source for the Social and Economic History of the Ḥijāz." In *Studies in the History of Arabia I*, 25–33. Riyadh, Saudi Arabia: Riyadh University Press, 1979.

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