

The *Kitāb al-Aṣl* of Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805) and its *Riwāyas* (Recensions)

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Abstract

This essay is a preliminary study of some aspects of the transmission of *Kitāb al-Aṣl* by Muḥammad b. al-Ḥasan al-Shaybānī. The essay examines information, preserved in later, mainly Ḥanafī works, about two major *riwāyas* of *al-Aṣl*, and analyses some points of doctrine on which they differ. These differences are shown to be substantial, as emerges from biographical sources. Given the divergence from each other and also, in one instance, from a third *riwāya*, I propose that the two *riwāyas* do not represent the content of a single original text. They may reflect either different stages in the development of a text that was still fluid, or else doctrinal changes that were introduced into a fixed text by its transmitters. The disparity between the *riwāyas* must be taken into consideration in any attempt to reconstruct the teachings and history of *Kitāb al-Aṣl*.

Keywords

al-Shaybānī – *al-Aṣl* – Ḥanafī law – *riwāya* – Abū Sulaymān al-Jūzjānī – Abū Ḥafṣ al-Kabīr

Of the three founders of the Ḥanafī school, Abū Ḥanīfa (d. 150/767) and his two leading disciples, Abū Yūsuf (d. 182/798) and Muḥammad b. al-Ḥasan

al-Shaybānī, it is the last who is said to have put the school's doctrine into writing. Whereas Abū Ḥanīfa left no written texts, and Abū Yūsuf only a few, many writings – which constitute the basis of Ḥanafī literature – are attributed to al-Shaybānī.¹ This corpus includes al-Shaybānī's *magnum opus*, *al-Aṣl*, also known as *al-Mabsūṭ*. It is the largest compendium of early Ḥanafī legal doctrine, and one of six works, all attributed to al-Shaybānī, that contain the most authoritative Ḥanafī doctrine, known collectively as *ẓāhir al-riwāya*.² The high regard in which *al-Aṣl* is held is expressed in the opinion that it is sufficient for someone to memorize its contents (in addition to early tradition, *madhhab al-mutaqaddimīn*) to qualify as a *mujtahid*.³ This reverence for *al-Aṣl* is further reflected in an anecdote about a non-Muslim sage (*ḥakīm min kuffār ahl al-kitāb*) who embraced Islam after having read it.⁴

Despite its importance, *al-Aṣl* was published in its entirety only in 2012, and our understanding of the history of this text and its recensions remains deficient. The purpose of this article is to supplement our understanding with evidence relating to the transmissions of *al-Aṣl*. This evidence, which is taken from later Ḥanafī works and from biographical dictionaries, suggests that the differences between the transmissions are too substantial to consider them as reflecting a single original work.

1 The *Riwāyas*

The 2012 Beirut edition of *al-Aṣl* is a scholarly twelve-volume edition prepared by Mehmet Boynukalın, who added a thorough introductory volume (on which I rely throughout the essay).⁵ This edition represents what I shall refer to

1 For a list of al-Shaybānī's works see Mehmet Boynukalın's Introduction volume (*al-Muqaddima*) of Muḥammad b. al-Ḥasan al-Shaybānī, *al-Aṣl*, ed. M. Boynukalın, 12 vols. + Introduction (Beirut: Dār Ibn Ḥazm, 1432/2012), 32–37.

2 For the notion of *ẓāhir al-riwāya* and its development see Salman Younas, "Authority in the Classical Ḥanafī School: the Emergence & Evolution of *Ẓāhir al-Riwāya*", *Islamic Law and Society*, 29 (2022), 58–122.

3 'Umar b. 'Abd al-'Azīz b. Māzah, al-Ṣadr al-Shahīd, *Kitāb Sharḥ Adab al-qāḍī li-l-Khaṣṣāf*, ed. M. H. al-Sirḥān, 4 vols. [Baghdad: Maṭba'at al-Irshād, 1397/1977], 1:190; 'Uthmān b. 'Alī al-Zayla'ī, *Tabyīn al-ḥaqā'iq sharḥ Kanz al-daqa'iq*, ed. A. 'I. 'Ināya, 7 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1420/2000), 5:83.

4 Muṣṭafā b. 'Abdallāh, Ḥājjī Khalifa, *Kashf al-ẓunūn 'an asāmī al-kutub wa-l-funūn*, ed. M. Sh. Yāltaqāyā and R. B. al-Kilīsī, 2 vols. ([Istanbul]: Maṭba'at Wikālat al-Ma'ārif, 1360–1362/1941–1943), 2:1581.

5 Shaybānī, *al-Aṣl*. The other (partial) publications of *al-Aṣl* include the chapter on Legal Devices (*Kitāb al-Ḥiyal*), edited by Joseph Schacht, together with a painstaking study of the text's history (Joseph Schacht, *Das kitāb al-maḥārīḡ fil-ḥijal des Muḥammad ibn al-Ḥasan*

as the *Aşl* vulgate (following Joseph Schacht's usage in *Das kitāb al-maḥāriğ fil-ḥijal*). With the complete work available in print, it is easy to see that it is made up of treatises (*kitābs*) that had existed independently of each other before they became chapters of a single compilation.⁶ One indication of this is that most of the chapters open with an *isnād* naming the transmitter of the chapter from al-Shaybānī. It is now obvious that, as Norman Calder has noted, these *isnāds* differ from each other.⁷ Of the nearly sixty chapters that comprise the complete text of the *Aşl* vulgate, thirty-eight are preceded by an introductory *isnād*. The other chapters, with one exception, open with *qāla Muḥammad b. al-Ḥasan*, or a variant of this statement, and no *isnād*. The *isnāds* vary in length and content: some give only the name of the immediate transmitter of that particular chapter from al-Shaybānī; others include one or two additional links – in one case even three – after the immediate transmitter.⁸ According to these *isnāds*, the direct transmitters of these thirty-eight chapters from al-Shaybānī are: Abū Sulaymān Mūsā b. Sulaymān al-Jūzjānī (d. after 200/815, Khurasan and Baghdad) – thirty chapters; Aḥmad b. Ḥafṣ, known as Abū Ḥafṣ al-Kabīr (d. 217/832, Bukhara) – five chapters; and, in addition, Dāwūd b. Rushayd (d. 239/853, Baghdad), Muḥammad b. Hārūn al-Anṣārī (d. ?), and a certain 'Abdallāh, each of whom transmitted one chapter.⁹

aš-Šaybānī: In zwei Rezensionen, Hildesheim: Georg Olms, 1968 [a reprint of the Leipzig 1930 edition]); an edition of *Kitāb al-Buyū' wa-l-Salam* (On Sales and Pre-Payments) by Chafik Chehata (Cairo: Maṭba'at Jāmi'at al-Qāhira, 1954); an English translation by Majid Khadduri, based on unpublished manuscripts, of three successive chapters: *Kitāb al-Siyar* (On Military Expeditions), *Kitāb al-Kharāj* (On Taxation), and *Kitāb al-Ushr* (On Tithe) (Majid Khadduri, *The Islamic Law of Nations: Shaybānī's Siyar*, Baltimore: The John Hopkins Press, 1966); a four-volume edition, including thirteen chapters that cover ritual law and some other subjects, by Abū al-Wafā' al-Afghānī (Hyderabad: Dā'irat al-Ma'ārif al-Uthmāniyya, 1966–1973). Nejmeddine Hentati has recently studied and edited three fragments of *al-Aşl*, containing parts of three chapters: *Kitāb al-Sariqa wa-Qaṭ' al-Tariq* (On Theft and Brigandage), *Kitāb al-Itq wa-l-Tadbir* (On Manumission), and *Kitāb al-Şalāt* (On Prayer) (Nejmeddine Hentati, *Ḥanaḫī Law in Ifrīqiya in the 3rd/9th Century: Asad b. al-Furāt's Transmission of the Kitāb al-Aşl by Muḥammad b. al-Ḥasan al-Shaybānī: Three Manuscripts from the Ancient Library of Raqqada-Kairouan Attributed to Al-Asadīyya: Book of Prayer, Book of Manumission, Book of Theft and Brigandage* [Leiden: Brill, 2024]). I am grateful to the anonymous reviewer for drawing my attention to this recent publication.

6 Ḥajji Khalifa, *Kashf al-ẓunūn*, 2:1581; Iwan Dimitroff, *Abū 'Abdallāh Muḥammad Ibn Al-Ḥasan Asch-Schaibānī und sein corpus juris "al-ğāmi' aš-şağīr"* (Inaugural Diss., Berlin, 1908), 25; Boynukalın, Introduction, 43.

7 Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 42–43.

8 In any attempt to date the final redaction of the vulgate, the death dates of the men who constitute these links should be taken into consideration, as well as a section from the *Mukhtaşar* of al-Ṭaḥawī (d. 321/933) (Shaybānī, *al-Aşl*, 2:21).

9 The *Kitāb al-Ushr*, the *Kitāb al-Ḥiyal*, and the *Kitāb al-Shirb* (On Water Rights), respectively.

It follows that the *Aṣl* vulgate does not reflect any single *riwāya* but rather is a collection of chapters from a number of *riwāyas*, among which that of Abū Sulaymān predominates. Furthermore, as Boynukalın demonstrates in detail, some chapters which, according to the opening *isnād*, represent a particular *riwāya*, nonetheless incorporate material from a different *riwāya*.¹⁰ For example, according to the *isnād* that opens the *Kitāb al-Muzāra'a* (on Sharecropping), the chapter represents the *riwāya* of Abū Sulaymān; towards the end of the chapter, however, one finds a section from Abū Ḥafṣ' *riwāya*.¹¹ In this instance, the transition between the *riwāyas* is clearly indicated by the introductory phrase: *qāla Abū Ḥafṣ*. Elsewhere, elements of two and possibly more *riwāyas* were combined without mention. Only by comparison with later works, whose authors occasionally preserved legal opinions from different *riwāyas*, can the various constituent elements of the *Aṣl* vulgate sometimes be connected with their respective transmitters.¹²

The compiling of the vulgate, which involved both assembling the independent treatises and integrating the different *riwāyas*, probably took place between the end of the fourth/tenth century and the second half of the fifth/eleventh century. Al-Ḥākim al-Shahīd (d. 334/945), in his *al-Kāfī*, refers to texts that became chapters of the vulgate as independent treatises; their order in *al-Kāfī* differs from that of the vulgate. Ibn al-Nadīm, who completed his *Fihrist* in 377/987–8, lists the chapters as separate books, and does not mention the titles *al-Aṣl* or *al-Mabsūt*, which later were used to designate the compilation; apparently the titles were not yet in use. By the time of al-Sarakhsī (d. 483/1090), the separate treatises had been collected into the single work called *al-Aṣl* or *al-Mabsūt*; both titles are used by al-Sarakhsī throughout his *Kitāb al-Mabsūt*.¹³ The compiler (or compilers) of the vulgate had several *riwāyas* of the text at his disposal. It seems that he selected one as the basic text for each chapter, but deviated from it in favor of a different *riwāya* whenever he considered the latter preferable, or when there was a lacuna in his basic text.¹⁴

The *riwāyas* that were available to the compiler of the vulgate are, unfortunately, not available to us. The *Aṣl* is known to have been transmitted, as a whole or in part, in five major *riwāyas*, by five students of al-Shaybānī: Abū Sulaymān al-Jūzjānī, Asad b. al-Furāt (d. 213/828, Qayrawan), Abū Ḥafṣ

10 Boynukalın, Introduction, 80–82.

11 Shaybānī, *al-Aṣl*, 10:178–179 (noted by Boynukalın).

12 Boynukalın, Introduction, 80–82; and see Example 2.5 below.

13 Schacht, *Das kitāb al-maḥārīğ fil-hijāl*, 9–10; Boynukalın, Introduction, 44. For Ibn Nadīm's list of the chapters as separate works, see Ibn al-Nadīm, *al-Fihrist*, ed. I. Ramaḍān (Beirut: Dār al-Ma'rifa, 1415/1994), 253–254.

14 Boynukalın, Introduction, 82.

al-Kabīr, Hishām b. ‘Ubaydallāh (d. 221/836, Rayy), and Muḥammad b. Samā’a (d. 233/847, Baghdad).¹⁵ As noted, three other scholars each transmitted a single chapter. None of the three is known to have transmitted any further material from the *Aşl*. One of them, Dāwūd b. Rushayd, was also a student of al-Shaybānī,¹⁶ while the other two cannot be identified with certainty.¹⁷

Of the five major *riwāyas*, those of Hishām b. ‘Ubaydallāh and Muḥammad b. Samā’a are apparently lost.¹⁸ Numerous legal opinions given by al-Shaybānī on disputed questions and transmitted by either Hishām or Ibn Samā’a appear in Ḥanafī works (indicated by “*wa-fi* [or: *wa-huwa*] *riwāyat Hishām* [or *Ibn Samā’a*] ‘*an Muḥammad*”),¹⁹ but it is not clear whether they come from the *Aşl*. One exception is a short paragraph transmitted by Hishām, which is included in only two manuscripts of the *Aşl* vulgate and may reflect his *riwāya* of *al-Aşl*.²⁰ An instance of Ibn Samā’a’s *riwāya* of *al-Aşl* appears below.²¹ As noted, the *riwāyas* of Abū Sulaymān and Abū Ḥafş are credited for most of the *Aşl* vulgate, at least in the chapters whose transmitters are mentioned in the prefatory *isnāds*. But there is no chapter for which the *riwāyas* of both Abū Sulaymān and Abū Ḥafş are known to have survived: The *isnāds* that open the chapters of the *Aşl* vulgate and indicate their respective transmitters are the same in all seventeen manuscripts on which Boynukalın’s edition is based,²²

15 Boynukalın (Introduction, 74) also mentions a *riwāya* of al-Mu’allā b. Manşūr, but gives no reference. Transmissions by al-Mu’allā from al-Shaybānī are documented a number of times in Ḥanafī literature, but it is not clear whether they represent his *riwāya* of *al-Aşl* or al-Shaybānī’s opinions that originate elsewhere.

16 ‘Abd al-Qādir b. Muḥammad Ibn Abī al-Wafā’ al-Qurashī, *al-Jawāhir al-muḍīyya fi ṭabaqāt al-Ḥanafīyya*, ed. ‘A. M. al-Ḥulw, 5 vols. (2nd ed., Cairo: Hajr li-l-Ṭibā’a wa-l-Nashr wa-l-Tawzī’ wa-l-I’lān, 1413/1993), 2:186. In addition to his *riwāya* of *Kitāb al-‘Ushr*, Dāwūd b. Rushayd transmitted other opinions of al-Shaybānī (for example, see Abū Bakr b. Mas’ūd al-Kāsānī, *Badā’i’ al-ṣanā’i’ fi tartīb al-sharā’i’*, ed. ‘A. M. Mu’awwaḍ and ‘A. A. ‘Abd al-Mawjūd, 10 vols. [Beirut: Dār al-Kutub al-‘Ilmiyya, 1418/1997], 4:127; Maḥmūd b. Sulaymān al-Kafawī, *Katā’ib al-lām al-akhyār min fuqahā’ madhhab al-Nu’mān al-mukhtār*, ed. ‘A. ‘Abd al-Raḥmān, 2 vols. [Beirut: Dār al-Kutub al-‘Ilmiyya, 1440/2019], 1:311). These opinions may perhaps originate in al-Shaybānī’s *nawādir* collection, known to have been transmitted by Dāwūd b. Rushayd (Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Āthār*, ed. A. W. al-Afghānī, 2 vols. [2nd ed., Beirut: Dār al-Kutub al-‘Ilmiyya, 1413/1993], 1:22 [editor’s introduction]), and see note 41 below.

17 Boynukalın, Introduction, 96–97.

18 *Ibid.*, 74, 82.

19 For example, Muḥammad b. Aḥmad al-Sarakhsī, *Kitāb al-Mabsūṭ*, 30 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1414/1993), 4:15; 30:232; Maḥmūd b. Aḥmad, Burhān al-Dīn Ibn Māzah, *al-Muḥīṭ al-Burhānī fi al-fiqh al-Nu’mānī*, ed. ‘A. S. al-Jundī, 7 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1424/2004), 1:512; 8:605.

20 Shaybānī, *al-Aşl*, 1:372, note 2.

21 See Example 2.3 below.

22 Boynukalın, Introduction, 173.

and these *isnāds* are identical to those of the respective chapters included in the editions of Chafik Chehata and Abū al-Wafā' al-Afghānī.

Two *riwāyas* independent of the *Aṣl* vulgate, containing parts of the work, are known to have survived. One is a *riwāya* of its *Kitāb al-Ḥiyal*, published by Joseph Schacht in 1930. This *riwāya*, whose transmitter is not indicated, differs from that of Muḥammad b. Hārūn al-Anṣārī represented in the vulgate. Schacht raises the possibility that the transmitter is Abū Ḥafṣ, who is known to have transmitted the *Kitāb al-Ḥiyal* from al-Shaybānī,²³ but he adds that this cannot be established with certainty. In fact, Schacht identifies three *riwāyas* of *Kitāb al-Ḥiyal*: that of al-Anṣārī contained in the vulgate, that of the text he published, and a lost *riwāya* of Abū Sulaymān.²⁴ On the strength of details relating to their legal content, Schacht suggests that the first two *riwāyas* represent the same line of transmission of *Kitāb al-Ḥiyal*, the one identified with Abū Ḥafṣ, whereas the *riwāya* of Abū Sulaymān represents a separate line of transmission.²⁵ Schacht's suggestion implies that there were two major lines of transmission, that of Abū Ḥafṣ and that of Abū Sulaymān, and that at least the former was handed down along a number of different routes. Multiple transmission of the two *riwāyas* is suggested by the plural form *nusakh* (versions), which al-Sarakhsī regularly employs interchangeably with *riwāya* when referring to the transmissions of Abū Sulaymān or Abū Ḥafṣ: *nusakh* Abī Sulaymān or *nusakh* Abī Ḥafṣ.²⁶ According to Boynukalın, al-Sarakhsī's use of the plural form implies that each of the two *riwāyas* had many transmitters, and that all the transmissions agree on the opinion in question.²⁷ Schacht was convinced that, although it was subject to later modifications,²⁸ the text he edited was the work of al-Shaybānī.²⁹

The other extant *riwāya* independent of the vulgate is that of Asad b. al-Furāt, a scholar from Qayrawan who studied in Medina under Mālik, and in Iraq under Abū Yūsuf and al-Shaybānī. He is said to have transmitted both Mālikī and Ḥanafī teachings in the Maghrib. Since the information about Asad has been preserved mainly by the Mālikī authors of Mālikī and North African biographical dictionaries, his role in transmitting Mālikī material in the Maghrib is emphasized, while his transmission of Ḥanafī material is eclipsed.

23 Sarakhsī, *al-Mabsūt*, 30:209; al-Shaykh Niẓām et al. [eds.], *al-Fatāwā al-Hindiyya al-ma'rūfa bi-l-Fatāwā al-'Ālamkiriyya fī madhhab al-imām al-a'zam Abī Ḥanīfa al-Nu'mān*, 6 vols. (2nd ed., Beirut: Dār al-Kutub al-Ilmiyya, 2010), 6:460.

24 Abū Sulaymān's *riwāya* of *Kitāb al-Ḥiyal* is mentioned in Niẓām, *al-Fatāwā al-Hindiyya*, 6:460.

25 Schacht, *Das kitāb al-maḥāriḡ fīl-ḥijal*, 12–13.

26 For example, Sarakhsī, *al-Mabsūt*, 1:91; 6:100; 9:163.

27 Boynukalın, Introduction, 74–75.

28 Schacht, *Das kitāb al-maḥāriḡ fīl-ḥijal*, 23–25.

29 *Ibid.*, 5–9; 11; 23.

In fact, Asad was the man most responsible for bringing Ḥanafī doctrine from Iraq to the Maghrib.³⁰ The Ḥanafī material that Asad transmitted in Qayrawan included at least part of al-Shaybānī's *Aṣl*.³¹ While there appears to be no reference to his *riwāya* of *al-Aṣl* in the surviving literary sources, three early fragments of it were preserved in the Great Mosque of Qayrawan.³² These were recently edited and published by Nejmeddine Hentati, and studied by Clément Salah.³³ They include almost all of *Kitāb al-Sariqa wa-Qaṭ' al-Ṭarīq*, a little more than a half of *Kitāb al-Itq wa-l-Tadbīr*, and eleven folios of *Kitāb al-Ṣalāt*.³⁴

The locations of the six identified transmitters of the material that would become *Kitāb al-Aṣl*, all direct disciples of al-Shaybānī, give us an idea of the extent to which this material spread in the generation immediately after al-Shaybānī, and perhaps even in his lifetime. Abū Sulaymān al-Jūzjānī lived in Baghdad where he studied under al-Shaybānī and Abū Yūsuf, whose works he transmitted.³⁵ He also had a connection with Khurasan, and especially, it seems, with the town of Balkh,³⁶ where he played a prominent role in spreading Ḥanafī

30 Miklos Muranyi, *Beiträge zur Geschichte der Ḥadīṭ- und Rechtsgelehrsamkeit der Mālikīyya in Nordafrika bis zum 5. Jh. D.H.: bio-bibliographische Notizen aus der Moscheebibliothek von Qairawān* (Wiesbaden: Harrassowitz, 1997); 22–23; Nurit Tsafir, *The History of an Islamic School of Law: The Early Spread of Hanafism*, (Cambridge, Mass.: Harvard University Press, 2004), 105–107; *EP*³, s.v. Asad b. al-Furāt (Jonathan Brockopp). Clément Salah has recently called into question Asad's connection with Mālikism. He suggests that Mālikī historians of North Africa merely portrayed him as an affiliate of the Mālikī school, in an attempt to reconstruct a Mālikī-oriented history of the region (Clément Salah, "Le *madhhab* ḥanafīte d'Ifrīqiya (II^e–IV^e/VIII^e–X^e siècle): Asad b. al-Furāt (m. 213/828) et la transmission du *Kitāb al-aṣl* d'al-Ṣaybānī (m. 189/805)", *Asiatische Studien – Études Asiatiques*, 76.4 [2022], 853–921, at 878).

31 Apart from *al-Aṣl*, Asad transmitted in Qayrawan the *Kitāb al-Aqdiya*, a work by the Ḥanafī Yahyā b. Zakariyyā' b. Abī Zā'ida (d. 182/798) (Muranyi, *Beiträge*, 25–26; idem, *Die Rechtsbücher des Qairawāners Saḥnūn b. Sa'īd: Entstehungsgeschichte und Werküberlieferung* [Stuttgart: Franz Steiner, 1999], 10–11). He may also have transmitted in Qayrawan al-Shaybānī's *Kitāb al-Siyar* (Muranyi, *Beiträge*, 22–23). In addition to legal teachings, Asad handed down Ḥanafī biographical material in the Maghrib (Tsafir, *The History*, 171 n. 39).

32 The three fragments are listed by Muranyi in *Beiträge*, 23–24, and in *Sahnun b. Sa'īd*, 7–8. This was before Muranyi identified the fragments as parts of *al-Aṣl*, but he mentions that Muḥammad al-Nayyāl has suggested to identify them as such (Muranyi refers to al-Nayyāl's *al-Maktaba al-athariyya bi-l-Qayrawān*, Tunis, 1963, 30–31, which is not available to me).

33 Hentati, *Ḥanafī Law*; Salah, "Le *madhhab* ḥanafīte".

34 Hentati included in *Ḥanafī Law* only two of the extant folios of *Kitāb al-Ṣalāt*.

35 Ibn al-Nadīm, *Fihrist*, 255; al-Khaṭīb al-Baghdādī, *Ta'rikh Baghdād*, 14 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), 13:36; Qurāshī, *Jawāhir*, 3:124, 492.

36 Al-Wā'iz al-Balkhī devoted an entry to Abū Sulaymān al-Jūzjānī among the seventy biographies included in his *Faḍā'il Balkh*, of men who lived in Balkh or had a significant

doctrine and transmitting al-Shaybānī's works.³⁷ Abū Ḥaḥṣ al-Kabīr, the leading scholar of Bukhara who was responsible for establishing the Ḥanafī center there, transmitted a number of al-Shaybānī's works after studying under him in Iraq.³⁸ Hishām b. 'Ubaydallāh was one of the two leading Ḥanafīs in Rayy. He studied under Abū Yūsuf and al-Shaybānī (the latter died in his house in Rayy); his transmission of the *Aṣl* is mentioned in Ḥanafī biographical dictionaries, together with that of Muḥammad b. Samā'a, a resident of Baghdad.³⁹ Dāwūd b. Rushayd also lived in Baghdad.⁴⁰ As noted, Asad b. al-Furāt transmitted the *Aṣl* in the Maghrib. Through these transmitters, the contents of *al-Aṣl* and al-Shaybānī's teachings as documented elsewhere,⁴¹ were disseminated in Iraq, western Iran, Khurasan, Transoxania, and the Maghrib as early as the last decades of the second/eighth century.

What did these contents consist of? According to Norman Calder, *al-Aṣl* as we know it had not yet taken shape at the time when, according to the above information, it was already in wide circulation throughout Islamic lands. Based

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- connection to it ('Abdallāh b. 'Umar Wā'iz, *Faḍā'il Balkh*, trans. from the Arabic: 'A. M. b. M. Ḥusaynī [Tehran: Bonyād-e Farhang-e Īrān, 1350], 210–214) (English translation: *Faḍā'il-i Balkh or "The Merits of Balkh"*, tran. A. Azad, E. Herzig, and A. Mir-Ansari, [Cambridge]: Gibb Memorial Trust, 2021). Al-Jūzjānī's grave reportedly is located in Fāriyāb, in the Jūzjān district, not far from Balkh (*Faḍā'il Balkh*, 213); even if the claim is false, it points to his connection to this area. He appears as "al-Jūzjānī al-Balkhī" in Muḥammad Maḥrūs 'Abd al-Laṭīf al-Mudarris, *Mashāyikh Balkh min al-Ḥanafīyya wa-mā infaradū bihi min al-masā'il al-fiqhiyya* (Baghdad: al-Dār al-'Arabiyya li-l-Ṭibā'a, 1978), 1:88, 158.
- 37 Wā'iz, *Faḍā'il Balkh*, 211. Al-Jūzjānī transmitted al-Shaybānī's *al-Siyar al-kabīr* to the Balkhī Nuṣayr b. Yaḥyā (d. 268/882) (Muḥammad b. Aḥmad al-Sarakhsī, *Sharḥ Kitāb al-Siyar al-kabīr li-l-imām Muḥammad b. al-Ḥasan al-Shaybānī*, ed. M. Ḥ. al-Shāfi'ī, 3 vols. [Beirut: Dār al-Kutub al-'Ilmiyya, 1417/1997], 1:5). For his students in Khurasan, see Nurit Tsafirir, *Collective Liability in Islam: The 'Āqila and Blood-Money Payments* (Cambridge: Cambridge University Press, 2020), 98 n. 24.
- 38 Muḥammad b. Ja'far al-Narshakhī, *Tārīkh Bukhārā*, ed. and trans. from the Persian: A. 'A. Badawī and N. M. al-Ṭirāzī (3rd ed., Cairo: Dār al-Ma'ārif, [1993]), 86–87; Qurashī, *Jawāhir*, 1:166; Kafawī, *Katā'ib*, 1:272; Muḥammad 'Abd al-Ḥayy al-Laknawī, *al-Fawā'id al-bahiyya fi tarājim al-Ḥanafīyya*, ed. A. al-Zu'bī (Beirut: Sharikat Dār al-Arqam bin Abī al-Arqam li-l-Ṭibā'a wa-l-Nashr wa-l-Tawzī', 1418/1998), 40, and see n. 41 below.
- 39 Tsafirir, *The History*, 73–74, and p. 23 below.
- 40 See note 16 above.
- 41 The transmitters of *al-Aṣl* also handed down *nawādir* from al-Shaybānī (for Abū Sulaymān and Abū Ḥaḥṣ, see Boynukalın, Introduction, 93, 95; for Hishām, Ibn Samā'a, and Dāwūd, see, for example, Ibn Māzah, *al-Muḥīṭ al-Burhānī*, 2:216; 4:20). Abū Ḥaḥṣ transmitted in Bukhara al-Shaybānī's *Kitāb al-Āthār* (Behnam Sadeghi, "The Authenticity of Two 2nd/8th Century Ḥanafī Legal Texts: *the Kitāb al-āthār* and *al-Muwāṭṭa'* of Muḥammad b. al-Ḥasan al-Shaybānī", *Islamic Law and Society*, 17 (2010), 291–319, at 313–314). Asad b. al-Furāt presumably transmitted al-Shaybānī's *Kitāb al-Siyar* in the Maghrib, as mentioned above (n. 31).

on an analysis of its text, Calder concludes that *al-Aṣl* “is the end-product of a lengthy period of development, involving accumulation of basic materials, successive redactions, and interpolation of *ikhtilāf* items and authority statements”.⁴² He adds that “the uniformity of the literary expression” of the text disguises a “messy and disorderly” collection of components.⁴³ It includes different modes of exposition, and several layers of interpolated materials.⁴⁴ These characteristics of *al-Aṣl* indicate, in his opinion, that it was shaped by different hands, as a collective “school text”, in a long, organic process, at the end of which it was ascribed to al-Shaybānī.⁴⁵ It remained fluid and open until receiving its more or less final shape only around the middle of the third/ninth century.⁴⁶

One may infer from Calder’s conclusions that the transmissions of *al-Aṣl* by al-Shaybānī’s direct students did not yet represent a fixed text, but rather a stage in the process of producing such a text. His conclusions have recently been contested by Clément Salah, on the basis of a study of the three Qayrawan manuscripts of Asad b. al-Furāt’s *riwāya*. Based on an analysis of their script and of audition and collation notes added to the manuscripts by later copyists, Salah dates two of them to the third/ninth century, and one to the fourth/tenth century.⁴⁷ Given that the earliest dated manuscript used by Boynukalın is from the seventh/thirteenth century,⁴⁸ the evidence of these early fragments is significant. Of particular importance is a note in the manuscript that contains the *Kitāb al-Itq wa-l-Tadbīr*. Here the copyist indicates that he (or his master) collated the copied text with the book (*kitāb*) of Asad b. al-Furāt.⁴⁹ According to Salah, the word *kitāb* in the context of collation means, in Qayrawanī usage, a copy owned rather than transmitted by the man whose name is mentioned in the collation statement. It follows, Salah argues, that the note refers to a copy of *al-Aṣl*, or of part of it, that was owned by Asad himself.⁵⁰ If Asad b. al-Furāt owned a book containing a text from *al-Aṣl*, Salah concludes, this text must have been fixed during Asad’s lifetime, that is, before his death in 213/828.⁵¹ This is a

42 Calder, *Studies*, 49.

43 Ibid., 48–49.

44 Ibid., 40–42.

45 Ibid., 49.

46 Ibid., 51.

47 Salah, “Le *maḏhab* ḥanafite”, 869–873, also referred to in Clément Salah, “The Earliest Manuscripts of Kairouan (9th–11th centuries): New Approaches for a More Accurate Dating”, *Arabica*, 71 (2024), 247–303, at 273–276.

48 Boynukalın, Introduction, 143–146.

49 Salah, “Le *maḏhab* ḥanafite”, 869; Hentati, *Ḥanafī Law*, 51.

50 Salah, “Le *maḏhab* ḥanafite”, 869.

51 Ibid., 884.

possible but not inescapable conclusion. While a written text can reasonably be considered more stable than an oral one, the fact that a text was written down is not, in itself, a proof that it was fixed.⁵² Salah adds, however, a more persuasive argument in support of this conclusion. His comparison between the manuscripts and printed editions of *al-Aṣl* shows that the differences between these texts are minor; for instance, the addition or omission of a word or a letter.⁵³ Furthermore, the organization of the chapters is identical, as is the list of the legal questions discussed.⁵⁴ If the text of the vulgate is the same as that transmitted by Asad, then the final redaction of this text must be dated to no later than Asad's lifetime, that is, several decades before Calder's dating. Although Salah concedes that late additions (of *ikhtilāf*) appear in the printed editions but not in the manuscripts from Qayrawan,⁵⁵ he takes the text of the manuscripts, and implicitly, that of the printed *al-Aṣl*, to reflect the teachings of al-Shaybānī.⁵⁶

A comparison between different *riwāyas* of the same work is a natural way of learning about the history of that work. Similar *riwāyas* suggest that there was a single authoritative text from which all of them are derived; significant differences between them raise questions about the existence of such a text.⁵⁷ This method has been applied to test Calder's conclusions regarding the *Muwatta'*, of which many *riwāyas* are extant.⁵⁸ In Calder's opinion, the *Muwatta'* was not authored by Mālik or by anyone else during his lifetime; rather, it was the product of a prolonged organic growth that involved several scholars, the final redaction taking place ca. 270 AH.⁵⁹ Jonathan Brockopp, in a book devoted to another early Mālikī text, *al-Mukhtaṣar al-kabīr* by Ibn 'Abd al-Ḥakam (d. 214/829), analyzed discrepancies between the *riwāyas* of the

52 According to Calder, the "transmission within a school tradition" did not mean "transmission of books with fixed texts. Books grew up through the slow accumulation of material and successive redactions" (*Studies*, 44); the material subject to this process of accumulation and redaction was, according to Calder, "initially, oral law ... which was gradually acquiring literary forms" (*Studies*, 49). The complexity of the organic growth of *al-Aṣl*, as described by Calder, through the interpolation of various elements into different literary formats, implies a written text that continues to develop.

53 The editions used in this comparison are Abū al-Wafā' al-Afghānī's 1990 edition, and Boynukalin's 2012 edition (Salah, "Le *madhhab* ḥanafite", note 123).

54 Salah, "Le *madhhab* ḥanafite", 888.

55 Ibid., 891.

56 Ibid., 892.

57 Whether or not a given difference is significant can, of course, be a matter of dispute.

58 For the known *riwāyas*, see *EP*², s.v. Mālik b. Anas (Schacht); for the extant ones, see Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta', and Madinan 'Amal* (Surrey: Curzon, 1999; reprint: New Delhi: Lawman [India] Pvt. Ltd., 2000), 23–24.

59 Calder, *Studies*, 34, 36–37.

Muwattaʿa, and concluded that the variations between them are “very wide”, suggesting that the *Muwattaʿa* developed organically and that “Mālik exercised no authorial control over his text”.⁶⁰ Even if the *Muwattaʿa* does contain an authentic core of Mālik’s juristic dicta, Brockopp argues, he did not produce it as a fixed text.⁶¹ Brockopp’s opinion accords with that of Goldziher, who called into question Mālik’s authorship of the *Muwattaʿa* on the ground of the extensive differences between its versions.⁶² Other scholars who compared the *riwāyas* of the *Muwattaʿa* arrived at a very different conclusion. For example, Yasin Dutton, in his review of Brockopp’s book, claims that Brockopp “downplays the similarities and highlights the differences” between the *riwāyas* of the *Muwattaʿa*. According to Dutton, the *riwāyas* “so clearly represent one author’s compilation and work ... that it is pointless to consider them to derive from anyone other than Mālik”.⁶³ The similarity between the *riwāyas* is even more striking, Dutton argues, when one considers that they were transmitted in many different and far-flung locations. This fact also leads him to conclude that all of the *riwāyas* are based on one source, which must be Mālik’s text.⁶⁴ A recent study by Ahmed El Shamsy supports Dutton. Comparing four *riwāyas* of the *Muwattaʿa*, El Shamsy asserts that they are remarkably similar to each other, and suggests that the variations between them reflect “Mālik’s own rewrites”, or his students’ “recording and citation practices”.⁶⁵ Unlike Calder, El Shamsy holds that the text was produced by Mālik himself and expresses his own doctrine.⁶⁶

Since there are many extant *riwāyas* of the *Muwattaʿa*, its history can be studied by comparing them. This method can be applied to the *Aṣl* only to a very limited extent, because, as noted, parallel *riwāyas* are rare. At the same time, however, many of the legal disparities between the *riwāyas*, particularly between those of Abū Sulaymān and Abū Ḥafṣ, are recorded in later Ḥanafī literature.

The dominance of these two *riwāyas*, and particularly of the former,⁶⁷ is reflected not only in the vulgate, but also in al-Ḥākim al-Shahīd’s *al-Kāfi*,

60 Jonathan E. Brockopp, *Early Mālikī Law: Ibn ‘Abd al-Ḥakam and his Major Compendium of Jurisprudence* (Leiden: Brill, 2000), 74–77 (the quotation is from p. 77).

61 *Ibid.*, 74 n. 15.

62 Ignaz Goldziher, *Muslim Studies*, ed. S. M. Stern, trans. from the German by C. R. Barber and S. M. Stern, 2 vols. (London: George Allen & Unwin Ltd, 1967–1971), 2:204 ff.

63 Yasin Dutton’s review of Brockopp’s *Early Mālikī Law: Ibn ‘Abd al-Ḥakam and his Major Compendium of Jurisprudence*, in *Journal of Islamic Studies*, 13.1 (2002), 42–49, at 44.

64 Dutton, *The Origins of Islamic Law*, 27.

65 Ahmed El Shamsy, “The Ur-*Muwattaʿa* and its Recensions”, *Islamic Law and Society*, 28 (2021), 352–381, at 380.

66 *Ibid.*, 380–381.

67 Ḥājī Khalīfa, *Kashf al-zunūn*, 2:1581; Boynukalın, Introduction, 75.

also known as *al-Mukhtaṣar* or *Mukhtaṣar al-Kāfi*, which is an abridgment of al-Shaybānī's main works.⁶⁸ *Al-Aṣl* is the basis and the dominant element of this abridgment, supplemented by al-Ḥākim with material from other works.⁶⁹ Following the text of *al-Aṣl*, *al-Kāfi* gives priority to the *riwāyas* of Abū Sulaymān and Abū Ḥafṣ, and to the discrepancies between them.⁷⁰ Al-Sarakhsī, in his *Mabsūṭ* – a commentary on al-Ḥākim's *al-Kāfi* – also focuses on the *riwāyas* of Abū Sulaymān and Abū Ḥafṣ, following the vulgate and *al-Kāfi*.⁷¹ At the beginning of *Kitāb al-Kasb* (On Earning), towards the end of the *Mabsūṭ*, al-Sarakhsī points to the dominance of these two *riwāyas*. Explaining why he decided to include *Kitāb al-Kasb* – supposedly a work by al-Shaybānī – even though it is absent from *al-Kāfi*, he says:

I thought it best to include with it [i.e., the *Mabsūṭ*] a dictated text of a commentary on *Kitāb al-Kasb*, which was transmitted by Muḥammad b. Samā'a from Muḥammad b. al-Ḥasan, God have mercy on him. It is one of his [i.e., al-Shaybānī's] compositions; however, it is not widely known because neither Abū Ḥafṣ nor Abū Sulaymān, God have mercy on them, heard it from him. For this reason, al-Ḥākim, may God have mercy on him, did not mention it in the *Mukhtaṣar*.⁷²

Considering the major role of these two *riwāyas* in transmitting the *Aṣl*, the differences between them, of which early Ḥanafīs were well aware, are essential for recovering the content and history of the *Aṣl*. With regard to these differences, the evidence of the two *riwāyas* that are independent of the vulgate – namely, that of *Kitāb al-Ḥiyal* and that of Asad b. al-Furāt – is of no help. Schacht found that the *riwāya* of *Kitāb al-Ḥiyal* that he edited, and the *riwāya* of the vulgate, are two variants of (probably) Abū Ḥafṣ' *riwāya*.⁷³ The three chapters (or parts thereof) transmitted by Asad b. al-Furāt are all represented in the vulgate by the *riwāya* of Abū Sulaymān (according to the *isnāds* that open the chapters). Therefore, when Salah compares Asad's *riwāya* with what he calls “the contemporary edition”, or variants of this,⁷⁴ he is in fact

68 *EP*, s.v. Ḥanafīyya (Heffening and Schacht).

69 Boynukalın, Introduction, 119.

70 *Ibid.*, 74, 120.

71 *Ibid.*, 74.

72 Sarakhsī, *al-Mabsūṭ*, 30:244. My translation follows partly that of Michael Bonner in his “The *Kitāb al-Kasb* Attributed to al-Shaybānī: Poverty, Surplus, and the Circulation of Wealth”, *Journal of the American Oriental Society*, 121.3 (2001), 410–427, at 414.

73 See p. 6 above.

74 Salah, “Le *madhab* ḥanafite”, 885, 888.

comparing Asad's *riwāya* with that of Abū Sulaymān. Therefore, so long as we cannot identify elements from other *riwāyas* in these chapters, whatever we learn from his comparison is relevant only to the relation between the *riwāyas* of Asad and Abū Sulaymān.

In the absence of a text of *al-Aṣl* for which the *riwāyas* of both Abū Sulaymān and Abū Ḥafṣ are known, we cannot compare their wording, structure, or style. However, substantive disparities between them, as documented in later Ḥanafī literature, are instructive on the divergence of their content. The following discussion focuses on this divergence.

In Ḥanafī literature, the doctrinal differences between the two *riwāyas* are first indicated by al-Ḥākim al-Shahīd in *al-Kāfī*, and then in later works, notably al-Sarakhsī's *Mabsūt*. Drawing on these indications, in the next section I present a sample of five disagreements. From these examples it emerges that the variations between the two *riwāyas* are by no means minor or insignificant. In response to specific legal questions, the solutions they propose differ substantially and in some instances they directly contradict one another, reflecting a dispute over a legal principle.

2 Sample Cases

2.1 *The Prayer of a Believer Detained in an Impure Place*

If a believer is detained (*maḥbūs*) in an impure place (*makān qadhīr*) with no means of performing ablution, should he pray despite being ritually impure? According to the *riwāya* of Abū Sulaymān, such a believer should pray by moving the head (*īmā'*) in ways that substitute for the required bodily gestures, thus imitating those who, at the same hour, are praying in the proper manner.⁷⁵ This opinion is said also to have been held by Abū Yūsuf. The *riwāya* of Abū Ḥafṣ presents the opposite view: a believer who is unable to perform ablution should not pray at all. This opinion is said to have been followed by Abū Ḥanīfa as well.⁷⁶

The vulgate attributes to al-Shaybānī the opinion of Abū Yūsuf, and thus represents the *riwāya* of Abū Sulaymān (consistent with the chapter's

75 Instead of moving the head, moving the eyes, the eyebrows and even, metaphorically, the heart was also accepted by some scholars, but not by the prevailing Ḥanafī opinion (Aḥmad b. Muḥammad al-Qudūrī, *Mukhtaṣar al-Qudūrī*, ed. S. Bakdāsh, [3rd ed., Beirut: Dār al-Bashā'ir al-Islāmiyya, and Medina: Dār al-Sirāj, 1437/2016], 45; 'Alā' al-Dīn al-Samarqandī, *Tuḥfat al-fuqahā'*, 3 vols. [Beirut: Dār al-Kutub al-'Ilmiyya, 1414/1993], 1:192).

76 Sarakhsī, *al-Mabsūt*, 1:123; Kafawī, *Katā'ib*, 1:273.

introductory *isnād*).⁷⁷ *Al-Kāfi*, like the vulgate, accepts Abū Sulaymān's *riwāya*, but it also mentions the *riwāya* of Abū Ḥafṣ.⁷⁸ Al-Sarakhsī discusses both *riwāyas*, although – unlike al-Ḥākim – he seems to accept the *riwāya* of Abū Ḥafṣ.⁷⁹

The two contrary opinions ascribed to al-Shaybānī originate in a dispute over a question of principle: should a believer who is unable to pray properly pray within the limits of his ability or should he not pray at all? Al-Shaybānī's opinion, according to Abū Sulaymān's *riwāya*, that this believer should pray by *imā'*, is based on the principle that a believer unable to pray as required should not miss the prayer entirely. He should rather pray as best he can, since the extent of a believer's religious obligation is determined by his capability.⁸⁰ The opinion held by al-Shaybānī according to Abū Ḥafṣ' *riwāya*, that a believer who cannot ritually purify himself should not pray at all, rests on the opposite principle, namely, that a prayer which cannot be performed properly should not be performed at all. A prayer performed by a ritually impure believer is, furthermore, tantamount to disobedience.⁸¹ The disagreement on this principle engendered dissent on other, similar questions. For example, Abū Yūsuf held that a man fleeing from an enemy, or engaged in fighting, or swimming away from a sinking boat, should pray by *imā'*. In the opinion of both Abū Ḥanīfa and (according to al-Sarakhsī) al-Shaybānī, such a man should not pray at all, for the prayer in such situations does not please God (literally: it does not draw the believer closer to God, *lā takūnu al-ṣalāt qurba*).⁸²

In this example, the contention is anchored in a dispute over a principle, and the two *riwāyas* stand in complete opposition: a ritual practice regarded by one *riwāya* as obligatory is categorically prohibited by the other.

2.2 A Foundling Claimed by Two Women

This example (like the two examples that follow) comes from *Kitāb al-Laḳūṭ* (On Foundlings). A man who rescues a foundling becomes the child's guardian, responsible for its upbringing and physical wellbeing, but he does not become the foundling's legal parent.⁸³ This means that if another person claims parentage, that claim is usually accepted, because the foundling's interest

77 Shaybānī, *al-Aṣl*, 1:105.

78 Muḥammad b. Muḥammad al-Marwazī, al-Ḥākim al-Shahid, *al-Kāfi*, MS Istanbul, Millet Library, Feyzullah 922, fol. 7b.

79 Sarakhsī, *al-Mabsūṭ*, 1:123.

80 Text: *wa-l-taklīf innamā yuthbatu bi-ḥasab was'ihī* (ibid.).

81 Text: *al-ṣalāt bi-ghayr tuḥūr ma'ṣiya* (ibid.).

82 Ibid.

83 *EF*³, s.v. Foundling (M. Fadel).

in having a parent outweighs the custodian's right to keep him.⁸⁴ Ḥanafī doctrine considers several cases in which someone may claim parentage. One of these involves the rival claims of two women, each claim supported by the testimony of one other woman (understood to be the midwife who attended the foundling's birth). The two *riwāyas* differ as regards Abū Ḥanīfa's opinion on these competing claims.⁸⁵ According to Abū Ḥafṣ' *riwāya*, the doctrine of Abū Ḥanīfa is that the claims of both women are to be accepted, and thus the foundling is considered to be the child of both (the text does not address the practical implications of such a solution). This solution does not represent the direct opinion of Abū Ḥanīfa, but a ruling derived from it (*qiyaṣ qawl Abī Ḥanīfa*),⁸⁶ suggesting a degree of reasoning exercised by Abū Ḥafṣ or a previous scholar. According to the *riwāya* of Abū Sulaymān, Abū Ḥanīfa held the contrary opinion: both claims are to be rejected, and the foundling is considered the child of neither woman.⁸⁷ Abū Yūsuf and al-Shaybānī followed the latter view.⁸⁸ On this matter the *Aşl* vulgate reflects the *riwāya* of Abū Ḥafṣ, without mentioning his name.⁸⁹ There is no introductory *isnād* to *Kitāb al-Laḳīṭ*, so it is not clear whose *riwāya* it represents otherwise.

The opposing legal solutions attributed to Abū Ḥanīfa by the two *riwāyas* originate in a disagreement over the weight to be given to the testimony of one woman. On the basis of Q. 2:282, the four Sunni law schools hold that witness testimony is valid only if provided by two men, or one man and two women. A concession may be made, however, in cases involving intimate feminine circumstances, such as giving birth, to which men have no access. In such cases, women's testimony can be accepted on its own. The exception is justified by *ḍarūra*, or necessity, namely the absence of men from such settings.⁹⁰ The four law schools disagree, however, over the number of women required for

84 Qudūrī, *Mukhtaṣar*, 204; 'Abdallāh b. Maḥmūd al-Mawṣilī, *al-Ikhtiyār li-ta'līl al-Mukhtār*, ed. 'A. M. 'Abd al-Raḥmān, 5 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1419/1998), 3:33. All references to males in this context include also females.

85 According to al-Kāsānī (*Badā'ī' al-ṣanā'ī'*, 8:325) the dispute is over al-Shaybānī's opinion, not that of Abū Ḥanīfa.

86 Shaybānī, *al-Aşl*, 5:245.

87 Text: *fa-huwa ibnuhumā jamī'an fī qawl Abī Ḥanīfa raḥimahu Allāh ta'ālā wa-hādhā fī riwāyat Abī Ḥafṣ raḥimahu Allāh ta'ālā wa-ammā fī riwāyat Abī Sulaymān raḍiya Allāh 'anhu lā yakūnu ibn wāhida minhumā* (Sarakhṣī, *al-Mabsūṭ*, 10:217. See also Ḥākim, *al-Kāfī*, fol. 164a; Maḥmūd b. Aḥmad al-'Aynī, *al-Bināya sharḥ al-Hidāya*, ed. A. Ş. Sha'bān, 13 vols. [Beirut: Dār al-Kutub al-'Ilmiyya, 1420/2000], 7:317).

88 Shaybānī, *al-Aşl*, 5:245; Ḥākim, *al-Kāfī*, fol. 164a.

89 Shaybānī, *al-Aşl*, 5:245.

90 Sarakhṣī, *al-Mabsūṭ*, 16:142–143; 'Abdallāh Muwaffaq al-Dīn Ibn Qudāma al-Maqdisī, *al-Mughnī*, ed. 'A. b. 'A al-Turkī and 'A. M. al-Ḥulw, 14 vols. + Index (2nd ed., Cairo: Hajr li-l-Ṭibā'a wa-l-Nashr wa-l-Tawzī' wa-l-I'lān, 1412–1413/1992), 14:134–135.

the testimony to be valid in such a case. Mālikīs require the testimony of two women, Shāfi'īs that of four.⁹¹ Ḥanafīs and Ḥanbalīs apply to the number of witnesses the concession arising from *ḍarūra*: given that an intimate feminine setting is often witnessed by only one woman, they accept the testimony of just one woman.⁹²

This Ḥanafī principle, namely, that in certain cases the testimony of one woman constitutes evidence, was interpreted in two different ways, as reflected in the difference between the two *riwāyas*. The opinion of Abū Ḥanīfa as represented in Abū Ḥafṣ' *riwāya*, namely, that both women's claims are to be accepted, each being supported by a single female witness, reflects the interpretation that such evidence is conclusive (*ḥujja tāmma*). The opposite opinion, attributed to Abū Ḥanīfa in Abū Sulaymān's *riwāya*, results from the understanding that the testimony of one woman is *ḥujja ḍa'īfa*, weak evidence, insufficient to validate a claim in opposition to another claim, as in this case.⁹³

Thus, the disagreement between the two *riwāyas* originates in a dispute over the interpretation of a principle, and the result is a stark contrast between them.

2.3 *How to Determine a Foundling's Religion?*

Two major criteria determine a foundling's religious affiliation: the religion of his custodian, and the religion prevalent in the place where he was found. A foundling rescued by a Muslim in a Muslim location is considered a Muslim. A problem arises when the two criteria lead to contradictory results, as in the case of an infant found by a Muslim in a clearly non-Islamic location, such as a church or a village inhabited by *dhimmīs*. In the *Aṣl* vulgate, and following it, in *al-Kāfi* and later works, this question is dealt with, repetitively, in two chapters, *Kitāb al-Da'wā* (On Claims) and *Kitāb al-Laḳīṭ*. According to *Kitāb al-Laḳīṭ*, whose transmitter from al-Shaybānī is unknown, the religion of the foundling is determined by the location in which he was found.⁹⁴ According to *Kitāb al-Da'wā*, the foundling follows the religion of his finder.⁹⁵ The *isnād*

91 For the Mālikīs see Saḥnūn b. Sa'īd, *al-Mudawwana al-kubrā*, 5 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1415/1994), 4:22; for the Shāfi'īs see Muḥammad b. Idrīs al-Shāfi'ī, *al-Umm*, ed. M. Maṭraji, 8 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1413/1993), 7:88.

92 Ḥanafīs: Qudūrī, *Mukhtaṣar*, 339; Ḥanbalīs: Ibn Qudāma, *al-Mughnī*, 14:134–135 (where another opinion of Ibn Ḥanbal's, which requires two women, is also mentioned).

93 Sarakhsī, *al-Mabsūt*, 10:217; Niẓām, *al-Fatāwā al-Hindīyya*, 2:305.

94 Shaybānī, *al-Aṣl*, 5:244; Ḥākim, *al-Kāfi*, fol. 164a; Sarakhsī, *al-Mabsūt*, 17:130; Kāsānī, *Badā'ī al-ṣanā'ī*, 8:320.

95 Shaybānī, *al-Aṣl*, 8:75; Ḥākim, *al-Kāfi*, fol. 347a; Sarakhsī, *al-Mabsūt*, 17:130.

at the beginning of *Kitāb al-Da'wā* states that it represents the *riwāya* of Abū Sulaymān.⁹⁶

With regard to this question, three more *riwāyas* (*nusakh*) of *Kitāb al-Da'wā* are mentioned (that is, three *riwāyas* not included in the vulgate).⁹⁷ At least two of them are attributed to Ibn Samā'a. One of the three *riwāyas* offers a third answer: whatever the circumstances may be, preference is given to Islam.⁹⁸ That is, a foundling rescued by a Muslim is considered a Muslim, regardless of what religion is practiced in the place where he was found; and he is considered a Muslim if found in Islamic surroundings, regardless of his finder's religion. Another *riwāya* (*ba'd al-nusakh*) of *Kitāb al-Da'wā*, attributed to Ibn Samā'a, proposes a different solution: the religion of the foundling is determined by his external appearance,⁹⁹ which means, according to the interpretation of Ibn Samā'a himself, the marks that distinguish a *dhimmī* from a Muslim, such as a cross around the neck, or a decorated silk garment, or hair cut in the middle of the head.¹⁰⁰ Alternatively, another *riwāya* of *Kitāb al-Da'wā*, also attributed to Ibn Samā'a, agrees with the vulgate, namely, that the foundling follows the religion of his finder.¹⁰¹

To sum up, one finds four different answers in *al-Aṣl* on the question of how to determine the religion of a foundling in ambiguous cases: by the religion prevailing in the place where the foundling was found (according to the *riwāya* of *Kitāb al-Laḳīṭ*, whose transmitter is unknown); by the religion of his custodian (according to the *riwāya* of *Kitāb al-Da'wā*, whose transmitter in

96 Shaybānī, *al-Aṣl*, 7:573; see also: Mawṣilī, *al-Ikhtiyār*, 3:34.

97 On al-Sarakhsī's use of *nusakh* (pl.) to indicate several versions of a single *riwāya*, see p. 6 above.

98 Text: *ayyuhumā kāna mujīb^{an} li-l-Islām yu'tabaru dhālika* Sarakhsī, *al-Mabsūṭ*, 10:215; see also 'Alī b. Abī Bakr al-Marghīnānī, *al-Hidāya sharḥ Bidāyat al-mubtadī*, ed. M. M. Tāmīr and Ḥ. 'A. Ḥāfīz, 4 vols. [Cairo: Dār al-Salām, 1420/2000], 2:888). It is not clear to me if the transmitter of this *riwāya* is also Ibn Samā'a.

99 Text: *annahu yuḥkamu li-zīy al-laḳīṭ wa-simāhu* (Sarakhsī, *al-Mabsūṭ*, 17:130, and a variation in 10:215). According to one, late source, Ibn Samā'a transmitted the same opinion from al-Shaybānī's *nawādir* ('Aynī, *al-Bināya*, 7:317).

100 Text: *wa-tafsīr hādhihi al-riwāya dhakarahu Ibn Samā'a raḥimahu Allāh annahu idhā kāna fī 'unqihī ṣalīb wa-'alayhi thawb dībāj wa-wasaṭ ra'sihī muḥraz* [read: *majzūz*] *fa-l-zāhir annahu min awlād al-Naṣārā fa-lā yuḥkamu lahu bi-Islāmihī* (Sarakhsī, *al-Mabsūṭ*, 17:130). For the correct reading of *muḥraz*, see al-Ḥasan b. Maṣṣūr al-Ūzjandī, Qāḍikhān, *Fatāwā Qāḍikhān*, ed. S. M. al-Badrī, 3 vols. (Beirut: Dār al-Kutub al-Ilmiyya, 2009), 3:297 (I owe this emendation and the reference to Qāḍikhān's *Fatāwā* to Tareq Rajab); it is not clear to me exactly what kind of a haircut is referred to.

101 Text: *wa-fī Kitāb al-Da'wā fī ba'd al-nusakh: u'tubira al-wājid wa-huwa riwāyat Ibn Samā'a 'an Muḥammad* (Marghīnānī, *al-Hidāya*, 2:888; 'Umar b. Ibrāhīm Ibn Nujaym, *al-Nahr al-fā'iḳ sharḥ Kanz al-daḳā'iḳ*, ed. A. 'I. 'Ināya, 3 vols. [Beirut: Dār al-Kutub al-Ilmiyya, 1422/2002], 3:274; and a variation in Sarakhsī, *al-Mabsūṭ*, 10:215).

the vulgate is Abū Sulaymān, and according to another *riwāya* of this chapter, ascribed to Ibn Samā'a); by the foundling's appearance (according to a second *riwāya* of *Kitāb al-Da'wā* by Ibn Samā'a); and by giving preference to Islam (according to a third *riwāya* of *Kitāb al-Da'wā*, by Ibn Samā'a or by another transmitter).¹⁰²

Whereas the previous examples demonstrate that Abū Sulaymān and Abū Ḥafṣ, both of whom transmitted directly from al-Shaybānī, offered contradictory solutions to particular problems, here we have two, and perhaps three different answers that are attributed to one direct transmitter, Ibn Samā'a. In other words, in addition to the first generation of transmitters, who disagreed with each other over the teachings attributed to al-Shaybānī, subsequent generations of transmitters disagreed over the contents of the *riwāyas* of al-Shaybānī's direct students.

2.4 *The Religion of a Foundling Claimed by a Dhimmī*

The discussion regarding the religion of a foundling claimed by a *dhimmī* branches off from the previous example. Consider the case of a *dhimmī* who claims paternity of a foundling rescued by a Muslim in a non-Islamic location. In support of his claim, the *dhimmī* produces two *dhimmī* witnesses. Should his claim be accepted? To answer this question, one refers to the basic case, namely, a *dhimmī* who claims paternity of a foundling who was rescued by a Muslim in a Muslim location and is thus considered a Muslim. In such a case the *dhimmī*'s claim is accepted on the basis of *istiḥsān*, that is, consideration of the best interest of the child, who benefits from being of known descent. By the same rationale, however, the child who is deemed to be of the same descent as his *dhimmī* claimer would not follow the latter's religion but rather would remain a Muslim. For whereas having a definite ancestry benefits the foundling, adopting the *dhimmī*'s religion is detrimental, since it would deprive him of the superiority he enjoys as a Muslim.¹⁰³

Similarly, if a *dhimmī* claims paternity of a foundling rescued by a Muslim in a Christian location, and the *dhimmī*'s claim is corroborated by two *dhimmī* witnesses, the claim is accepted. The foundling is nevertheless deemed to be

102 Of these four opinions, the one documented in *Kitāb al-Laḳīṭ* prevailed, and achieved the status of *zāhir al-riwāya* (Kāsānī, *Badā'i' al-ṣanā'i'*, 8:320; Mawṣilī, *al-Ikhtiyār*, 3:34; Ibn Nujaym, *al-Nahr al-fā'iḳ*, 3:274).

103 Text: *da'wāhu tuḍminu al-nasab wa-huwa nāfi' li-l-ṣaghīr wa-ibṭāl al-Islām al-thābit bi-l-dār wa-huwa yaḍurruhu fa-ṣaḥḥat da'watuhu fīmā yanfa'uhu dūna mā yaḍurruhu* (Marghīnānī, *al-Hidāya*, 2:888. See also Aḥmad b. 'Alī al-Jaṣṣāṣ, *Sharḥ Mukhtaṣar al-Ṭahāwī fi al-fiqh al-Ḥanafī*, ed. M. 'Iṣmat Allāh 'Ināyat Allāh et al., 8 vols. [2nd ed., Beirut: Dār al-Bashā'ir al-Islāmiyya, 1431/2010], 4:67–68; Sarakhsī, *al-Mabsūṭ*, 17:130).

a Muslim. This is the *riwāya* of Abū Sulaymān.¹⁰⁴ According to the *riwāya* of Abū Ḥafṣ, however, the foundling takes not only the *dhimmī*'s descent but also his religion.¹⁰⁵ This *riwāya* implies that the testimony of the two *dhimmīs* is given preference over the child's welfare. As al-Sarakhsī explains (in favor of Abū Sulaymān's *riwāya*), the opinion represented by the *riwāya* of Abū Ḥafṣ, which calls for changing the foundling's religious affiliation on the basis of the testimony of *dhimmīs*, implies the recognition of such testimony. This is unacceptable according to Ḥanafī doctrine, which holds that the testimony of unbelievers against Muslims is invalid.¹⁰⁶ Therefore, such a testimony cannot serve as a proof against the Muslim custodian's right to keep the foundling, or against the foundling's right to remain a Muslim (following his custodian's religion).¹⁰⁷

In this example, the difference between the *riwāyas* reflects a disagreement over a legal principle, namely, the validity of a non-Muslim's testimony against a Muslim. This is similar to Example 2.2, in which the difference between the *riwāyas* arises from a disagreement over the validity of one woman's testimony. In both examples, the opinion in the *riwāya* of Abū Ḥafṣ reflects a greater willingness to accept the witness of disadvantaged groups, women and *dhimmīs*.

2.5 Ownership of a Wad'ʿa (Deposit) in a Territory Conquered by Muslims

The following difference between the two *riwāyas* appears in the *Kitāb al-Siyar*, in the discussion of spoils of war. It relates to the question of what happens to the property of a Muslim who lives in *dār al-ḥarb* when this territory is conquered by a Muslim army. Does he retain ownership of the property or is it treated as an integral part of *dār al-ḥarb*, thus becoming *fay'*, booty, that belongs to the entire Muslim community? The prevailing Ḥanafī opinion takes a middle course: the Muslim retains ownership over movables (*manqūlāt*), but his immovable property (*'aqār, arḍ* or *dūr*) is *fay'*.¹⁰⁸

104 Shaybānī, *al-Aşl*, 8:75. The attribution to the *riwāya* of Abū Sulaymān is based on the opening *isnād* of the chapter (*Kitāb al-Da'wā*) and on references in later sources.

105 Ḥākīm, *al-Kāfī*, fol. 347a; Sarakhsī, *al-Mabsūt*, 17:131.

106 Kāsānī, *Badā'ī' al-şanā'ī'*, 9:56.

107 Text: *wa-shahādāt ahl al-dhimma laysat bi-ḥujja 'alā al-wāḥid* (read: *al-wāḥid*) *wa-lā 'alā man ḥukima bi-islāmihī tab'^{an} li-l-wāḥid* (read: *li-l-wāḥid*) *fa-kāna wujūduhu ka-'adamihī* (read: *wujūduhā ka-'adamihā*) (Sarakhsī, *al-Mabsūt*, 17:131).

108 Shaybānī, *al-Aşl*, 7:456–7; Sarakhsī, *al-Mabsūt*, 10:66; Marghinānī, *al-Hidāya*, 2:831–832; 'Abdallāh b. Aḥmad al-Nasafī, *Kanz al-daqa'iq*, in 'Umar b. Ibrāhīm Ibn Nujaym, *al-Nahr al-fā'iq sharḥ Kanz al-daqa'iq*, ed. A. 'I. 'Ināya, 3 vols. (Beirut: Dār al-Kutub al-Ilmiyya, 1422/2002), 3:216; Zayla'ī, *Tabyīn al-ḥaqā'iq*, 4:107–108.

A specific question relates to a Muslim living in *dār al-ḥarb* who has entrusted movable property to another party in *dār al-ḥarb* as a deposit, *wadī'a*.¹⁰⁹ In Ḥanafī law, a deposit is usually treated differently from a movable that is in the possession of its owner, depending on whether the owner (a Muslim) is (i) a subject of *dār al-ḥarb* (usually a convert), or (ii) a subject of the Muslim state residing in *dār al-ḥarb* under an assurance of safety, *amān* (henceforth: a *musta'min*).¹¹⁰

- (i) In the first case, the Ḥanafīs distinguish between a *wadī'a* entrusted to a Muslim or a *dhimmī*, and one entrusted to a *ḥarbī* (an infidel who is not a *dhimmī*). The most authoritative Ḥanafī opinion (*zāhir al-riwāya*) is that if the *wadī'a* was entrusted to a Muslim or a *dhimmī*, it remains the property of its owner; but if it was entrusted to a *ḥarbī*, it becomes *fay'*.¹¹¹
- (ii) In the case of a *musta'min* there are two views: (a) The opinion in the vulgate is that his *wadī'a* becomes *fay'* whether or not its custodian is a *ḥarbī*.¹¹² (b) By contrast, according to *al-Kāfī*, a *musta'min*'s ownership of his *wadī'a* continues despite a Muslim conquest even if the deposit is a *ḥarbī*.¹¹³

Al-Kāfī usually adheres closely to the vulgate, and its deviation from it in this case is striking. The reason for the deviation emerges from later sources: *al-Kāfī* reflects the *riwāya* of Abū Sulaymān, while the vulgate reflects that of Abū Ḥafṣ.¹¹⁴ The difference between the opinions represented by the two *riwāyas* is substantial. The *riwāya* of Abū Sulaymān, as reflected in *al-Kāfī*, treats a deposit made by a *musta'min* like any other movable that belongs to a Muslim in *dār al-ḥarb*. That is to say, he retains ownership despite the Muslim

109 With regard to *wadī'a*, Ḥanafī jurists do not distinguish between movables and immovables, but they appear to assume that a deposit is always a movable.

110 The term *musta'min* usually refers to a non-Muslim from *dār al-ḥarb* residing in Islamic territory under a pledge of security (*ET*³, s.v. *Amān* [H. Halilieh]). Here the opposite is meant, namely, a subject of the Muslim state staying in *dār al-ḥarb* under *amān*. I use the term *musta'min* in the latter sense in the absence of a more specific term (I found *musta'min* in this latter meaning only in a late source: Muḥammad b. 'Alī 'Alā' al-Dīn Al-Ḥaṣḥakafī [d. 1088/1677], *al-Durr al-muntaqā fī sharḥ al-Multaqā*, in 'Abd al-Raḥmān b. Muḥammad Shaykhizādah, *Majma' al-anhur fī sharḥ Multaqā al-abḥur*, ed. Kh. 'I. al-Manṣūr, 4 vols. [Beirut: Dār al-Kutub al-'Ilmiyya, 1419/1998], 2:430).

111 Sarakhsī, *al-Mabsūṭ*, 10:67; Marghīnānī, *al-Hidāya*, 2:831–832; Zaylā'ī, *Tabyīn al-ḥaqā'iq*, 4:107–108; Shaykhizādah, *Majma' al-anhur*, 2:427–428.

112 Text: *wa-kadhālika mā kāna awda'a ḥarbiyy^{an} aw ghayrahu fa-innahu lā yakūnu lahu wa-yakūnu fay'^{an}* (Shaybānī, *al-Aṣl*, 7:458).

113 Text: *wa-mā kāna lahu min wadī'a 'inda ḥarbī aw dhimmī fa-huwa lahu wa-laysa bi-fay'* (Ḥākim, *al-Kāfī*, fol. 210b; followed by Sarakhsī, *al-Mabsūṭ*, 10:68).

114 Zaylā'ī, *Tabyīn al-ḥaqā'iq*, 4:108; Shaykhizādah, *Majma' al-anhur*, 2:430; Ḥaṣḥakafī, *al-Durr al-muntaqā*, 2:430; Nizām, *al-Fatāwā al-Hindīyya*, 2:234–235.

conquest. The *riwāya* of Abū Ḥaḥṣ, as reflected in the vulgate, is the opposite: if Muslims conquer *dār al-ḥarb*, the *musta'min* loses ownership of the property. It becomes *ḥay'*, irrespective of the identity of the person to whom it was entrusted.

This difference has significant practical implications. The *riwāya* of Abū Sulaymān serves the interests of the individual *musta'min*; that of Abū Ḥaḥṣ serves the interests of the Muslim state. Many *musta'mins* were merchants who traveled from one country to another and stored commodities in those countries.¹¹⁵ For them, the solution represented by the *riwāya* of Abū Ḥaḥṣ might mean serious loss in case of a Muslim conquest.

Whereas later sources indicate that the opinion in the vulgate (ii, a) reflects the *riwāya* of Abū Ḥaḥṣ, the *isnād* at the start of *Kitāb al-Siyar* states that this chapter is based on the *riwāya* of Abū Sulaymān. The discrepancy illustrates the phenomenon described above: the transmitter identified in the prefatory *isnād* of a chapter is not necessarily responsible for the entire content of that chapter.¹¹⁶ In this case, an element from the *riwāya* of Abū Ḥaḥṣ has been inserted into a text that generally represents Abū Sulaymān's *riwāya*. This insertion attests to the liberty taken by the compiler (or compilers) of the vulgate in merging two – or possibly more – *riwāyas* into one text. The insertion of Abū Ḥaḥṣ' *riwāya* also suggests an attempt to advance the state's interests over those of the individual *musta'min*.

In these five examples, the variations between the two *riwāyas* thus amount to significant *ikhtilāf*. They show the *riwāyas* to be entirely contrary to each other, as in examples 2.1 and 2.2; or in disagreement over matters of principle, as in examples 2.1, 2.2, and 2.4; or representing a wide variety of opinions, as in example 2.3; or reflecting contrasting interests, as in example 2.5. These differences are clearly too weighty to be explained by citation practices or copyist mistakes or any other activity relating to the physical production of a text. Rather, they reflect different legal approaches that created different legal contents. Such a divergence between the *riwāyas* indicates a divergence by at least one of them from any common source text. In other words, based on the sample examined, the *riwāyas* of Abū Sulaymān and Abū Ḥaḥṣ cannot both be regarded as conforming to the doctrinal content of a single original text of *al-Aşl*.

¹¹⁵ In fact, the expression *tājir bi-amān* (a merchant under a pledge of safety) is sometimes used generically for any subject of the Muslim state who resides in *dār al-ḥarb* under *amān* (Ḥākim, *al-Kāfi*, fol. 210b; Sarakhsī, *al-Mabsūt*, 10:67).

¹¹⁶ See p. 4 above.

But what is the degree of nonconformity? Are the two *riwāyas* separated merely by a few individual legal opinions, but otherwise closely related to each other, or are they broadly distinct from each other? To fully gauge the degree of nonconformity we need to know not only the nature of the differences between the *riwāyas* but also their number. If the number of instances is small, then, even if each of them is significant, the divergence of the entire *riwāya* from the original text is of limited significance. Because the complete *riwāyas* of Abū Sulaymān and Abū Ḥafṣ are unavailable, our estimate of the extent of *ikhtilāf* between them must rely on the points of dispute recorded in later Ḥanafī works. A digital examination of the literature reveals between fifty and sixty such points of difference between the *riwāya* of Abū Sulaymān and that of Abū Ḥafṣ, scattered over some thirty chapters.¹¹⁷ It is not clear if these differences represent the full scope of the discrepancy between the two *riwāyas* or if there are additional cases not recorded in the literature. Be that as it may, the number of documented disparities is not negligible, suggesting that the two *riwāyas* were significantly different from each other.

3 The Biographical Material

A similar impression emerges from biographical information, which, in addition, points to a contest for priority among the *riwāyas* of *al-Aṣl* in general, and between those of Abū Sulaymān and Abū Ḥafṣ in particular. A revealing anecdote about the latter two *riwāyas* is found in *Faḍā'il Balkh*, by 'Abdallāh b. 'Umar al-Wā'iz al-Balkhī. The work, which was written in Arabic by 610/1214, survives only in a Persian translation (sometimes mixed with Arabic) by 'Abdallāh b. Muḥammad b. al-Qāsim al-Ḥusaynī, completed in 676/1278. This is mainly a biographical dictionary of men connected to Balkh. It includes a biography of Abū Sulaymān, in which it is reported that when he and Abū Ḥafṣ had completed their legal training under al-Shaybānī and were about to return home – Abū Sulaymān presumably to Balkh or its vicinity, and Abū Ḥafṣ to Bukhara – they each asked al-Shaybānī for an *ijāza*, that is, an authorization to teach the doctrines that they had learned from him and recorded in writing. Al-Shaybānī agreed to Abū Sulaymān's request but refused to give an *ijāza* to Abū Ḥafṣ. He explained that Abū Ḥafṣ had to cross the Oxus (Jayhūn) on his way home, and the books (or notebooks, *kutub*) containing al-Shaybānī's teachings might be lost in the river. For this reason, al-Shaybānī stipulated that Abū Ḥafṣ would have to memorize the contents of the books

¹¹⁷ The inquiry did not include *al-Kāfi*, which is not available in print.

in order to receive an *ijāza*. Abū Ḥafṣ extended his stay in Iraq and complied with al-Shaybānī's request. On his way home, the books did indeed fall into the river. Upon arriving in Bukhara, Abū Ḥafṣ sent to Abū Sulaymān asking to borrow his records of al-Shaybānī's teachings in order to make new copies of his own. Fearing that his copies would likewise be lost in the river, Abū Sulaymān agreed only on the condition that Abū Ḥafṣ travel to him to use his copies. On hearing this, Abū Ḥafṣ decided to forego Abū Sulaymān's copies and instead rewrote al-Shaybānī's teachings from memory. This, the anecdote concludes, accounts for the differences between the *riwāya* of Abū Ḥafṣ and that of Abū Sulaymān.¹¹⁸

The anecdote is not historical. As its concluding remark implies, its purpose is to explain why there are differences between the two *riwāyas*. The story is also intended, however, to assess the value of the *riwāyas* in relation to each other. It implies that the *riwāya* of Abū Ḥafṣ, written from memory, is less reliable than that of Abū Sulaymān, which is based on notes approved by al-Shaybānī. The inevitable conclusion is that whenever there are differences between the two *riwāyas*, that of Abū Sulaymān is to be preferred. In elevating the authority of Abū Sulaymān's *riwāya* above that of Abū Ḥafṣ, the anecdote supports the tendency reflected in Ḥanafī works, where Abū Sulaymān's *riwāya* is dominant, and usually preferred over that of Abū Ḥafṣ. The attempt reflected in the anecdote to prove that Abū Sulaymān's *riwāya* is superior to that of Abū Ḥafṣ suggests a competition between the *riwāyas*, and a dispute over their authority in relation to each other. It follows that the variations between the two *riwāyas* must have been weighty: Had they been minor, no competition or dispute would have arisen.

The controversy over the authority of the *riwāyas* of *al-Aşl* extended beyond those of Abū Sulaymān and Abū Ḥafṣ. In the biography of Hishām b. 'Ubaydallāh, whose *riwāya* of *al-Aşl* is lost, as noted, it is said that Abū Bakr al-Jaṣṣāṣ (d. 370/980) "disliked having *al-Aşl* in the *riwāya* of Hishām read to him because it was [partially] corrupt. [Instead] he asked for the *riwāya* of either Abū Sulaymān or Muḥammad b. Samā'a to be read to him because they were correct and accurate".¹¹⁹ This report, whether true or not, echoes

118 Text: *va-az in ast keh revāyāt mayān-e Abū Sulaymān va-Abū Ḥafṣ mokhtalef ast* (Wā'iz, *Faḍā'il Balkh*, 211–212).

119 Text: ... *annahu kāna yakrahu an yuqra'a 'alayhi al-Aşl min riwāyat Hishām li-mā fihi min al-iqtirāb wa-kāna ya'muru an yuqra'a 'alayhi al-Aşl min riwāyat Abi Sulaymān aw riwāyat Muḥammad b. Samā'a li-ṣiḥḥat dhālika wa-ḍabṭihimā* (Qurashī, *Jawāhīr*, 3:569; and similar versions in Ḥusayn b. 'Alī al-Şaymarī, *Akhbār Abi Ḥanīfa wa-aṣḥābihi* [Beirut: 'Ālam al-Kutub, 1405/1985], 162; and in Aḥmad b. Muṣṭafā Ṭāsh Kubrī Zādah, *Ṭabaqāt al-fuqahā'* [2nd ed., Mosul, 1961], 28).

a dispute over the authority of the *riwāyas*.¹²⁰ Whereas the *Aṣl* vulgate and *al-Kāfi* both give precedence to the *riwāyas* of Abū Sulaymān and Abū Ḥafṣ, here the *riwāya* of Abū Ḥafṣ is not mentioned, and the *riwāya* of Ibn Samā'a – which, as mentioned above, is also lost, and is not represented in the vulgate – is elevated to the level of Abū Sulaymān's; the disapproval of Hishām's *riwāya* is consistent with its elimination from the vulgate.

4 Conclusion

There are a number of possible explanations for the differences between the *riwāyas* of Abū Sulaymān and Abū Ḥafṣ. One is that they originate with al-Shaybānī himself. Over decades of writing and lecturing, his teachings may have developed and changed, and the variations between the *riwāyas* would reflect different stages of this development. The phenomenon of a work being transmitted from its originator in more than one version is characteristic of early Islam. Students transmitted from their teacher a text that he approved at a certain time, but which he continued to develop and teach, transmitting modified versions to later students.¹²¹ Boynukalın proposes that this process of change gave rise to the differences and inconsistencies between the *riwāyas* of *al-Aṣl*: the author changed his opinion on a given legal question, one transmitter recorded his opinion before the change, another after it.¹²² This explanation accords with al-Sarakhsī's note that most of the works (*kutub, taṣnīfāt*) that were later combined to comprise *al-Aṣl* were revised by al-Shaybānī more than once; after composing a work, he would rewrite or modify it.¹²³ Ḥanafī texts contain instances in which al-Shaybānī gave different answers to the same legal question. These disparities were subsequently ascribed by the Ḥanafīs to al-Shaybānī's changes of mind (indicated by the locution *thumma raja'a*

120 I suspect that the text in al-Qurashī's *Jawāhir*, or at the least its wording, is later than al-Jaṣṣās, because the title *al-Aṣl* came to indicate al-Shaybānī's work only after the lifetime of al-Jaṣṣās, as discussed above. In fact, the version preserved by al-Ṣayma'ī (d. 436/1044) has *al-uṣūl* instead of *al-Aṣl*.

121 El Shamsy, "The Ur-*Muwatta'*", 353.

122 Boynukalın, Introduction, 87.

123 Sarakhsī, *al-Mabsūṭ*, 30:287; Boynukalın, Introduction, 106, 109–110. Al-Shaybānī also wrote two versions of *al-Jāmi' al-kabīr*, the later more comprehensive and more nuanced than the earlier; his students transmitted first the early version, then the later one (Muḥammad b. al-Ḥasan al-Shaybānī, *al-Jāmi' al-kabīr*, ed. M. M. Tāmir [Beirut: Dār al-Kutub al-'Ilmiyya, 1421/2000], editor's Introduction, 3).

Muḥammad ‘an ...).¹²⁴ Ahmed El Shamsy offers a similar explanation for the differences between the recensions of the *Muwattaʿa*: they reflect changes introduced by Mālik during the long period when he taught the *Muwattaʿa*.¹²⁵ Mālik’s regular change of opinion is well documented,¹²⁶ and he is known to have reshaped the *Muwattaʿa* over several decades.¹²⁷ According to this explanation, the texts transmitted by the author’s immediate students were not finalized, or fixed, but rather work in progress, and this process resulted in the variations between the *riwāyas* of the text.

Another possible explanation is that the differences between the *riwāyas* reflect changes introduced in a fixed text by its transmitters, whether the author’s students or later transmitters. In general, the early Muslims did not give much attention to the faithfulness of transmission, and transmitters took liberty in changing the texts they transmitted.¹²⁸ Disagreement between students and their master, and among students, was a typical feature of the early legal schools.¹²⁹ Thus, deviation from the original resulted not only from carelessness but also from wishing to leave a mark on the content transmitted. There is ample evidence to show that the founders’ teachings were sometimes expanded, revised, or overruled by their students, with the result that contradictory opinions were attributed to the same teacher.¹³⁰ The divergent opinions of successive generations of jurists formed the layers that comprise the school’s doctrine. *Taqlīd*, as the term was generally understood, meant a commitment not to individual opinions, but rather to the school’s

124 For example, Naşr b. Muḥammad Abū al-Layth al-Samarqandī, *ʿUyūn al-masāʾil fī furūʿ al-Ḥanafīyya*, ed. S. M. Muḥannā (Beirut: Dār al-Kutub al-ʿIlmiyya, 1419/1998), 36; Zaylaʿī, *Tabyīn al-ḥaqāʾiq*, 5:141; Zayn al-Dīn b. Ibrāhīm Ibn Nujaym, *al-Baḥr al-rāʾiq sharḥ Kanz al-daqaʾiq*, ed. Z. ʿUmayrāt, 9 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1418/1997), 5:162.

125 El Shamsy, “The Ur-*Muwattaʿa*”, 375–376, 380. Schacht too notes that the form of Mālik’s teachings changed over time (*EF*², s.v. Mālik b. Anas [Schacht]).

126 Umar F. Abd-Allah Wymann-Landgraf, *Mālik and Medina: Islamic Legal Reasoning in the Formative Period* (Leiden: Brill, 2013), 21.

127 El Shamsy, “The Ur-*Muwattaʿa*”, 373; Dutton, A Review of Brockopp’s *Early Mālikī Law*, 43–44.

128 *EF*², s.v. Mālik b. Anas (Schacht).

129 Wymann-Landgraf, *Mālik and Medina*, 16–22.

130 Nimrod Hurvitz, “The *Mukhtaṣar* of al-Khiraqī and its Place in the Formation of Ḥanbali Legal Doctrine”, in *Law, Custom and Statute in the Muslim World: Studies in Honor of Aharon Layish*, ed. Ron Shaham (Leiden: Brill, 2006), 1–16, at 12–13; Wymann-Landgraf, *Mālik and Medina*, 21; Clément Salah, “Aṣḥab b. ʿAbd al-ʿAzīz (m. 204/820) et l’évolution du *madḥab* mālikite (iii^e-vi^e/ix^e-xii^e siècle)”, *Islamic Law and Society*, 30 (2023), 392–441, at 401–403.

principles and methodology;¹³¹ that is, jurists were loyal to the school, not to any particular authority within it, not even the founder.¹³² Since students were committed to the founder's legal principles rather than to the opinions he derived from them, their own opinions occasionally differed from his.¹³³ But even the *taqlīd* of principles was not always followed, as Wael Hallaq showed in his discussion of *takhrīj*. *Takhrīj* indicates different ways in which *ijtihād* was applied in order to reach a legal opinion that was then attributed to the founder.¹³⁴ In theory, legal cases resolved by *takhrīj* were supposed to represent the principles and doctrines of the presumed founder, so that they could be presented as derived from his methodology. In reality, however, *takhrīj* often rested on a basis far beyond the boundaries of the founder's teachings and methodology. By means of *takhrīj*, as Hallaq demonstrates, Ḥanafī legal norms were transferred to Shāfi'ī law and came to be considered of Shāfi'ī origin,¹³⁵ and jurists might propose two contradictory solutions for the same legal problem, both of which were incorporated in the school's doctrine.¹³⁶ The activity of *takhrīj*, through which the school doctrine developed, was most intensive in the fourth/tenth and fifth/eleventh centuries,¹³⁷ but it started earlier. When, at the end of the second/eighth and the beginning of the third/ninth century, Ḥanafī students were producing legal solutions to questions not addressed by their masters, they did so, to a large degree, by means of *takhrīj*.¹³⁸ Hallaq suggests that Abū Sulaymān and Abū Ḥafṣ were among those involved in this activity.¹³⁹ Abū Sulaymān's independent opinions, which are recorded in Ḥanafī works, corroborate Hallaq's suggestion.¹⁴⁰ Abū Ḥafṣ is similarly known to have developed his own opinions, in contrast to other Ḥanafī scholars.¹⁴¹

131 Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 98–99; Ahmed El Shamsy, “The First Shāfi'ī: The Traditionalist Legal Thought of Abū Ya'qūb al-Buwayṭī (d. 213/846)”, *Islamic Law and Society*, 14 (2007), 301–341, at 321–322.

132 Hallaq, *Authority*, 109.

133 El Shamsy, “The First Shāfi'ī”, 317–322; idem, “Rethinking *Taqlīd* in the Early Shāfi'ī School”, *Journal of the American Oriental Society*, 128.1 (2008), 1–23, at 9–13.

134 Hallaq, *Authority*, 43–56.

135 Ibid., 45–47.

136 Ibid., 44–45.

137 Ibid., 43.

138 Ibid., 48.

139 Ibid.

140 See, for example, Kāsānī, *Badā'ī' al-ṣanā'ī'*, 1:411; Ibn Māzah, *al-Muḥīṭ al-Burhānī*, 1:96; Ibn Nujaym, *al-Nahr al-fā'iq*, 3:34.

141 Text: *Wa-li-Abi Ḥafṣ ikhtiyārāt yukhālifu fihā jumhūr al-aṣḥāb* (Laknawī, *Fawā'id*, 39).

Furthermore, *al-Aṣl* contains many rulings said to represent not the opinions of the school's founders, but rather opinions derived from them by means of *qiyās* (indicated in the sources by: *qiyās qawl Abī Ḥanīfa wa-Muḥammad*, for example, or *qiyās qawl Abī Yūsuf wa-Muḥammad*). The opinion represented by the *riwāya* of Abū Ḥafṣ in Example 2.2 above is a case in point.¹⁴² Boynukalın raises the possibility (which he does not favor) that these are additions to the text by its transmitters, developed by way of *qiyās* based on the founders' opinions.¹⁴³

It is not the purpose of this essay to decide whether either of these explanations, or any other, might account for the differences between the *riwāya* of Abū Sulaymān and that of Abū Ḥafṣ; in fact, the explanations proposed are not mutually exclusive. Rather, I have sought to demonstrate that the two major *riwāyas* of *al-Aṣl* are significantly distinct from each other. The nature of the legal differences between them, as emerges from the sample cases, their scope, and the evidence of the biographical dictionaries, all suggest that Abū Sulaymān's and Abū Ḥafṣ' *riwāyas* of *al-Aṣl* do not represent the content of a single base text, and that they were not perceived as doing so. Rather, they seem to have been competing versions attributed to two direct students of al-Shaybānī, each claiming to present the correct text. This divergence must be taken into account in any attempt to recover the history and teachings of *al-Aṣl*.

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¹⁴² See p. 15 above.

¹⁴³ Boynukalın, Introduction, 66–70.